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75	„	„	284
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117	„	„	233
120	„	„	140
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149	1951	„	40
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168	1951	„	148
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337	„	„	64
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355	„	„	48
365	„	„	265
368	„	„	8
374	„	„	132
393	1950	„	121
401	„	„	205
405	1951	„	149
410	„	„	10
413	„	„	212
456	„	„	18
462	„	„	179
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I L R (1950) Cuttack

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526	„	„	233
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540	„	„	20
545	„	„	84
551	„	„	60
561	„	„	240
574	„	„	31
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102	1950	„	261
108	„	„	210
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Cut L T			AIR
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158	1951	„	265
160	„	„	92
166	1952	„	87
172	1951	„	10
174	„	„	230
182	„	„	148
186	„	„	78
195	„	„	29
197	„	„	180
200	„	„	30
202	„	„	81
209	„	„	86
220	„	„	60
227	„	„	245
233	„	„	64
242	„	„	141
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NOTE

As most of the Indian Law Reports and other Official Reports have yet to complete their year, it has been decided not to delay issuing of these Indexs but to give the reference Table of 1951 Other Journals = All India Reporter in the next year's Index.

CASE OVERRULED IN A. I. R. (38) 1951 ORISSA

Second Appeal No. 41 of 1946 (Ori.) Overruled in A. I. R. (38) 1951 Orissa (C. N. 87) 362 (F B).

THE

ALL INDIA REPORTER

Orissa High Court

1951

*** A. I. R. (38) 1951 Orissa 1** *[C. N. 1.]*

SPECIAL BENCH

RAY C. J., JAGANNADHADAS AND NARASIMHAM JJ.

Rama Chandra Misra—*Petitioner* v. *President, District Board, Ganjam*—*Opposite Party.*

Criminal Revn. Petn. No. 42 of 1949, D/- 21-8-1950.

†(a) Madras Local Boards Act (XIV [14] of 1920), S. 166 — Provisions are not repealed by implication by S. 42, Motor Vehicles Act (1939) — Government of India Act (1935), S. 107.

Section 166, Madras Local Boards Act, is concerned with safeguarding the public roads whereas the Transport Authorities in S. 42, Motor Vehicles Acts, are concerned with the regulation of traffic in the interests of public safety and convenience. Thus when the objects of S. 42 of the Central Act and S. 166 of the Madras Act are entirely different though there is overlapping of the functions of the two bodies to some extent, the question of the provision of a later statute repealing by implication the provision in an earlier statute does not arise. Moreover, when the Central Legislature passed the Central Act in 1939 they were fully aware of the existence of S. 166 of the Madras Act and if their intention was really to repeal the same they would have surely expressly said so in S. 134 which deals with 'Repeal'. [Paras 9, 10]

It is therefore possible for an owner of a motor vehicle plying for hire to comply with both the provisions. [Para 15]

Das J.—**The "authorisation" which a permit holder has under S. 42 (1), Motor Vehicles Act, 1939, is not in the nature of a "right," as vesting in the permit holder a "right" in or over the road. To so construe, it would interfere with the statutory ownership of road vested in the District Board under S. 60, Madras Local Boards Act, from which is implicit the Board's duty to keep the road in repair and the right to impose such restrictions as may be necessary in the interests of proper maintenance of roads. If S. 42 was not couched in negative term but gave a positive right, it would have been a matter for consideration whether the right so given would to that extent override the right of the Local Board to the road.** [Para 21]

Anno. Motor Veh. Act, S. 42 N. 1.

(b) Interpretation of Statutes—Repeal by implication.

Repeal by implication should not be inferred unless there is no other way out. One of the tests to be applied in deciding whether an earlier statute is repealed by a later statute is whether both of them can stand together and their provisions obeyed to the full extent. There is no inconsistency when it is possible to obey each without disobeying the other. [Para 11]

(c) Motor Vehicles Act (1939), S. 134 (4) — Section 166, Madras Local Boards Act (XIV [14] of 1920) deals with fees and not with taxation of Motor vehicles.

Section 166 of the Madras Act is a provision dealing with 'fees' and not with 'taxes' and consequently no necessary implication can be drawn about its invalidity from the provisions of sub-s. (4) of S. 134, Motor Vehicles Act.

[Distinction between tax and fees pointed out.] [Para 13]

Moreover the subject "Taxes on vehicles suitable for use on roads, whether mechanically propelled or not including tramcars" was made an exclusively provincial subject by an amendment made to Sch. 7, Government of India Act, 1935, by Parliament in the India and Burma (Miscellaneous Amendments) Act, 1940 (3 & 4 Geo. VI Ch. 5) and a new item 48-A was inserted in List II of that schedule which by S. 17 (1) of that Act was given retrospective effect, in consequence of which all statutes dealing with taxation of motor vehicles that were in force prior to the commencement of the Government of India Act, 1935, would continue in force after its commencement until repealed or amended by a competent Legislature. (See S. 292, Govt. of India Act).

Moreover sub-s. (4) of S. 134, Motor Vehicles Act, was omitted by S. 22, Motor Vehicles (Amendment) Act 1942 (Act XX [20] of 1942) and it is no longer in S. 134. [Para 13]

(d) Government of India Act (1935), S. 107 (1) — Repugnancy between Madras Local Boards Act (XIV [14] of 1920) and Motor Vehicles Act (1939)— S. 107 (1) has no application.

By virtue of the definition in S. 311 (2), Government of India Act, only those laws that were made by the Provincial Legislatures constituted under the Government of India Act, 1935, would come within the definition of 'Provincial law' within the meaning of S. 107 (1). The Madras Local Boards Act (1920) being an Act of 1920 passed long before the commencement of the Government of India Act, 1935, would be an existing 'Indian Law' and not a 'Provincial law.' The

Central Act of 1939 (Motor Vehicles Act) would be a 'Federal Law'. Hence the repugnancy, between these two Acts, if any, is between a provision of an existing 'Indian Law' on the one hand and a provision of a 'Federal law' on the other and not between a provision of a 'Provincial law' and a provision of either a 'Federal law' or an existing 'Indian law'. Section 107, Government of India Act, 1935, has absolutely no application. If there is such a repugnancy between an existing 'Indian law' and a Federal law such repugnancy should be resolved in accordance with the general principles relating to the construction of statutes and not by any provision of the Government of India Act, 1935. [Para 14]

(e) Madras Local Boards Act (XIV [14] of 1920) as amended by Act (XI [11] of 1930) S. 166 (1) (a)—Scope—Plying for hire.

Section 166 as amended by Act XI [11] of 1930 is comprehensive of every kind of purpose to which the District Board road is put. Therefore even the running of a motor vehicle which is engaged on hire over the District Board road would amount to 'use' of the road within the meaning of that section. [Para 16]

(f) Madras Local Boards Act (XIV [14] of 1920), Ss. 166 and 223—Offence of not obtaining licence for plying Motor Vehicle on hire during quarter January-March 1944, is continuing offence—Offence can be committed even on last day of the quarter. [Para 17]

(g) Madras Local Boards Act (XIV [14] of 1920), S. 166—Order sanctioning prosecution, not referring accused by name, but as "Secretary of Cuttack Motor Association" — Accused admitting ownership of vehicle in question and that he plied it without licence — Non-mention of his name in sanction, held immaterial and had not prejudiced accused. [Para 17]

R. K. Das — for Petitioner; D. Sahu — for Opposite Party.

Narasimham J. — This petition is against the judgment of Sri Priyanath Sarkar, Magistrate, 1st class, Berhampur, convicting the petitioner under S. 207, Madras Local Boards Act, 1920, for contravention of S. 166 of that Act and sentencing him to pay a fine of Rs. 50 in default to undergo simple imprisonment for one week. The learned Magistrate also passed an order under S. 212 of that Act directing the petitioner to deposit the full licence fee of Rs. 285 plus cost to the District Board of Ganjam.

[2] The petitioner is the owner of two motor buses Nos. O. R. C. 107 and O. R. C. 115 which were plying for hire between Cuttack and Berhampur in January-March 1944. He had obtained a permit from the Regional Transport Authority for plying the vehicles on the road from Cuttack to Berhampur during the said period but he did not obtain any licence from the Ganjam District Board as required by S. 166 (1) (a), Madras Local Boards Act, 1920, (hereinafter referred to as the Madras Act). The President of the District Board, therefore, sanctioned his prosecution for contravention of the said section which was punishable under S. 207 of that Act.

[3] The prosecution examined only one witness, namely, Parsuram Behera (P. W. 1), a clerk of the office of the Ganjam District Board, at Chhatrapur who was in charge of issuing of licences to motor vehicles. His evidence was that buses Nos. O R. C. 107 and O. R. C. 115 were plying from Berhampur to Cuttack on hire on the District Board road during the quarter from January to March 1944; that the petitioner was the owner of the vehicles and that he did not obtain a licence from the District Board for plying the said vehicles on hire for the quarter in question. During the examination of the petitioner under S. 342, Criminial P. C., he frankly admitted that he plied his buses for hire for the period in question without obtaining a licence from the District Board, Ganjam.

[4] The Motor Vehicles Act, 1939 (hereinafter referred to as the Central Act) was passed by the Central Legislature sometime in 1939 and it contains exhaustive provisions relating to the control of motor vehicles. Chapter IV of the Act deals specifically with the control of those motor vehicles which carry passengers or goods for hire or reward. Section 42 prohibits the owner of a transport vehicle from using it except in accordance with the conditions of a permit granted by the appropriate transport authority. It is not denied that the petitioner had obtained a permit under that section from the competent authority for the period in question. On behalf of the petitioner, it is contended that the aforesaid Central Act overrides the provisions of S. 166(1) of the Madras Act and that a person who has obtained a permit under S. 42 of the Central Act need not obtain a licence from the District Board under S. 166 (1) of the Madras Act.

[5] Material extracts from the two sections are quoted below.

Section 42 (1) of the Central Act — "No owner of a transport vehicle shall use or permit the use of the vehicle in any public place, save in accordance with the conditions of a permit granted or countersigned by a Regional or Provincial Transport Authority authorising the use of the vehicle in that place in the manner in which the vehicle is being used."

Section 166 (1) of the Madras Act—"No person shall use : (a) any motor vehicle for hire, or (b) any motor lorry, on any public road in a district, except on a licence obtained from the President of the District Board."

[6] The Madras Act with its several subsequent amendments continued to remain as the law in force in Ganjam District in the year 1944. In 1931 the Madras Legislature passed another Act known as the Madras Motor Vehicles Taxation Act, 1931, abolishing the levy of tolls in the Presidency of Madras and also the levy of taxes on motor vehicles by local bodies and providing for taxation of motor vehicles by the Provincial Government at certain stipulated rates. In Sch. I

to that Act there were several provisions dealing with consequential amendments made to the Madras Act so as to bring it in conformity with the Madras Motor Vehicles Taxation Act. But so far as S. 166 of the Madras Act was concerned, there were no consequential amendments, apparently because the Madras Legislature thought that the section dealt with the issue of licences on payment of *fees* and not with levy of taxes on motor vehicles. Consequently, S. 166 of the Madras Act, and the provisions of the Madras Motor Vehicles Taxation Act continued to exist side by side in Ganjam District.

[7] Prior to the passing of the Central Act in 1939, the Motor Vehicles Act, 1914 (Act VIII [8] of 1914) and the rules framed by the Madras Government under that Act known as the Madras Motor Vehicles Rules, 1923, remained in force in Ganjam District. Under those Rules motor vehicles plying for hire were required to take permits from certain specified authorities. But in R. 30 (a) (i) (ii) of those Rules it was expressly provided that no permit should be granted unless the applicant produced satisfactory evidence that he obtained the licence under S. 166 of the Madras Act. Therefore by virtue of this express provision an owner of a motor vehicle plying for hire was made aware of the necessity of obtaining a licence from the District Board under S. 166 of the Madras Act in addition to the permit from the appropriate authority under the said Rules and no doubt about the necessity of complying with both the statutory provisions could ever arise. But, soon after the passing of the Central Act in 1939, the Government of Orissa framed a new set of rules known as the Orissa Motor Vehicles Rules, 1940, which replaced the Madras Motor Vehicles Rules, 1923, in Ganjam District. In the Orissa Motor Vehicles Rules, 1940, however, there was no provision corresponding to R. 30 (a) (i) (ii) of the Madras Rules requiring compliance with S. 166 of the Madras Act also before granting a permit under the Central Act. Whether this omission was due to oversight or to some other reason it is difficult for us to say at present. But Mr. Das on behalf of the petitioner, urged that the Orissa Government deliberately omitted any reference to a licence under S. 166 of the Madras Act in their Rules of 1940, because they knew that that section was repealed by implication with the passing of the Central Act. But in considering the purely legal question regarding the implied repeal of an earlier enactment by a later enactment the action of the Provincial Government in omitting any reference to the earlier enactment in the Rules framed by them under the later enactment is not a decisive guide and the whole question has to be considered in accordance with the well known principles dealing with interpretation of statutes. But the petitioner can reasonably urge that because of this omission he was under the mistaken impression that no licence need be obtained under the Madras Act. This may be a point in his favour at the time of considering the sentence.

[8] Mr. Das's argument may be summed up thus :

(1) The provisions of the Central Act which is a later self-contained statute dealing with motor vehicles must by necessary implication repeal the provisions of S. 166 of the Madras Act.

(2) Section 166 of the Madras Act is, in substance, a statutory provision relating to taxations of motor vehicles even though it purports to deal with the levying of fees. Therefore, it would become inoperative after the expiry of nine months from the commencement of the Central Act by virtue of the necessary implication arising out of sub-s. (4) of S. 134 of the Central Act.

(3) Section 166 of the Madras Act is, in any case, void under S. 107 (1), Government of India Act, 1935.

[9] The subject "mechanically propelled vehicles" was included in the Concurrent Legislative List (Item 20 of List III) in the Government of India Act, 1935. From a perusal of the various provisions of the Motor Vehicles Act, 1939, it will be clear that the Act was passed with the main object of controlling motor traffic, controlling drivers, providing for compulsory insurance and for securing the safety and convenience of the public and developing a co-ordinated system of transport. Chapter IV of that Act deals with control of transport vehicles, that is to say, vehicles plying for hire or reward. Section 42 (already quoted) requires that the owner of such vehicles should obtain permits from the Regional or Provincial Transport Authority as the case may be. Such authorities are statutory bodies constituted by the Provincial Governments and under cls. (a) to (f) of sub-s. (1) of S 47, a transport authority is required to consider the interests of the public, the necessity of preventing unhealthy competition among transport services, the condition of the roads and other factors. The repair or maintenance of the roads was not a matter within the scope of the Central Act and there is no provision in it dealing with that subject. But if the provisions of S. 166 of the Madras Act, are carefully scrutinised, it will be noticed that the main object of S. 166 of the Madras Act was to regulate the use of public roads by motor vehicles plying for hire, by issue of licences, so as to safeguard against excessive wear and tear of the roads

and also to provide for repairs to such roads. Licence fees were added to the District Fund under R. 5B (3) of Sch. V to that Act and one of the main purposes for which the District Fund may be utilised was the repair and maintenance of public roads vesting in the District Board (see S. 112 (1) (i)). The regulation of traffic with a view to provide for the convenience of passengers or for preventing unhealthy competition amongst rival transport services was not the function of the District Board. It is true that there is overlapping of the functions of the two bodies to some extent, but in essence, the District Board was concerned with safeguarding the public roads whereas the Transport Authorities were concerned with the regulation of traffic in the interests of public safety and convenience. Thus when the objects of S. 42 of the Central Act and S. 166, Madras Act, are entirely different and these statutory provisions are meant for different purposes the question of the provision of a later statute repealing by implication a provision in an earlier statute does not arise.

[10] Moreover, when the Central Legislature passed the Central Act in 1939 they were fully aware of the existence of S. 166 of the Madras Act and if their intention was really to repeal the same they would have surely expressly said so in S. 134 which deals with 'Repeal' :

'Repeal by implication is not favoured .... It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the Statute book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention."

(*Maxwell on Interpretation of Statutes*, 9th Edn. p. 173). In *Hill* v. *Hall*, (1876) 1 Ex. D. 411 : (45 L. J. M. C. 153), it was pointed out :

"It is common learning that one statute may be impliedly repealed by a subsequent statute necessarily inconsistent with it : but then the inconsistency must be so great that they cannot both be to their full extent obeyed."

This decision lays down that one of the tests to be applied is whether the two provisions could be obeyed to their full extent. Similarly in *Kutner* v. *Phillips*, (1891) 2 Q. B. 267 : (60 L. J. Q. B. 505), it was observed that :

"a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together."

Lord Halsbury while discussing whether there was inconsistency between an earlier and a later statute observed : "Where is the inconsistency if both may stand together and both operate without either interfering with the other ?" *Tabernacle Permanent Building Society* v. *John Knight*, (1892) A. C. 298 : (62 L. J. Q. B. 56). To a similar effect are the observations of Scrutton L. J., in *Flannagan* v. *Shaw*, (1920) 3 K. B. 96 at p. 105 : (89 L. J. K. B. 168) :

"Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied."

In *Lewis* v. *Berrey*, (1936) 1 Ch. D. 274 : (105 L. J. Ch. 38), also it was pointed out that :

"a Court does not construe a later Act as repealing an earlier Act unless it is impossible to make the two Acts or the two sections of the Act stand together . . ."

[11] Thus there seems to be abundant authority for the view that repeal by implication should not be inferred unless there is no other way out and that one of the tests to be applied in deciding whether an earlier statute is repealed by a later statute is whether both of them can stand together and their provisions obeyed to the full extent. This 'obedience test' has doubtless come in for some criticism from the majority of Judges in an Australian Case *Clyde Engineering Co. Ltd.* v. *Cowburn*, (1926) 37 C. L. R. 466. But the point has been further explained by Higgins J., in that judgment at pp. 503 and 504 where he points out that "there is no inconsistency when it is possible to obey each without disobeying the other." In the present case as already pointed out the two statutory provisions have been made for entirely different purposes and the different statutory authorities who have been given powers to enforce those provisions have quite different functions to perform. Doubtless there may be some overlapping on minor matters, but on essentials their duties are quite different. Consequently repeal by implication should not be inferred especially when the Central Legislature while expressly providing for repeal of some other statutory provisions in S. 134 of the Central Act deliberately refrained from making any mention of the Madras Act.

[12] In *Corporation of Madras* v. *Madras Electric Tramways Ltd.*, A. I. R. (18) 1931 Mad. 152 : (54 Mad. 364) there is an interesting discussion on the subject of repeal by implication. Though on facts that case may be slightly different from the present one, some of the English decisions cited therein especially *Uckfield Rural District Council* v. *Croborough District Water Co.*, (1899) 2 Q. B. 664 : (68 L. J. Q. B. 1009), *Morin & Son, Ltd.* v. *Marsland*, (1909) 1 K. B. 744 : (78 L. J. K. B. 346) and *London County Council* v. *District Surveyors' Association*, (1909) 2 K. B. 138 : (78 L. J. K. B. 729), are instructive. The last case is of special interest in the present discussion. In that case the question for decision was whether there was an inconsistency between the Education Acts, 1870 to 1902, on the one hand and the London

Building Act, 1894, on the other. The local education authority for London after obtaining the approval of the Board of Education under the said Education Acts began the construction of a building for use as a public Elementary School. But it omitted to give notice of such construction to the district surveyor as required by the London Building Act, 18 4. It was pointed out that the building regulations made by the Board of Education were designed in the interests solely of the children attending the school whereas the requirement of notice to the district surveyor under the London Building Act, 1894, was designed mainly in the interests of the outside public and not in those of the persons using the building itself. This argument seems to have found favour with Lord Alverstone C. J. who while rejecting the contention that inconvenience would arise if two public authorities had concurrent jurisdiction over the erection of a building observed :

"This argument as to the conflict of jurisdiction of different public authorities has been addressed to us in other cases, where it was sought to exclude from the supervision of the district surveyor certain structures which were required to comply with the regulations of the Postmaster-General, the Board of Trade, and other public bodies; *but there is no valid reason why a building should not comply with both.*" In the present case also it was contended by Mr. Das that if the District Board and the Transport Authorities had both control over the plying of motor vehicles for hire on certain routes there may be conflicting orders and inconvenience to the public. But as such control is exercised for different purposes and there is no reason why an owner of a motor vehicle plying for hire should not comply with the orders issued by both there seems to be no justification for inferring implied repeal of the impugned provision of the Madras Act.

[13] I now take up the argument of Mr. Das based on S. 134 (4) of the Central Act. Sub-s. (4) runs thus :

"Nothing contained in this Act shall until the expiry of a period of nine months from the commencement of this Act, operate to invalidate any provisions relating to the taxation of motor vehicles contained in any Provincial enactment or rules made thereunder in force at the commencement of this Act."

Mr. Das argued that by necessary implication from this sub-section it follows that but for the saving clause provided therein all statutes relating to taxation of motor vehicles would have become invalid after the passing of the Central Act and that the said sub-section extended their life for a period of nine months only from the commencement of that Act. The obvious answer to this argument is that S. 166 of the Madras Act is a provision dealing with 'fees' and not with 'taxes' and consequently no necessary implication can be drawn about its invalidity from the provisions of sub-s. (4) of S. 134 of the Central Act. The broad distinction between a 'tax' and a 'fee' is well known. I have already shown that S. 166 of the Madras Act is intended for the limited administrative purpose of enabling the District Board to regulate the use of public roads by certain classes of motor vehicles. The fees collected by the issue of licences are not meant to be a regular source of revenue to the District Board, though they are credited to the District Fund. A maximum is fixed in sub-s. 3 (a) so that the fees may not become a source of profit to the District Board. But it is unnecessary to discuss this question further because I cannot accept Mr. Das's contention that by necessary implication from sub-s. (4) of S. 134 of the Central Act all statutes dealing with taxation of motor vehicles would become invalid. The Madras Motor Vehicles Taxation Act, 1931, continued in force in Orissa long after 1944. In 1940 the Orissa Legislature passed an Act known as the Motor Vehicles Taxation (Orissa Amendment) Act, 1940 (Orissa Act III [3] of 1940) amending that Act in its application to the ex-Madras area. Moreover, the subject "taxes on vehicles suitable for use on roads, whether mechanically propelled or not, including tramcars" was made an exclusively provincial subject by an amendment made to the Sch. 7, Government of India Act, 1935, by Parliament in The India and Burma (Miscellaneous Amendments) Act, 1940 (3 & 4 Geo. VI Ch 6) and a new item 48-A was inserted in List II of that Schedule. By S. 17 (1) of that Act retrospective effect was given to that amendment in consequence of which all statutes dealing with taxation of motor vehicles that were in force prior to the commencement of the Government of India Act, 1935, would continue in force after its commencement until repealed or amended by a competent Legislature (*see* S. 292). It is not necessary to surmise (at ?) present as to why the Central Legislature thought it necessary to enact sub-s. (4) of S. 134 of the Central Act. But it is sufficient to note that, that sub-section was omitted by S. 22, Motor Vehicles (Amendment) Act, 1942 (Act XX [20] of 1942) and it is no longer in S. 134. Therefore reliance on that sub-section seems futile.

[14] The third argument of Mr. Das based on S. 107 (1), Government of India Act, 1935, seems equally groundless. That section merely says that if a Provincial law is repugnant to a Federal law or to an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List then the Provincial law to the extent of that repugnancy shall be void. The definition of the expression 'Provincial law' as given in sub-s. (2) of S. 311 of that Act is "a law made by a Provincial Legislature established under this Act" That is to say only those laws that were made by Provincial Legis-

latures constituted under the Government of India Act, 1935, would come within the definition of 'Provincial law.' The Madras Act being an Act of 1920 passed long before the commencement of the Government of India Act, 1935, would be an existing 'Indian Law' and not a 'Provincial law.' The Central Act of 1939 would be a 'Federal law ' In the present case, therefore, the repugnancy, if any; is between a provision of an existing 'Indian law' on the one hand and a provision of a 'Federal law' on the other and not between a provision of a 'Provincial law' and a provision of either a 'Federal law' or an existing 'Indian law.' Section 107, Government of India Act, 1935, has absolutely no application. If there is such a repugnancy between an existing 'Indian law' and a 'Federal law' such repugnancy should be resolved in accordance with the general principles relating to the construction of statutes and not by any provision of the Government of India Act, 1935. (In this paragraph I have deliberately used the expressions found in the Government of India Act, 1935, prior to the adaptations made in 1947 after the passing of the Indian Independence Act).

[15] I would therefore hold that the S. 166 of the Madras Act was not repealed by necessary implication by S. 42, Central Act, inasmuch as it is possible for an owner of a motor vehicle plying for hire to comply with both the provisions. The main arguments of Mr. Das must fail.

[16] Another point which was taken up for the first time in the Court of revision was that the Crown did not lead any evidence to show that the vehicle in question was actually plying for hire on the District Board road of Ganjam and that consequently the petitioner was entitled to an acquittal. The expression 'ply for hire' has a special meaning as explained in (*Local Fund Overseer* v. *Pakkirisami Thevan*, A. I R. (15) 1928 Mad. 166 : (29 Cr. L. J. 30) where it was held

"there must be a general invitation by the person in charge of the vehicle to the members of the public to make contracts with him for carriage in the vehicle."

This interpretation of the said expression has been followed in *Ganesh Ramchandra* v. *Emperor*, A. I. R. (17) 1930 Bom. 167 : (31 Cr. L. J 931), *Khushi Ram* v. *Emperor*, A. I. R. (18) 1931 Lah. 569 : (32 Cr. L. J. 948) and *Berry Mahapatra* v. *Emperor*, A. I. R. (23) 1936 Pat. 321 (37 Cr L. J 8 0) on which the learned advocate for the petitioner relied. But in my opinion any discussion as to the true meaning of the expression 'ply for hire' is of mere academic interest in the present case. The only witness examined by the District Board, namely, Parsuram Behera (P. W. 1) stated that he knew vehicles Nos. O. R. C. 107 and O. R. C. 115 and that they were plying from Berhampur to Cuttack on hire on the District Board road. This portion of his evidence was not challenged at all and on the other hand during the examination of the petitioner under S. 342, Criminal P. C., he admitted that he did ply his passenger buses for hire without a licence from the District Board. It was thus proved as well as admitted that the vehicles were plying for hire on the District Board road and the only point in controversy was whether a licence was required under S 166, Madras Act. Moreover S. 166 (1) (a) as amended by the amending Act, 1930 (Madras Act XI [11] of 1930) does not contain the expression 'ply for hire.' On the other hand the material portion of that section is 'use of any motor vehicle for hire.' It may be that the expression 'ply' is more restrictive than the expression 'use' But S. 166 as amended is comprehensive of every kind of purpose to which the District Board road is put. Therefore even the running of a motor vehicle which is engaged on hire over the District Board road would amount to 'use' of the road within the meaning of that section. This view is supported by *Veerappa* v. *Emperor*, A. I. R. (17) 1930 Mad. 441 : (31 Cr. L. J. 625). But it is unnecessary to enter into further discussion on this point because, as already pointed out, even if it be held that S 166 (1) deals 'plying for hire' of motor vehicles, from the facts as admitted and proved in this case it is clear that the petitioner did ply his vehicles for hire on the District Board road.

[17] I may now deal with some minor points which were urged for the first time in this Court. The order of the President, District Board, sanctioning prosecution (Ex. 2) does not refer to the petitioner by name but refers to 'Secretary, Cuttack Motor Association, Cuttack.' The petitioner stated in his examination under S. 342, Criminal P. C., that he was the Secretary of that Association from 31-3-1944. The quarter during which the offence was said to have been committed ended on 31-3-1944. It was urged that the sanction order was irregular inasmuch as during the quarter in which the contravention was said to have occurred the petitioner was not the Secretary of the Association. There is not much force in this argument because on his own admission he was the Secretary on 31-3-1944. The offence of not obtaining a licence during the quarter January-March, 1944 is a continuing one (see proviso to S. 223 of the Madras Act) and consequently even on 31-3-1944 the offence was committed. Moreover there is the evidence of P. W. 1 to the effect that the petitioner is the owner of O. R. C. 115 and

O. R. C. 107 and the petitioner's own admission is that he did ply his bus for hire during the period in question without a licence from the District Board. In view of these admissions, the non-mention of his name in the sanction order of the President is quite immaterial and no prejudice has been caused to him by describing him as 'Secretary, Cuttack Motor Association.'

[18] Another minor point taken up was that in the sanction order (Ex. 2) the numbers of the buses were shown as O. R. G. 107 and O. R. G. 115 whereas the numbers of the petitioner's buses were O. R C. 107 and O. R. C. 115. The letter 'G' appears to have been typed by mistake for the letter 'C' in the sanction order. This will be clear if Ex. C is scrutinised. There the typist after first typing the letter 'G' corrected it by typing over it the letter 'C'. Moreover on this point there is the unchallenged testimony of P. W. 1 to the effect that Ex. 2 is the authority of the District Board sanctioning the prosecution of the petitioner who was the owner of O. R. C 107 and O. R. C. 115. No prejudice has been caused to the petitioner by the slight inaccuracy in the order sanctioning prosecution.

[19] The petitioner was rightly convicted. As regards sentence, however, I am inclined to take the view that the offence was somewhat of a technical nature and the petitioner was perhaps misled by the action of the Provincial Government in omitting any reference to S. 166 of the Madras Act in the Orissa Motor Vehicles Rules, 1940. While therefore maintaining the conviction of the petitioner under S. 207/166, Madras Local Board Act, 1920, I would reduce the sentence of fine to Rs. 10 only in default the petitioner should undergo simple imprisonment for one week. The Magistrate's order directing him to deposit the full licence fee of Rs. 285 plus cost to the District Board, Ganjam, under S. 212 of that Act is maintained. Subject to this modification in the sentence the revision petition is dismissed.

[20] I should add that in 1948 the Orissa Legislature amended the Madras Local Boards Act by the amending Orissa Act XVI [16] of 1948 in consequence of which S. 166 has been omitted from the Madras Act. This amendment, however, will not affect the legal questions involved in the present petition which depend on the law as it stood in the quarter from January to March 1944 in Ganjam district.

[21] **Jagannadhadas J.**—I have had the advantage of reading the judgment of my learned brother Narasimham J. and I agree entirely with the same.

[22] I wish only to add that as pointed out in the judgment of Knox C. J. and Gavan Duffy, J., in 37 C. L. R. 466 at p. 478.

"Statutes may do more than impose duties: they may, for instance, confer right: and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it."

In the light of this test, I had some hesitation whether the "authorisation' which a permit holder has under S. 42 (1), Motor Vehicles Act, 1939, is not in the nature of a "right." I am satisfied on a careful consideration that the "authorisation" cannot be construed as vesting in the permit holder a "right" in or over the road. To so construe, it would interfere with the statutory ownership of road vested in the District Board under S. 60, Madras Local Boards Act, from which is implicit the Board's duty to keep the road in repair and the right to impose such restrictions as may be necessary in the interests of proper maintenance of roads. As stated by my learned brother, the Motor Vehicles Act is concerned with traffic and the Local Boards Act with Roads. It would not be legitimate to construe the provision of S. 42, Motor Vehicles Act, dealing with traffic, as giving to the permit-holder a right to the use of the road for plying his vehicle. If S. 42 was not couched in negative terms but gave a positive right, it would have been a matter for consideration whether the right so given would to that extent override the right of the Local Board to the Road.

[23] **Ray C. J.**— I am in entire agreement with what has been said by brother Narasimham J. The burthen of Mr. R. K. Das's contention ha been that a permit from the Regional Transport Authority gives him an absolute right to bus-traffic on the roads within the territory of its function. It is to be noted, however, much of looseness of terminology prevails in these matters. Loose terminology and cloudy thinking always go hand in hand. There is no constitutional right to drive a motor-car on the public highways or to do various other things there. They are privileges. The laws of the land give the citizens these privileges, or withhold them, or grant them under such restrictions as the public interest may seem to require. There is a fundamental difference between right and privilege. Privileges can be well equated with immunities from certain defined restrictions. They yield to others' rights or even privileges equally important in the social set up of things. Laws have to be administered so as to strike a happy balance between them in the same degree and to the same extent as between individual liberty and social control. The District Board a quasi-public body, has certain liabilities to its constituents, and has certain privileges too granted by the State. These latter are correlated to the former. So long as laws defining the correlation

are allowed to stand, permission, granted by one authority, with assignments of particular purpose, will not have the legal effect of doing away with the need for exercise of another independent authority set up with the object of fulfilling another object. Particularly, if an authority is burdened with certain liabilities of which the financial incidence has to be offset by way of certain fees, it would require express or next to express legislation to uproot the one while leaving alone the other. The second conceptual confusion centres round the words 'fees' and 'taxes'. There is a fundamental difference between the two. Even a private individual can levy a fee for granting certain immunity but cannot appropriate the sovereign right of taxing. This distinction was prominent in the Government of India Act, 1935, that governed the legislation of the country till the other day in delimitation of taxing power of the Federation, the Central Government and the Provinces. What the District Board was empowered with was to levy fees for maintenance of the public roads and thoroughfares which vest in them for the purpose. The two authorities exist for different purposes, and accordingly there is no direct conflict between the laws relating to them.

[24] I would, therefore, agree with my learned brothers that the revision shall be dismissed subject to modification of sentence proposed.

R.G.D. *Revision dismissed.*

A. I. R. (38) 1951 Orissa 8 *[C. N. 2.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Tankadhar Nag and another—*Appellants* v. *Bishnu Nag and others*—*Respondents.*

Second Appeal No. 558 of 1948, D/- 25-4-1950.

(a) Court-fees Act (1870), S. 12 (2) — Taxing officer of High Court—Power to order payment of deficit court-fee paid in lower Courts.

The power given by sub-s. (2) of S. 12 applies to the deficit in subordinate Courts payable by the appellant in the lower appellate Court. Further, this power may be exercised even if there be no express decision by the lower Court regarding the court-fee. [Para 4]

Anno. C.-F. Act, S. 12, N. 15.

(b) Court-fees Act (1870) S. 5—Deficit court fee paid in lower Court—Registrar of Orissa High Court—Power of, to recover deficit.

By virtue of R. 13, sub-r. (4) in Chap. III of the High Court Rules, the Registrar of the Orissa High Court is authorised "to dispose of all matters relating to court-fees." This is the power of the Court itself delegated to the Registrar under cl. 38 of the Patna Letters Patent which by virtue of para. 6 of the Orissa High Court Order 1948, applies to the High Court of Orissa. The power to dispose of a matter relating to court-fee is a judicial power which can be delegated to the Registrar under Letters Patent. Therefore the Registrar of the Orissa High Court can, if he so chooses, dispose of the matter of the payment of deficit court-fees for the lower Courts himself or refer the matter to the Court. [Para 5]

Anno. C.-F. Act, S. 5, N. 5.

(c) Court-fees Act (1870), S. 12—Land situate in Patna State—Suit and appeal relating to, filed in Court in that State—Integration with Orissa State—Second appeal in Orissa High Court—Payment of deficit court-fee in lower Courts—Calculation of court-fee.

Before the integration of the Orissa State an appeal arising in a land-suit was filed on 15th October 1947 in a Court which was then in the Patna State. After the integration, a second appeal was filed in the Orissa High Court. The taxing officer revalued the suit-land and called upon the parties in the lower Courts to pay the deficit court-fees under the law prevalent in the Orissa State.

Held that the court-fee payable in the Courts below would be not on the footing of the Orissa court fees Act, but on the law relating to the court-fees prevalent at the time in the Patna State. [Para 9]

A. N. Purohit—for Appellants.

G. G. Das—for Respondents.

Jagannadhadas J. — This matter comes before us on a reference by the Registrar. The only question is as to the court-fee payable by the respondents in this appeal on the memorandum to the lower appellate Court. The plaintiffs filed a suit for declaration of title and recovery of possession and obtained a decree in the trial Court against the defendants. The defendants appealed and succeeded in the lower appellate Court. Hence the plaintiffs have come up with this second appeal and the defendants are the respondents herein.

[2] The suit property is 8.23 acres of land and the plaintiffs valued it for purposes of jurisdiction and court fees at Rs. 70 and paid a fixed court fee of Rs. 15 on the plaint. When the defendants appealed to the lower appellate Court, they adopted the same valuation and paid the same court-fee. The plaintiffs in their turn, did the same when they filed the second appeal in this Court. The valuation was not questioned in the Courts below and has been tacitly accepted. When the plaintiffs filed this second appeal on the assumption that the value of the subject-matter was Rs. 70, the Stamp Reporter objected to the same. He was of the opinion that the suit property which covers 8.23 acres should be worth not less than Rs. 800 and called upon the plaintiffs-appellants to pay D. C. F. on that footing both in the High Court and in the trial Court. The matter was referred to the Registrar, who assessed the value of the property at Rs. 1 000 and called upon the plaintiffs to pay the deficits of the two Court accordingly. The plaintiff though he originally contested the valuation, had ultimately to submit to the order of the Registrar and he paid the D. C. F. of Rs. 226-4-0 on 24th November 1949 and the appeal was admitted on 14th December 1949.

The respondent on whom notices were served entered appearance on 18th January 1950. They were thereafter called upon to pay the D.C.F., in respect of their appeal memorandum to the lower appellate Court on the valuation of Rs. 1,000 already fixed, as against the plaintiffs-appellants. The respondents objected to the same and hence this reference.

[3] Before the Registrar, two objections were raised (1) that the taxing officer has no jurisdiction to examine and call for the deficit court-fee for the lower Courts; (2) that the taxing officer's jurisdiction is restricted at the maximum to what is reported by the Stamp-Reporter to be the proper value and the deficit. We have no hesitation in over-ruling both these objections.

[4] It is no doubt true that the taxing-officer as such, that is, the officer appointed as taxing officer under S. 5, Court-fees Act, has nothing to do with the deficit of the court-fees paid in the Subordinate Courts. But in this Court the Registrar is the taxing officer. We must assume that the orders passed against the respondent and the reference to us has been made by the Registrar as such. The power of the High Court to collect the deficit court-fee paid in respect of the plaint or the appeal memorandum in the subordinate Courts is not open to any question. That is specifically provided for by the Court-fees Act, Ss. 12 (2) and 28. In the present case, however, the provision which is more appropriate is S. 12 (2). The power under that sub-section applies to the deficit in the subordinate Courts payable not only by the appellant, but also by the respondent. This follows clearly from the wording of S. 12 (2) which is perfectly general. Authority for the same is also to be found in *Rowlins* v. *Lachmi Narain*, A. I. R. (5) 1918 Pat. 210 : (3 Pat. L. J. 443) and *Brij Krishna Das* v. *Murli Rai*, A. I. R. (7) 1920 Pat. 656 : (4 Pat. L. J. 703), and other cases. Further it is now well settled that in order that the power under sub-s. (2) of S. 12, Court-fees Act, may be exercisable it is not necessary that there should be an express decision by the lower Court regarding the court-fee. See *Bidhu Bhusan* v. *Kala Chand*, A. I. R. (14) 1927 Cal. 775 : (106 I C. 335) and *In re, Lakshmi Ammal*, A. I. R. (13) 1926 Mad. 96 : (91 I. C. 729).

[5] The position of the Registrar in respect of the powers of the Court under S. 12 (2) would normally be that of an officer of the Court assisting the Court in the discharge of its functions under the sub-section. But by the rules of this High Court, he is also placed on a higher footing. By virtue of R. 13, sub r. (4) in Chapt. III of the High Court Rules, he is authorised "to dispose of all matters relating to court-fees." This is the power of the Court itself delegated to the Registrar under Cl. 38 Patna Letters Patent which by virtue of para. 6, Orissa High Court Order, 1948, applies to this Court. There can be no doubt that the power to dispose of a matter relating to court-fee is a judicial power which can be delegated to the Registrar under the Letters Patent. That the Registrar's power in this behalf is judicial is also implicit in R. 16 which requires this power of the Registrar amongst other in his absence to be performed by a Judge. Therefore, under the rules the Registrar can, if he so chooses, dispose of the matter himself or refer the matter to the Court. There is accordingly no substance in the contention that the Registrar has no power to deal with this matter. It is the lax use of the word "taxing-officer" that has given scope for this contention.

[6] As regards the contention that the Registrar has no power to fix the valuation higher than what was reported by the Stamp-Reporter, it is obvious that this argument is wholly without any foundation, when it is appreciated that the Registrar is exercising the delegated power of the Court itself.

[7] The respondent's counsel has, however, raised two further arguments before us. (1) He says that the valuation which has been determined as against the plaintiff at a time when he was himself not before the Court does not bind him. He, therefore, contests the valuation on its merits. (2) He says also that since this is a case that comes up from the Patna State and since the appeal in the lower appellate Court was filed by his clients on 15th October 1947, that is, prior to the integration of the States with Orissa, it is not the Court-fees Act of Orissa that was applicable but only the law relating to the court-fees which was prevalent in the state at the time.

[8] As regards the first of these points, I agree with the contention that the valuation fixed by the Registrar in the absence of the present respondents cannot bind him and that he must be given a fresh opportunity to contest that valuation. The Registrar has assessed the value of the subject-matter of the suit at Rs. 1 000 relying entirely on the allegation in para. 4 of the plaint that the plaintiffs improved the land at a cost of Rs. 1000. But he has not noticed that in para. 5 of the written statement, the defendants deny totally both the fact of the improvement and the cost of the improvement. Even if the improvement be true, the plaintiff may have exaggerated the claim. It may not also necessarily follow that because a person has had to spend a thousand rupees for improvement, the cost of the land has been added to by one thousand rupees. It may depend upon

how much of that investment was well utilised and how much wasted As against the plaintiff, however, this statement of his might be taken as a piece of evidence though it cannot be held to bind him. But so far as the defendant is concerned, this statement cannot be of much value against him especially where he totally denies the truth of it in the written statement itself. The defendant must, therefore, have the opportunity of adducing material to show the correct value of the suit-land. The value will of course have to be determined on what the Court can accept as evidence and not on mere hypothetical guesswork. It is desirable in this case that the correct valuation should be re-determined in the presence of the plaintiffs-appellants also so that if it is found that the value is less than what the Registrar has previously found, the plaintiffs may also get the appropriate relief.

[9] The contention of the learned counsel that the court-fee payable in the Courts below would be not on the footing of the Orissa Court-fees Act, but on the law relating to the court-fees prevalent at the time in the Patna State is also correct. That matter has not been considered by the Registrar presumably because it has not been raised before him. The Registrar will have to investigate and determine what was the proper court-fee payable in this case in the lower Court with reference to the law in that State at the time.

[10] This matter will, therefore, have to go back to the Registrar for a proper investigation and decision. He will be free to dispose of the matter finally under the powers vested in him or to refer the matter to the Court once again if so required.

[11] I may add that in cases of this kind which raise a question of D.C.F. in the Courts below payable both by the appellant and by the respondent, it is desirable the appeal should first be taken on the file on the appellant paying the court-fee as in the lower Courts and the appeal admitted and then the question of revaluation and the deficits consequent on that in all the Courts should be determined in the presence of both the parties at one and the same time.

[12] **Narasimham J.** — I agree.

V.S.B. *Order accordingly.*

A. I. R. (38) 1951 Orissa 10 *[C. N. 3.]*

JAGANNADHADAS J.

Udayanath Mohapatra and another — *Appellants* v. *Rahas Pandsani and others* — *Respondents.*

Second Appeal No. 342 of 1949, D/ 25-4-1950.

(a) Court-fees Act (1870), S. 7 (iv) (c) — Suit for declaration and consequential relief — Court-fee in practice of Orissa High Court.

A suit brought by Hindu sons against the decree-holder auction-purchaser praying for a declaration that the decree and subsequent proceedings are not binding and for recovery of possession of the disputed property should be treated as a suit for declaration and consequential relief. Even though under S. 7 (iv) (c) the party is entitled to value the relief at his option yet, the litigant cannot be allowed to place an arbitrary valuation on the relief and where the valuation made by the party is grossly disproportionate to the market value, the Court can require the ad valorem court-fee on the market value to be paid (Practice of Patna High Court followed). [Para 3]

Anno. C. F. Act, S. 7 (iv) (c) N. 21.

(b) Practice — Precedents — Orissa High Court — In matters of court-fee, practice of Patna High Court should be followed. [Para 3]

P. C. Chatterjee — for Appellants; H. Mohapatra and S. C. Palit — for Respondents.

Order. — This matter comes to me as taxing Judge in pursuance of the order of the Bench which held that the Bench has no jurisdiction to deal with the question of deficit relating to the appeal memorandum in the High Court. I proceed to deal with it treating the order of reference by the Registrar to the Bench as an order of reference to me as the taxing Judge by the taxing officer; the Registrar being also the taxing officer. The suit out of which this appeal arises was brought in the following circumstances as stated in the order of reference.

"In execution of the decree obtained against the plaintiffs' father who is defendant 3, the disputed property has been sold away in court-auction at the instance of the decree-holder, the late husband of defendant 1. The decree-holder purchased the property and also took delivery of possession through Court. In the suit out of which this appeal arises, the plaintiff questioned the decree and the subsequent proceedings on the ground that the loan was contracted for illegal and immoral purposes. They therefore pray for declaration that the decree and the subsequent proceedings are not binding and for recovery of possession of the disputed property. Defendant 2 was impleaded as a subsequent trespasser."

[2] The plaintiffs paid in the lower Courts ad valorem court-fee of Rs. 226-4-0 valuing the property at ten times the assessment of Rs. 22-10-0. This was accepted by the trial Court on a specific issue raised before it regarding the valuation and the sufficiency of the court-fee. The property in dispute is Government jerayoti land of the extent of 7.51 acres and the learned Registrar being of the opinion that the value was inadequate re-assessed the value of the subject matter of the suit at Rs. 2082 that being the amount for which the decree-holder the husband of defendant 1 purchased the suit-property at court auction as appears from the sale-certificate which has been marked as an exhibit in the case. The appellants contest this valuation and hence this reference.

[3] In the trial Court the statutory valuation of 10 times the assessment was accepted following the cases in *Venkatasiva Rao* v. *Venkatanarasimha Satynarayana Murthy*, A. I. R. (19) 1932 Mad. 605 : (56 Mad. 312). *Annamalai Mudaliar* v. *Krishtappa Mudaliar*, A. I. R. (22) 1935 Mad. 66 : (58 Mad. 385). This statutory valuation applies to cases that fall under cl. 5, S. 7, Court-fees Act, that is, suits for possession. In Madras a suit for declaration and possession is treated normally as only a suit for possession. It appears however to be the settled practice of the Patna High Court to treat a suit for declaration and possession as a suit for declaration and consequential relief and to require ad valorem court-fee on the market value to be paid. See *Brij Krishna Das* v. *Murli Rai*, A. I. R. (7) 1920 Pat. 656: (4 Pat. L.J. 703); *Ram Sekhar Prasad* v. *Sheo Nandan Dubey*, A. I. R. (10) 1923 Pat. 137 : (2 Pat. 198) and *Sital Prasad* v. *Ramdas Sah*, A. I. R. (26) 1939 Pat. 274:(18 Pat. 267), Under S. 7, cl. (4) (c) the party is no doubt entitled to value the relief at his option, but the Patna practice insists that the litigant cannot be allowed to place an arbitrary valuation on the relief and that where the valuation made by the party is grossly disproportionate to the market value, the Court can require the ad valorem court-fee on the market value to be paid. While no doubt the statutory valuation is not applicable to such cases and while it may be legitimate to correct gross undervaluation and to prevent mere arbitrary valuation, it may be a question for consideration whether the Court is entitled to substitute its own valuation for that of the litigant and deprive the party of the option that the statute has given to him of putting his own valuation. However, that may be in a matter of this kind the practice which has been all along been prevailing in this Court, namely, the practice of the Patna High Court should be followed. Following that practice, since the value of Rs. 226-4-0 is grossly inadequate as compared with the market value of the suit-property, that valuation must be rejected. The taxing officer has therefore quite properly adopted the price fetched at the Court auction sale, namely, Rs. 2082 as the market value with reference to which the court-fee on the appeal memorandum is to be assessed. Before the taxing officer a contention appears to have been raised that since the plaintiffs would in any case succeed only in respect of 2/3rds of the suit-property, the court-fee need be paid only on 2/3rds of the value as fixed. The appellant has not chosen to confine his appeal memorandum to 2/3rds share. What the court-fee he will have to pay if he so chose, it is unnecessary to say. As the appeal memorandum relates to the entire suit property as it now stands, the appellant has to pay the court-fee on the full value of the property as now determined. The appellant is therefore directed to pay deficit court-fee on the appeal memorandum on the basis of the above valuation within two weeks from the date of the reopening of the Court after the summer recess. The office will intimate to the appellant's counsel the exact deficit that he has to pay before the Court closes for summer recess.

V.S.B. *Ordered accordingly.*

A. I. R. (38) 1951 Orissa 11 *[C. N. 4.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Paramananda Das and another — *Plaintiffs* — *Appellants* v. *Sankar Rath* — *Defendant* — *Respondent.*

Second Appeal No 176 of 1946, D/-21-3-1950.

(a) Tenancy laws—Orissa Tenancy Act (II [2] of 1913 as amended in 1938), S. 31 (1)—S. 31 (1) overrides S. 54, T. P. Act—T. P. Act (1882), S. 54.

The provisions of S. 31 (1) override the provisions of S. 54, T. P. Act. [Para 4]

Notwithstanding the provisions of S. 54, T. P. Act, every transfer of an occupancy holding or a portion thereof by sale irrespective of the value of the property transferred is compulsorily registrable under S. 31 (1), O. T Act subject of course to the exceptions provided in that sub-section. In the absence of such registration title cannot pass by such transfer. [Para 5]

(b) Government of India Act (1935), Sch. VII, List 2, Item 21 — Agricultural land— Meaning — Words and Phrases.

The expression 'agricultural lands' must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry. [Para 8]

(c) Civil P. C. (1908), O. 6. R. 2—Party when can succeed on grounds other than those set up.

If a Court sees that the plaintiff is entitled to the relief which he claims although on ground other than those put forward in his claim the Court should grant that relief, if the defendants were not thereby taken by surprise. [Para 11]

In a suit for ejectment of a tenant on the termination of his tenancy, a decree for ejectment of the defendant as a trespasser can be passed where the relationship of landlord and tenant is not established and where defendants were not taken by surprise or prejudice caused to them [Para 11]

Anno. C. P. C., O. 6, R. 2, N. 9.

R. K. Das and M. S. Rao — for Appellants; *B Mohapatra* —for Respondent.

Narasimham J. — This is an appeal from the appellate judgment of the District Judge of Cuttack reversing the judgment of the Munsif of Jajpur and dismissing the appellants-plaintiffs' suit for ejectment of the defendant-respondent from a house in village Rebana in Jajpur subdivision.

[2] It is an unchallenged fact that the disputed property consists of survey plot Nos. 446 and

447 having an area of .09 decimals and .04 decimals respectively and recorded in Khata No. 8 in the last settlement operations. The Khatian, however, was not exhibited in the lower Court but the statement in the plaint giving the aforesaid plot numbers, area and khata number have not been controverted in the written statement. It is also an unchallenged fact that the said two plots lie in the *Basti* of the village and at present there is a house standing thereon with its appurtenant *Bari*. It is further admitted by the parties that the previous owner of the property was one Rukuni Bewa. The plaintiffs claimed to have purchased the property from her by two *kabalas* dated 8 4-1943 and 25-6-1943. They alleged that the defendant was occupying the house as a tenant-at-will of Rukuni Bewa at a monthly rental of Rs. 1-8-0 and that after the plaintiffs' purchase the defendant was asked to vacate the house but he refused. Thereupon, the plaintiffs issued a notice to quit on 2-9-1943 and then instituted the present suit for declaration of their title, recovery of possession after eviction of the defendant therefrom and also for consequential reliefs such as recovery of arrear rental due from the defendant. The defendant contended that he had purchased the same property from Rukuni Bewa by an oral sale sometime in 1942 and that at that time there was no house standing on the plots. He claimed to have constructed a building thereon and to be staying there in his own right. He therefore challenged the title of the plaintiffs on the ground of prior sale from the original owner. The trial Court disbelieved the defendant's story of oral sale and held that the plaintiffs acquired valid title to the property by the two registered *kabalas* executed in their favour by Rukuni. But he disbelieved the plaintiffs' story of the defendant occupying the house as a tenant and consequently while decreeing the plaintiffs' suit for ejectment and recovery of possession he disallowed their claim for arrears of rent. The lower appellate Court however accepted the defendant's story of prior oral sale accompanied by delivery of possession from Rukuni Bewa and held that the defendant's title to the property must prevail over the subsequent sale by Rukuni Bewa in favour of the plaintiffs even though the latter might have been made by registered documents. As the value of the property was admittedly below Rs. 100 he held that under S. 54, Transfer of Property Act, title validly passed by oral sale accompanied by delivery of possession. One of the points taken up before appellate Court was that notwithstanding anything contained in S. 54, T. P. Act, all transfers of occupancy holdings or portions of the same, irrespective of their value, should be made by registered instruments as expressly provided in S. 31 (1), Orissa Tenancy Act, as amended by Orissa Act VIII [8] of 1938, and that consequently the oral sale in favour of the defendant could not convey any title. The learned lower appellate Court has not dealt with this question in a satisfactory manner. It is difficult to say what exactly his decision is on this question. He seems to have held that S. 54, T. P. Act, would prevail and that the defendant acquired good title by oral sale accompanied by delivery of possession.

[3] In the second appeal the findings on facts of the lower appellate Court were not challenged but the following two questions of law were argued at great length. (i) Section 31 (1), Orissa Tenancy Act, should prevail over S. 54, T. P. Act, and consequently the sale of an occupancy holding or a portion thereof without a registered instrument would not convey any title; and (ii) the suit was for ejectment of the defendant on the ground that he was a tenant and when the story (as?) to tenancy was disbelieved by both the lower Courts it was not open to this Court to grant relief to the plaintiffs on the ground that the defendant was a trespasser, thereby completely changing the nature of the suit.

[4] The first point involves an interpretation of the provisions of the Government of India Act, 1935, under which the Orissa Legislature passed the Orissa Tenancy (Amendment) Act of 1938 (Orissa Act (VIII [8] of 1938), and inserted S. 31 (1) which runs as follows :

"Every transfer of an occupancy holding or a portion or share thereof whether by sale, exchange or gift shall be made by registered instrument except in the case of a sale in execution of a decree or of a certificate signed under the Bihar and Orissa Public Demands Recovery Act, 1914."

As already pointed out, the disputed plots are in Khata No. 8 and consequently they form part of an occupancy holding. The aforesaid section of the O. T. Act would therefore, apply unless it can be said that S. 54, T. P. Act would override the provisions of that section of the Orissa Act. Under the Government of India Act, 1935, legislation in respect of "transfer of property other than agricultural land" was dealt with in item 8, Concurrent List, and the Centre as well as the Province had concurrent powers to legislate on the subject. But under item 21, Provincial legislative list (List II), "transfer, alienation and devolution of agricultural land" was a subject exclusively in the Provincial field. Doubtless, S. 54, T. P. Act, would ordinarily apply to agricultural as well as non-agricultural land. But that Act was "an existing Indian law" under the Government of India Act (see S. 311 (2) and in respect of

matters included in the Provincial legislative list (List II) the Provincial Government had full powers to legislate even though that legislation may have the effect of amending, modifying or repealing any of the provisions of such a law in respect of that subject. This follows as a necessary result from a construction of sub-S. (3) of S. 100 read with S. 292 of the Government of India Act, 1935. When the Orissa Legislature passed the Orissa Tenancy (Amendment) Act, 1938, it purported to legislate in respect of matters covered by item 21, List II, which may be quoted in full:

"Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove."

The subject-matter of sub-S. (1) of S. 30 of the Orissa Act, is relatable to "transfer of agricultural land" as specified in that item. Therefore there seems to be no doubt that so far as transfer of agricultural land is concerned, the Provincial Legislature had exclusive jurisdiction and the provisions of S. 31 (1) would necessarily override the provisions of S. 54, T. P. Act.

[5] It was, however, contended that the main object of insisting on registration of transfers of occupancy holdings under S. 31 of the Orissa Act was to provide for automatic service of notice on the landlord through the Registration Officer as provided in sub-ss. (2) and (3) of that section and that the only result of non-registration of such transfers would be to make them not binding on the landlord. But so far as the validity of the transfer was concerned, it was urged that the general law as laid down in the T. P. Act should prevail and that where the property is less than Rs. 100 in value transfer by sale can be effected even without a registered instrument. This argument, however, is not sound. Prior to the passing of the O. T. (Amendment) Act of 1938, transfers of occupancy holdings required the consent of the landlord and also the payment of mutation fees. These were abolished by the Amending Act but with a view to give notice to the landlord of transfers so as to enable him to make necessary corrections in his rent-roll, elaborate provisions were made in S. 31 requiring compulsory registration irrespective of the value and making adequate provisions for service of notice on the landlord through the Registration Officer. The whole object of the amending Act was therefore to give complete freedom to the occupancy raiyats to transfer their holdings or portions of the same subject only to compulsory registration so as to ensure automatic service of notice on the landlord. There is nothing in S. 31, O. T. Act, to indicate that registration was necessary only for the limited purposes of making such transfers binding on the landlord. On the other hand, a fair construction of sub-s. (1) makes it clear that registration was made mandatory. The Legislature was fully aware of the provisions of S. 54, T. P. Act, and when they, while purporting to legislate on a subject which was in their exclusive legislative field, expressly made registration of transfers of occupancy holdings compulsory the reasonable inference is that S. 31 (1) would override S. 54, T. P. Act. I have, therefore, no hesitation in holding that notwithstanding the provisions of S. 54, T. P. Act, every transfer of an occupancy holding or a portion thereof by sale irrespective of the value of the property transferred is compulsorily registrable under S. 31 (1), O. T. Act, subject, of course, to the exceptions provided in that sub-section. In the absence of such registration title cannot pass by such transfer.

[6] Mr. Mohapatra thereupon contended that there was no clear evidence on record to show that the disputed property was 'agricultural land' and that consequently the case should be remanded to the lower Court with a view to enable the parties to adduce clear evidence as regards the nature of the land. He urged that if he could succeed in showing that the disputed property was not 'agricultural land', then the transfer of such land would be relatable to item 8, List III, (concurrent legislative list). In such a case even though the Provincial Legislature has concurrent powers of legislation any provision repugnant to S. 54, T. P. Act, would be void unless the assent of the Governor-General was obtained as provided in sub-s. (2) of S. 107, Government of India Act, 1935. From a perusal of the Gazette notification publishing the O. T. (Amendment) Act, 1938, it appears that that Act was assented to by the Governor and not by the Governor-General. Mr. Mohapatra, therefore, contended that in so far as S. 31 (1) of the Orissa Act purported to deal with transfers of non-agricultural lands it would be inconsistent with S. 51, T. P. Act, and that the latter section would prevail in view of S. 107 (2), Government of India Act.

[7] It is true that there is no finding by the lower Courts to the effect that the disputed property is 'agricultural land'. But I do not think there was any doubt on this question at all. (After discussing the evidence the judgment proceeded:) On these materials it cannot be said that the disputed property is not 'agricultural land'. The very fact that the settlement authorities entered it in a separate Khata as 'Sthitiban' would indicate that they recognised it as agricultural land because by virtue of the

definition of the expression 'raiyat' in S. 5 (2), O. T. Act, the primary purpose for which the right to hold the land was obtained was for the purpose of cultivation.

[8] The expression 'agricultural land' occurring in Item 21, List II, has not been defined in the Government of India Act but there are by now several decisions explaining the same. In the case of *Megh Raj* v. *Allah Rakhia*, the first decided by the Federal Court in (1942) 5 F. L. J. 33 : (A. I. R. (29) 1942 F. C. 27) the said expression was not fully explained though there are some observations to the effect that the general character of the land and not the use to which it may be put at a particular point of time would be one of the factors in deciding whether a piece of land is agricultural land or otherwise. That case went up to the Privy Council (See *Megh Raj* v. *Allah Rakhia*, A. I. R. (34) 1947 P. C. 72 : (74 I. A. 12) and though their Lordships also did not attempt at an exhaustive definition of the expression 'agricultural land' they held that S. 3 (1), Punjab Restitution of Mortgaged Lands Act, which defined 'land' as including the sites of buildings and other structures on a land that is occupied for agricultural purpose; applied to agricultural land. This seems to be an implied decision to the effect that even sites of buildings if occupied for the purpose of agriculture would be agricultural land even though no operation of agriculture may be done thereon. In *Sarojini Devi* v. *Sri Kristna*, A. I. R. (31) 1944 Mad. 401 : (I. L. R. (1945) Mad. 61), Patanjali J. made the following observations :

"We are of opinion that for the purposes of the relevant entries in Lists II and III of Sch. 7 the, expression 'agricultural lands' must be taken to include lands which are used or are capable of being used for raising any valuable plant or trees or for any other purpose of husbandry."

Similarly in *Nil Govinda* v. *Rukhmini Deby*, A. I. R. (31) 1944 Cal. 421 : (48 C. W. N. 759), it was held that any land though lying unused, but capable of being used, for raising crops, vegetables etc. and also the land used as the site for the farmer's residences should be regarded as agricultural lands.

[9] Judged by the aforesaid decisions I do not think that there can be any doubt that the disputed plots are agricultural lands. They are entered in a raiyati Khata by the settlement authorities which itself raised a presumption to the effect that they were meant either for the residence of a raiyat for facilitating agriculture or else they were unused lands that may be used for growing vegetables or other crops. The mere fact that the plots lie in the middle of a *basti* will not make them non-agricultural so long as they are capable of being used for the aforesaid purposes. Moreover the defendant himself admitted that he was using a portion of the plot as his cattle-shed which shows that the plot is used for a purpose subservient to agriculture. In this state of the evidence it seems unnecessary to remand the case with a view to enable the parties to adduce further evidence to prove the nature of the land. That the land is capable of producing vegetables seems to be clear because it was elicited during the cross-examination of the plaintiffs that the defendant has been growing vegetables by fencing it all round.

[10] I would, therefore, hold that the fact that the disputed property is agricultural land was practically unchallenged in the lower Courts and that consequently the provisions of S. 31 (1), O. T. Act, would apply to the transfer of such land notwithstanding any of the provisions of S. 54, T. P. Act. The oral purchase of the defendant cannot therefore confer any valid title.

[11] Mr. Mohapatra thereupon contended that in view of the frame of the suit for ejectment of a tenant of the termination of his tenancy by a notice to quit, a decree for ejectment of a trespasser cannot be passed. He relied on *Seetha Beherani* v. *A. Jagannath*, 9 Cut. L. T. 32: (A. I. R. (31) 1944 Pat. 312). That case is, however, distinguishable on facts from the present case. Here the relief claimed by the plaintiffs was for confirmation of their title and recovery of possession after declaring that the defendant had no title to the same. Doubtless there was a consequential prayer for arrears of rent on the ground that the defendant was a monthly tenant in possession of the house from the previous owner, namely, Rukuni Bewa. But the plaintiffs had no personal knowledge of this tenancy. When they purchased the land from Rukuni Bewa they found the defendant in possession of the same and seem to have inferred the existence of the relationship of landlord and tenant between Rukuni and the defendant. The plaintiffs might have failed to show that the defendant was a monthly tenant from the time of Rukuni Bewa but if they could prove their title they are still entitled to a decree for ejectment because their suit was, in essence, a suit for declaration of title and recovery of possession. In cases of this type the main point to consider is whether any prejudice was caused to the defendant. As pointed out by Banarji J. in the Full Bench of the Allahabad High Court reported in *Balmakund* v. *Dalu*, 25 ALL. 498: (1903 A. W. N. 112 F. B.):

"If a Court sees that the plaintiff is entitled to the relief which he claims, although on grounds other than those put forward in his claim, the Court should grant that relief, if the defendants were not thereby taken by surprise. This is not a case in which the defendant was, or could be, taken by surprise if the

question of the title set up by the plaintiff in his plaint was determined. The claim for the ejectment of the defendant from the cattle-shed in question was based upon two grounds —(1) that the plaintiff was the owner of it that the defendant had no title to it, and that he had wrongly withheld possession from the plaintiff; and (2) that the defendant had been the plaintiff's tenant and the tenancy had been determined by notice. If the plaintiff could succeed in proving either of the two grounds set up by him he would be entitled to a decree for ejectment; but his failure to prove the second ground would not preclude him from asking the Court to try the other ground put forward in the plaint."

These observations apply with full force to the present case. One of the issues raised was issue No. 2 which runs as follow:

"Assuming plaintiffs' Kabala *bona fide* and for consideration can it prevail over the oral sale of the defendant?"

This issue is a clear issue on the question of the relative strength of the title claimed by the real parties and it has nothing to do with the question of tenancy. Both parties led evidence to prove their respective title and no prejudice was caused to the defendant nor was he taken by surprise. I think the plaintiffs are clearly entitled to a decree for ejectment of the defendant as a trespasser even though the relationship of landlord and tenant might not have been established.

[12] For the aforesaid reasons I would set aside the judgment of the lower appellate Court and restore the judgment and decree of the Munsif with cost.

[13] **Jagannadhadas J.**—I agree entirely with my learned brother on the various points dealt with in his judgment.

[14] As a matter of construction of S. 31 (1), O. T. Act, it appears to me to be quite clear that an unregistered private sale of agricultural land is ineffective to pass title irrespective of the value thereof. If the section had merely said that "every sale etc., shall be registered" it might have been possible to contend that registration is superimposed on a sale, whose validity must depend on other legal provisions—and that non-compliance with registration, while it may have been so superimposed to provide for *ipso facto* notice to the landlord, does not vitiate the sale itself, if otherwise valid. The section, however, says that "transfer by sale *shall be made* by registered instrument". This language is similar to that in S. 54, T. P. Act which in respect of property of the value of rupees one hundred and upwards says that the "transfer *can be made only* by a registered instrument." I have, therefore, no doubt that the effect of S. 31 (1), O. T. Act, as of S. 54, T. P. Act, is to invalidate the transfer which offends against it.

[15] It does appear rather anomalous that while non-agricultural property of value less than rupees one hundred can be transferred without a registered instrument, occupancy holding in Orissa of whatever insignificant value can be transferred only by a registered instrument. This apparent anomaly is, however, intelligible with reference to the conditions prevailing at the time when this S. 31 (1) was introduced with the O. T. Act by way of an amendment by Act VIII [8] of 1938. By the same amending Act, the occupancy holding of a raiyat which was hitherto non-transferable except by consent of landlord was made statutorily transferable and the tenant was relieved of the liability to pay heavy mutation fee which was usually 25 per cent. of the sale consideration to the landlord to obtain his consent (S. 30-A, O. T. Act). The incurring of some expense for stamp and registration by the raiyat was a comparatively light burden and was probably required for the purposes of providing a dependable machinery for the information of the landlord. It would be defeating the intention of the legislature to construe the provision as merely directory and not mandatory.

[16] In the result, I agree with the order proposed by my learned brother.

V.B.B. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 15 *[C. N. 5.]*

PANIGRAHI J.

Raja Bahadur of Khallikote—Petitioner v. *Lingaraj Padhi and another—Opposite Party.*

Civil Revn. No. 266 of 1949, D/- 10-4-1950.

Debt Laws — Ganjam Smallholders Relief Act (XXX [30] of 1947), S. 2 (2)—Rain-fed (Barsha-dhar land—If can fall under "wet land".

If paddy is grown on a portion of the land described as "rain-fed" (*barsha-dhar*), that portion is wet land within the meaning of S. 2 (2). [Para 3]

Where a tenant grows paddy on 2 acres out of the 10.6 acres recorded as *barsha-dhar* in his name, he is still left with 8.6 acres of "other land." Computing the two acres of paddy lands equivalent to four acres of other land according to the calculation laid down in Explanation 2 to S. 2, he would be in possession of 12.6 acres in all and would not be a small holder as defined in the Act. [Para 3]

P. V. B. Rao and S. C. Patnaik—for Petitioner.
D. Sahu—for Opposite Party.

Order. — The petitioner is the landholder and the opposite party are his tenants in respect of plots Nos. 147 and 148 measuring 10.62 acres in Rambha village. These two plots are recorded as 'Barshadhar' that is rain-fed. The point for determination is whether the lands come within the category of "wet lands" occurring in subs. (2) of S. 2, Ganjam Smallholders Relief Act, 1947 (Orissa Act XXX [30] of 1947).

[2] Orissa Act XXX [30] of 1947 defines a smallholder as a "person" who holds land not exceeding six acres of wet land or twelve acres of other land". The petitioner's case is that the classification of the suit lands as 'rain-fed' is itself an indication that they are wet. The view taken by the Revenue Divisional Officier is that 'rain-fed' is a category different from 'wet' and he relies on Board's standing order NO. 7 cl. 7, which says:

"as a rule all lands are classed under the two general heads 'wet' and 'dry'. In some districts another class of lands called Manawari has been recognized by Government. These are lands upon which wet crops are down grown with the aid of rain water impounded on the land."

The note to this paragraph also says that the transferred of ryati land from 'dry' to 'wet' and vice versa and from Manawari to dry and wet and vice versa are sanctioned by collectors. The Orissa Act does not define 'wet-lands' and it must be presumed that the meaning attaching to the expression in the area to which the Act is made applicable holds good. "Wet land" etymologically means, "holding water, saturated with water heavily," while wet crop means, "grown in a moist or watery soil," the most valuable of the wet crops being sugarcane; *see* Hunter's Imperial Gazette of India, vol. II, page 63. In the Madras Presidency the word "wet" has a well-recognized meaning and is applied to lands where wet crops can be grown. Paddy is admittedly wet crop: see Baden-Powell, vol. iii, p. 65. The further sub-division of wet into 'irrigated' or 'Manawari' or 'rain-fed' is made by the Settlement Department and a different rate of assessment, intermediate between irrigated and dry, is levied upon lands which grow paddy crops with the help of rain-water. Wet means mostly paddy crop land or land irrigated by river channels or tanks or those aided by wells": see Baden-Powell, vol. iii p. 56, note, and "survey field" is defined as "land not exceeding 6 acres of wet land or 12 acres of dry land". In this case, as already pointed out above the Record of Rights describes the land as 'rain-fed' (Barshadhar). The question, therefore, is whether 'rain-fed' land is or is not to be deemed 'wet land'.

[3] The opposite party was examined as P. W. 1 and his evidence is that in two or three acres, out of the plots in dispute, paddy is grown, in two acres mandia is grown, while the rest is left uncultivated. There is no source of water supply except rain. If admittedly paddy is grown on two or three acres that extent must indisputably be 'wet land' within the meaning of sub-s. (2) of S. 2 of the Act. Explanation 2 to S. 2, further lays down:

For the purpose of this clause, in the case of a person who owns wet land or other land one acre of wet land shall be deemed to be two acres of dry land and vice versa."

If the opposite party grows paddy on two to three acres, this must be equivalent to his being in possession of 4 to 6 acres of 'other land'. Admittedly he has got in all, 10.6 acres recorded in his name. Even if we take the minimum average of land according to the evidence of the opposite party, as two acres-on which paddy is grown—he will still then be left with 8.6 acres of 'other land'. Computing the two acres of paddy lands equivalent to four acres of other land according to the calculation laid down in Expln. 2 to S. 2, he would thus be in possession of 12.6 acres in all and would not be a 'smallholder' as defined in the Act.

[4] The view taken by the Revenue Divisional officer that Barshadhar, cannot be 'wet' must, in the circumstances, be held to be incorrect. Even in the other view, if paddy is grown on a portion of the land the opposite party would lose the benefit conferred upon smallholders by the Act.

[5] This revision succeeds, but in the circumstances there shall be no order as to costs.

V.B.B. *Revision allowed.*

A. I. R. (38) 1951 Orissa 16 *[C. N. 6.]*

RAY C. J. AND PANIGRAHI J.

Nopram Ramgopal —Petitioner v. *Commissioner, Income-tax, B. & O., Patna—Opposite Party.*

Special Jurisdiction Case No. 16 of 1949, D/- 13-3-1950.

Income tax Act (1922 as amended in 1939), S. 25 (4)—Business assessed to tax different from one in existence in 1918—Test—Relief under S. 25 (4).

It was with a view to preventing double taxation on the same income that the remedial provision in S. 25 (4) was enacted. If, therefore, the business which is now assessed to tax is not the same, nor could it be said to have arisen from some other business which had been in existence in the year 1918, the petitioner cannot claim any relief under S. 25 (4). Whether a particular business has grown out of some business or whether two or more concerns constitute one business, is essentially a question of fact. The test for ascertaining whether two or more concerns constitute one business or not is to see whether the different businesses are so interlocked with one another or dovetailed into one another, that if one fails the others also fail. If on the other hand, each business can be carried on independently of the other, the finding would be that the business would constitute independent business.

[Para 5]

Anno. Income-tax Act, S. 25, N. 4.

B. N. Mohanty and S. K. Ray — for Petitioner; Standing Counsel, G. C. Das —for Opposite Party.

Panigrahi J.—This is a petition under S. 66 (2), Income-tax Act, against an order of the Income Tax Tribunal, Madras Branch, praying for an order calling upon the Tribunal to state a case for the petitioner and refer it to this

Court for decision. The question arising for decision, according to the petitioner, is

"whether under the facts and circumstances of the case the provisions of S. 25 (4) are applicable to all the activities of a business or to those activities which suffered tax under the Income-tax Act, 1939."

[2] The petitioner represented a joint Hindu family concern and was carrying on mercantile business in grains prior to 1918 and had been assessed to income-tax under the Income-tax Act, 1918. During the assessment year 15.4 43 to 2-4-44, the joint family became separated and was succeeded by a partnership firm consisting of the members of the family. The petitioner claimed exemption from income-tax under S. 25 (4), Income-tax Act, 1939. The Income-tax officer rejected his claim, but the Appellate Assistant Commissioner held that the provisions of S. 25 (4) would apply to the facts of the case and allowed the benefit of those provisions to the petitioner in two out of the six businesses carried on by him on the relevant date of succession. The Appellate Assistant Commissioner held that the petitioner could get relief only in respect of those activities that were actually in existence in the year 1918 and suffered tax under the Act of 1918, but not in respect of the additional business activities which came into existence subsequent to that year. This view of the Assistant Commissioner was confirmed by the Income-tax Appellate Tribunal in their order, dated 24-11-48. It is against this order that the petitioner has filed the present revision petition.

[3] The admitted facts are that the petitioner-firm had only grain business and head office business in the year 1918, when he was assessed to income-tax under these two heads. In 1922, he started the business of salt manufacture and also established a cardboard factory. In addition, he purchased some shares in another partnership firm started after 1922. A branch office was opened at Calcutta sometime subsequent to that year. In 1918, assessments were being made in advance but this practice underwent a change in 1922 when it was decided to charge tax on the previous year's income. In order to prevent double taxation, relief was given to such persons as had been assessed under the Act of 1918. The Appellate Assistant Commissioner, therefore, held that those businessees which were not in existence in 1918 had never been assessed to income-tax and that, therefore, the petitioner was not entitled to claim any relief in respect of the income of those businesses. The petitioner attempted to establish that he had also salt business in 1918, but that attempt failed for want of evidence. In fact, it was found that the salt-manufacturing business had been started only in 1926 or 1927 while the cardboard factory was started sometime later. The petitioner was called upon to satisfy the tribunal that salt was one of the commodities that were being dealt with by the Hindu undivided family in 1918. The books of account produced by him in support of his case were, however, not accepted and the tribunal found that, as a matter of fact, the petitioner did not have any dealings in salt in 1918 from which the alleged salt business could have grown.

[4] Mr. Mohanty, learned counsel for the petitioner, contends that the Income-tax authorities and the Appellate Tribunal failed to properly appreciate the effect of the provision contained in S. 25 (4), Income-tax Act, 1939. That section reads as follows:

"Where a person who was at the commencement of the Indian Income-tax Amendment Act 1931, carrying on any business, profession, or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act 1918, is succeeded in such capacity by another person, the change being not merely a change in the constitution of the partnership, no tax shall be payable by the first-mentioned person in respect of the income, profits and gains....."

[5] Mr. Mohanty's contention is that it is the person who is assessed to tax and not the business that he may be engaged in. In other words, he argued that a person is entitled to relief irrespective of the nature of the business he was conducting in 1918. Stretched to its logical limits, this argument would result in relief being given to every person who was assessed to tax in 1918, irrespective of the nature of the business or the number of businesses he may be engaged in during the year of assessment. The section, in express terms, refers to "business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act." On a plain reading of the section, it appears to me that the income from a particular business which was in existence in the year 1918 and had been assessed to income-tax would not be taken into account and re-assessed It was with a view to preventing double taxation on the same income that the remedial provision in S. 25 (4) was enacted. If, therefore, the business which is now assessed to tax is not the same, nor could be said to have arisen from some other business which had been in existence in the year 1918, the petitioner cannot claim any relief under S. 25 (4). It is well established that whether a particular business has grown out of some business or whether two or more concerns constitute one business, is essentially a question of fact. The test for ascertaining whether two or more concerns constitute one business or not is to see whether the different businesses are so interlocked with one another or dovetailed into one another, that if

one fails the others also fail. If on the other hand, each business can be carried on independently of the other, the finding would be that the businesses would constitute independent businesses. Mr. Mohanty's argument is that the concerns belong to one person arising out of common capital and should accordingly be considered to be no more than different branches of the same business. He cited the example of a shopping concern which has different items of business, such as shoes, wearing apparel, furniture and so forth; but, however varied the departments may be there is one fact that governs them all and that is the business of buying and selling. If, for instance, a shopping concern had also insurance business it can hardly be said that the two would constitute one business. In the present case, if the grain business which had been taxed under the 1918 Act and the cardboard factory which had been started in 1922 were so interdependent and so inter-connected as to constitute, in essence. one business concern, the petitioner's contention can be upheld. But the fact is that the grain business consisted in buying and selling for profit whereas the cardboard factory business was started for the purpose of manufacturing cardboards and making a profit. I cannot, therefore, persuade myself to hold that the business concerns started after 1918 such as manufacture of salt or of cardboard, were so intimately connected with the purchase and sale of graine that had been in existence from 1918, as to constitute one business. The view taken by the tribunal is, therefore, correct and we see no reason to call upon, them to state a case for the petitioner.

[6] **Ray C. J.**—I agree.

V.B.B. *Petition dismissed.*

A. I. R. (38) 1951 Orissa 18 *[C. N. 7.]*

RAY C. J.

Govinda Chandra — Petitioner v. *State— Opposite Party.*

Criminal Revn. No. 168 of 1950, D/- 4-8-1950.

Criminal P. C. (1898), S. 499, Sch. V, Form XIII —Surety bond without bond by accused is not bail bond.

Criminal Procedure Code, Sch. V, Form No. XIII, contemplates that there should be two bonds, one taken from the accused undertaking to appear on the dates of hearing on pain of forfeiting the bond of any amount fixed by the Court, and the other from the surety chosen by him (accused) undertaking, on accused's failure, to make good the sum forfeited by the accused and, for the matter of that, by him. Any surety bond executed without the bond by the accused is not a bail bond within the Code and is not enforceable in the manner prescribed in the Code. If for some reason, the accused, the primary obligor, is released, the surety stands released without anything more. The word "bail" is properly applicable to "security with surety" and not "surety without security." The essentiality of the position is that until an accused forfeits his bond of appearance, the question of surety's liability does not arise : A. I. R. (27) 1940 Lah. 339 ; A. I. R (32) 1945 All. 389 and A. I. R. (33) 1946 All. 116, *Dissent.* [Paras 6, 7]

Anno. Cr. P. C., S. 499, N. 1 and 7.

K. N. Das — for Petitioner; Advocate-General — for Opposite Party.

Order. — The petitioner (Gobinda Chandra Srichanar) has been declared to have forfeited the bail bond executed by him to ensure attendance of accused Bira Naik in Criminal Case No. 389, started by Maguni Biswal of Dhenkanal. On 16-1-1950, which was one of the dates of hearing, the accused Bira Naik did not attend the Court, and the petitioner, his bailor, fully alive to his responsibility, made a representation to the Court that the non-appearing accused was ill. The learned Magistrate did not accept the story of illness but however, was forced to adjourn the case to 30-1-1950. On that date, the accused appeared, and the bailor too appeared and filed a petition asking to be released from the liability of bail bond. It appears from the record that one Banshi Naik executed a bail bond for Bira Naik on 3-3-1950. The petitioner was called upon to show cause why the surety bond should not be forfeited and the payment of Rs. 200 agreed under the bond to be paid in default of the accused's attendance in Court, should not be enforced.

[2] Both the Courts below have disbelieved the story of Bira Naik's illness on 16-1-1950, and have found themselves not justified, on any reason whatsoever, to excuse the bailor from the liability.

[3] Mr. K. N. Das, the learned counsel for the petitioner, has attacked the proceeding as tainted with illegality. According to him, the suretyship should have, first of all, been forfeited, and then only he could have been called upon to show cause why payment of the amount undertaken should not be enforced. I do not quite follow this argument. If his argument is upheld it would mean that the surety bond should be forfeited without hearing the bailor. That can never be the intention of law. Before forfeiting the bond, the bailor should be given an opportunity to show cause. If he fails to satisfy the Magistrate as to the existence of any sufficient reason disabling him from fulfilling the terms of the bond, he is to be directed to pay. Mr. Das should maintain that at that stage he shall be given further opportunity to show cause. At present, I am not advised to express any opinion on this. But I find no irregularity in the proceeding.

[4] But for reasons different from that placed before me, the payment should not be enforced.

I have the bond before me. What has been undertaken in that bond is that the petitioner should appear in Court from day to day. It reads like this:

"We the accused have been called upon to furnish securities with one surety of Rs. 200 each in the Criminal Case No. 389 started by Maguni Biswal (Complainant) as against Lambodar Behera and 5 others. I, therefore, agree that from today till the disposal of this case I shall appear in Court on 30-12-1949 and on all other dates to which the case is adjourned at 10 O' clock every day and in case I fail to appear I shall have to pay Rs 1200. If I fail to pay, the State shall realise it by attaching and selling my properties. I execute the *Muchalika* to this effect. Dated 14-12-1949, Sd. G. C. Srichanar."

[5] The document contains a list of the names of the 6 accused persons. None of them has been made to sign this document by way of execution. This amounts to saying that the accused persons have not bound themselves to appear in Court on condition of forfeiting the sum of Rs. 200 each. As it appears from Criminal P. C., Sch. V, Form No. XIII, there should be two bonds, one taken from the accused undertaking to appear on the dates of hearing on pain of forfeiting the bond of any amount fixed by the Court, and the other from the surety chosen by him (accused) undertaking, on accused's failure, to make good the sum forfeited by the accused and, for the matter of that, by him. I cannot conceive that without an accused himself executing a bond, any surety could be thought of. The very conception behind the word "surety" and the liability implied in that status as recognised by law is to reimburse the loss sustained by the principal on account of failure of performance on the part of the obligor. The principal (i.e., the State in this case) has double remedy—one against the principal obligor, and the other against his surety. Not taking a bond from the accused person to appear on the dates fixed amounts to leaving him to act at his own option. If the accused is not bound to appear, there is no meaning requiring the surety to make him appear. It is well established in law that if the principal by his laches or otherwise releases the debtor from the liability sought to be assumed by the surety, his remedy against the surety is frustrated.

[6] Execution of a bond is imperative under the Code. Section 499, Criminal P. C., reads :

"Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be."

The section contemplates two cases : one when the accused is to be released on his own bond, and the other release on bail. Execution of a bond by the accused is imperative, and in the case of release on bail, a bond by one or more sufficient sureties has to be executed in addition. Mark that in the first part of the section the bond is to be for such sum of money as the Court thinks sufficient, and with regard to the sureties' bond in the latter part of para (1) of the section, nothing is mentioned about the "sum". This is because surety implies pre-existence of a fixed liability by the obligor (principal) and the surety is to undertake to reimburse the primary obligation. Hence for what sum the surety bond or bonds shall be executed is thereby pre-determined. Any surety bond executed without the bond by the accused is not a bail bond within the Code and is not enforceable in the manner prescribed in the Code. Section 502 contemplates release of a surety without entailing release of the accused. If for some reason, the accused, the primary obligor, is released, the surety stands released without anything more.

[7] It may be noticed that surety does not thereby acquire an overall control of the accused's person. He is to watch the movements of the accused, and, on apprehension that he may abscond, may inform the Court and seek release of his liability where upon he is not held bound to it but the accused is arrested, and on his arrest the surety is freed from the bond and stands discharged Where the accused has not been made to execute a bond, the only control on the accused is non-existent and the foundation of the security is knocked from its bottom. The result is unenforceability of the surety bond. Bail means security with sureties whereas the bond, referred to in the first proviso to S. 496, is a simple recognisance of the principal without any surety. The word "bail" is properly applicable to "security with surety" and not "surety without security." In the case of *Wadhawa Singh* v. *Emperor*, 29 Cr. L. J. 491-109 I. C. 219 : (A. I. R. (15) 1928 Lah. 318), it has been held under no provision of the law can a police officer or a Court take a third party's bond for the appearance of the accused without taking an undertaking (bond) from the accused himself. Such a bond is invalid and the person executing it incurs no legal liability if the accused absconds. I have considered, in this connexion, the views of the Judges who decided the cases: *Indar* v. *Emperor*, 41 Cr. L. J. 958 : (A. I. R. (27) 1940 Lah. 339), *Nisar Ahmed* v. *Emperor*, A. I. R. (32) 1945 ALL. 389: (47 Cr. L. J 209), and *Abdul Aziz* v. *Emperor*, A. I. R. (33) 1946 ALL. 116 : (47 Cr. L. J. 528). With the greatest deference, I would not agree with them. In *Indar's case*, (41 Cr. L. J. 958 : A. I. R. (27) 1940 Lah. 339), S. 499

has not been taken into consideration. In the Allahabad cases, their Lordships have failed to consider that the accused, remaining at large without executing a bond, cannot be said to have been released on bail. To hold otherwise, would amount to setting the imperative provisions of S. 499 at naught. If the accused has not been released on bail, and has not undertaken to appear on pain of forfeiture of a bond for a certain amount, the consideration for the surety bond fails and the surety's liability is enlarged or subjected to greater risk than he shall be considered to have undertaken under the provisions of S. 499 without his consent. The surety's bond, therefore, becomes unenforceable. The Legislature has deliberately used the word 'surety' indicating that his liability is secondary. Besides, on principle, I am bound, sitting in this Court, by the view prevailing in the Patna High Court. The point has been dealt with in the case of *Baidynath* v. *Emperor*, A. I. R. (34) 1947 Pat. 58: (48 Cr L. J. 324), where it was held that a bond by the surety alone was not contemplated by the Code and there was no power in the Code to forfeit such a bond.

[8] In this view of the matter, even if I read this document in the manner in which the learned Advocate-General wants me to read, namely, that he did not bind himself to appear in Court but to cause accused's appearance, I should hold that on account of non-execution of a bond by the accused, the liability of the surety under the sort of bond did never arise. Secondly, if the State Government would insist upon the hidden or implied meaning under this document and should like to enforce the penalty, the bailor is entitled to demand his pound of flesh and to say that, in accordance with the terms of the document, he had appeared on all dates in Court. It having appeared from the record that though the accused did not appear the bailor did not fail to make his appearance, it has to be held that he has fulfilled the terms of the bond and he cannot be held liable.

[9] There are two deficiencies in the case that are at the moment irremediable: (i) No bond for appearance has been taken from and executed by the accused: and (ii) that the bailor, bound as he is by the bond, has fulfilled its terms to the effect that he should appear in Court from day to day. He has nowhere agreed to be liable to pay any sum for non-appearance of the accused. The essentiality of the position is that until an accused forfeits his bond of appearance, the question of surety's liability does not arise.

[10] In the circumstances, I would set aside the orders of the Courts below calling upon the petitioner to make payment on forfeiting his bond. In my judgment, he is not liable to any penalty whatsoever. The revision is allowed.

R.G.D. *Revision allowed.*

A. I. R. (38) 1951 Orissa 20 *[C. N. 8.]*

RAY C. J. AND NARASIMHAM J.

Kulamoni Mohanty — Petitioner v. *The State—Opposite Party.*

Criminal Misc. No. 97 of 1950, D/-22-8-1950.

Preventive Detention Act (1950), S. 7—Grounds vague and untrue — Detention held unjustified — Criminal P. C. (1898), S. 491.

A was arrested on 24-2-1950 under S. 107, Criminal P. C. but no proceedings were started under the section. He was then put under detention for three months by the District Magistrate. Just before the expiry of the period, the order was revoked by the Chief Secretary who passed an order of detention on 16th May 1950 but made the detention effective from 28-2-1950. The grounds supplied to *A* which were exactly similar to those supplied to other four detenus, alleged that *A* was an avowed member of Communist party which described the present agitation as 'Civil War' and that *A* was attempting to collect weapons etc. and was likely to go underground. No further details were given on the ground that their disclosure was against public interest. In an application by *A* under S. 491, Criminal P. C.:

Held that the grounds were too vague. Moreover, they were such as could be taken against every member of that party and if really existed, were sufficient to declare the party unlawful. In absence of such declaration every member of the party could not be predicated to be sabotageous or violent;

Further, the circumstances of his arrest and subsequent orders showed that the grounds alleged were not true. The order of detention was therefore set aside. [Paras 4, 5]

Government Advocate—for Opposite Party.

Ray C. J. — The petitioner (Kulamoni Mohanty) has been ordered to be detained for one year by the Government of Orissa from 28-2-1950 under S. 3 (1), Preventive Detention Act (IV [4] of 1950). Long after this detention, that is on 19-5-1950, he was served with a copy of the grounds as contemplated in S. 7 of the Act, wherein he was told that he had a right to make a representation against the order of detention.

[2] We have no information if he has made any such representation In his petition to this Court, he asserts that he had been holding a service in B. N. Rly. for the last eleven years and had not been officially suspended or dismissed. This assertion is intended to convey that he is a man who is following peaceful avocation of life and no blemish has been found in his career as a public servant by his immediate superior. He further says that he was first arrested on 24-2-1950 under S. 107, Criminal P. C., but no proceeding under the section was started. He was then put under detention for three months by the District Magistrate of Cuttack as per his order NO. 354-Res. of 28-2-1950. He further says

that just prior to the termination of this period of detention, the Chief Secretary to the Government of Orissa revoked the above mentioned order of detention by the District Magistrate. Then came the present order which is now the subject of consideration. This order is dated 16-5-1950, but it prescribes his detention as under the order to take effect from 28-2-1950. It does not appear that the District Magistrate gave him copy of the grounds for the detention order passed by him. It is imperative under S. 7 of the Act. The section says:

"7 (1) When a person is detained in pursuaone of a detention order, the authority making the order shall, as soon as may be, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order, ... and in a case where it has been made by . . . . an officer subordinate thereto (State Government) to the State Government."

It is apparent that since 28th February till 16th May, his detention was insisted upon without affording him the necessary opportunity of making a representation to the State Government.

[3] The petitioner also avers in the penultimate paragraph of his petition that there is every reason and proof to believe that the grounds supplied to him are not even genuinely misconceived notions of the Government regarding him, and they are but formal recitals of a fixed formula for justifying the detentions of such persons against whom the Government cannot find any actual ground; the petitioner submits this because he finds the grounds of his detention to be completely and entirely a faithful copy of the grounds (even including the numbers of the orders containing them in some cases) supplied to four other detenus who are now in this (Cuttack) Jail along with the petitioner: the detenus concerned are Shyamaghan Ray Chowdhury, Govinda Chandra Sarangi, Graja Tripathy and Jaldhar Nanda.

[4] In the background of this statement made in the petition which the State Government has not taken care to controvert, the validity or otherwise of the grounds has to be examined. The grounds, in a nut shell are that the petitioner is an avowed member of the Communist Party who are out to follow the policy of the Communist Party of India and are describing the present agitation of the Communist as 'Civil War' and are making every attempt to collect the weapons and foment disorder, etc., and that the petitioner is likely to go underground to further the plans of the Communist Party, namely, commission of sabotage and violence. The learned Government Advocate, in supporting the State's case, urges that the grounds could not be any the more specific inasmuch as any further information might disclose facts which the State considers to be against the public interest to disclose. This provision, however, has to be read along with the provisions which prescribe the object for which the grounds are to be supplied Preventive detentions are cases in which individuals are deprived of their liberty without a trial. The provision which compels the detaining authority to supply them grounds and the provision that they will be given an opportunity to avail of the grounds in order to make representation for the purpose of clarifying their position and repudiating the grounds urged against them to a prescribed authority and periodical review of their cases by the Advisory Board are meant to be considered, in the circumstances, as substituted for trial. As it has always been said that the weapon in the hands of the Government is very powerful the minimum of liberty that has been given to the detenus in the set up of things should not be whittled down in the manner, of which the present case is the type. I can easily conceive that the grounds could have been more specific without disclosing the facts which are against the public interest to disclose. He should have been said when, where and with whom he had been planning. If the fact that he was going to plan was based upon any statement made by him or any document or correspondence from which it appeared, without disclosing specifically those documents or statements, it could have been said that those documents had been discovered or the statements had been verified, and that therefrom it appeared that he intended planning sabotage and violence. The grounds, as they stand are too vague to be availed of for the purpose of making a representation.

[5] The circumstances that he was first of all arrested in anticipation of a proceeding under S. 107, Criminal P. C., and that he was later detained under the orders of the District Magistrate, who failed to supply him the grounds of detention under S. 3 (3) of the Act but must have made a report to the State Government, make it doubtful if the informations that reached the Government at the time of his arrest were sufficient to warrant his detention. Besides such orders of detention have always been held to be sham orders. If people are arrested on charges of offence or mis-behaviour likely to prejudice the public peace within the meaning of S. 107, Criminal P. C., and then the proceedings against them are dropped and recourse is taken to the provision of Preventive Detention Act for their detention, they are entitled to have it adjudged that the grounds are not true. Besides it can be said that the grounds like these can be

taken to have been extended against every member of the Communist Party, Orissa. Such grounds, if they exist, as in the nature of things they should, would be sufficient for a Party to be declared unlawful. That the Party has not been declared unlawful makes it clear that it cannot be predicated that every individual member of the Communist Party is either a sabotageous or violent. Under the circumstances, to tell of a particular communist that he is so because he is an avowed communist would be nothing but vague. The State has not made out a case of any clear immediate danger happening to the maintenance of public order by allowing the petitioner to remain at large. Under the circumstances, we direct his release forthwith.

[6] **Narasimham J.**—I agree.

D.R.R. *Application allowed.*

A. I. R. (38) 1951 Orissa 22 *[C. N. 9.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Sm. Chanchala Devi and others—Plaintiffs—Appellants v. *Puri Bank Ltd. and others—Defendants—Respondents.*

A. F. O. D. No. 18 of 1945, D/- 25-4-1950.

(a) Benami — Burden of proof — Purchase by female—Presumption.

When a plea of benami purchase is raised, the ostensible title cannot be displaced except on clear and cogent proof of the benami character of the purchase. The burden of proving this lies on the person asserting the benami character. The source of the purchase money has always been considered a primary and crucial factor in making out the benami character of a purchase. The same burden of proof applies equally to a case where a sale deed stands in the name of a female. There is no presumption in law that merely because the female had a husband at the time of the purchase, the sale deed must be presumed to be benami for the husband. Neither is there any presumption that a married woman has no funds of her own to be available as consideration for the purpose. When considering the question as to the source of purchase money, the matter has to be looked at not necessarily by requiring express and positive proof of the supply of specific funds of the husband or of the wife for the disputed purchase, but proof of the relevant facts with reference to the broad probabilities and the circumstances in the light of the evidence is enough. [Para 6]

(b) Civil P. C. (1908), O. 6, R. 2 and O. 7, R. 7—Claim suit under O. 21, R. 63 by daughters that attached property belonged to mother and not father—Defence of benami— Plea of advancement can be taken by plaintiffs— It is not a mere alternative case. [Para 8]

Anno. Civil P. C., O. 6, R. 2, N. 5; O. 7, R. 7, N. 3.

(c) Benami—Advancement—Purchase in name of wife—Trusts Act (1882), S. 82.

Where in India a purchase has been made by a person in the name of his wife or child or other close relation, the presumption is that it was benami and that there is no presumption that purchase was intended by way of advancement. The presumption of no advancement is however a rebuttable one. But there must be proof of some circumstances which would indicate the intention to benefit though no direct proof of the same is necessary. [Para 9]

Where a comparatively small sum out of the total investment in the purchase of property in the name of the wife is stridhan of the wife and the sale deed concerned relates only to a small extent of the total extent of the property purchased and the rest of the funds are all supplied by the husband, the presumption of no advancement is not rebutted. [Para 12]

Anno. Trusts Act, S. 82, N. 3.

B. N. Das and G. B. Mohanty — for Appellants; *S. N. Sengupta and S. Mohanty*—for Respondents.

Jagannadhadas J. — Plaintiffs are the appellants in this appeal. The suit is one under O. 21, R. 63, Civil P. C. and relates to 62½ acres of land at Dolamandap Sahi in the town of Puri with pucca and kutcha structures standing thereon. The facts leading to the suit are as follows :

[2] Plaintiffs are the daughters of defendant 2. Defendants 3 to 6 mortgaged the suit property along with other properties to defendant 1 the Puri Bank, by a deed of mortgage dated 10th March 1934, Ex. 6, for a sum of Rs. 25,000. The Bank obtained a decree on the mortgage and brought this property to sale in Execution Case No. 1379 of 1941. The plaintiffs intervened with a claim petition on the ground that the suit property belonged to their deceased mother and not to their father defendant 2, that they are entitled to the same as the Stridhan heirs of their mother, and that their father and brothers mortgaged the suit property fraudulently without their knowledge. (It may be mentioned that under the Patna amendment to O. 21, R. 58, Civil P. C., a claim proceeding can be instituted also in the execution of a mortgage decree.) The basis for this claim by the plaintiffs is the fact that the suit property has been acquired in bits under six successive sale-deeds ranging from 1902 to 1923 all of which stand in the name of their mother who died on 15 February 1933. The claim was rejected by the executing Court and hence this regular suit by the plaintiffs under O. 21, R. 63 to establish their right to the suit-property.

[3] The case of the plaintiffs is that the various purchases were made with the stridhan money of their mother while it is the case of defendant 1, the Puri Bank that the purchases were made with the money of defendant 2 and that the sale-deeds were taken benami in the name of his wife. The learned Subordinate Judge in the trial Court has, after consideration of the evidence and circumstances, accepted the contention of defendant 1 and dismissed the plaintiffs' suit and hence this appeal.

[4] The plaintiffs' father, defendant 2 herein,

one Banamali Kar, was a native of the village of Chandpur in the District of Cuttack. He was not a person having any substantial ancestral property and appears to have shifted to Puri more than fifty years ago in order to eke out his livelihood. He took up service with a Bengali Lady named Giribala Dasi who was running an excise shop a cloth shop and a grocery shop. in Puri and other excise shops in the mofussil. He seems to have won his employer's confidence fairly early and became her trusted assistant and in course of time, the management of her excise business and grocery shop appears to have been left in his hands. As early as in 1911, his employer executed a power-of-attorney in his favour including others, vide Ex, 6. He appears also to have been admitted as a partner with her into her business at one time. When for one reason or other the license of the excise shop could not be obtained by his employer, Giribala Dasi. the shop appears to have been run for a year in his name for her. In so far as can be gathered from the material exhibited in this suit, he had made purchases of various items of property between 1910 to 1923 under as many as 14 sale-deeds and the property so acquired or the price paid therefor was not inconsiderable.

[5] The suit properties have been purchased under six sale-deeds of which one dated 6th November 1906 relating to a portion of plot No. 431 has not been exhibited. The other purchases are as follows :

Ext. No.	Date of Execution.		Plot No.	Extent (In acres).	Consideration.
Ext. 1	... 16-9-1902	...	430	.10	390
Ext. 1-A	... 18-12-1919	...	432	.20	600
Ext. 1-B	... 22-2-1920	...	436	.20	350
Ext. 1-C	... 6-6-1922	... (The rest of plot No. 431 appears to have been purchased under the unexhibited sale-deed dated 6-11-1906)	Portion of 431	.9	1000
Ext. 1-D	... 13-9-1923		Part of plot No. 433	.2½	150

Thus under these six sale-deeds the suit area of 66½ decimals comprised in plot Nos 430. 431, 432 and a portion of plot No. 433 and plot No. 436 along with the pucca and kutcha superstructures standing thereon at the time were purchased for an aggregate consideration of about Rs. 2600. The question for consideration is whether having regard to the evidence and circumstances in this case, these purchases were made by the plaintiffs' mother herself or benami by defendant 2 in the name of his wife.

[6] It is necessary to appreciate clearly the principles which have to be kept in view when a question of this kind arises. There can be no doubt that when a plea of benami purchase is raised. the ostensible title cannot be displaced except on clear and cogent proof of the benami character of the purchase. The burden of proving this lies on the person asserting the benami character It is unnecessary to lay down what all circumstances are relevant to make out the benami character of a purchase; but the source of the purchase money has always been considered a primary and crucial factor. The same burden of proof applies equally to a case where a sale-deed stands in the name of a female. There is no presumption in law that merely because the female had a husband at the time of the purchase, the sale-deed must be presumed to be benami for the husband. Neither is there any presumption that a married woman has no funds of her own to be available as consideration for the purpose. The dictum of the Privy Council in *Lakshmiah Chetty* v. *Kothandrama Pillai*, A. I. R. (12) 1925 P. C. 181 : (48 Mad. 605) and other cases following it which is in the following terms:

"There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a Benami transaction by which the beneficial interest in the property is in the husband although the ostensible title is in the wife,"

cannot be, and has not been, taken to mean that such a purchase is to be presumed to be benami, merely because it was purchased during her married status. In order that the above quoted dictum of the Privy Council, may apply, it must be made out as a fact that the purchase was by the husband and that the source of the consideration for the purchase was the funds of the husband. (See *Ratanchand Fakirchand* v. *Deochand Dayathai*, A. I. R. (33) 1946 Bom. 157 : (223 I. C. 618). But it is also necessary to observe that when considering the question as to the source of purchase money, the matter has to be looked at not necessarily by requiring express and positive proof of the supply of specific funds of the husband or of the wife for the disputed purchase, but proof of the relevant facts with reference to the broad probabilities and the circumstances in the light of the evidence is enough. The position relating to the quantum of proof required in such cases to establish the

benami character has been authoritatively laid down by the Federal Court in the latest case reported in *Gangadara Aiyar* v. *Subramania Sastrigal*, A.I.R. (36) 1949 F. C. 88 : (1945 F. L. J. 90) where their Lordships in an unanimous judgment state the position as follows:

"It is the settled law that the onus of establishing that a transaction is benami is on the plaintiff, the person asserting the benami character and it must be strictly made out. The decision of the Court cannot rest on mere suspicion, but must rest on legal grounds and legal testimony. In the absence of evidence, the apparent title must prevail. It is also well-established that in a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came and when it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts."

The evidence and circumstances in this case have to be judged with reference to these standards.

[7] There is no direct and express evidence on behalf of defendant 1, the Puri Bank, that the consideration under the various sale deeds actually belongad at the time to defendant 2 or that defendant 2 had specific funds at the time out of which the consideration was in fact paid. [After discussing the evidence the judgment proceeded.] The above review of the facts and circumstances emerging from the evidence establishes (1) that defendant 2 was in possession of substantial funds during the period 1910-1933, when almost the entire investment on the acquisition of the land relating to the suit-houses and the reconstruction of the super-structures thereon was incurred. (2) That as a matter of fact he was acquiring substantial properties during that period. (3) The recitals in the sale-deeds relating to the suit property show that the consideration therefor in so far as it was by way of set-off of previous debts was that of D-2 and in so far as it was cash, was paid through his hands. (4) It is in a way admitted by the plaintiffs in their plaint that the money required for the very substantial investment by way of reconstruction had its origin from defendant 2. (5) The plaintiffs' case of their mother being in possession of independent Stridhan funds is clearly disproved. Taking all these circumstances together, it is a reasonable inference that the consideration for the various sale-deeds and for the reconstruction of the structures thereupon was supplied completely by defendant 2 and not by the plaintiffs' mother. I have therefore no hesitation in agreeing with the conclusion arrived at by the learned Subordinate Judge that the purchase of the suit property under the various sale deeds above referred to in the name of the plaintiffs' mother must be taken to have been really made by defendant 2 from out of his own funds.

[8] Learned counsel for the appellant however argues that even if it is taken as sufficiently proved that the consideration for the above sale-deeds and for the reconstruction of the houses thereupon was supplied by defendant 2, it must in the circumstances of this case be taken to be with an intention that the beneficial interest therein should belong to the plaintiffs' mother that is to say that the consideration was provided by way of advancement. It is objected on behalf of the respondents that the question as to whether there was an intention by way of advancement is a question of fact which has not been put in issue at all at the trial and that such a question of fact cannot be permitted to be raised at this stage. It has been pointed out that there is no indication in the plaint of any such alternative case and that the plaint was entirely on the footing that as a fact the consideration for various sale-deeds was actually supplied by the plaintiffs mother and not by defendant 2. The case in *Ishan Chunder Singh* v. *Samachurn*, 11 M. I. A. 7 at p. 20 : (6 W. R. 57 P. C.) is cited to show that a question of this kind is not to be allowed to be taken for the first time in the appellate stage. I am not however prepared to overrule the argument of the appellant's counsel on this ground. An argument that even if the purchase-money was supplied by defendant 2, the title does not belong to him, is not a mere alternative case. The one and the only question is whether the purchases are benami. Defendant 1 seeks to make it out by showing that the funds were supplied by defendant 2. The plaintiffs may disprove it by showing that the intention was to benefit their mother. It appears to me, however, that on the material before us, there is nothing sufficiently to indicate that there was any intention on the part of defendant 2 to purchase the property under the various relevant sale-deeds for the benefit of his wife, once it is found that the purchases were made by him and out of his funds and not by the wife out of her funds. Quite a large number of cases decided by the Privy Council have repeatedly established the proposition that where in India a purchase has been made by a person in the name of his wife or child or other close relation, the presumption is that it was benami and that there is no presumption that the purchase was intended by way of advancement. It is sufficient to refer to the cases in *Gopee Krist Gosain* v. *Gunga Persaud*, 6 M. I. A. 53 : (4 W. R. 46 P. C.); *Mt. Bilas Kunwar* v. *Desraj Ranjit Singh*, A. I. R. (2) 1915 P. C. 96 : (37 ALL. 557); *F. J. R. Kerwick* v. *K. M. Kerwick*, A. I. R. (8) 1921 P. C. 56 : (48

Cal. 260); *Lakshmiah Chetty* v. *Kothandrama Pillai*, A.I.R, (12) 1925 P. C 181 : (48 Mad. 605) and *Gurandittа* v. *T. Ramaitta*, A. I R. (15) 1928 P. C. 172 (55 Cal. 944). The presumption of no advancement is no doubt a rebuttable one. But there must be proof of some circumstances which would indicate the intention to benefit though no direct proof of the same is necessary. It is no doubt true that as stated in *Mahomed Sadiq Ali Khan* v *Fakr Jahan Begam*, A. I. R. (19) 1932 P. C. 13 at p. 20 : (6 Luck. 556) :

"Though there may be no presumption of advancement in such cases in India very little evidence of intention would be sufficient to turn the scale."

What is the nature of that "little evidence" which is required to turn the scale can be gathered from a notice of the facts of this very case in *Mahomed Sadiq Ali Khan* v. *Fakr Jahan Begam*, A. I. R. (19) 1932 P. C. 13 : (6 Luck. 556) and of a few other cases where the intention of advancement was found as a fact.

[9] In *Mahomed Sadiq Ali Khan* v. *Fakr Jahan Begam*, A. I. R. (19) 1932 P. C. 13 at p. 20 : (6 Luck. 556) the property in dispute was purchased by a Mohammedan in the name of the daughter of his favourite wife. At the time of the daughter's marriage, he sent the deed to the father-in-law of the daughter for his inspection representing it as her property. It was held that this was sufficient evidence of his intention that the purchase was for the benefit of his daughter, *Shambhu Nath* v. *Pushkarnath*, A. I. R. (32) 1945 P. C. 10 : (I. L. R. (1945) Kar. P. C. 168) is a case of deposits by the deceased in the bank in the joint names of himself and his close relations. Some of his near relations were destitute widows and others were Pardanashin ladies. Their Lordships held that these circumstances were sufficient to lead to an inference that the deposits were for advancement and that it was unlikely that the deceased chose the names of such persons as joint holders of the deposits benami. In *Manmohan Das* v. *Mt. Ram Dei*, A. I. R. (18) 1931 P. C. 175 : (134 I. C. 669) there was a deed of gift executed by a recently married husband in the name of his minor wife. The deed itself recites the fact of the recent marriage, the minority of his wife and the advice of his relations and his own desire to make arrangements for his wife's maintenance. It was also in evidence that the husband had led a somewhat extravagant life prior to marriage and that the property covered by the deed of gift was his sole remaining asset. It was held by their Lordships of the Privy Council that the deed must have been meant by way of advancement.

[10] Learned counsel for the appellants relied strongly on a case in *Sitamma* v. *Sitapati Rao*, A. I. R. (25) 1938 Mad. 8 : (I. L. R. (1938) Mad. 220). In that case it was found that a person made an adoption and that various properties were purchased in the name of his wife. The adoption deed itself suggested the possibility of strained relations between the adopted son and the adoptive mother. It was held that it was not unlikely that the purchase in the name of the wife with the funds supplied by the husband was meant to be for the benefit of the wife. It was also further found on the facts that subsequent dealings with the property were on the footing of recognising the ownership and the possession of the wife. In the case their Lordships of the Madras High Court say :

"The mere suspicion that the purchases might not have wholly been made with the lady's money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that moneys belonging to the husband, whether in a smaller measure or a larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction, though it is an important criterion. It is true that in the Indian law the English rule as to presumption of advancement has not been adopted, but S. 82, Trusts Act, recognises that money may have been contributed by another, towards a purchase with the intention of giving a beneficial interest to the person in whose name the purchase is made. The relationship of husband and wife between the person who contributes the money and the person in whose name the sale is taken will be a very important factor in determining whether the transaction was really meant for the benefit of the wife or not."

As already stated above, the facts and circumstances of that case were such as to render it very probable that the benefit of the wife was specifically intended.

[11] In the present case, the only circumstances that may be relied on in favour of an intention to benefit the wife by these purchases are if at all the following:—In 1903 to 1904, plot No. 430 purchased under the sale-deed, Ext. 1 was mutated in the name of the plaintiffs' mother, vide, Ext. 2. In 1920-21 plot No. 436 purchased under sale-deed, Ext. 1-B was mutated in the name of the plaintiffs' mother, vide Exts. 2-A and 3-B. For the purchase under Ext. 1-C of portion of plot No. 431, the mutation in the plaintiffs' mother's name was effected in 1922, vide Ex. 3. It is also in evidence that in the Puri Municipal Survey records, Ext. 4, prepared some time before 1922, the name of the plaintiffs' mother is recorded in respect of plot No. 433, with an extent of .14 acres showing her as the owner, thereof. It is also in evidence that when the application for sanction of the plan of the two storied building to be reconstructed on the suit-site was made and sanctioned in 1932, under Ext. 7, the building was

stated to be that of Gouri Debi. On the other hand, however, there is absolutely no evidence of any possession or enjoyment by the plaintiffs' mother during her lifetime or by the plaintiffs at any time prior to the date of the suit which was filed in 1944, since the date of their mother's death in 1933. It is also admitted by the plaintiffs in para. 18 of the plaint that the sale deeds relating to the suit property were in the custody of defendant 2 and that the municipal assessments were also in his name. The mutation proceedings and the entry in the municipal survey record following almost immediately on the execution of the respective sale-deeds was a matter of course and are not by themselves any indication of intention of defendant 2 that the purchases were meant to be for the benefit of his wife. The application for sanction of the plan for reconstruction of a two-storied structure cannot also be said to be of any significance in the face of the admitted fact that municipal assessments were all in the name of defendant 2 himself. It is no doubt true as pointed out in *Girija Kumari* v. *Kiran Chandra*, A. I. R. (34) 1947 Pat. 471 : (26 Pat. 253) that

" where a sale-deed alleged to be benami is taken in the name of a female member of the family definite evidence of subsequent possession by that female member is somewhat difficult. "

[12] But where as in this case the evidence and the circumstances point to a conclusion that the source of the purchase money was supplied by the husband, more satisfactory evidence of circumstances leading to the conclusion that there was an intention of beneficial advancement is required. The only other circumstances that have been pointed out and relied upon on behalf of the appellants are that the last lease-deed, Ex. 1-D for Rs. 150 in terms recites that the consideration paid was Stridhan amount of the wife and it is also pointed out that during the course of the 20 years between 1910 to 1933, when defendant 2 made as many as eighteen purchases only these four all of which relate only to a particular residential house were purchased in the name of the wife and that the earliest purchases under Ex. 1 is of the year 1902, some years before the purchases in the name of defendant 2 himself appears to have started. The recital that the money supplied under Ex. 1-D was Stridhan cash of the plaintiffs' mother was no doubt a relevant factor in considering the question as to whether the money supplied for that or earlier purchase was that of defendant 2 or of plaintiffs' mother. But once a conclusion on that matter has been reached against the plaintiffs, it appears to me that a recital of that kind in the sale-deed relating only to a very small extent out of the total extent of the property and to a comparative small sum of Rs. 150 out of the total investment of over ten thousand is not enough to indicate any clear intention on the part of defendant 2 that the various purchases ranging from 1902 to 1923 were all meant for the benefit of the wife. On the other hand there are not in this case as in the cases in *Sitamma* v.. *Sitapati Rao*, A. I. R. (25) 1938 Mad. 8 : (I. L. R. (1938) Mad. 220); *Mahomed Sadiq Ali Khan* v. *Fakr Jahan Begam*, A.I.R. (19) 1932 P. C. 13 : (6 Luck. 556) and *Shambhu Nath* v. *Pushkarnath*, A. I. R. (32) 1945 P. C. 10 : (I. L. R (1945) Kar. P. C. 168), proof of any outstanding circumstances which would have rendered it *prima facie* probable that the husband would have intended to make these various purchases for the purpose of providing for his wife. It is to be noticed that the very first purchase on record is in the name of the wife and the other disputed purchases all relate to the residential house in which he was living all along. It is more likely than not that these purchases at that time were intended for his own benefit. It is most unlikely that a person like him succeeding in business and investing his moneys in the purchase of site and construction of structure constituting his residential house in which he happens to be living all the time would have intended that the same is not to belong to himself, but to his wife. It is not possible and it is unnecessary to speculate what might have been the reason for his making these purchases in the name of the wife or for making specific recital in the last only of the disputed purchases that the consideration therefor was stridhan money of the wife. On a consideration therefore of the entire circumstances and evidence in this case, I have come to the conclusion that there is no sufficient evidence in this case of circumstances probablising any positive intention on the part of defendant 2 of making these purchases for the benefit of his wife. I agree therefore with the conclusion of the learned Subordinate Judge that the suit property stood benami in the name of plaintiffs' mother and that it belonged in fact to defendant 2 and his sons defendants 3 to 6 at the time of the mortgage to defendant 1.

[13] In the result, therefore, the plaintiffs' suit must fail and the appeal must be dismissed with costs.

[14] **Narasimham J.**— I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 27 *[C. N. 10.]*

RAY C. J. AND NARASIMHAM J.

Ananta Charan and others — *Petitioners* v. *The State*—*Opposite Party.*

Criminal Misc. Cases Nos. 69, 77, 78, 79, 80, 81, 82 and 83 of 1950, D/- 17-8-1950.

(a) Public Safety—Preventive Detention Act (1950) —After expiry of detention under Orissa Act, detenu can be detained under Central Act on same grounds.

Once a man is detained under a provincial preventive detention measure on the basis of his prejudicial activities he can, on the expiry of the term, again be detained under the Central Act on the self-same grounds, particularly when there has happened nothing to show that his approach, from the standpoint of his political creed, to the political, social and economical problems of the society has undergone any change. [Para 3]

(b) Public Safety — Preventive Detention Act (1950) —Grounds under, for detention have no wide divergence from those under Orissa Act which was in force —Satisfaction of detaining authority under Orissa Act on previous occasion can be relied on for satisfaction of detaining authority under Central Act—It is not for Court to decide what will be particular period of detention. [Para 4]

(c) Public Safety — Preventive Detention Act (1950) —Vagueness of grounds—Tests of vagueness.

Whenever the grounds are found vague, the detenu is entitled to an order of release from the Court. They can be held to be vague if the minimum of information that will entitle the detenu to present a case in his expected representation is not available on the face of it. Besides, the vagueness consists in that the reasons of apprehension of the detaining authority are too remote being mere possibility upon possibility or contingency upon contingency. Merely saying that detenu is a dangerous character and his creed is communism, is not sufficient. [Paras 5, 6]

It is not for the Court to consider the falsity or otherwise of the allegations. It is the function of the Advisory Board. [Para 7]

V. Pasayat — for Petitioners; Advocate-General— for Opposite Party.

Ray C. J.—These cases arise out of petitions made by the petitioners named above for issue of writs of Habeas Corpus as against their detention under the Preventive Detention Act (IV [4] of 1950). Mr. V. Pasayat, Advocate, appears for all the petitioners *amicus curiae*. The arguments advanced by him are common to all the cases and we, therefore, propose to pass one judgment covering all the petitions.

[2] The arguments advanced are : (i) That the petitioners other than those of Cr. Misc. Cases Nos. 69, 79 and 83 are old detenus, and the respective orders of detention passed against them are based on the same grounds as on which they had been detained prior to the Preventive Detention Act enacted after the Constitution. This, he urges, is sufficient indication that the detaining authority had not applied his mind to the facts and circumstances appearing against the petitioners. In the course of argument, he has pointed out that in some cases even the grammatical inaccuracies in the construction of some of the sentences have reappeared. His contention, therefore, is that there was no exercise of that mental process which is necessary in order that the detaining authority be satisfied that, in order to prevent the petitioners from acting in a manner prejudicial to the maintenance of public order, their detention was necessary. This deficiency deprives the order of the irreducible minimum of rationality and reasonableness under the Constitution; (ii) The second ground urged is that the satisfaction of the detaining authority on the previous occasion cannot be relied on for the satisfaction of the detaining authority for fresh detention after the passing of the Preventive Detention Act. In this connexion, a passage from an unreported decision of his Lordship the Chief Justice of Bombay High Court is relied on:

"The satisfaction which the law required was the satisfaction of the detaining authority when the order was made and it was not open to the authority to fall back upon the satisfaction which was valid in 1948. Therefore, on this ground also the petitioners were entitled to succeed."

(iii) Lastly, it was argued that the grounds, as supplied, are vague and cannot be held to be sufficient for the satisfaction of the detaining authority.

[3] Contention No. (i) : It is difficult to say that because the self-same grounds formed the basis of the detaining authority's satisfaction on a subsequent occasion, it would necessarily follow that the mind of the authority concerned did not grapple with particular facts and circumstances of each individual's case. It is not that in one or two cases, new grounds have not been added. It cannot be ruled, as an absolute proposition of law, that once a man is detained under the preventive detention measure on the basis of his prejudicial activities, he cannot, on the expiry of the term, again be detained on the self-same grounds, particularly when there has happened nothing to show that his approach, from the standpoint of his political creed, to the political, social and economical problems of the society has undergone any change. It is not far too wrong to say that a man is to be judged by his association with politically dangerous individuals, or his advocacy of a cause, which, if pursued, involves manifestation of violence, sabotage, chaos and confusion in the present day social, political and economical set up of things, and is, otherwise, subversive of the established Government. His Lordship Chagla C. J. is reported to have said, in his judgment., (assuming that the quotation given in the newspaper "Cross Roads, Vol. II, No. 14, dated 4-8-1950" under the column "Difference between Old and New" at p. 8 is correct etc.), while examining

the question as to how long past acts would determine the rationality of a fresh order of detention, that "*he would refuse to lay aown any specific period.*" We are not inclined to accept unconditionally that the past acts of a man are not safe criteria of his propensities and likely future activities; on the other hand, if he belongs to a particular group of political agitators whose ideals to subvert the present established Government by producing confusion and chaos in the society for the purpose of unbalancing the same and by various other activities of revolutionary character are well known, it would not be unreasonable for the administrative authorities to consider the detention of such persons as necessary to prevent them from acting in a manner prejudicial to the maintenance of the public order. Besides potential risks from a person's activities, granting that he has the definite frame of mind prone to the purpose, have to be determined by the surrounding circumstances including the political climate, both in the national and international spheres. If the members of a particular group of agitators are known to be, as a matter of habit, exploiting the situation, prevailing in the Country, and if their political aims, as judged from their past acts, are not offset by any change in their creed, and if there be no reasonable ground to believe that the particular member concerned's views have undergone fundamental change, it cannot be said that the circumstances do not constitute reasonable grounds for satisfaction of the detaining authorities. Besides, we, in Court, are labouring under the disadvantages of not being able to investigate the authenticity of the allegations on which the orders of detention are based. As an abstract proposition of law, we are not ready to say that past acts should not be taken into consideration. I would here invite attention to an observation by Roxburgh and Lahiri JJ. of the Calcutta High Court in an unreported case to the effect that

"*past activity at any rate of reasonably recent date alone might in some circumstances be considered by Government as alone justifying detention.*"

Besides these detention orders are not punitive but preventive, so that if on the self-same grounds they are detained from time to time, it does not amount to saying that they are punished twice or several times for the commission of a solitary and specific offence. Reasonableness of the ground involving exercise of executive discretion based on ratiocination rather than arbitrariness is always relatable to social and political atmosphere of a country of which the Executive Government is the best Judge. Grounds which would be insufficient for such satisfaction in one state of things would be overwhelmingly sufficient in another state. So long and so far as the conditions justifying necessity for prevention exists, detention order made within the reasonable limits laid down by the Legislature would be quite justifiable. It would be beyond our power of interference even if it does not fit within judicial strait jacket. The Legislature has entrusted it with the Executive Head of the State on account of the vantage ground that they occupy from which they can strike a happy balance between personal liberty and social control.

[4] The second ground is based upon the short summary of his Lordship Chagla C. J.'s decision in the Bombay case, referred to. Without questioning the correctness of that decision, we are inclined to hold that it has no application to the facts of the present case. In that case, as it has been pointed out by his Lordship, there was a wide divergence of grounds between the Public Security Measures Act, the law of the land for preventive detention in Bombay, prior to the enactment of the Preventive Detention Act, and the latter Act. The divergence, as pointed out by him, seems to be fundamental. Such divergence however, does not exist between the Preventive Detention Act (IV [4] of 1950) and the Orissa Act, that was formerly in force. The relevant sections in both the Acts are almost identical. His Lordship is reported to have said :

"According to the old Act it was sufficient, if a person had acted in the past or was acting in the present or was likely to act in future in prejudicial manner, to enable the detaining authority to pass an order. In the detention Act, however, the proper authority has to be satisfied that it was necessary to detain a person with a view to prevent him from acting in a prejudicial manner."

As I have already pointed out, there being no such divergence between Orissa Act and the present Preventive Detention Act, the decision has no relevance. There is another thing to which I must draw attention in this connexion, namely, that it is either assumed or acknowledged to be correct that for certain period the past acts of a citizen will be sufficient guide for the authorities to control his movements so as to prevent him from acting in a manner prejudicial to the public safety. If that be so, what will be the particular period is not for a Court of Justice to define nor any hard and fast rule can be laid down but it is for the detaining authorities to decide, particularly they being in the more advantageous position of having all the materials before them, a large part of which is not available to the Court.

[5] Lastly, it has been argued that the grounds are vague. We know it is agreed unanimously by all the High Courts in India that

whenever the grounds are found vague, the detenu is entitled to an order of release from the Court. What vagueness is in this relation has seldom been defined. In order to determine that they are vague, we have to keep in view the purpose for which the grounds are supplied. They are supplied in order to enable the detenu to make a representation to the detaining authority refuting the correctness of the involved facts and inferences founding the grounds. They can be held to be vague if the minimum of information that will entitle the detenu to present a case in his expected representation is not available on the face of it. Besides as I would hold that the vagueness consists in that the reasons of apprehension of the detaining authority are too remote being mere possibility upon possibility or contingency upon contingency. In the American Courts, in administering the law of preventive detention, they always set before them as guide a rule known as '*clear and immediate danger rule*" which, I think, throws some light on what vagueness should mean in such cases. If the acts of the detenu or his mental frame or his political association or creed are of uncertain implications and there is no prospect of his taking to dangerous or violent activities in response to them, or, in other words, if under the cause-and-effect rule circumstances reveal no proximity between the apprehension and the possibility of his future activities and the reasons given for the preventive orders, they can be considered vague. As I have said, if the grounds are vague, certainly the detenus are entitled to an order of release In this connexion we have carefully examined the grounds in each individual case. Except in the case of petitioner Bharat Jena in Cr. Misc. No. 80/50, we find that the grounds are definite, clear, precise and stand the test of clear and immediate danger rule. It should have been better if the detaining authorities should have said, in the grounds, that they consider it likely that the detenu should indulge in subversive or violent activities in a manner prejudicial to the maintenance of public order. But the implications are quite clear that they have satisfied themselves that the detenus concerned must be kept in custody in order to prevent them from acting in the aforesaid manner.

[6] So far as Bharat Jena is concerned, the grounds supplied to him, we consider, are too vague to support an order of detention. He is said to be of a desperate character and his political creed is said to be communism. None of these ideas would carry us to any sense of certainty in relation to his proneness to act in a prejudicial manner endangering the social order. Besides, these are not sufficient to enable him to make a representation to the authorities concerned.

[7] In some cases, Mr. Pasayat wanted to convince us that some allegations with regard to the activities of some of the detenus are false. He could not, however, supply us the necessary materials for it except his own assertion which, assuming they are true, we could hardly act upon. Besides, it would be the function of the Advisory Board to test the correctness of these allegations and the Board will be in a more advantageous position than ourselves to consider representations of the detenus after examining all the material records including Police and other reports of a confidential character. As the detenus have been in custody for nearly 6 months and their cases are going to be reviewed by the Advisory Board, we should not concern ourselves with the requisite enquiry.

[8] In these circumstances, we dismiss the petitions of all the aforesaid petitioners except that of Bharat Jena in Cr. Misc. No. 80/50, who, we direct, shall at once be set at liberty.

[9] **Narasimham J.**—I agree.

R.G.D. *Orders accordingly.*

A. I. R. (38) 1951 Orissa 29 *[C. N. 11.]*

RAY C. J.

Appanna — Accused — Petitioner v. *The State—Opposite Party.*

Criminal Revn. No. 7 of 1950, D/- 28-7-1950.

Bihar and Orissa Excise Act (II [2] of 1915), Ss 47, 57 and 87—Sale of liquor at place not specified in license.

Where a license holder for sale of liquor sells Government licensed liquor at a place other than one specified in his license, he is guilty under S. 47 (a). Hence, S. 57 is not applicable and non-compliance with the provisions of S. 87 (b) will not vitiate the prosecution. [Para 9]

M. S. Rao — for Petitioner; Advocate-General — for Opposite Party.

Order. — The petitioner (Ch. Appanna) has been convicted under S. 47(a), Bihar and Orissa Excise Act, for having in possession and causing the sale of Government licensed liquor in a *tati* enclosure near the Jyoti Cinema in Berhampur town, and has been sentenced to pay a fine of Rs. 200, and in default to undergo simple imprisonment for two months.

[2] Appanna is admittedly a license-holder for sale of the liquor in Shop No. 2 in Berhampur town.

[3] The contentions that are raised in this case are (1) that even if he sold, as alleged by the prosecution, at the *tati* enclosure, he cannot be held to have committed an offence inasmuch as there was nothing in license that it was con-

fined to be availed of in any particular part of the town; (ii) that in view of S. 87 of the Act, initiation of the prosecution was bad in law inasmuch as cognisance had been taken on the complaint of the Excise Sub-Inspector who had not been authorised by the Collector within the meaning of the section; and (iii) in relation to sufficiency of the evidence adduced and its proper appreciation and due appraisement by the Courts below.

[4] The third contention should not be entertained as against the concurrent findings of the Courts below in revision.

[5] With regard to the first contention, the prosecution should have done well to have produced the license showing that the particular premises, referred to in S. 30 of the Act, were delimited in the license. Through Mr. Advocate-General, who was appearing for the State, I directed for the production of the license or its copy from the Berhampur Excise Department. Except a counterfoil which lacks in all details in its particulars, nothing more could be produced. But Mr. Advocate-General has handed over to me a license granted to a retail-seller of the liquor in Cuttack. It appears from that that the specification of the locality in which the retail sale is to take place has been duly incorporated and the same has been indicated by boundaries of the place. That specification of the place while granting a license is a matter of condition and essentiality will appear from the statutory rules (Vol. IV, Part I, p. 1 of the Orissa Excise Manual). The part is headed "General condition applicable to vend licenses under the Excise Law". Paragraph 1 reads:

"A licensee may sell an intoxicant only at the place or on the premises specified in that behalf on the license, and sale by him or on his behalf in any other place is absolutely prohibited."

[6] I would, therefore, hold, agreeing with the Courts below, that the place in which the petitioner was found selling the Government licensed liquor was not the place specified in his license and by doing so he did something which was absolutely prohibited. As to initiation, S. 87 says:

"No Magistrate shall take cognizance of an offence referred to—

(a) in S. 47 ..... except on the complaint or report of an Excise Officer or an Officer empowered in this behalf by the Local Government: or

(b) in S. 57 ..... except on the complaint or report of the Collector or an Excise Officer authorised by the Collector in this behalf."

[7] Mr. Rao, the learned counsel for the petitioner, forcibly contends that the offence charged is one within S. 57 of the Act and as such the complaint in the case must fulfil the requirements of S. 87 (b). According to his contention, the offence is one under S. 57(b), which, omitting the immaterial portion thereof, would read:

"If any holder of a licence, in any case not provided for in S. 47, wilfully contravenes any rule made under S. 89 or S. 90, or

(c) Willfully does any act, in breach of any of the conditions of the licence, for which a penalty is not prescribed elsewhere in this Act, &c."

[8] We have to read S. 47 (a) under which the petitioner has been prosecuted side by side. It reads:

"If any person, in contravention of ..... licence ..... granted under this Act,

(a) ..... sells any intoxicant, he shall be liable to imprisonment .... or to fine ...."

[9] Cases covered by S. 47 are excluded from the purview of S. 57. The crucial position, therefore, is whether the offence in the present case is one under S. 47 or S. 57. Section 57 either (b) or (c) refers to such violation of rules or conditions of license as are not elsewhere provided for. This amounts to say that if the offence charged falls under S. 47 (a), as quoted above, non-compliance of the provisions of S. 87, as contended for by the learned counsel for the petitioner, will not vitiate the prosecution. In my judgment, this case comes very clearly and specifically under S. 47 (a) and as such does not come under the purview of S. 57. There is, therefore, no illegality in launching the prosecution. All the contentions advanced by the learned counsel having thus failed the revision fails and is dismissed.

D.H. *Revision dismissed.*

A. I. R. (38) 1951 Orissa 30 *[C. N. 12.]*

NARASIMHAM J.

Hari Sahu — Petitioner v. *Pasori Sahu — Opposite Party.*

Criminal Revn. No. 26 of 1950, D/- 21-7-1950.

Criminal P. C. (1898), S. 522 (3)—Order under, long after original conviction or appellate order.

There is nothing in S. 522 (3), to limit the jurisdiction of an appellate or revisional Court to the passing of an order within one month either of the original conviction or of the appellate order. It is left to the discretion of appellate and revisional Courts not to exercise their powers under this section in cases where there has been undue or excessive delay in moving the Court for its use: A. I. R. (34) 1947 Cal. 390. *Dissent.* [Paras 4, 5]

Anno. Cr. P. C., S. 522, N. 10, Pts. 7 and 8.

S. N. Dasgupta — for Petitioner; *B. K. Pal — for Opposite Party.*

Order.—This petition is for revising an order under S. 522 (3), Criminal P. C., passed by the Sessions Judge of Cuttack under the following circumstances.

[2] The petitioner was tried for the offence of house trespass under S. 448, Penal Code and convicted by a Magistrate on 27-6-1949. His appeal to the Sessions Judge was disposed of on

10-8-1949 and though the conviction was maintained the sentence of fine was reduced. A criminal revision to this Hon'ble High Court was dismissed on 16-9-1949. Till then the opposite party did not apply to any of the three Courts for action under S. 522, Criminal P. C. On 24-11-1949 for the first time the opposite party applied to the appellate Court (the Sessions Judge, Cuttack) praying for an order for restoration of possession of a portion of the house which the petitioner was said to be occupying forcibly. The Court passed an *ex parte* order allowing the petition. Thereupon, the petitioner filed an application for reconsideration of the *ex parte* order and on 17-1-1950 the Sessions Judge refused to reconsider the same. This revision petition has been filed against that order dated 17-1-1950.

[3] The sole question of law for consideration is whether the Court of appeal can pass an order under S. 522 (3), Criminal P. C., long after the disposal of the appeal. In the present case the appeal was disposed of on 10-8-1949 and the order under S. 522 (3), Criminal P. C. was passed more than three months later on 24-11-1949. Mr. Dasgupta's contention is that the Court of appeal became *functus officio* after disposing of the appeal on 10-8-1949 and that it had no jurisdiction to pass an order under S. 522 (3), Criminal P. C. on any subsequent date. He further argued that even if it be held that the Court had any such jurisdiction that jurisdiction was limited to the period of 30 days from the date of the disposal of the appeal and that it cannot be extended beyond that period. In support of this argument he has relied on a single Judge's decision of the Calcutta High Court reported in *Abdul Mannan* v. *Taiyab Ali*, A. I. R. (34) 1947 Cal. 390 : (48 Cr. L. J. 908).

[4] Mr. Pal has, however, relied on a series of decisions of almost all other High Courts taking a contrary view. In *Fida Hussain* v. *Sarfaraz Hussain*, A. I. R. (20) 1933 Pat. 617 : (34 Cr. L. J. 940), a single Judge relying on an earlier decision of the Patna High Court held that there was nothing in S. 522 (3), Criminal P. C., to limit the jurisdiction of an appellate Court to the passing of an order within one month either of the original conviction or of the appellate order. It was left to the discretion of appellate and revisional Courts not to exercise their powers under this section in cases where there has been undue or excessive delay in moving the Court for its use. The same view has been taken in a later Division Bench decision of the Patna High Court reported in *Gudri Mahton* v. *Jangi Mahton*, A. I. R. (21) 1934 Pat. 154 : (35 Cr. L. J. 1158). The Nagpur High Court has taken the same view in *Namdeo Atmaram* v. *Emperor*, A. I. R. (25) 1938 Nag. 316 : (39 Cr. L. J. 342) which has been followed in *Ramnath Sheonarayan* v. *Sonaji Krishanji*, A. I. R. (35) 1948 Nag. 250 : (49 Cr. L. J. 383). Similarly the Lahore High Court in *Roda* v. *Autar Singh*, A. I. R. (25) 1938 Lah. 839: (40 Cr. L. J. 980) and the Allahabad High Court in *Nihal Singh* v. *Emperor*, A. I. R. (26) 1939 ALL. 662 : (40 Cr. L. J. 958) have taken the same view. My attention has not been drawn to a decision of any High Court which has taken the view of the single Judge of the Calcutta High Court in *Abdul Mannan* v. *Taiyab Ali*, A. I. R. (34) 1947 Cal. 390 : (48 Cr. L. J. 908).

[5] Apart from the overwhelming authority against the Calcutta view, the provisions of sub-s. (3) of S. 522, Criminal P. C. do not appear to warrant such a limitation on the powers of the appellate Court. Unlike sub-ss. (1), (3) of S. 522, Criminal P. C. does not expressly say that the power of the Court of appeal or revision, as the case may be, to pass an order under that section must be exercised either at the time of passing the order or within one month from the date of such order. When the section is entirely silent as regards the law of limitation which should control the superior Court's action under sub-s. (3), there seems to be no justification for importing the same rule of limitation prescribed for the trial Court in sub-s. (1) of that section. I would, with respect agree with Rowland J.'s observation in *Fida Hussain* v. *Sarfaraz Hussain*, A. I. R. (20) 1933 Pat. 617: (34 Cr. L. J. 940) to the effect that in the absence of any such express provision, the matter should be entirely left to the discretion of the Court of appeal or revision as the case may be and though such a Court may not care to interfere and pass an order under sub-s. (3) of S. 522, Criminal P. C. where there has been *undue delay* there is nothing in the section prohibiting it from exercising such power in exceptional cases.

[6] I am therefore of the opinion that the lower Court has committed no illegality in passing an order under S. 522 (3), Criminal P. C. more than three months after the date of the appellate order.

[7] The revision petition is dismissed.

G.M.J. *Revision dismissed.*

A. I. R. (38) 1951 Orissa 31 *[C. N. 13.]*

RAY C. J. AND NARASIMHAM J.

Pusarala Narasinhaswamy — Petitioner v. *Indian Dominion—Opposite Party.*

Criminal Revn. No. 341 of 1949, D/- 18-8-1950.

(a) Criminal P. C. (1898), Ss. 439 and 412—Conviction on plea of guilty—Power of High Court to interfere with conviction in revision.

Reading Ss. 435 and 439 together, it is evident that the High Court can interfere in all cases of incorrectness, illegality or impropriety of any finding, sentence or order, or the irregularity of any proceedings of the inferior Courts by taking such measures or passing such orders as could be passed by an appellate Court. The provision in S. 439 (1) to the effect that a Court of revision should exercise the powers of a Court of appeal only means that it should exercise the power which a Court of appeal in an appeal legally entertainable by it can do. [Para 6]

Therefore, even though no appeal would lie to an appellate Court under S. 412 against an order of conviction based on the accused's own plea of guilty except as to the extent or legality of the sentence, the High Court, in its revisional jurisdiction, may interfere with the conviction as distinguished from merely the sentence if it satisfies itself that the finding is either incorrect or illegal or improper. [Para 7]

Anno. Cr. P. C., S. 412, N. 1; S. 439 N. 25.

(b) Criminal P. C. (1898), S. 439 (6) — Plea of guilty by accused—Conviction—In revision conviction if can be challenged.

Where an accused is convicted on his own plea of guilty in the trial Court, he shall not be allowed in revision before the High Court to withdraw from his plea of guilty in so far as it means his confession of the facts charged; but at the same time he shall be allowed to challenge the legality of the conviction apart from the sentence if any error in the proceeding has vitiated the trial and affected the legality of the conviction. [Para 9]

Anno. Cr. P. C., S. 439 N. 31 Pt. 16.

(c) Interpretation of Statutes — Erratum.

(*Obiter*) Ordinarily, the erratum should take effect to rectify the error with effect from the date of the original publication. [Para 4]

H. Mahapatra—for Petitioner.

Advocate-General—for Opposite Party.

Ray C. J.—The petitioner has been convicted by the Subdivisional Magistrate of Nawrangpur under S. 7 read with S. 8 of Act XXIV [24] of 1946, and has been sentenced to undergo rigorous imprisonment for two months and to pay a fine of Rs. 50 in default to undergo rigorous imprisonment for a further period of two months.

[2] On 16.6.1948, he was attempting to transport by road in lorry (No. ORK 139) 12 maunds and 17 lbs. of rice in small gunny bags which were kept concealed amongst bags containing tamarind from the right side of the Indravati river to the left in contravention of Government Notification No. 39547 ST dated 5 11.47. The petitioner pleaded guilty to the charge before the trial Court who convicted him, as aforesaid. The prosecution had examined two witnesses.

[3] The legality of the conviction is challenged. This gives rise to a question whether the plea of guilty in the trial Court debars him from challenging the conviction on merits. The learned appellate Court overruled petitioner's contention that he could not, in law, have been convicted of the offence charged. In this connexion he observed :

"It appears from the record of statement of the accused prepared by the learned lower Court that the details of the alleged contravention were put to in the form of a single question to the accused and his plea was recorded 'the accused has pleaded guilty to the charge'."

He further said :

"In the present case, the accused made the plea of guilty after the details of the alleged contravention had been put to him. Hence, the plea of the accused-appellant has been properly recorded and the appellant had appreciated the nature of the charge made against him and then made his plea before the lower Court. Therefore, no appeal will lie except for sentence."

[4] In two subsequent paragraphs, the appellate Court, however, did consider the merits of the contentions advanced before him which were slightly different from what have been contended here. One of the two contentions was that the Government Notification No. 39547 dated 5-11-1947 was faulty and carried no meaning. The second contention was that the prosecution had failed to prove that the Government of India had delegated their power to the Provincial Government as the fact of delegation had not been published in any Official Gazette. The notification, as first published, omitted the word 'left' before the word 'side', that is, the relevant phrase read "from the right side to the side." By an erratum published on 20-11-1947, the omission was supplied and accordingly the necessary correction was published. It is contended here that the erratum should not validate the notification. This contention can be overruled as having no substance. The alleged offence, in the particular case, was committed on 16-6-1948, long after the erratum was published. Ordinarily, the erratum should take effect to rectify the error with effect from the date of the original publication. But had the alleged offence been committed after the first publication of the Gazette notification and before the publication of the erratum, a different consideration might have been applied. But in this particular case, the notification had stood corrected long before the commission of the offence. The contention, fails. I am happy to note that the learned lower appellate Court having taken the same view overruled the contention.

[5] The contention involving absence of delegation by the Government of India has been reiterated in this Court, but in a different form and from a different aspect. What was contended there was that the fact of delegation had not been officially published and it was rightly thrown out by the Court. What is contended here is that the Government of Orissa secured the delegation in the form of an approval to their proposal to the effect that they should exercise the power of banning transport from the north side of the river Indravati to the

south. Later, however, they introduced a change prohibiting such transport from the right side of the river to the left. The river has a meandering course. In some places the right side would be to the east while the left to the west. The contention, therefore, is that when, as is in the present case, the place of origin of the transport is to the eastern side of the particular sector of the river concerned and the destination is to the western side thereof, no offence can be said to have been committed even though it offends the Government of Orissa Notification, it being in excess of the delegation obtained.

[6] Before considering the merits of the contention, I shall have to address myself to a contention, raised by the learned Advocate-General, which is in the form of a preliminary objection to its entertainment, that the accused having pleaded guilty in the Court below he is not entitled to challenge the legality of the conviction except as to the extent or the legality of the sentence. In this connexion, reliance has been placed upon Ss. 271 (2), 412 and 439, Criminal P. C. It is urged that the High Court's powers of revision are limited to the powers enumerated in sub-s. (1) of S. 439, namely, powers conferred on a Court of Appeal by Ss. 423, 426, 427 and 428 of the Code or on a Court by S. 338 etc. As according to S. 418 (412 ?) no appeal lies against a conviction based upon accused's own plea of guilty, the High Court's power is too limited accordingly. Free of any authority, I should rule out this contention as unsound. Section 439 is an enabling one. Chapter XXXII of the Code in which S. 439 occurs deals with the subjects of "Reference and Revision". Section 435 confers revisional jurisdiction of either wider or more limited character on Courts of various grades of which the High Court is one. The Courts below the High Court are given revisional jurisdiction for the purpose of ultimately making a reference to the High Court. With regard to High Court, the material portion of the section reads :

"The High Court . . . . may call for and examine record of any proceeding, before any Criminal Court situate within the local limits of its jurisdiction for the purpose of satisfying itself . . . . . as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that execution of any sentence be suspended and, if the accused is in confinement, he be released on bail or on his own bond pending the examination of the record."

(The rest of the section is not material.) Section 436 deals with direction of further inquiry into a dismissed complaint by High Court and other Courts mentioned therein. Section 437 is not relevant for the present purpose, being confined to the powers of the Sessions Judge or District Magistrate or an Additional Sessions Judge to make a report for the orders of the High Court the result of such examination, on examining the record of any proceeding under S. 435 of the Code or otherwise. Next comes S. 439 which opens with the words

"in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers &c."

Reading Ss. 435 and 439 together, it would be evident that the High Court can interfere in all cases of incorrectness, illegality or impropriety of any finding, sentence or order or the irregularity of any proceedings of the inferior Courts by taking such measures or passing such orders as could be passed by an appellate Court under Ss. 423, 426, 427 and 428 or by any other Court by S. 338. The ambits of the powers are to be delimited by reference to S. 435, that is, power of removing any deficiency in the finding, sentence or order, or proceedings, call it incorrectness, illegality or impropriety or the like. After so satisfying itself, the Court, in order to give proper relief to the parties themselves and to rectify the errors or illegality &c., as the case may be, shall make such orders as a Court of Appeal could make in appropriate cases. In saying that a Court of Revision should exercise the powers of a Court of Appeal what is meant to be said is that it should exercise the power which a Court of Appeal in an appeal legally entertainable by him could do.

[7] The result of my examination of the provisions, in short, is that even though no appeal would lie to an Appellate Court under S. 412 of the Code against an order of conviction based on the accused's own plea of guilty except as to the extent or legality of the sentence, the High Court, in its revisional jurisdiction, may interfere with the conviction as distinguished from merely the sentence if it satisfies itself that the finding is either incorrect or illegal or improper. This, however, shall not be understood to mean that the High Court should, without any good reason or in an arbitrary manner, disregard the plea of guilty. It must be satisfied that the plea of guilty has either been misunderstood or misconceived under the particular features present in the case.

[8] I shall now deal with certain authorities cited at the Bar. The learned counsel for the petitioner has relied on a decision of Rowland, J. of the Patna High Court in the case of *Krishna Chandra Sinha* v. *Emperor* A. I. R. (30) 1943

Pat. 313: (44 Cr. L. J. 801). The learned Judge deals with the question in the following words:

"Hence it is suggested that where in a particular case the powers of an appellate Court are restricted by S. 412 the powers of the High Court in revision are similarly restricted. The argument, it seems to me, loses right of the provisions of Ss. 413 and 414 and the consequences of those provisions. In those two sections it is enacted that in certain cases there shall be no appeal but such provisions have never been considered to forbid the High Court in revision from exercising just as wide powers as if there had been an appeal and the High Court had been the appellate Court. In my opinion, therefore, the powers of this Court in dealing with the present application are as ample as if an appeal on the merits had been entertainable by the Sessions Judge and had been dismissed."

In the case of *Emperor* v. *Nana Sahu*, A. I. R. (30) 1943 Bom. 209: (44 Cr. L. J. 668), Divatia J. held:

"As the learned Sessions Judge points out, it is open to them in revision to challenge the conviction as illegal even though they pleaded guilty to the charge. As held by our Court in *Chunilal* v. *Emperor*, 23 Bom. L. R. 1023 : (A. I R. (14) 1927 Bom. 67 : 27 Cr. L J. 1148), an accused person, who pleads guilty before a Magistrate and is convicted, can contend under S. 412, Criminal P. C., in his application for revision, that his conviction is illegal."

In the case of *Supdt. and Remembrancer of Legal Affairs, Bengal* v. *Jnanendranath*, 33 C. W. N. 599 : (A. I. R. (16) 1929 Cal. 747 : 30 Cr. L. J. 1038), Mukherji J. held that even when a person had been convicted on his own plea of guilty, he had the right under S. 439 (6) to show cause against his conviction, withdrawing in effect the said plea. Graham J. taking a contrary view held that S. 439 (6) had no application where there was a plea of guilty except when the convicted person could show that there was some mistake in recording the plea of that he did not in fact take such plea. On account of this difference of opinion, the case was referred to a third Judge, Buckland J. His Lordship held that in the case of a person who had been convicted on a plea of guilty, the conviction against which he might show cause under S. 439 (6), Criminal P. C. would mean the judgment of the Court sentencing him. Against such conviction, cause might be shown by attacking the propriety or legality of the sentence but not by withdrawing the plea of guilty or going behind such plea as a confession of the facts charged. His Lordship had, however, said that against a conviction on the accused's own plea of guilty, he might show cause by contending that there was some defect in the proceedings or the fact to which he confessed by his plea of guilty did not amount to an offence or offence of which he had been convicted. His Lordship, in this connection, relied on the case of *Reg.* v. *Brown*, (1890) 24 Q. B. D. 357: (59 L. J. M. C. 47). His Lordship explained his decision to be confined to the case that such an accused could not go behind his plea of guilty as a confession of the facts charged. Dealing with Mukherji J's view, based mainly on the theory that an accused even after passing of sentence on conviction was entitled to withdraw his plea of guilty, his Lordship said that, the withdrawal of a plea of guilty was a totally different matter; actually there was no provision in the Criminal P. C. which allowed that to be done, though his Lordship had no doubt that the Court would permit it in a proper case. The English authorities moreover agreed that the leave of the Court was required and that such leave could not be given after sentence, that is judgment, had been pronounced. (*Reg.* v. *Clouter*, (1859) 8 Cox. 237, *Reg.* v. *Sell* (1840) 9 C. & P. 346: (173 E. R. 863); and *Rex.* v. *Plummer*, (1902) 2 K. B. 339: (71 L. J. K. B. 805).)

[9] It is clear from examination of the authorities that ordinarily the accused shall not be allowed to withdraw from his plea of guilty in so far as it means his confession of the facts charged but at the same time he shall be allowed to challenge the legality of the conviction apart from the sentence if any such error in the proceeding has vitiated the trial and affected the legality of the conviction. I reserve my opinion, however, as to the view given by Rowland J. of the Patna High Court that the disqualification of the order of conviction's appealability attaches strictly to a case where the trial Court convicts the accused on his own plea alone without any aid or consideration of any evidence adduced before him.

[10] In this view of the matter, coming to the present case, the accused's plea of guilty is based upon his confession of the facts charged, namely, that he was attempting to transport contraband foodgrains from the right side of the local sector of Indravati river to its left. If such transport does not amount to an offence in law for lack of delegation to the Provincial Government by the the Central Government of the power of banning transport, his conviction cannot be held determined by his plea. We have, therefore, to consider the contention of the learned counsel on its merits. I have set forth his contention above. Its merit hinges upon whether delegation with reference to transport from north side to to the south of the river stands good in relation to the ban of transport from the right side to the left.

[11] The course of a river is, in its broad outline, the direction of the line between its source and its mouth. For the purpose of general direction, the line joining the two points would be the indicator. If the line runs from

east to west, the two sides of the river should be north and south. The direction north is to the right of man standing with his rear to the east and front to the west. Therefore, in the case of such a river, with its flow from east to west, its right side is generally the north side and left side is the south side. In the case of a river, meandering in its course, the midstream-line of a particular sector considered independently may be such that its right side lies to its east and the left to its west; but taking the river as a whole, it is on the north side of the river. In the circumstances, in the facts of this particular case, there has been no substantial variation between the power delegated and the power exercised. Alteration, if any, is merely a matter of form rather than of substance. This alteration in the phraseology of the notification has been adopted for the sake of exactitude and to avoid evasion of the ban. I would, therefore, hold that the power of the Provincial Government does not suffer from lack of delegation by the Centre.

[12] In the result, I uphold the order of conviction. With regard to the sentence, however, it errs on the side of severity and calls for reduction. I would, therefore, remit altogether the sentence of imprisonment and alter the sentence to one of fine only. Subject to this modification in the sentence, the revision is dismissed.

[13] **Narasimham J.**—I agree.

V. S. B. *Revision dismissed.*

A. I. R. (38) 1951 Orissa 35 *[C. N. 14.]*

RAY C. J. AND PANIGRAHI J.

Kunja Sahu and others — *Appellants* v. *Bhagaban Mohanty and others* —*Respondents.*

A. F. A. D. Nos. 218 and 33 of 1945, D/-13-5-1949.

Hindu Women's Rights to Property Act (1937), S. 3 (2) and (3) — Object of Act is remedial and not benevolent—Rule of survivorship is kept in abeyance — Widow succeeds to her husband's estate without being coparcener — (Per *Panigrahi J.* — Widow becomes member of coparcenary though not coparcener herself—She can be represented by Karta)—Interest devolving upon her is defined and definable though it forms part of joint family estate —She has limited power of disposal over interest devolving upon her under Act — Objection as to alienation by coparcener of his interest in joint family estate is not applicable when interest devolves upon or is acquired by one who is not a co-parcener — Widow can, without claiming partition alienate interest of her husband that devolves upon her under the Act—Phrase, "the same interest" in S. 3 (2) interpreted. [Paras 4, 6, 13, 17, 18]

Anno. Hindu Women's Right to Property Act, S. 3, N. 1.

L. K. Das Gupta (in No. 218 of 1945) and R. N. Sinha (in No. 33 of 1945) — for Appellants; L. K. Das Gupta (In No. 33 of 1945) — for Respondents.

Ray C. J.—This is a plaintiffs' appeal in a suit for declaration that the suit lands are their ancestral joint family properties and that defendant 1 has not acquired any title thereto by virtue of a sale-deed dated 27-3-1940, executed by defendant 2. The plaintiffs and the husband of defendant 2 were members of a joint Hindu Mitakshara family at the time of the latter's death. On his death, defendant 2 succeeded to her husband's interest in the family properties under the Hindu Women's Right to Property Act. She transferred her this interest in favour of defendant 1 by the aforesaid sale-deed. The suit was resisted on the ground that defendant 2 had the right to alienate and the said alienation is binding on the plaintiffs. There was some dispute as between the parties as to whether the claimed properties were ancestral joint family properties. That controversy, however, has been set at rest and has not been re-agitated here. In this appeal, we shall proceed on the assumption that Judhisthir was joint in mess and estate at the time of his death.

[2] The learned Munsif dismissed the plaintiffs' suit on the findings that the properties, in dispute, were joint family properties and defendant 2 had no right. The learned lower appellate Court reversed the decree of the trial Court holding that defendant 2 had the right of alienation under S. 3 (3), Hindu Women's Right to Property Act, as extended to agricultural lands in Orissa. Hence the second appeal by the plaintiffs.

[3] Mr. L. K. Das Gupta, the learned counsel for the appellants, contends most strenuously that the interest that devolves upon a widow under the Hindu Women's Right to Property Act is not alienable by her till she exercises the right of partition as a male coparcener. The hard core of his reasoning is that the interest that devolves upon her is defined in sub-s. (2) of S. 3 of the Act as 'the same interest as he (the husband) himself had.' His submission is that as the husband before reducing his undivided interest in the coparcernary property to a specified one by partition, had no right of alienation, the same right cannot be conceded to a widow. He tries to substantiate his proposition dexteriously by picking up a few judicial pronouncements in which several characteristics attributable to coparcener's interest in the coparcenary have been attributed to the widow's interest that devolves upon her under the Act and argues that the absence of right of alienation is a necessary corollary. This method of reasoning, however ingenious, does not serve well in law which is not logical. I shall deal with these cases gradually and will show that the views expressed therein do not run counter to the conception of

right of alienation as inherent in the estate that devolves upon a deceased male coparcener's widow. With regard to the scheme of the Act and the language employed to carry that out, his contention, in the main, is that sub-s. (2) of the section contains the key provision as to the extent and nature of the widow's interest and, that, in that context, sub-s. (3) is a limited provision, that is to say, it lays down certain limitations that detract from the right that is connoted by the defining words 'the same interest as he himself had.' When encountered with the question why then should the interest be described as the limited interest known as a Hindu Women's estate' in sub-s. (3), he replies that its object was to deny to her the status of being a fresh stock of descent which she would otherwise have been had not that limitation been imposed by the aforesaid words. But this answer, to my mind, is not adequate to resolve the difficulty. The legislature shall not be presumed to have been redundant in expression of its will. Right of claiming partition would obviously be included within the words 'the same interest as he himself had' occurring in sub-s. (2). It would then be redundant to provide for the right of partition in the proviso to sub-s. (3). In view of the language of the section, it would be irreconcilable and inconsistent to hold that the scope and object of sub s. (3) is confined to curtailment of the interest defined in sub-s. (2) by imposing certain limitations thereon. It is fundamentally correct to say that in the absence of compelling circumstances, full effect shall be given to the plain ordinary grammatical meaning of the words used in a statute. The relative importance of sub-ss. (2) and (3) shall have to be ascertained by interpreting the words used therein in their plain grammatical meaning. It is significant that the sub-s. (2) is subjected to the provisions of sub-s. (3) in so far as it provides for what interest the widow shall get. The word 'subject,' in Oxford Dictionary, means 'in a state of subjection or dependence; under the control, rule or influence of something; subordinate.' The author of the lexicon illustrates the significance of the word by certain citations, such as,

"treaty is subject to ratification that this is not valid unless ratified. The arrangement is subject to your approval, that this is not final until you approve."

The plain grammatical meaning of sub-s. (2), therefore, is that predominantly her interest is that defined in sub-s. (3). In construing the extent and nature of the interest, the provision of sub-s. (3) cannot be precluded from consideration. The words 'the same interest as he himself had' must, in giving a meaning to them, be either subordinated to or reconciled with what is conveyed by the words 'the limited interest known as a Hindu Women's estate in sub-s. (3). If that estate under the Hindu law gives her a larger estate, she shall get it. In order, therefore, to reconcile the meaning of the word 'interest' in sub-s. (2) with the conception underneath sub-s. (3), it should either refer to quantity as distinct from quality or to such quality as appertains to a male coparcener's interest but not repugnant to nor inconsistent with the interest of a Hindu woman's estate. On a detailed analysis, it will appear that there is no repugnancy between the two sub-sections. Both can be harmonised. The words 'limited interest of a Hindu woman's estate' have been advisedly used by the Legislature as the most appropriate conveyancer of connotation of the 'interest' conferred on the widow by the statute. The incidents of Hindu woman's estate are as follows: (i) it is not a life estate; (ii) it reverts to the heir of last full owners; (iii) it has limited power of disposal; (iv) it carries full power of enjoyment; (v) it is not a trust estate for the benefit of the reversioners; and (vi) it is subject to such liabilities as would be in the hands of prudent owner and as would prevail against her husband.

[4] The object of the Act is remedial and benevolent. The rule of survivorship that stands in the way of widow succeeding to her husband's estate in a joint family property is suspended for her benefit. This suspension is not intended to disrupt the coparcenary except in so far as it is necessary to give the widow an independent status which can be worked out so as to make her economically independent. As observed by Mayne, in his commentary on Hindu Law, in Ch. XVII 'Woman's Estate' Para. 635:

"The typical form of estate inherited by a woman from a male is the widow's estate. The same limitations apply to all estates derived by a female by descent from a male, or a female, whether she inherits as daughter, mother, grandmother, sister or as any other relation. In the phraseology of English law, her estate is neither a fee nor an estate for life, nor an estate tail. This is the view in all the schools except in Bombay."

[5] It would be shocking to interpret the Act in such a manner as would deny to a joint coparcener's widow an estate inferior even to that of a widow's estate. The fallacy of Mr. Das Gupta's argument will be clear if we visualise that in order to give her the same interest as her husband had, she should have an absolute interest rather than a limited estate enuring till her death. It would also follow from his argument that she exercises her right of partition and she becomes a full owner without any limitations on her right of alienation. But is that view consistent with her having the limited estate of a Hindu widow? All the limitations that would prevent her from dealing with the property as an absolute owner are attributable to her estate

being defined as a limited interest of a Hindu Woman's Estate.

[6] In accordance with Hindu law, as administered in certain provinces, a coparcener has a right to alienate his undivided share in the joint family property, e. g., in Madras. His interest is liable to be seized by attachment by a creditor. It is a property which is reducible to possession either on partition or on mere declaration of an intention to separate. But this right of separation from the coparcenary by declaring one's intention cannot belong to the widow within the meaning of the Act. That is only available to a coparcener. A Hindu widow on whom the interest devolves, under the Act, of a coparcener, is undoubtedly not a coparcener. On the other hand, in order to give effect to Mr. Das Gupta's argument, she should also be clothed with the rights which her husband had, or could have called to his aid, had he chosen to do so and this will include a right to disrupt the coparcenary by a declaration of her intention, This would amount to *reductio ad absurdum*. The general effect of the Act is that the rule of survivorship is kept in abeyance. The widow succeeds to her husband's interest without being a coparcener. The interest that devolves upon her becomes defined and definable in her hands though continues to be a part of the joint family estate in the sense in which a male member of a joint family under the Dayabhag School or such a male member's widow has. Like any other property, it is alienable and can be alienated by her. There must be express words in the Statute to deny to her right of alienation which is fundamentally inherent in every right to or in property. In the statute, under consideration, the only words of limitations are to be found in the expression 'limited interest of a Hindu Woman's Estate' occurring in sub-s. (3). In short, interpreting the provisions of sub-s. (3), according to the plain grammatical meaning of the language in which it is enacted and after assigning such meaning to the terms of art (namely, Hindu Woman's Estate), such meaning as they carry under the law in which the terms are used, the interest that a widow gets in her husband's interest in a joint family estate is the same as she would get in her separate or self-acquired properties. If there is nothing in conflict as between the two sub-sections due to the plain grammatical meaning of the words 'the same interest' in sub-s. (2), it should be limited in its connotations to quantity rather than quality or nature and character of the interest for the sake of reconciling the two sub-sections so as to produce a coherent and harmonious working of the Act. As sub-s. (3) is clear and unambiguous, any ambiguity or indistinctness in the meaning of sub-s. (2) emerging from its language must be dissolved on account of the latter's subordination to the former and a harmonious construction should be put upon it so as to give effect to sub-s. (3). In this view, the widow has a limited power of disposal over the interest that devolves upon her. The objection as to alienation by a coparcener of his interest in the joint family estate is not applicable when that interest devolves upon or is acquired by one who is not a coparcener of the joint family. Take the instance of a coparcener's interest having been attached by his creditor during his life time. His subsequent death does not prevent the attaching creditor from getting the attached interest sold. It is because as soon as it is attached, it is prevented from lapsing into the joint family estate and stands out of fluctuation. It then becomes a specified interest. It so happens when it devolves upon the widow. After devolution, it is an interest which unlike a coparcener's interest can be predicated with certainty. In that event, as a property, it carries with it the incidents of transferability at the hands of its holder either limited or absolute.

[7] I shall now proceed to deal with some of the cases relied upon by the learned counsel for the appellants.

[8] *Vinod Sagar* v. *Vishnubhai Shankar*, A. I. R. (34) 1947 Lah. 388—This has been cited to establish that the widow and her interest that has devolved on her under the Act still continues under the management of the Karta of the joint family until she has exercised her right of partition and from this it is urged that she is under the disability of a coparcener which means absence of right of alienation in her. This argument is fallacious As I have already said, in a Dayabhag joint family, the interest of a member is defined and is not subject to the same limitation as to its alienability as that of a Mitakshara family; but as regards the management of the family property, the Karta has the same dominion and the same right of representation as that of a Mitakshara family.

[9] *Jadaobai* v. *Puranamal*, A. I. R. (31) 1944 Nag. 243 : (I. L. R. (1944) Nag. 832)—This case decides that the devolution of the interest on the widow under the Act is by way of succession and not survivorship. This favours the contention that the widow holds the property as a tenant-in-common and not as a joint tenant though after her death it again lapses into the joint estate. The learned Judges, who decided this case, referred to a decision of Horwill J. reported in *Natarajan Chettiar* v. *Perumal Ammal*, A. I. R. (30) 1943 Mad. 246 : (206 I. C. 356) in which Horwill J is reported to have said that the effect of S. 3 cls. (2) and (3) may be

regarded as survival of the husband's *persona* in the wife, giving her the same rights as her husband had *except that she can alienate property only under certain circumstances.* The theory of survival of husband's *persona* was not accepted by the Hon'ble Judges of the Nagpur High Court. But the theory of her right of alienation was not repelled.

[10] *Kalian Rai* v. *Kashi Nath*, A. I. R. (30) 1943 ALL. 188 at p. 190 : (I. L. R. (1943) ALL. 307). Here her interest in the joint family estate is compared to that of a member of Dayabhag joint family. In this view, she shall have a right of alienation.

[11] *M. C. Chinniah Chettiar* v. *Sivagami Achi*, A. I. R. (32) 1945 Mad. 21 : (I. L. R. (1945) Mad. 402). This is a case in which it has been held that before partition is effected, the interest devolving upon the widow is liable to fluctuation so as to be reduced on an adoption. With great respect, I cannot go so far as that because it would be difficult to assume that her interest will be enhanced on the death of a coparcener as it would have been had her husband been alive.

[12] *Siveshwar Pd. Narain Singh* v. *Haranain Mal*, A. I. R. (32) 1945 Pat. 116 : (23 Pat. 760) has been relied upon for the proposition that her interest is an undivided interest in the joint family; but the actual decision is against Mr. Das Gupta's submission. Firstly because, Fazl Ali. C. J. (as he then was) has held that it is an asset of her husband in her hands, the position untenable in the light of Mr. Das Gupta's contention. This may be contrasted with the position that such an interest could not have been seized in the hands of a coparcener as an asset left by a deceased coparcener. This reason proves that the interest in her hands is a defined and definable interest. Fazl Ali C. J. quotes with approval from the decision of Venkataraman Rao J. reported in *Saradambal* v. *Subbarama Ayyar*, A. I. R. (29) 1942 Mad. 212 : (I. L. R. (1942) Mad. 630) which has also been cited by Mr. Das Gupta. I shall quote a passage from this learned Judge's observation. He says:

"Giving the language its plain meaning, the widow takes that interest subject to the rights and obligations attached to that interest and subject to the restrictions placed on her powers by Cl. (3) of S. 3 of the Act. That clause leaves the right to partition untouched but restricts the right of alienation because the nature of the interest which she takes is a Hindu woman's interest. What a Hindu woman's interest is, is well defined in Hindu law, that is she is competent to alienate that interest only for purposes sanctioned by Hindu law and that interest is liable to be seized in execution of decrees for the payment of debts of the last male owner.

* * * *

Once the rule of survivorship no longer operates, there is nothing to preclude a creditor from attaching the property.

* * * *

As pointed out by the Judicial Committee in *Moni Ram* v. *Kerikolitani*, 5 Cal. 776 at p. 789 : (7 I A 115 P. C.) 'the whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest."

[13] In consideration of what I have said above, I am unhesitatingly of opinion that defendant 2 was competent to alienate the interest that devolved on her on the death of her husband in the joint family estate and that defendant 1, has acquired a good title thereto. In the result the appeal is dismissed with costs throughout.

[14] **Panigrahi J.**—The facts giving rise to the litigation out of which this second appeal arises are simple. Plaintiff 1, Narottam father, of plaintiff 2, Dharu, father of plaintiffs 3 and 4, and Judhisthir, husband of defendant 2, were brothers and lived in a joint family. On the death of Judhisthir sometime in 1939, his widow defendant 2, executed a sale-deed of the suit lands in favour of defendant 1 on 27-2- 40. The plaintiffs thereupon filed a suit in 1944 for a declaration that the suit lands being their ancestral family lands, no title passed to defendant 1 under the sale deed executed in his favour by defendant 2. The plaintiffs prayed for confirmation of, or, in the alternative, for recovery of possession. Both the Courts below found that Judhisthir was the Karta of the family and died while living jointly with the plaintiffs. The learned Munsif who tried the suit in the first instance gave a decree to the plaintiffs, but, on appeal, the learned Subordinate Judge ordered the dismissal of the plaintiff's suit as he held the alienation valid under the Hindu Women's Right to Property (Extension to Agricultural Land in Orissa) Act —Act V [5] of 1944, by which the provisions of the Hindu Women's Right to Property Act, 1937, were extended to agricultural land with retrospective effect.

[15] The question agitated in this appeal is as to whether the widow of a deceased coparcener has the right to alienate her husband's interest in the corparcenary estate. The Hindu Women's Right to property Act—Act XVIII [18] of 1937—came into force on 14-4-37. The Act was intended to improve the status of Hindu widows in a joint family. Prior to the passing of the Act, a widow, in a joint family, had no interest in the coparcenary property of her husband except a right to maintenance. The Act gave her a right to claim the share that her husband would have had and this right can be enforced by partition. Section 3, sub-s. (2) provides as follows:

"When a Hindu governed by any school of Hindu law other than Dayabhag school or by customary law dies, having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-s. (3), have in the property the same interest as he himself had."

Sub-section (2) of S. 3 says :

"Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner."

[16] As I read the two sub-sections, I come to the conclusion that sub-s. (2) limits the extent of the widow's estate to 'the same interest as her husband had' while sub-s. (3), describes the character of that estate as a Hindu Woman's estate. The proviso to sub-s. (3), creates a right in the widow to reduce the interest of her husband to her separate possession by claiming partition as a male owner. The expression 'the same interest as he himself had' occurring in S. 3, sub-s. (2), is not very happily worded and is capable of different interpretations. It is contended for the plaintiffs-appellants that the expression means that the interest that the widow acquires is of the same kind and is subject to the same limitations as it was while in the hands of her husband as coparcener. It is, therefore, argued that as the husband was incapable of alienating the undivided interest in the coparcenary, his widow suffers from the same disability so long as the coparcenary has not been disrupted by a suit for partition. This is the only ground on which the alienation in favour of defendant 1, is challenged.

[17] The Act does not effect a statutory severance of status though it creates, on the death of a coparcener a limited interest known as the Hindu Women's Estate in favour of his widow. The coparcenary remains intact, but the husband's interest does not pass to his coparceners by survivorship and devolves on his widow. The widow remains a member of the coparcenary though she is not a coparcener herself. She can thus be represented by the Karta of the family and the interest that she has acquired is liable to fluctuation as the interest of any other living coparcener is, unless she carves out her estate from the coparcenary by a partition. Prior to the passing of the Act, she had no such right which could be enforced in a Court of Law. The Act being remedial, it should receive a beneficial construction so that the purpose of the legislation may be carried out. If the appellants' contention were to be accepted, the result would be that, on the death of a coparcener, his widow should invariably be driven to file a suit and she can claim no right in the coparcenary unless it is disrupted. This could hardly have been the result intended by the Legislature. On the other hand, by recognising the right of the widow to alienate for purposes for which a woman's estate can be sold even while the coparcenary is left intact, no disruption of the coparcenary would be necessary. According to the appellants' argument, the husband was incapable of alienation during his lifetime and therefore his widow would likewise be unable to alienate because sub-s. (2) of S. 3 says that she has the same interest as her husband had. It would equally be arguable that the widow becomes a coparcener or the manager as her husband was the one or the other quoad the family property because she succeeds to the same 'interest' of her husband. This reading of the section would render the next succeeding subsection nugatory as the interest devolving on the widow shall be limited interest known as Hindu Woman's estate if she is deprived of her right to alienate during her lifetime which she would have if she were the widow of a sole surviving coparcener. Sub-sections (2) and (3) would, therefore, be inconsistent with each other and would stultify the object and intendment of the Act.

[18] In my judgment, therefore, 'the same interest' means that the interest of the husband shall devolve on his widow to the same extent, i. e., subject to the rights and obligations which that interest had at the time of her husband's death. If that interest had been encumbered or had been otherwise charged, the widow cannot ignore them. If there were debts of the family for the discharge of which the husband's interest was liable, they can be recovered from the husband's interest in the hands of the widow. 'Same interest' is not synonymous with 'same kind of interest' or 'same status' it means 'same right a share'.

[19] Having regard to the intendment and purview of the Act, the two sub-sections can be reconciled only in the way that I have indicated above. I agree with the order proposed that this appeal should be dismissed.

Re:— Second Appeal 33 of 1945.

[20] **Ray C. J.**— For the reasons, stated in my judgment in S. A. NO. 218 of 1945, the appeal is dismissed. There shall be no order for costs of this Court.

[21] **Panigrahi J.** — This is a defendant's appeal, and the very same question that has been raised in another case before this Court, viz., S. A. 218/1945, arises in this appeal also.

[22] The plaintiff-respondent alleging to be the adopted son of one Krupasindhu filed the suit, out of which this appeal arises, for a declaration that the alienation made by his adoptive mother defendant 2, in favour of defendant 1, is invalid and is not binding upon him. The

plaintiff obtained a decree in the trial Court and it was confirmed by the learned District Judge on appeal. We have held in S. A. No. 218 of 1945 that a widow can alienate the interest devolving upon her, on the death of her husband, and that such alienation will be valid as against the other member of the coparcenary. In this case, both the Courts have found in favour of the plaintiff's adoption. The plaintiff and defendant 2 therefore succeed to the property of Krupasindhu Pandu and take it in equal shares. The plaintiff shall accordingly be entitled to the joint possession of the suit properties with defendant 1, the alienee from the adoptive mother of the plaintiff.

R.G.D. *Appeals dismissed.*

A. I. R. (38) 1951 Orissa 40 *[C. N. 15.]*

RAY C. J.

Padma Charan Behera and others — Petitioners v. *Rangadhar Das — Opposite Party.*

Criminal Revn. No. 483 of 1949, D/- 20-1-1950.

(a) Cattle-trespass Act (1871), Ss. 20, 22 —Order of compensation by Magistrate not competent to receive complaint under S. 20 — Legality — Criminal P. C. (1898), Ss. 529, 537.

An order of compensation awarded by a Magistrate other than one before whom a complaint of illegal seizure was made and who was not competent to entertain the same is not cured either by S. 529 or by S. 537, Criminal P. C. [Para 2]

Anno. Cr. P. C., S 529, N. 2; S. 537, N. 12; Cattle-trespass Act, S. 20, N. 1.

(b) Cattle-trespass Act (1871), S. 22—Compensation—Indication of heads on which losses suffered.

To entitle the complainant to compensation under the section, in the petition of complaint or, at any rate, in the evidence adduced for the complainant the different heads on which losses have been suffered must be specifically indicated. [Para 4]

Anno. Cattle-trespass Act, S 22, N. 10.

(c) Cattle-trespass Act (1871), S. 22 — Award of excessive compensation — Interference —Criminal P. C. (1898), S. 439.

Where the compensation awarded under the section is excessive, High Court can interfere. [Para 5]

Anno. Cr. P. C, S. 439, N. 8; Cattle-trespass Act, S. 22, N. 3.

(d) Cattle-trespass Act (1871), S. 20 — Complaint to Magistrate not competent to receive it —Expiry of period of 10 days — Applicability of S 14, Limitation Act — Limitation Act (1908), S. 14.

Where a complaint under the section is made to a Magistrate not competent to receive it and the period of ten days prescribed by section expires, it will no longer be open to the complainant to make a comtilaint to a competent Magistrate. Section 14, Limitadon Act is not applicable to such cases. [Para 3]

Anno. Lim. Act, S. 14, N. 2, 5; Cattle-trespass Act, S. 20, N. 1.

L. K. Dasgupta—for Petitioners; P. Mohanty and Bijoy K. Ray—for Opposite Party.

Order.—The petitioners have been found having seized a few heads of cattle which belonged to the opposite party and impounded them. The seizure but not the detention has been adjudged illegal by the Honorary Magistrate. The Magistrate has awarded a compensation of Rs. 75 distributing the same as between the petitioners equally. Thus each petitioner has been awarded a liability to pay a sum of Rs. 15 to the complainant-opposite party. Several contentions have been raised by Mr. Dasgupta, the learned counsel for the petitioners. They are : (i) That the Magistrate had no jurisdiction to hear and dispose of the complaint; (ii) That neither in the petition of complaint nor in the evidence, the complainant made any mention of the loss or, at any rate, the items or heads of such loss, and in the absence of such allegations and proof, no compensation beyond the fines, paid to the pound-keeper, being a sum of Rs. 7/8, should have been awarded to the complainant; and lastly, (iii) that the compensation awarded is highly excessive.

[2] For the first contention, reliance is placed upon S. 20, Cattle-Trespass Act (I [1] of 1871), which reads :

"*20. Power to make complaints*—Any person whose cattle have been seized under this Act or, having been so seized, have been detained in contravention of this Act, may, at any time within ten days from the date of the seizure make a complaint to the Magistrate of the District or any Magistrate authorised to receive and try charges without reference to the Magistrate of the District."

Within the purview of the section, contention 1 must succeed. In the case of *Raghu Singh* v. *Abdul Waheb*, 23 Cal. 442, it has been held that an order of compensation awarded by a Magistrate other than one before whom a complaint of illegal seizure was made and who was not competent to entertain the same is not curable either by S. 529 or by S. 537, Criminal P C. In this view, the order passed by the Honorary Magistrate is illegal and void. The appellate Court's decision against that cannot stand on a better footing. I, therefore, quash the order as also the proceeding taken before the Honorary Magistrate.

[3] I am not aware nor have I been fully advised if the Sub-Divisional Magistrate before whom the complaint was filed is a Magistrate who is authorised to receive and try the charges referred to in S. 20 of the Act without reference to the Magistrate of the District. In case the Sub-Divisional Magistrate was not entitled to entertain it, the complainant will be in tremendous difficulties. According to S. 20 he has to make his complaint within ten days from the date of the seizure. It is no longer open to him to make a complaint to a competent Magistrate within the meaning of S. 20 as the ten days' period has expired. I do not think S. 14, Limitation Act, is applicable to such cases.

[4] With regard to the second contention there is no doubt some amount of conflict of authorities in the different High Courts. In cases reported in *Baijnath Sahay* v. *Emperor*, A. I. R. (10) 1923 Pat. 292 : (24 Cr. L. J. 311); *Ramdularey* v. *Monohar*, A. I. R. (17) 1930 Nag. 149 : (31 Cr. L J. 278) and *Boijoo* v. *Emperor*, A. I. R. (26) 1939 Oudh 37 : (40 Cr. L. J 141), it has been consistently held that specific sum representing the loss sustained shall be claimed in the petition of complaint in lieu of compensation. A contrary view has been indicated in *Bhujharat* v. *Emperor*, A. I. R. (22) 1935 ALL. 925 : (37 Cr. L J. 247) and *Kolandai Chetty* v. *Perumal Kavundan*, A. I. R. (15) 1928 Mad. 869 : (29 Cr. L. J. 325). I do not find any difficulty in coming to my own decision. My decision is that in the petition of complaint, or, at any rate, in the evidence adduced for the complainant the different heads on which losses have been suffered must be specifically indicated. Suppose, by illegal seizure of cattle, the owner is deprived of any amount of milk that he should have otherwise obtained, he must be entitled to be compensated against such loss. But in order to be so compensated, he must lodge it and prove it so that the accused may have the opportunity (to meet? that case. Suppose, the accused knew what grounds were relied upon, he would have been able to show that each of the grounds on which the loss was based was without foundation. It is fundamental in administration of justice that no part shall be allowed to steal a march over the other. Every party must specifically lodge and prove his case so that his adversary gets an opportunity to meet it. I am also, at the same time, of the view that suppose the petition of complaint is silent, it would be no reason to throw away the complainant's claim for compensation for the loss, provided he alleges and proves it during the hearing and the so-called accused gets an opportunity to plead and prove in reply. In this case, there is neither such allegation nor proof though there is a general prayer in the petition for *Khatikhesara*. It has also been held in *Shaik Hussain* v. *Sanjivi*, 7 Mad. 345 : (1 Weir. 713), that the complainant may be allowed the costs of the proceeding though not the pleader's fee, if any, incurred by him. I would, therefore, hold that the petitioners will also succeed in their second contention.

[5] The last contention is whether compensation awarded is excessive and if the High Court can interfere. High Court's power of interference is neither challenged nor is it challengeable. I will refer to the case of *Emperor* v. *Madho*, 126 I. C. 497 : (A. I. R. (17) 1930 Oudh 250 : 31 Cr. L. J. 1015). But it does not arise for me to settle the fair compensation as I have held that I shall set aside the order of the Magistrate and the proceeding so far as they were conducted before him.

[6] Let this case go back to the Sub-Divisional Magistrate of Kendrapara. It is for him to find out whether he is a Magistrate authorised to receive and try the charges under S. 20 of the Act without any reference by the District Magistrate. I bring to his notice the provision of S. 20 of the Act. If he is a competent Magistrate to take up the case, the proceeding shall be deemed to be based upon the complaint which has been duly filed within the period of limitation prescribed in the section. He shall, and I consider it is imperative, that he should allow the parties to adduce fresh evidence as the proceeding before the Honorary Magistrate, which includes examining and recording the evidence of witnesses, is bad in law. In case he is not a Magistrate competent, it is all hopeless for the complainant. He has absolutely no remedy. I invited the parties to settle their differences, so that some amount of compensation could have been awarded to the complainant, who, I have no doubt, has suffered losses on account of the illegal seizure. The matter of illegality of seizure is also in dispute and the petitioners stand on their right to have the case retried if the case does lie before a competent Magistrate.

[7] In the result the petition is allowed. The orders of the Courts below are set aside.

G.M.J. *Petition allowed.*

A. I. R. (38) 1951 Orissa 41 *[C. N. 16.]*

RAY C. J. AND PANIGRAHI J.

Giridhari Mohanty—Defendant—Appellant v. *Abdul Khan, Plaintiff and others, Defendants—Respondents.*

A. F. A. D. No. 255 of 1945, D/- 20-1-1949.

(a) Tenancy Laws—Orissa Tenancy Act (II [2] of 1913), S. 212—Transfer of holding after rent decree—Holding, if can be sold in execution in absence of transferee.

At the time of sale in execution of a decree for recovery of rent, the entire landlord's interest and also the ryoti interest should be represented respectively by the decree-holder as well as the judgmedt-debtor. Anyone of these parties having ceased to have either the landlord's interest or the ryoti interest, as the case may be, the execution and the sale thereunder should lose the character of being an execution of a rent decree as such with the result that the sale will not pass the holding or the tenancy, as the case may be. Therefore, a particular landlord after knowledge of the transfer and after knowing that the occupancy right has accrued to the transferee to the exclusion of the till-then-recorded tenant and the judgment-debtor, he cannot be allowed to effectively pass the holding by the sale in execution proceedings conducted in the absence of the transferee to the auction-purchaser at such sale. [Paras 3 and 5]

(b) Tenancy Laws — Orissa Tenancy (Amendment) Act (VIII [8] of 1938), S. 31 — Notice — Object.

The object of the Legislature is that after a transfer is made valid and binding against a landlord, he shall not be permitted to sell away the holding in the absence and behind the back of the transferees provided he had notice of the transfer. [Para 4]

(c) Tenancy Laws—Orissa Tenancy Act (II [2] of 1913), S. 74—Charge under—Execution proceeding—S. 52, T. P. Act, if attracted—T. P. Act (1882), Ss. 52 and 100.

A charge under S. 74, Orissa Tenancy Act, is not a charge within the meaning of S. 100, T. P. Act, as all the incidental rights and liabilities are not attracted to such a charge. It cannot, therefore, be held that a proceeding in execution of a rent decree is a proceeding within the purview of S. 52, T. P. Act in which any right to immovable property is in dispute between the parties until a valid attachment is effected. [Para 9]

Anno : T. P. Act, S. 52, N. 2, S. 100, N. 12.

B. K. Pal — for Appellant; S. P. Mohapatra — for Respondents.

Ray C. J.—It is a defendant 1's appeal in a suit for declaration of title and recovery of possession of the disputed property which constitutes an occupancy holding in Touzi No. 3019 in the district of Cuttack. Defendant 5 was the original owner of the occupancy holding. He had usufructorily mortgaged the same to defendent 2 and father of defendant 3 who were recorded as mortgagees. Ultimately, defendants 6 to 9 purchased the holding in execution of the mortgage decree before 1938. An *ex parte* decree in a rent suit was obtained against the recorded tenants on 27-2-1941. The decree was put into execution on 3-4-1941 in which an order to issue attachment against the holding was passed on 4-4-1941. The attachment was effected on 30-4-1941. Before effectuation of the attachment and after the commencement of the execution, that is, on 25-4-1941, the plaintiff purchased the holding and it can be premised without any controversy that by such purchase he acquired the right of occupancy and all other rights appurtenant thereto under the provisions of S. 30A, Orissa Tenancy Act. The section provides that such transfers (of occupancy holding of a ryot, or a portion of share) shall carry with it the occupancy right in the holding and all the rights appurtenant thereto. The transfer, referred to in S. 30A, has to be effected notwithstanding the provisions of the T. P. Act in the manner provided in S. 31. The latter section provides that the registration of the transfer deed made compulsory in case of sales of occupancy holdings of any valuation must be accompanied with a notice to the landlord. So in the case of auction sales. The object behind this specific provision as to the mode of transfer being to make it binding on the landlord for all purposes and to all the extent for which such binding character is needed under the provisions of the Orissa Tenancy Act. It has been found by the Courts below and has not been controverted at the Bar that the requisite notice had been given to the landlord on 9-5-1941. The auction sale was held in pursuance of the execution case already referred to long after this notice. The auction-purchaser, namely, the appellant took possession through Court and thereby dispossessed the plaintiff. Hence this suit. The suit was decreed by both the Courts below. Hence this appeal by defendant 1 who was the only contesting defendant.

[2] Mr. Pal, appearing for the appellant, raised certain very interesting points of law. The pith and substance of his argument is that rent being a first charge on the holding, his purchase in execution of the rent decree should prevail over the private purchase of the plaintiff who must be held bound by the execution proceeding and by the order passed in the said proceeding resulting in the sale of the disputed holding. He supplements his contention by invoking the aid of doctrine of *lis pendens* as enacted in S. 52, T. P. Act. According to him, notwithstanding the plaintiff's purchase during the pendency of the execution proceedings, the holding passed to him under the provisions of S. 74 read with S. 212, Orissa Tenancy Act.

[3] This contention, with equal strenuousness is repelled by Mr. S. P. Mohapatra, counsel for the respondent, who contends that the doctrine of *lis pendens* is not attracted to the facts of the present case as neither the suit for recovery of rent nor the execution proceedings arising therefrom are such suits or proceedings as are contemplated in S. 52, T. P. Act, as no right to immovable property was at any moment in dispute as between the parties thereto. He, however, contends that in order to pass the occupancy holding at the sale, the conditions necessary under the provisions of S. 212, Orissa Tenancy Act, are that the relationship of landlord and tenant shall continue till the date of sale which did not happen in this case as the holding had been effectively sold with notice to the landlord before the relevant date. At the date of sale, the judgment-debtor in the suit was no longer the ryot and was not representing the holding. The position of law is too well settled to be controverted that at the time of sale in execution of a decree for recovery of rent, the entire landlord's interest and also the ryoti interest should be represented respectively by the decree-holder as well as the judgment-debtor. Anyone of these parties having ceased to have either the landlord's interest or the ryoti interest, as the case may be, the execution and the sale thereunder should lose the character of being an execution of a rent decree as

such with the result that the sale will not pass the holding or the tenancy, as the case may be.

[4] The only contention that I have to consider in this case is whether the landlord could sell the holding without impleading the transferee. The transferee is one in this particular case who became the ryot of the holding as against the landlord. His purchase was, no doubt, subject to the charge of arrears of rent till then accruing due, whether decreed for or not sued upon. Under the circumstances, to allow him to sell the holding without bringing him upon the record as a judgment-debtor would amount to encourage the sale of one's property at a court's sale without bringing him unto the proceedings before the Court. As a principle, it is fundamental that nobody's property will be sold except in a proceeding to which he is a party. The case might have been different if this purchase was either not binding upon the landlord or was not within his knowledge or notice. That the object of this notice to the landlord in effecting the transfer is to make it binding against a landlord so that he cannot have the privilege of selling the holding by way of enforcement of a decree without making the transferee a party for arrears of rent is clear from certain provisions of the Act in addition to the one providing for compulsory service of notice. Much assistance is deprived from Expl. (2) of sub-s. (2) of S. 31-B, 31-B is the section which made all transfers of pre-amendment days of the Tenancy Act valid and binding against a landlord. As this measure was given, as it was, a retrospective effect of divesting the landlords of certain vested rights that have already accrued to them, the Legistature thought it fit to compensate them by enabling them to sue for recovery of such registration fees as were lawfully payable by the transferees. Then the Legislature was confronted with the position whether this by itself, will be sufficient protection to the transferees. They realised, protection from rent execution sales was needed too. In order to effectuate it, sub-s. (2) was enacted which is to the effect that the holding or portion or share of an occupancy ryot shall not be liable to be sold in satisfaction of a decree for arrears to rent without making the said transferee a party to the proceedings in execution of a decree provided that the transferee *has given notice of transfer by registered post to the landlord*. There is no doubt this sub-section applies to the cases of prior transferees and it is so indicated by the words "the said transferee" which mean "the transferee referred to in the earlier part of the section, namely, sub-s. (1)". The object of the sub-section, however, was completely fulfilled by making it incumbent upon the transferee to give notice of the transfer by registered post. The object of the Legislature, however, is clear that after a transfer is made valid and binding against a landlord, he shall not be permitted to sell away the holding in the absence and behind the back of the said transferees provided he had notice of the transfers. Though sub-s. (2) does not in terms apply to subsequent transfers, there is no doubt as to the intention behind the explaination attached to it. The explanation reads :

"Notwithstanding anything contained in this Act or in the Code of Civil Procedure, in the case of a transfer of a holding or a portion or a share thereof, whether before or after the decree, the transferee may be brought on record in the proceedings in execution either in substitution of or in addition to the judgment-debtor, and such transferee shall, when so added or substituted, be treated as a judgment-debtor for all purposes of the said proceedings in execution of the decree."

[5] I say this explanation enures to the benefits of all transferees either prior to or later than Orissa Tenancy Amendment Act, 1938, on account of the occurrence of the following words "notwithstanding anything contained in this Act." If the explanation was intended to be confined in its operation to the case of subsequent transferees only, it could have been said "notwithstanding anything contained in this section." At any rate, this explanation enables the landlord to implead the transferees at any stage of the execution case, even at the time of the sale or thereafter before confirmation, and to treat them as judgment-debtors for all purposes of the proceedings. This explanation shall be understood in the context of the previous tenancy laws according to which none but the recorded tenant would be allowed to have the privilege of paying up the decretal amount either in course of execution proceedings or after holding of the sale and before its confirmation. No landlord would be allowed to implead such a transferee unless he be deemed to consent to the transfer. The present change was necessary to keep pace with the changes with regard to the newly conferred substantive rights of an occupancy ryot to sell his holding in a manner and with the effect of having a binding force against the landlord. Under the circumstances, if a particular landlord after knowledge of the transfer and after knowing that the occupancy right has accrued to the transferee to the exclusion of the till-then-recorded-tenant and the judgment-debtor, it would amount to violence to the language of the law and the principles behind it to hold that he would still be allowed to effectively pass the holding by the sale in execution proceedings conducted in the absence of the transferee to the auction-purchaser at such sale. Mr. Pal also agrees that in case

this transfer had taken place either during the pendency of the rent suit or after the decree but before the execution proceedings started, the holding could not have been proceeded against in the absence of the transferee. His contention is that the application of the doctrine of *lis pendens* makes the sale binding against the transferee even without his being impleaded. In order to attract the provisions of S. 52, T. P. Act, the proceedings or suit concerned must be one in which any right to immovable property is directly and specifically in question. It is not contended that such a right is in question in the suit for recovery of rent even though rent is a first charge according to S. 74 of the Act. It is well settled in the case of *A. H. Forbes* v. *Maharaj Bahadur Singh*, 41 I. A. 91 : (A. I. R. (1) 1914 P. C. 111) and *Krishnapada Chatterji* v. *Manadasundari*, 59 Cal. 1202 : (A. I. R. (19) 1932 Cal. 321 F.B.), that in case the landlord loses the landlord's right in respect of the holding before it is put to sell in execution of a rent decree, the execution of the decree as such loses the character of its enforcement as a rent decree with the consequence that the holding or tenure, as the case may be, does not pass. The Full Bench decision of the Calcutta High Court overrules certain previous decisions of that Court reported in *Kshetrapal Singh* v. *Kritarthamayee Dassi*, 33 Cal. 566 : (3 C. L. J. 470 F. B.), *Manindranath* v. *Ashutosh*, 21 C. W. N. 1132 : (A. I. R. (5) 1918 Cal. 521) and *Syedunnessa Khatun* v *Amiruddin*, 45 Cal. 294 : (A. I. R (4) 1917 Cal. 2). Their Lordships of the Full Bench fully approved the doctrine laid down in the case of *Prafulla Krishna* v. *Nosibannessa*, 24 C. L. J. 331 at p. 331 : (A. I. R. (4) 1917 Cal. 308 S. B.). Similarly, it has been held in the case of *Sm. Binapani Debi* v. *Banku Behari Mandal*, A. I. R. (30) 1943 Cal. 475 ; (209 I. C. 237) that if the tenant loses the interest before execution of the rent decree, the execution sale will not be competent so as to convey the holding to the purchaser. Mr. Pal, therefore, contends that the case will be different if the holding is dealt with by way of transfer during the pendency of the execution proceedings, when according to him it becomes a proceeding in which 'any right to immovable properties directly and specifically in question.' This leads us to consider whether the charge declared in S. 74 is a charge within the meaning of S. 100 so as to attract all the provisions of the Act in respect thereto. If the matter was *res integra*, I could hold otherwise, but it is covered by abundance of authorties that a suit for enforcement of a charge is a suit relating to immovable property for the purpose of S. 53, T. P. Act. The authorities in this respect are *Sudhamoyee Singh* v. *Jessore Loan Co., Ltd.* (A. I. R. (32) 1945 Cal. 322 : (49 C. W. N. 68)), *Setharamanuja Charulu* v. *Venkatasubbama*, 54 Mad. 132 : (A. I. R. (17) 1930 Mad. 824), and *Aravamudu Ayyangar* v. *Abhiramvalli Ayah*, 66 M. L. J. 566 : (A. I. R. (21) 1934 Mad. 353). But there is a clear distinction between the charge as declared in S. 74, Orissa Tenancy Act and the charge within the meaning of S. 100. According to the latter section, a charge is one either created by act of parties or by operation of law. The section provides:

"Where immovable property of one person is by act of parties or by operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property and all the provisions hereinbefore contained which apply to simple mortgage shall, so far as may be, apply to such charge."

[6] Truly speaking, a charge created by operation of law would be a charge within the meaning of the section if the law that creates the charge does not provide for any limitations in relation thereto. Charge, to start with, even if it is a charge with all necessary incidents thereof does not create an interest in immovable property. In this connexion I would quote a passage from Mulla's commentary on S. 100, T. P. Act:

"In a charge there is no transfer of an interest in the property but the creation of a right of payment out of property specified. The broad distinction between a mortgage and a charge is this: that whereas a charge only gives right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property. A mortgage is a *jus in rem*, a charge a *jus ad rem* and the practical distinction is that a mortgage is g od against subsequent transferees and a charge is only good against subsequent transferees with notice."

[7] In this view of the matter, it has to be seen whether the charge as declared in the Tenancy Act is necessarily and without any choice left to the landlord made payable out of the charge property, namely, occupancy holding. The suit for recovery of rent is commenced as a suit of recovery of money due as arrears of rent in respect of a holding from the tenant holding it. There is not a word in the suit about either declaration or enforcement of the statutory charge. Under the provisions of the Tenancy Act, such a decree is enforceable against any properties of the judgment-debtor other than the holding. In that view, it is difficult to say that execution of a decree for recovery of rent is of necessity and of essence a proceeding relating to any right to immovable property. As in the case of landlord's losing his interest either after the decree or the execution proceeding the decree loses the character of being a decree for enforcement of the charge or a proceeding in which some right to immovable property is to be proceeded against,

so in the case of the tenant losing his interest as such the decree or the execution proceeding is devested of its character as such. Under the circumstances, it cannot be always said that a proceeding set on foot for execution of a decree is necessarily a proceeding in which any right to immovable property is specifically and directly in question. There is a very valuable guide which can be obtained from a decision of Stone C. J. in the case of *Sitaram Sheolal* v. *Krishnarao Balaji*, (A. I. R. (27) 1940 Nag. 156: (I. L R. (1941) Nag. 607). This decision relates to interpretation of a charge as provided in S. 9 (1), C. P. Tenancy Act. The language of the Act which came up for consideration is as follows:

"Notwithstanding anything contained in S 100, T. P. Act, and O. 34, Sch. 1, C. P. C., 1908, such holding shall be liable for the satisfaction of such charge in execution of a decree for rent against the tenant, whether such decree orders such sale or not."

[8] How far it is a charge within the meaning of S. 100, T. P. Act, is answered by his Lordship in the following passage:

"The extent to which the ordinary law is set aside is therefore clearly indicated, and, in our opinion, the departure cannot be carried further by implication. The object of S. 9 (1) is to give the landlord precedence for his rent. That object is completely attained the moment the holding is sold in *the manner specified in the Section*. In our opinion, the 'first charge' enures no further than that. *Section 9 does not confer rights of subrogation.*"

[9] To give effect to Mr. Pal's contention would amount to give such incidents of a charge to the charge under consideration under the ordinary law as are either set aside or departed from by the very law which declares it to be a charge. Assuming for a moment that Mr. Pal is right in his contention that as soon as execution starts with a prayer to put the holding to sale, it commences as a proceeding in which some specific right to immovable property is specifically and directly in question as between the decree-holder and the judgment-debtor, the provision for effecting attachment in order to enable the decree-holder (landlord) to proceed against an occupancy holding would be completely nugatory: but it is difficult to explain the position on any other hypothesis than that the decree is considered to be a money decree and enforceable only as such until the occupancy holding is attached in the manner provided in the Civil Procedure Code. Such is not the case under the ordinary law relating to enforcement of charge decrees. It appears from S. 100 that a charge under the ordinary law is to be enforced in the manner provided for enforcement of a simple mortgage. The section says

"and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be apply to such charge (which includes a charge created by acts of parties as well as by operation of law)."

One of these provisions is that a holder of a charge is not entitled to enforce it even though personal liability may be involved in it, against any property of the charge-maker before exhausting his remedies against the charge property. This is the rule which applies to the available remedies of a mortgagee. That it is so will appear from the decision of their Lordships of the Privy Council in the case *Banku Behari* v. *Naraindas Dutt*, 54 I. A. 129: (A. I. R. (14) 1927 P. C. 73). In this connexion, reference may be made to O. 34, R. 15, Civil P. C. But unlike charge-holder under ordinary law, the landlord of a tenancy is not confined to first exhausting his remedies against a holding and then only to proceed against the judgment-debtor's other properties. He can exhaust his other remedies on the other hand before he considers it necessary to fall back upon the holding as a security for repayment of the decretal debt in a rent suit. Under the circumstances, all the incidental rights and liabilities are not attracted to a charge under S. 74, Orissa Tenancy Act. It is difficult, therefore, to hold that the execution proceeding is a proceeding within the purview of S. 52, T. P. Act, in which any right to immovable properties is in dispute between the parties until a valid attachment is effected. Besides, any transfer by one party during *lis* which is otherwise binding on the other party of the suit or proceeding, cannot be hit by the mischief of the section. Suppose, both the parties agree in making a transfer, the transfer must stand unaffected by the result of the suit or proceeding. So is a transfer by an occupancy tenant to which his landlord's consent is implicit by virtue of the statute as soon as its conditions for giving notice to him are fulfilled. In my view, therefore, the doctrine of *lis pendens* does not help the appellant: the only result is that the holding has not passed to the auction-purchaser, namely, the appellant, and in fact, he has purchased the right, title and interest of the judgment-debtor who had lost all rights in the holding by virtue of his transfer in favour of the plaintiff.

[10] Then the question arises what other remedy is the appellant entitled to? There is no doubt that the appellant is a *bona fide* purchaser for value. He had paid the money for the arrears of rent decree to the landlord. There is no doubt nor is it controverted at the Bar that the transferee (plaintiff) purchased the holding subject to his liability to pay the arrears of rent then due in respect of the holding. This includes his liability to pay the decretal amount. Mr Mohapatra, relying upon the *Nagpur case*, already cited argues that the idea of subrogation being foreign to the rent charge, the auction-purchaser cannot be said to have subrogated

to the right of a charge holder and of calling upon him to pay. This may be the technical aspect of the law, put under the general principles which, so far as they apply to contracts between the parties, have been enacted in S. 70, Contract Act, would apply to cases not directly governed by contract but by considerations which amount to those in the nature of contracts. Strictly giving effect to the technical rules, we could direct the sale to be set aside and relegate the landlord to the position of an execution creditor reviving the execution case and giving him leave to proceed against the transferee; but that would be multiplying unnecessary litigations, the ultimate result of which will be that the auction-purchaser would be refunded the money paid by him as purchase money and the plaintiff would be liable to pay up the decretal dues. In the circumstances, the learned counsel of both sides have agreed that the plaintiff shall be put on terms in respect of his decrees which he has secured of having his title declared and having restored to him the possession. Accordingly, we put him on terms that he shall re-imburse defendant 1 by paying back the amount for which he had purchased the property at the court sale. I do not fix any time for this payment as it is a condition affixed to his execution of the decree for possession. Under the circumstances of the case, each party should bear his costs throughout. In view of the fact that the plaintiff should recover possession on making payments, the decree for mesne profits, as passed by the Courts below, must stand vacated. In the result the appeal is dismissed without costs.

[11] **Panigrahi J.**—I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 46 *[C. N. 17.]*

PANIGRAHI AND NARASIMHAM JJ.

Shyam Sundar Padhi and others — Appellants v. *Indramoni Das and another — Respondents.*

M. A. No. 21 of 1948, D/- 7-12-1949.

Civil P. C. (1908), S. 47 and O. 23, R. 3—Compromise decree — Power of executing Court to grant relief against penalty — Contract Act (1872), S. 74.

A compromise decree merely embodies the agreement arrived at between the parties and is no more than any other contract between the parties. It cannot, therefore, claim the sanctity of a judgment followed by a decree of the Court. [Para 4]

An executing Court has got the power to apply the equitable principle embodied in S. 74, Contract Act, and relieve one of the parties to the contract against any term which operates as a penalty although the contract may have been embodied in a decree of the Court : A. I. R. (13) 1926 Pat. 122, *Dissent.* [Para 6]

Anno. C. P. C., S. 47, N. 79; O. 23, R. 3 N. 27.; Contract Act, S. 74, N. 16.

B. K. Pal—for Appellants.

Panigrahi J. — The judgment-debtors in a compromise decree for maintenance are the appellants before us.

[2] The decree provided that the judgment-debtors should pay maintenance to the decree-holder at the rate of Rs. 6 a month and in case of default of payment of the allowance for six consecutive months the judgment-debtors shall be liable to pay maintenance at Rs. 12 a month. The judgment-debtors defaulted payment for six months consecutively and the decree holder assigned his decree to opposite parties 1 and 2 (respondents). When the decree was put in execution, the judgment-debtors (appellants) raised several objections one of which has been debated before us. The contention of the judgment-debtors is that the stipulation embodied in the compromise decree, to the effect that the judgment-debtors shall pay double the monthly maintenance allowance in case of default for six consecutive months, is in the nature of a penal class and cannot be enforced in execution.

[3] The Courts below overruled the plea of the judgment-debtors on the ground that an executing Court cannot go behind the decree and is bound to give effect to whatever terms are embodied in the decree. Reliance was placed for this view on the case reported in *Jitendra Nath* v. *Jasoda*, A. I. R. (13) 1926 Pat. 122 : (92 I. C. 617) where a Division Bench of the Patna High Court held that the doctrine of penalty is not applicable to stipulations contained in decrees whether passed on compromise or contest. Their Lordships who decided this case relied on a case of the Bombay High Court reported in *Shirekuli Timappa* v. *Mahablya*, 10 Bom. 435. The principles underlying these decisions is that S. 74, Contract Act, which provides for relief against penalty does not apply to decrees which embody and express the adjudication of a Court. It was held that the application of the principle of contract to execution of decrees would introduce uncertainty and confusion and that, therefore, the application of the equitable principle should be confined only to cases where the parties have not gone beyond the stage of contract. The case reported in *Shirekuli Timappa* v. *Mahablya*, 10 Bom. 435 arose under the old Civil Procedure Code and was later expressly dissented from by a Full Bench of that Court in *Krishna Bhai* v. *Harigovind*, 31 Bom. 15 : (9 Bom. L. R. 813 F. B.). The question referred to the Full Bench was whether when the plaintiff is seeking to enforce by original suit a right to forfeiture contained in a consent decree whereby the status of landlord and tenant is established between the plaintiff and the defendant, the Court, in the exercise of its equitable jurisdication, is precluded from

granting such relief against forfeiture as it might have granted had the status arisen from contract or custom, and this question was answered in the negative. The principle has been laid down as early as in *Wentworth* v. *Bullen*, (1829) 9 B & C. 840 at p. 850 : (9 L. J. K. B. 33) as follows ; and has since been repeatedly affirmed :

"A contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a Judge."

[4] Turning now to the language of the Civil Procedure Code we find that O. 23, R. 3 lays down as to how the compromise of a suit is to be recorded. It says :

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise . . . . the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as as it relates to the suit."

When a compromise is filed by the parties to a suit during the pendency of the suit, the Court merely records the compromise and does not look into the legality of the terms embodied therein. The agreement between the parties may be voidable at the option of one of the parties; or the decree itself may be set aside by a suit at the instance of one of the parties on the ground that the compromise was brought about by undue influence or fraud. It cannot therefore claim the sanctity of a judgment followed by a decree of the Court. A compromise decree accordingly merely embodied the agreement arrived at between the parties and is no more than any other contract between the parties. That this is the view taken by all the Hight Courts in India, including the Patna High Court, is now beyond doubt.

[5] In *Mt. Nand Rani* v. *Durga Das*, 2 Pat. 906 : (A. I. R. (11) 1924 Pat. 387) the question whether an executing Court had the power to extend the time allowed by agreement and embodied in a decree of the Court, was directly raised, and Mullick and Bucknill JJ. held—following *Kandarpa Nag* v. *Banwari Lal Nag*, 33 C. L. J. 244 : (A. I. R. (8) 1921 Cal. 356), that although a contract may have ripened into a decree the Court will not be precluded from giving relief which it would have been competent to give if it had been called upon to adjudicate upon a contract in the first instance. Unfortunately the attention of their Lordships who decided the case reported in *Jitendra Nath* v. *Jasoda*, A. I. R. (13) 1926 Pat. 122 : (92 I. C. 617) was not invited to the earlier case in *Mt. Nand Bani* v. *Durga Das*, 2 Pat. 906 : (A. I. R. (11) 1924 Pat. 387). Subsequent to the decision in that case of 1926, there have been a series of decisions of the same High Court, in which not only has that decision not been followed but a contrary view has been expressly adopted. Our attention has been drawn to the cases reported in *Sasadhar Ganguli* v. *Raghal Singh*, A. I. R. (17) 1930 Pat. 234:(125 I. C. 123), *Saheb Lal Bhagat* v. *Mohd. Ishaque*, A. I. R. (22) 1935 Pat. 59 : (154 I. C. 393); *Jahuri Lal* v. *Kandhai Lal*, A. I. R. (22) 1935 Pat. 123 : (156 I. C. 302) and *Khetro Swain* v. *Padmnaabha Singh Deo*. A. I. R. (30) 1943 Pat. 403 : (211 I. C. 41). In the last-mentioned case, the latest Bombay case reported in *Burjorji Shapurji* v. *Madhavlal Jesingbhai*, 58 Bom. 610 : (A. I. R. (21) 1934 Bom. 370), which is based on the Full Bench view of that High Court in *Krishna Bhai* v. *Harigovind*, 31 Bom. 15: (9 Bom. L. R. 813 F. B.), was followed. Mr. Pal, appearing for the judgment-debtors has also cited before us the Full Bench decisions of the Allahabad High Court and the Lahore High Court reported in *Mohiuddin* v. *Kashmiro Bibi*, 55 ALL. 334 : (A. I. R. (20) 1933 ALL. 252 F. B.) and *Prem Parkash* v. *Mohanalal*, A. I. R. (30) 1943 Lah. 268: (I.L.R. (1944) Lah. 379 F. B.). The view of the Madras High Court is also in conflict with the decision in *Jitendra Nath* v. *Jasoda*, A. I. R. (13) 1926 Pat. 122:(92 I. C. 617). See *Peda Linga Reddi* v. *Hanumayya*, 37 I. C. 764:(A. I. R. (5) 1918 Mad. 1307); *Jaya Rao* v. *Venkatanarayana Chetty*, A. I. R. (12) 1925 Mad. 264:(80 I. C. 925); *Subbayya* v. *Peddayya*, A. I. R. (24) 1937 Mad. 234 : (169 I. C. 345).

[6] On a review of the various authorities, we are satisfied that the consensus of opinion in all the High Courts is that an executing Court has got the power to apply the equitable principle embodied in S. 74, Contract Act, and relieve one of the parties to the contract against any term which operates as a penalty although the contract may have been embodied in a decree of the Court. We have therefore to hold that the authority of the decision in *Jitendra Nath* v. *Jasoda*, A. I. R. (13) 1926 Pat. 122:(92 I. C. 617) has been considerably weakened, if not expressly overruled and cannot be regarded as sound law. The decision of the Courts below—based on the authority of this case—must accordingly be overruled and the objection of the judgment-debtors upheld.

[7] We accordingly direct that the decree-holder shall be entitled to execute his decree and realize maintenance allowance, only at the rate of Rs. 6 a month and that penal clause providing for payment of double that amount in the event of non-payment for six consecutive months shall not be enforced. This appeal succeeds but as there is no appearance for the opposite

party respondent there shall be no order as to costs.

[8] **Narasimham J.** — I agree.

V.B.B. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 48 *[C. N. 18.]*

RAY C. J. AND PANIGRAHI J.

Jagannathram Gangaram — Petitioner v. *Commissioner, Income-tax B. & O. Patna— Opposite Party.*

Special Jurisdiction case No. 15 of 1949, D/- 22-3-1950.

(a) Income-tax Act (1922), S. 66—Question of law—Legal facts and physical facts.

Facts, as such, are divisible into "facts physical" and "facts legal". Where the Court pronounces a finding of legal fact, it is more often than not a question of law to adjudge whether the materials are sufficient in law to the establishment of the legal fact. The finding of the legal fact recorded by the Appellate Tribunal, in order to be binding and conclusive as a finding of fact, must be based upon sufficient evidence. The legal fact, must flow conclusively from the physical facts, if not established. [Paras 8, 14]

Anno. Income tax Act, S. 66, N. 4, 10.

(b) Income-tax Act (1922), S. 66—Question of law—Joint family.

Declaration of intention to separate with ascertainment of shares by the members of a coparcenary creates disruption of a Hindu joint family. Here, the fact of declaration is a physical fact, so is the ascertainment of shares to be held in separate tenancy in pursuance of that declaration. But disruption of the joint family which creates severence of the joint status into individual is the legal fact. [Para 8]

Anno. Income-tax Act, S. 66 N. 11.

(c) Hindu law—Joint family—Partition.

Partial partition of joint family assets by verbal agreements followed by necessary changes in the account books of the family is permissible in law. [Para 10]

(d) Hindu law — Joint family — Partition—Division of businesses can best be achieved by necessary changes in the books of accounts. [Para 10]

B. N. Mohanti and Monohar Lall—for Petitioner; Standing Counsel—for Opposite Party.

Ray C. J.—This case was heard on 22-3-1950 and its result was then communicated after close of the hearing. We reserved deliverance of our judgment incorporating the reasons.

[2] This is a motion by an assessee, a Hindu undivided family invoking our jurisdiction to issue a writ requiring the Appellate Tribunal (income-tax) to state a case and to refer the same to the Court in the event of our not being satisfied of the correctness of their decision in rejecting the assessee's appeal and in refusing to state a case to this Court. For the reasons stated below, we are not satisfied with the decision of the Tribunal as correct.

[3] The facts that constitute the background in which the correctness of the Tribunal's decision has to be considered are that one Jagannathram and his five sons [(i) Gangaram, (ii) Ramanarayan, (iii) Bhagawan, (iv) Kanhialal and (v) Surajmal] constituted a joint family. The family owned extensive properties, both movables and immovables, inclusive of two business concerns in Yarn and Timber. Indisputably the family continued joint till 9-11 1942, the date of commencement of the accounting period 1942-43 the period ends on 28-10-1943. Before that date two of the aforesaid sons had died. Of them late Ramanarayan has left behind a widow and late Bhagwan a son by name Satyanarayan, a minor who is a member of the joint family. It is claimed by the assessee that on 9-11-1942, the members of the family under the leadership of Jagannathram ascertained the shares of the family members, namely, Jagannathram, his three sons and the son of a predeceased son, to be 1/5th each in the joint family assets. They separated the aforesaid two businesses of Yarn and Timber from the joint family and divided the same amongst five members allotting the timber business to Jagannathram and Satyanarayan and the Yarn business to the shares of Gangaram, Kanhialal and Surajmal. The bone of contention is that since that date these two business concerns ceased to be joint family properties and became the separate properties of the members to whom they were alloted and held, *inter se*, "in common tenancy" and distinct from "in coparcenary". In order to carry out the purpose of the said division, two deeds of partnership agreements were brought into being—one was executed and entered into between Gangaram, Kanhialal and Surajmal governing the Yarn business which had been taken out of the joint family assests and allotted to them as a part of their share in the joint family properties and the other was similarly executed and entered into as between Jaganathram and Satyaranayan covering Timber business. Each of the two documents with material variations as were appropriate in relation to the business which it was intended to govern contained a recital giving out the fact of partition of the joint family and formation of partnership firms. For the sake of perspicuity, the following quotation may be taken from one of said two documents :

"The aforesaid Jagannathram, Gangaram, Kanhialal, Surajamal and Satyanarayan minor through guardian Jagannatharam on 8-11-42 mutually agreed and decided that their share in the entire joint family properties is equal i. e., 1/5th share each and in pursuance of the same they further decided to divide their joint family business in Twist and Timber in the same proportion and further decided that the Twist business with a capital of Rs. 105,000 will fall to the lot of Gangaram of the first party, Kanhialal, Surajmal of the second and third party, each being deemed to have contributed and contributing Rs. 35,000 as his share capital and which

they will run in partnership to the exclusion of Jagannath and Satyanarayan and similarly timber business with capital of Rs. 70,000 will fall to the lot of Jagannathram and Satyanarayan minor through guardian Jagannathram each being deemed to have contributed Rs. 85,000 as his share capital and which the latter two alone will run in partnership under the name of Jagannathram Satyanarayan to the exclusion of the former, namely, Gangaram, Kanhialal and Surajmal, and all the members further decided that their remaining properties, namely, their landed properties, buildings and all other movables and immovables will continue as joint as before under the name of Jagannathram Gangaram and with this clear understanding that they are separate so far their twist business is under the name of Kanhialal Surajmal and timber business under the name of Jagannathram Satyanarayan with the specification of shares and contribution of capital as enumerated above are concerned and they are joint as regards the remainder of the joint family property ....."

[4] On execution of the aforesaid two documents, the parties approached the Registrar of Firms and secured certificate of registration in March 1944. This was followed by correspondence to the Commilla Bank and to a supplier of Yarn in the years 1944 and 1945 respectively stating that the two trades referred to therein were being run as partnership Firms as between the different groups of persons named in the partnership deeds.

[5] In the assessment year, namely, 1944-45, three sets of returns were filed —one for Jagannathram Gangaram as representing the Hindu undivided family before the Income-tax Officer (Special Circle), Cuttack who had been vested with special power to deal with it by the commissioner, Income-tax, Bihar and Orissa, Patna, and the other two separate returns, one for Kanhialal Surajmal and another for Jagannathram Satyanarayan, in relation to the incomes of the timber and the twist business respectively before the Income-tax Officer, Cuttack, who had territorial jurisdiction over them. Side by side, the two partnership Firms filed applications before the said Income-tax officer Cuttack, for registration of their Firms for the purpose of this Act under S. 26A, Income-tax Act, 1922. The Income-tax officer Cuttack, it is stated, instead of making an assessment order or registering the firms under S. 26A, sent the case records to the Income-tax Officer (Special Circle) who had seisin of the assessment of the Hindu undivided family income. The Income-tax Officer (Special Circle) treated the incomes of the aforesaid two business concerns as part of the Hindu undivided family incomes and made an order of assessment on the consolidated income of Rs. 96,918 in place of Rs. 579 returned by the Hindu undivided family as such. The firms of Kanhialal Surajmal and Jagannathram Satyanarayan fruitlessly appealed to the Appellate Assistant Commissioner in the matter of S. 26A. The Appellate Asst. Commissioner observed that he had no such case before him. Thereupon they appealed to the Appellate Tribunal. The said Tribunal, by its order dated, Camp-Puri, 27-3-947, observed:

"No orders seem to have been passed by the I. T. O., Cuttack, to whom applications for registrations have been filed. Objection was also raised by the Hindu Undivided family Firm before the I. T. O. (Special Circle) that the income from these two partnerships should not be included in the income of the Hindu Undivided family. The Special I. T. O. has stated that there was no proceeding for registration of a partnership before him and, therefore, no application under S. 26A can be entertained by him. Against that order as confirmed by the Appellate Asst. Commissioner, the present appeals have been filed before the Tiounal. . . . . The appeal against the decision of the Special I. T. O. of the Hindu Undivided family Firm is pending before the Tribunal. . . . . We have no doubt that after the appeal of the Hindu Undivided family Firm is disposed of by the Tribunal, the I. T. O. Cuttack before whom the returns and the applications for registration of the appellant's firms were filed will deal with them in accordance with law. The two appeals are rejected."

The result is that the matter of assessment of the Firms will be governed by the decision of the Tribunal against which the present partition is directed.

[6] The Appellate Tribunal, agreeing with the orders of the Income-tax Officer (Special Circle) and the Appellate Asst. Commissioner, observed:

After considering the several matters brought before us and having heard both the parties to the appeal, we cannot but hold that the timber and yarn business continued to be in the ownership of the Hindu Undivided family of Jagannathram Gangram during the relevant accounting period commencing on 9-11-1942 and ending on 29-10-43."

[7] The assessee moved the Tribunal to state a case under sub-s. (1) of S. 66 of the Act. The reply of the Tribunal was:

"The evidence adduced by the assessee in support of its contention was examined and after considering in para. 7 of its order the salient features of that evidence, the Tribunal came to the conclusion that the timber and yarn businesses continued to be in the ownership of the Hindu Undivided family of Jagannathram Gangram during the relevant accounting period. That finding, based as it is on the evidence placed before it, is a finding of fact. No question of law arises out of the said finding and this application is dismissed."

[8] It is urged before us by the learned counsel for the assessee that the finding of fact as recovered by the learned Tribunal is not based on sufficient evidence. Facts, as such, are divisible into "facts physical" and "facts legal". A physical fact is one that is capable of perception by the senses. Those facts either do occur as incidence or do arise as result equally tangible in all respects in the chain of cause and effect; but inferences deducible in law which go to establish a circumstance which either amounts to a status or gives rise to a status in relation to rights and obligations are legal facts. Some-

times several inferences do, as their combined effect, create a legal fact. Declaration of intention to separate with ascertainment of shares by the members of a coparcenary creates disruption of a Hindu joint family. Here, the fact of declaration is a physical fact, so is the ascertainment of shares to be held in separate tenancy in pursuance of that declaration. But disruption of the joint family which create severence of the joint family which creates severence of the joint status into individual is the legal fact. Where the Court pronounces a finding of legal fact, it is more often than not a question of law to adjudge whether the materials are sufficient in in law to the establishment of the legal fact.

[9] The learned Tribunal refer to para. 7 of their order disposing of the appeal as containing the salient features of the evidence adduced by the assessee. The paragraph, therefore, needs examination. It is there that, if at all, the materials sufficient in law to make out the legal fact expressed, as found, have to be searched for. The documents of partnership of the two businesses of yarn and timber are rejected along with the certificate of registration with the Registrar of Firms on the ground that they were made on 25-1-1944 and June 1944 respectively. It is held that they being subsequent to the accounting period afford no evidence of the severence of the two businesses from the assets of the joint family property. This conclusion is arrived at even though the recitals in the document contradict such a conclusion. The partnership agreements themselves predicate that the division of the joint family assets, so far as the two businesses form an integral part of them, had taken place from 9-11-1942. The Tribunal observe :

"The clauses in the partnership agreements that the partnership businesses shall be deemed to have commenced on and from Kartik Sudi-1-Samvat 1999-2000, corresponding to 9-11-1942 have no meaning. This may have been mentioned despite the fact that the decision to take these businesses out of the family fold, was arrived at a much later date."

In the same strain the learned Tribunal say:

"Even the division of profits between the partners in the books of the two different businesses for the accounting year ended 29-10-1943 might have been done long after, i. e., after the partnership agreements were executed."

[10] The questions that can be addressed to are if the legal fact that the status of the joint family was not disrupted is supported by the physical fact, that the deeds of agreements recited the physical fact of division having taken place on 9-11-1942, and the profits, acquired in the businesses since that date up to 29-10-1943, were divided as between the partners and not carried into the joint family assets. The answer cannot but be in the negative. It has to be borne in mind that in the Head Office books relating to joint family concerns, the real division of capital of these two businesses, as between the five members of the family, each getting Rs. 35,000, was made on 9-11-42. It should also be borne in mind that partial partition of joint family assets by verbal agreements followed by necessary changes in the account-books of the family is permissible in law. Earlier in their judgment in para. 5, the Tribunal have observed :

"But mere entries in the books of account cannot alone be considered to be sufficient for the purpose of establishing transfer of a business from one ownership to another. There seems to be no agreement in writing for recording the arrangement to take out these two businesses from the family fold, and turn them into two separate partnerships."

This observation is undisputably based upon misconception of law. It has been held over and over again on high judicial authorities that division of businesses can best be achieved by necessary changes in the books of account. This also is in accord with commonsense.

[11] Secondly, the Tribunal observe in para. 7 :

"In addition to that, one of the books, viz., Malhacoolly account book, written up in 1943 showed the name of Jagannathram Gangaram despite the fact that the timber business had changed its name and belonged, as claimed by the appellants, to the firm of Jagannathram Satyanarayan."

This fact has not been considered in its context. The Tribunal has not examined the nature and contents of these books. They may, consistently with the assessee's theory, contain in the name of Jagannathram Gangaram if the entries therein present either the previous advances from or arrears due to Jagannathram Gangaram which were carried over to the year 1943. Besides, to demonstrate the uncertainty involved in such summary consideration, I shall quote from para. 13 of the Appellate Assistant Commissioner's judgment in Income-tax Appeal No. 80 of 1946-47 of the year of assessment 1945-46 and of the assessee Messrs. Jagannathram Gangaram, Cuttack, wherein he says :

"Under the heading 'Non-production of books' the I. T. O. has also discussed 'the few pages of rough *Rokar* and the few pages of *Hatachitha* 'which were discovered during a surprise visit on 30-11-1944. I have examined these books, so-called rough *Rokar* which consists of a few stitched papers in which there are stray jottings. It is alleged that they were found by the I. T. O. on the top of the Almirah and they did not belong to the assessee. The figures reproduced by the I. T. O. were practically the only figures noted therein and these related to the prior accounting year. This does not prove the existence of any regular rough *Rokar* for the previous year. The *Hatachitha* is similarly an obscure book-let consisting of entries in 2½ pages from 1-6-1944 to 7-9-1944. There are stray jottings regarding sale of timber amounting to Rs. 575-3-0 and grains Rs. 12-14-0. During this period the two timber accounts of the assessee produced before the I. T. O. showed a sale of Rs. 5088. The identity

of the Chitha is of doubtful nature, and as noted in para. 4 above the I. T. O. in summing up his reasons for S. 23 (4) assessment has not laid any stress on these two booklets containing few pages."

[12] The Appellate Tribunal seems to think that the assessee on whom did lie the onus did not adduce sufficient evidence to establish his case. To sum up, the assessee has produced books of account containing severance of the concerned businesses from the joint family assets, the distribution of allotment of those businesses to several members or group of members, the documents sufficiently proclaimed to the world by their registration of creation of partnership firms, and the separate bank accounts and business transactions with the customers on the footing that they are separate partnership firms businesses as distinguished from joint family businesses. It was up to the Tribunal to consider the cumulative effect of these as to their sufficiency to establish the assessee's version. To counterbalance the above, it has not been shown that either the incomes derived from these businesses or the expenses incurred in them are shared in by all the members of the joint family as part of their joint family business. As regards interpolation of the transaction of division of capital in the *Nakal* (of yarn shop) within 6" of space, the Tribunal observe:

"The Appellate Assistant Commissioner has not come to any finding on this point in his appellate order dated 28-8-46."

Nor have they arrived at any finding of their own as to the suspicious feature of the writing. The Head Office books are the only relevant books in which the division of capital as such is to be duly entered into. No exception has been taken by any of the authorities concerned about them.

[13] The Appellate Tribunal had not dispelled in their judgment, the doubt created by the I. T. O. on the effectiveness of the partnership agreements executed on 25-1-44 on the ground that there could be no division of the joint family assets without all the five male members of family being signatories either as executants or otherwise thereto. This objection overlooks that the recitals in both the documents are identically the same and in them there is a clear acknowledgment by two members of the family in one document and three in the other that there has been such a division. Besides in those recitals the members of the timber business group disclaim any interest in the yarn business and the members of the yarn business group disclaim any interest in the timber business. These documents have, therefore, the necessary substance though not the form of being documents establishing complete division having taken place with the concurrence of all the members of the family in respect of the two businesses since 9-11-42.

[14] My conclusion, therefore, is that the finding of the legal fact recorded by the Appellate Tribunal, in order to be binding and conclusive as a finding of fact, must be based upon sufficient evidence. The legal fact must flow conclusively from the physical facts, if not established. On the high authority of Sir George Rankin, in the case of *Sundar Singh* v. *Commissioner of Income-tax, C. P. & U. P.*, (1942) 10 I T. R. 457 : (A. I. R. (29) 1942 P. C. 57), it has been said :

"To decide that an Instrument is in this sense not genuine is to come to a finding of fact. Whether there was evidence upon which it was open to the Income-tax Authority to come to such a decision is a question of law."

[15] In the circumstances, stated above, we should issue a writ of *mandamus* to the Income-tax Appellate Tribunal, Madras Branch, to state a case as to whether there was sufficient evidence in the case to hold that the timber and yarn businesses were not severed from the joint family assets.

[16] **Panigrahi J.**— I agree.

D.H. *Order accordingly.*

A. I. R. (38) 1951 Orissa 51 *[C. N. 19.]*

RAY C. J. AND NARASIMHAM J.

Antarjami Mohanty and others —*Petitioners* v. *State of Orissa* —*Opposite Party.*

Criminal Revn. No. 112 of 1950, D/- 16-8-1950.

Police Act (1861), S. 30 — Thoroughfare — Meaning — Comparison with public place — Words and phrases.

If people gather as a matter of right in a particular place it may become a public place but it does not necessarily follow that the place is a "thoroughfare". For a place to be thoroughfare there must be unobstructed transit. That is to say, the place must be used as a passage for the people to pass through. A "thoroughfare" is wider expression than a "road" or a "street" but it is narrower than a "public place." [Para 5]

The foot of a hill close to a tank in the absence of evidence that it was used as a path by the public cannot be held to be a thoroughfare even assuming that the public had a right to gather there.

[Paras 5, 7]

Anno. Police Act S. 30 N. 2.

V. Pasayat — for Petitioners; Govt. Advocate — for Opposite Party.

Narasimham J. — The eight petitioners were convicted under Ss. 143 and 145, Penal Code, and also under S. 32, Police Act, and sentenced to various terms of imprisonment. Their appeal was dismissed by the Additional Sessions Judge of Berhampur.

[2] The charge against them was that on 18-9-1945 they assembled at a meeting at the foot of a hill in village Roulpalli in Ganjam

district with the common object of disobeying a notice issued by the District Superintendent of Police under S. 30, Police Act, requiring the obtaining of a licence as a condition precedent to the holding of meetings and assemblies on public roads and thoroughfares. While the meeting was being held a Police Officer approached the crowd and asked them to disperse. They however refused and then some of the leaders were arrested with the help of additional police force which arrived at the spot.

[3] The facts are all admitted. On 17-8-1949 the District Superintendent of Police with the sanction of the District Magistrate issued a notice under S. 30, Police Act, (Ex. 6), requiring all persons intending to convene or collect an assembly in any public road or thoroughfare to take a licence from the appropriate police officer. This notice was to remain in force for a period of three months from that date and the orders were duly promulgated in the locality. The petitioners admittedly collected at a public meeting on 18-9-1945 and none of them had a licence.

[4] In the charge framed against the petitioners the common object of the unlawful assembly was specified as follows: "the common object of which was to resist the execution of the orders under s. 30, Police Act." It was therefore the duty of the prosecution to prove beyond reasonable doubt the aforesaid common object of the assembly. That is to say, the prosecution must show that the common object of the persons who collected at the meeting was to hold a meeting without a licence on any public road or thoroughfare in the thanas specified in the notice. All that the prosecution has proved is that the petitioners and other persons collected at the foot of Gupteswar hill and that there was a tank close-by. No evidence at all was led to show that the place where the meeting was held was either a road or a thoroughfare. Mr. Pasayat therefore urged that the prosecution failed to prove the essential ingredients of the offences and that on the meagre evidence led by the prosecution it cannot be said that the petitioners either disobeyed the order of the Superintendent of Police issued under S. 30, Police Act, or else that they had the common object of disobeying such an order.

[5] It appears that this point was taken up in the lower appellate Court and that Court has met the point as follows :

"It is however clear that the meeting was being held near the Gupteswar temple. There was also a tank nearly and only the mere fact that it was at the foot of a hill does not detract from the character of the spot from being a thoroughfare where people admittedly gather as a matter of right and the dictionary meaning of the word is "a place of unobstructed transit" which obviously imports something wider than roads and streets."

The lower appellate Court appears to have overlooked the essential distinction between a public place on the one hand and a thoroughfare on the other. If people gather as a matter of right in a particular place it may become a public place but it does not necessarily follow that the place is a "thoroughfare". The dictionary meaning of the word, as pointed out by the lower appellate Court, indicates that there must be unobstructed transit. That is to say, the place must be used as a passage for the people to pass through. The Oxford Dictionary meaning is as follows :

"A road, street, lane or path forming a communication between two other roads or streets, or between two places; a public way unobstructed and open at both ends."

This indicates clearly that every public place will not necessarily become a thoroughfare unless that place is used as a passage for people to pass through. The lower appellate Court is undoubtedly right in saying that a "thoroughfare" is a wider expression than a "road" or "street," but it is narrower than a "public place". Therefore, in the present case, the prosecution should not have remained content with merely proving that meeting was held at the foot of Gupteswar hill close to a tank where the people may be expected to gather as a matter of right. The prosecution must further establish that the actual site of the meeting was used as a passage by the public. It may be that the meeting was held away from the path so that the traffic on the thoroughfare may not be disturbed and where the prosecution has failed to prove that it was held actually on a thoroughfare the petitioners can claim the right of acquittal.

[6] If statutes enacted after the passing of the Police Act are carefully scrutinised it seems clear that the Legislature was fully aware of the difference between a "publice place" on the one hand and a "way" or "thoroughfare" on the other. For instance, in para. 2 of sub-s. (1) of S. 133, Criminal P. C. the expressions "way which is or may be lawfully used by the public" and "public place" are used in juxtaposition so as to indicate that there is a difference in the meaning of the two expressions, Similarly, in S. 2 (24), Motor Vehicles Act, 1939, the expression "public place" was given the following wide definition.

A 'public place' means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access, and includes any place or stand at which passengers are picked up or set down by a stage carriage."

This shows that though a thoroughfare may be a public place the converse may not always be correct.

[7] The same question has been considered in an Allahabad case reported in *Emperor* v. *R. N. Basu*, A. I. R. (20) 1933 ALL. 614 : (34 Cr. L. J. 1062) where it was held that the whole of a public park known as the Parshottem Das Park in Allahabad cannot be said to be a thoroughfare within the meaning of S. 30, Police Act. The present case is weaker for the prosetion than that Allahabad case where the public nature of the park was beyond doubt. Here the prosecution has not proved that the foot of the hill where the meeting was held was itself a public place. But even if we assume that the public have a right to collect there, we cannot further assume, in the absence of any evidence, that it was actually used as a path by the members of the public.

[8] The learned Advocate-General asked for a remand so as to enable the prosecution to show that the place where the meeting was held was actually thoroughfare. We have however gone through the case diary and we find that this aspect of the question was not considered at the time of the investigation. There is absolutely no material in the diary to show what was the nature of the place where the meeting was held. A remand at this belated stage may lead to fabrication of false evidence and unnecessary harassment to the petitioners.

[9] We would therefore allow this petition, set aside the convictions and sentences and acquit the petitioners.

[10] **Ray C. J.** — I agree.

V.B.B. *Conviction set aside.*

A. I. R. (38) 1951 Orissa 53 *[C. N. 20.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Hadu—Accused—Appellant v. *The State.*

Criminal Appeal No. 7 of 1950, D/- 9-8-1950.

(a) Penal Code (1860), S. 300—Murder trial—Seizure of blood-stained articles—Seizure made a week after alleged murder—Blood stains disintegrated and their origin not detectable—No value can be attached to this evidence. [Para 7]

Anno. Penal Code S. 300 N. 45, 46, 52.

(b) Evidence Act (1872), S. 133—Accomplice—Who is.

Where a person in charge of a cart states that the cart contains a dead body, he cannot be assumed to be an accomplice in the absence of proof that he was aware that the death was the result of a crime. (Para 8]

Anno. Evi. Act S. 133 N. 2.

(c) Evidence Act (1872), S. 133 — Accomplice and co-accused—Evidence by.

The statement of a co-accused may be admissible in certain circumstances though not examined, but not that of an accomplice who is available to be examined. [Para 8]

Anno. Evi. Act S. 133 N 4.

(d) Evidence Act (1872), S. 8—What amounts to conduct.

What is admissible under S. 8 is the conduct of the party and the statement which effected or influenced that conduct. Silence may in certain circumstances amount to conduct. [Para 8]

Anno. Evi. Act S. 8 N. 2, 4.

(e) Evidence Act (1872), S. 6—Spontaneous statement.

All spontaneous statements in someway connected with the transaction under investigation are not admissible. It must be shown that the statement is a part of the transaction. [Para 9]

Anno. Evi. Act S. 6 N. 2, 3.

(f) Evidence Act (1872), S. 6—Part of the same transaction.

Hearsay statements to be admissible as substantive evidence of the truth of the facts stated therein must themselves be part of the transaction and not merely uttered in the course of the transaction. [Para 9]

Anno. Evi. Act S. 6 N. 2, 3.

(g) Evidence Act (1872), S. 6—Single transaction—Simultaneous spontaneous statement.

Where the transaction is a single incident, a statement by a person who was perceiving the incident made simultaneously with the occurrence of the incident, may, with justification, be said to be part of the transaction inasmuch as it is the result of a spontaneous psychological reaction through perception. [Para 9]

Anno. Evi. Act S. 6 N. 2, 3.

(h) Evidence Act (1872), S. 6—Statement arising out of accidental facts.

Statements arising out of accidental facts occurring in the course of a chain of events which constitute the transaction are not to be treated as part of the transaction and cannot be admitted in evidence under S. 6. [Para 9]

Anno. Evi. Act S. 6 N. 2, 3.

(i) Penal Code (1860), S. 300—Murder—Circumstantial evidence.

The mere fact that a person has been last seen with the murderer is not by itself enough, unless it appears that the latter was in the company of the deceased at or about the time when and at the place where the murder appears to have been actually committed. [Para 11]

Anno. Penal Code S. 300 N. 45.

(j) Penal Code (1860), S. 300—Motive.

The mere existence of motive is by itself not an incriminating circumstance. [Para 11]

Anno. Penal Code S. 300 N. 35.

(k) Evidence Act (1860), S. 106—Circumstantial evidence—Absence of explanation by accused.

The guilt of the accused cannot be inferred from absence of reasonable explanation in a case depending on circumstantial evidence where the other circumstances are not by themselves enough to call for his explanation. [Para 11]

Anno. Evi. Act S. 106 N. 2.

B. N. Rath—for Appellant, B. M. Patnaik—for Advocate General—for the State.

Jagannadhadas J. — The appellant before us has been convicted under Ss 302 and 201, Penal Code, and sentenced to transportation for life under first count and to rigorous imprisonment for five years under the second count the sentences to run concurrently. He has been held guilty of having murdered one Bhima Panda on

the night of 19-5-1949 and caused the disappearance of the dead body from the scene of the offence with the intention of screening himself. At the trial, there was another accused, A-2, the brother of the appellant but he has been given the benefit of doubt by the learned Sessions Judge and acquitted.

[2] The appellant Hadu Samanta is a resident of Humma Gada. The deceased Bhima Panda is a resident of the village Nadapandapalli, some distance away. The evidence on the side of the prosecution shows that the appellant and the deceased were on friendly terms and that the deceased was placing implicit confidence in the appellant. The appellant had taken a lot of gold and money from the deceased under the inducement that he would teach him some *vidya* whereby he could get gold and that he would perform a *homa* which would bring out to him golden pots from the earth. It is in evidence of the wife of the deceased, P. W. 13, that the deceased sold away his lands and the gold and silver ornaments on the person of his wife and his daughter and had given in all about Rs. 3000 to the appellant in the course of about two years prior to the date of the alleged occurrence, and that her husband used to go to the house of the appellant frequently to demand gold from Hadu and was being put off. It is also her evidence that her daughter grew into marriageable age and that the deceased accordingly pressed the appellant for return of his money in order to be able to perform the marriage of his daughter. This evidence of the wife of the deceased, P. W. 13, is substantially corroborated by her brother, P. W. 1.

[3] According to the prosecution case, the deceased went to the house of the appellant for the last time for demanding money 8 days prior to his death. On the day of the occurrence, he was returning to his village, but on the way by the time he arrived at the village called Borada, he felt suffering from some ailment and started belching and vomiting in front of the house of one Natia Parida, P. W. 5. P. W. 5 sent word to one Govinda Panda, nephew of the deceased who was running a tea-shop at a place called Munshipenta on the other side of the river which adjoined the village Borada. On the arrival of Govinda Panda, the deceased wanted to go back to the house of the appellant, presumably because he thought that his ailment was the result of some medicine which, according to him, he had taken at the house of the appellant, and wanted to take his advice for getting rid of the trouble. P. W. 5 was persuaded to take the deceased back to the village of the appellant for hire. According to his evidence, he took the deceased on a cart from Borada to Gada Humma and arrived there at about sun set time. He stopped in front of a house whose owner he could not identify. The owner was not there at the time and the deceased got out of the cart and sat in front of the house waiting for the arrival of the owner, coughing, belching and spitting all the time. The owner arrived at about 2 ghadis after sun set and Bhima Panda said to the owner:

"What medicine you gave me. I become restless. I could not go to my village, so I returned. I shall remain with you."

The owner told him: "All right." Thus saying he took him inside his house. The owner while taking the deceased inside his house asked P. W. 5 to wait to take him back. But the deceased refused to go back and accordingly P. W. 5 returned back to his village with the cart.

[4] Information that the deceased felt unwell while he was returning back to his village was sent by Govind Panda to the wife of the deceased, P. W. 13, on that very day. P. W. 13 accordingly went to Humma Gada early next morning, that is on 20th, and went straight to the house of the appellant. But she did not find him there. She found, however, his brother, A-2, who on enquiry told her that her husband was at the house till midnight, but that he did not know anything further about him as he himself had gone away to Rambha. She thereupon felt suspicious and went to the Karan of the place, P. W. 2 who also sent for the Karji, P. W. 8. They all went to the house of the appellant and she there made a statement, Ex. 2, in which she reported the fact that her husband was missing and that she suspected foul play by the appellant and made mention of the pre-existing back-ground of the relations between her husband and the appellant. The village officers had some search made for the deceased in the village and by about 1 P. M. got news that a dead body, was lying near a tank in the village. The wife of the deceased immediately went to the place and recognised the dead body as that of her husband. The matter was reported to the police by the Karji, P. W. 8, as per Ex. 5. There was the usual inquest and post mortem examination of the dead body. The post mortem report Ex. 3 and the evidence of the doctor, P. W. 4, shows that the deceased had on his body six injuries, namely, one contused wound on the left side of the face and head, one bruise with haemmatoma on the left side of the head and face, one bruise with haemmatoma on the left side of the neck. One bruise with haemmatoma on the front of the chest mainly on the left side, one echymosis on the left eye-brow and a bruise on the left skin. On dissection it was found that the muscles were found severely contused and there

was lacerated blood clot throughout musculation. The lower jaw had broken into small pieces and also the greater part of the ramus of the same bone. The super part artery was macerated on the leftside of the neck and there were other internal injuries. The doctor was of the opinion that all the injuries were ante mortem and that the death of the person was probably due to the combined effect of the injuries on the neck, face and chest. The prosecution case as above stated is spoken to by P. Ws. 13, 2, 8, and 4. There can be no reasonable doubt that the deceased came back to the house of the appellant on the evening of 19-5-1949 and that he was not there early morning of the 20th when is wife, P. W. 13, came and made inquiries for him. These facts are clearly made out by the evidence of P. W. 5 and P.W. 13. That the deceased was inside the house of the appellant for some considerable time on the night of 19-5-1949, is also amply made out by the prosecution evidence. P. W. 3 an Inamdar in the village and a close neighbour of the appellant, says that he saw the deceased being brought to the house of the appellant by a cartman in a retching and vomiting condition at a time when the appellant was not in the house; that the appellant returned to his house at about 6 P. M. and that he heard the sound of retching and vomiting of the deceased from inside the house of the appellant till about 10 P. M. when he went to his bed. He no doubt admits in cross-examination that he did not himself see Bhima Panda on that occasion, but says that from the sound of the retching and vomiting, which he was hearing, he was able to recognise that it was Bhima Panda, presumably because according to his evidence, he knew the deceased as he was frequenting the appellant's house fairly often. P. W. 9 gives evidence that he went out from his house to the village shop to make purchases by about 8 P.M., that when on his way he passed the house of the appellant, he heard belching sound from inside the house of the appellant both when going to the shop and returning from the shop. P. W. 10 gives evidence that on that day at about 6 P. M. when he was going to the tank, he saw a person coming towards Humagada on a cart and that on his return journey he saw the cart standing at the door of the appellant and saw a man lying on the cart vomiting and making vomiting noise. P. W. 5 himself, the cart-man who brought the deceased from Borada to Hummagada has definitely stated that the deceased was taken inside the house presumably by the appellant. The accused in his statement before the Sessions Court admits that the deceased was brought in a cart to his house that evening when he was not in his house and that when he came to the house, he found the deceased sitting on the verandah vomiting and retching. He further says that he asked him to leave the place fearing that he might have been attacked with cholera and that the deceased thereupon sat on the cart and left his place. In his earlier statement before the committing Magistrate's Court, however, he stated as follows :

"Bhima came to my house on the evening of 19th. He was sitting on the cart and was vomiting. I took him inside my house. At about 8 P. M. in the night, I had gone away to Rambha to see the Jatra. I returned back by about 9 or 10 next morning. By the time, I returned, Bhima Panda, was not in my house."

In view of this categorical admission in the committing Magistrate's Court, it is clear that his present statement in the trial Court that he sent back the deceased immediately on seeing him by the very cart on which he came fearing that he might have been attacked by cholera is an after-thought and is false. The evidence of P. W. 5 definitely contradicts this. Further as appears from the evidence of P. W. 13, the second accused, the brother of the appellant had stated to her the next morning that Bhima Panda the deceased was inside the house until about 12 P. M. in the night when he left for Rambha for the Jatra. It must therefore be taken as conclusively established that Bhima Panda was in the house of the appellant on the night of the 19th for some considerable time.

[5] There can also be no reasonable doubt on the medical evidence of P. W. 4 and Ex. 3 that the deceased met with his death as a result of serious injuries inflicted on him. Learned counsel for the appellant argued that the effective cause of the death may not have been the injuries received by the deceased in the murderous assault but only poisoning. The basis for this suggestion is the fact that on dissection in the course of the post mortem examination, the viscera of the dead body had been taken out and sent for chemical analysis and that as appears from the report, Ex. 13, atropin, the active principle of Belladona and Dhatura had been detected in the viscera. Learned counsel for the appellant points out that on the evidence it is clear that the deceased had a lot of vomiting and retching prior to his death. He suggests that it must have been the effect of Dhatura poisoning. While this may be so, there is absolutely no indication in the evidence that such poisoning was the effective cause of the death in this case. None of the usual results of such poisoning on the internal organs of the body have been found on dissection as is clear from the post mortem certificate. The doctor has not been asked whether the death was likely to have been the result of poisoning. He is clear and definite that the

deceased died as a result of the injuries received. There is therefore no room for speculation. Some faint suggestion has also been made that the deceased may have died as a result of a jackal bite. The foundation for this suggestion is a statement in Ex. 2, the report said to have been given by P. W. 13 to the village officers. In her evidence, however, she denied that her husband had been bitten by a mad jackal. There is therefore no proof of the same. It is clear beyond doubt that the deceased died as the result of a murderous assault.

[6] It is also beyond any doubt that the deceased met with his death in the village of the accused at some time before 1 P. M. on 20th since his dead body was found by the side of the village tank at 1 P. M. The only question is at whose hands did he meet with his death.

[7] There is admittedly no eye-witness to the murder. The prosecution seeks to bring home to the accused the offence of murder by relying on the circumstances. It is necessary therefore in the first instance to see what are the circumstances proved. There is the fact that the deceased was in the house of the accused on the night of the 19th some hours prior to the find, at 1 P. M. the next day, of the dead body of the deceased within a distance of probably less than a mile from his house. There is the further fact of the pressing demands of the deceased against the appellant, shortly prior to the occurrence, for the return of his money to enable him to perform his daughter's marriage, which might render it not unlikely that the appellant might have wished to do away with the deceased. A few other circumstances have also been brought out in the prosecution evidence some of which appear to be of no consequence. The Sub-Inspector of Police, P. W. 15, in a search of the house of the appellant on 26th recovered from the room in his occupation, one blood-stained lungi, Ex. 5, one blood-stained gamuchha, Ex. 6, two stones, Exs. 1 and 1-A and one grinding stone, Ex. 7, one door-plank, Ex. 2 and a clod of earth from his wall, Ex. 8. The Chemical Examiner has certified that Exs. 5, 6, 7 and 8 had stains of blood and sent them up to the Serologist for test as to the origin of the blood. The Serologist's report shows that the blood stains had disintegrated and their origin could not be detected. No significance therefore attaches at all to the find of these articles on seizure, especially having regard to the fact that the seizure was as late as nearly a week after the alleged occurrence. It further appears from the evidence of the Sub-Inspector, P. W. 15 that on 29 5-1949, he seized a cart lying by the side of the road near the house of one Dinabandhu Raja, a brother-in-law of the appellant. He found some blood stains on it and according to his evidence, there was no other cart in the village. The blood has not been certified to be human blood and it is impossible to attach any value to this evidence especially having regard to the fact that the seizure is ten days after the occurrence.

[8] The most important incriminating circumstance however on which the prosecution relies is this. It is in the evidence of P. W. 6, a resident of Raghunthpor, a village about a mile from Hummagada, that on 19th, he had taken cart-load of fruit on hire from his village to Pratappur, Jaleswar Khandi, and that on his return therefrom by about 10 P. M., he passed through Humagada village. As he was coming in his cart, he found a cart standing at the door of the accused on the road with bullocks unyoked and tied to the cart. The cart was blocking his way and he accordingly asked the man, standing by to shift the cart a little to allow his cart to pass. That person asked him to take the cart by the side way as a dead body has been loaded on it. Out of fear he left the place. He says in chief examination that as a matter of fact he saw a dead body on the cart, but in cross-examination he explains that he found a man lying in the cart and took it to be a dead body when the man standing near the cart told him that it was a dead body. It was a dark night though there was visibility. He saw the appellant and his brother sitting on the verandah of their house at the time, but that he cannot recognise the person standing near that cart. If this evidence can be taken as proving that a dead body was actually in front of the house of the accused on a cart the night of 19th at about 10 P. M., it undoubtedly leads to a reasonable inference that there was a death within the house of the accused that night to the knowledge of the appellant and this would be a very strong circumstance against the accused. Learned counsel for the appellant urges that this evidence is not admissible since what is proved is only the hearsay of some unidentified person on the basis of which this P. W. 6, believed that he saw a dead body at the time. He also urges that what P. W. 6, may have seen was only the cart in which the deceased was brought by P. W. 5 at the time when he was waiting for the arrival of the accused and just at the time when the accused had come. There is however no room for thinking that the cart which P. W. 6, saw, was the cart of P. W. 5, P. W. 6, says that the cart which he saw was an open cart while it is in the evidence of P. W. 3 that the cart on which the deceased was first brought to the house of the accused was a cart with a Doli in which the deceased at that time was lying. Furthermore, according to the evidence of P. W. 5 he left the

deceased inside the house of the accused by about two Gadhias as after sunset which he puts at 8 P. M. and left the village presumably with the cart, but according to the evidence of P. W. 6, he saw the cart on which a body was lying in front of the house of the accused at about 9 or 10 P. M. on the night. Though the exact time to which these witnesses speak may not be accurate, it does not appear likely from the evidence that P. W. 6 refers to the same point of time at which P. W. 5 was still waiting in front of the house of the accused. It must therefore be taken that what P. W. 6 speaks to, is not the cart of P. W. 5 at the time when he brought the deceased to the house of the appellant. One remarkable matter in this connection may be noticed. The accused when asked in the Sessions Court "Have you heard the evidence of P. W. 6? What have you to say to it "answers" Yes, he went past my house at 8 P. M. while Bhima Panda was on the cart alive." This taken in connection with his other answer in the Sessions Court that he sent back the deceased on the very cart of P. W. 5 fearing that he was attacked with cholera without taking him inside the house may be taken to mean that according to him, P. W. 6 saw him only when the deceased was on the cart of P. W. 5. But as already pointed out above, the defence of the accused that the deceased was sent back immediately on the same cart and was not taken inside his house is clearly false, and the evidence shows as above stated that what P. W. 6 saw was not the cart of P. W. 5. The above quoted answer of the accused however clearly shows that P. W. 6 has stated the truth when he deposed that he saw a cart with a body lying on it in front of the accused's house, P. W. 6 has not recognised the body as that of Bhima Panda, but this gap has been supplied by the accused himself in his answer. The question still remains whether what P. W. 6 say at the time was Bhima Panda alive or already dead. This depends entirely on the admissibility of the statement made by the unidentified person standing by the side of the cart to P. W. 6 to the effect that there is a dead body on the cart and offering it as a reason for taking P. W. 6's cart away by another route. The learned Sessions Judge while noticing that this statement may not be admissible being hearsay, thinks that the person who made the statement must be treated as an accomplice and that the statement is therefore admissible on that ground. The learned Judge is obviously wrong in this view. Though no doubt the unidentified person was in charge of the cart on which the dead body was found which according to his own statement was a dead body, there is no material on which it can be said that he was aware that the death was the result of a crime and that he was therefore participating in the offence of screening the evidence of the crime. It cannot therefore be assumed that the unidentified person is an accomplice. But even if he is, his statement cannot be evidence without his being examined in Court. The learned Judge obviously makes a confusion between an accomplice and a co-accused. The statement of a co-accused may be admissible in certain circumstances, though not examined, but not that of an accomplice, who is available to be examined. It may no doubt be taken to have been proved from the evidence of P. W 6 that an unidentified person stated to him that there was a dead body on the cart and that P. W. 6 believed it to be so. But this obviously is not enough unless the statement of the unidentified person is admissible as substantive evidence to prove the existence of the dead body itself at the time. The learned Government Advocate very strongly urged that it is admissible on the principle of the admissibility of *res gestae* falling within S. 6, Evidence Act. He also says that since the statement was made while, according to the evidence of P. W. 6 the accused and his brother were sitting on the verandah, it would be admissible under S. 8. The argument based on S. 8, can be summarily disposed of. What is in evidence is only that at the time when the statement was made, the appellant was on the verandah. There is no proof as to what was his reaction when he heard it or if he heard it at all. What is admissible under S. 8 is the conduct of the appellant, and the statement which effected or influenced that conduct. Though silence may in certain circumstances, amount to conduct there is no proof even of a positive silence which may conceivably be taken to be conduct. There is therefore no basis for the argument that the statement is admissible under S. 8.

[9] What therefore has to be considered is whether the statement is admissible under S. 6 Evidence Act, which runs as follows :

"Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places."

The argument strongly urged by the learned Government Advocate is that on the assumption that the murder may have taken place in the house of the appellant and that the body was disposed of by carrying the dead body on a cart and throwing it away at or about the place where it was ultimately found, the whole of the series of events from the murderous assault to the throwing away of the dead body constituted one transaction and that the statement of the unidentified person spoken to by P. W. 6 was part of that series of events and that the said

statement being a spontaneous reaction to the request of P.W. 6 for removing the cart from his way is admissible. He relies not only on S. 6, but also on the illustration "A" thereto, to show that spontaneous statements in the course of the transaction are admissible, as being *res gestae*, The learned Government Advocate referred us to authorities from tex books on the principle of *res gestae*. The term "*res gestae*" is not used in the Evidence Act and the use of that term as indicating any well-defined and intelligible principle has been strongly criticised by learned authors on Evidence like Phipson and Wigmore. They point out that it has been responsible more for confusion than for any clear definition. It also appears from the text books that the rule relating to *res gestae* has been differently understood and applied in English Law and in American Law. It is not therefore helpful to try to determine the admissibility of the statement in question by any elaborate reference to either the American Law or the English Law. We must only turn to S. 6, Evidence Act. Illustration "A" to S. 6 no doubt has indicated that the spontaneous statement of a bystander who sees the commission of murder is admissible. From this it cannot be deduced as is contended that all spontaneous statements in someway connected with the transaction under investigation are admissible. According to S. 6 what is admissible is a fact which is connected with the fact in issue as "part of the transaction."

"A transaction may consist of a single incident occupying a few minutes or it may be spread over a variety of facts etc. Occupying a much longer time and occurring on different occasions or at different places". (See Sircar on Evidence, p. 54).

Where the transaction consists of different acts, in order that the chain of such acts may constitute the same transaction, they must be connected together by proximity of time, proximity or unity of place, continuity of action and community of purpose or design. (See *Amrita Lal* v. *Emperor*, A. I. R. (3) 1916 Cal. 188 at p. 196 : (16 Cr. L. J. 497). Hearsay statements to be admissible as substantive evidence of the truth of the facts stated therein must themselves be "part of the transaction" and not merely uttered in the course of the transaction. Where the transaction is a single incident, a statement by a person who was perceiving the incident made simultaneously with the occurrence of the incident, may, with justification, be said to be part of the transaction inasmuch as it is the result of a spontaneous psychological reaction through perception. If 'A' assaults 'B' in the neck with a knife and this is seen by a bystander who exclaims 'A' is killing 'B' the exclamation is as much a part of the transaction of murder as the gushing out of the blood from the wound inflicted on the neck with the only difference that the wound inflicted is a physical reaction to the act and the other is the psychological reaction through perception. While no doubt the spontaneity of the statement is the guarantee of the truth, the reasons for its admissibility under S. 6 is that it is a part of the transaction and not merely because it is spontaneous. It must further be noted that the statement as that in Ill "A" to S [6?] is relevant only if it is that of a person who has seen the actual occurrence and who uttered it simultaneously with the incident or so soon thereafter as to make it reasonably certain that the speaker is still under the stress of the excitement caused by his having seen the incident. In the present case, in order that the statement in question may be admissible in evidence as substantive proof of the murder, it is not enough that it has been made spontanously in the course of the transaction constituted by the murder and the disposal of the dead body, but it must be made out that the person had himself seen the commission of the murder and that the statement was made almost simultaneously with it. There is no indication in this case at all that the unidentified person who made the statement had actually witnessed the murder or that no substantial time had elapsed between the occurrence of the murder and the making of the statement spoken to by P. W. 6, assuming that the murder had already taken place. Nor can the said statement be considered by any stretch of imagination to be a part of the transaction. The statement was made in answer to a request made by P. W. 6 for removing the cart out of the way. It was a statement which arose out of the mere casual accident of P. W. 6 going that way in his cart. Therefore the proximate connection of the statement is not with the murder and the attempt to dispose of the dead body, but with the mere accidental fact of some other cart coming along that way. No kind of connection by way of continuity or community of design or purpose can be traced between the murder or the disposal of the dead body and the statement made. All that can be said is that the statement was made in the course of the transaction, but it cannot be said to be part of it. If statements of that kind arising out of such accidental facts occurring in the course of a chain of events which constitute the transaction are to be treated as part of the transaction and admitted in evidence under S. 6, it will lead to a serious inroad on the salutary rule prohibiting hearsay evidence. I can see no reason for extension of S. 6 to statements of the kind in question in the present case and no authority has been placed before me to justify it. I am therefore of the opinion that the state-

ment of the unidentified person to P. W. 6 at about 10 P. M. that night that there was a dead body in front of the appellant's house is inadmissible in evidence.

[10] Ruling out the statement, therefore, the only two circumstances that remain against the appellant are as already stated, (1) the fact that the deceased was with the appellant in his house for some considerable time prior to the finding of the dead body the next day at about a mile from his house, the deceased having gone there in a state of illness. (2) The fact that the appellant might have had a substantial motive to do away with the deceased. To this, may be added the further fact that the accused gives prevaricating explanations in the committing Court and in the Sessions Court as to whether the deceased was with him on the night of 19th and that while he had no explanation to offer in the Committing Magistrate's Court as to how the deceased who admittedly came to his house in a sick condition disappeared by next morning, he gives a false explanation in the Sessions Court that the deceased was never taken into his house but was sent away immediately on the very cart on which he came.

[11] I am clear in my mind that the two circumstances stated above, apart from the attitude or explanation of the accused are not by themselves enough to bring home the guilt to the accused. The mere fact that a person has been last seen with the murderer is not by itself enough, unless it appears that he was in the company of the deceased at or about the time when and at the place where the murder appears to have been actually committed. There is no clear indication in this case where and when the murder was committed. As regards the existence of motive, it is well established that the mere existence of motive is by itself not an incriminating circumstance. The only hesitation, I have felt in the case, was whether the false explanations and the prevaricating pleas of the appellant in this case can be treated as an additional circumstance which taken in connection with the other two circumstances can be said to establish the guilt of the accused beyond any reasonable doubt. I have come to the conclusion that in the circumstances of this case, this is not enough and that the accused must be given the benefit of doubt, however grave the suspicion against him may be. The absence of any explanation or a false explanation no doubt is a circumstance that is sometimes relied on to bring home the guilt of the accused in a case depending on circumstantial evidence, on the ground that the facts proving his innocence must be within his special knowledge and that the burden of at least offering a reasonable explanation is on him on the principle of S. 106, Evidence Act. But that would be so only in a case where other circumstances proved are so sufficiently strong against him as to point to him as very probably the culprit and therefore calling for his explanation. If in such a situation the accused gives an explanation which may be reasonably true in the proved circumstances, the accused gets the benefit of doubt, though he may not prove the truth of the explanation. See *Rex* v. *Schama and Abramovitch*, (1915) 84 L. J. K. B. 396: (112 L. T. 480). But if the accused in such a case does not give an explanation at all or gives a false explanation, this by itself is a circumstance which may well turn the scale against him. But to infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its burden. In this case, as I have already pointed out, there is nothing else except the presence of probable motive and the fact that the deceased was in the house of the accused on the previous night. The position might have been different if the medical evidence indicated that the death must have occurred at a time when the deceased was found, on the evidence, to be inside the appellant's house or if any traces of human blood had been discovered inside or in front of his house or on his person or on the articles connected with him and likely to have been used in the murder. But no such facts have been proved in this case. I am, therefore, of the opinion that however grave may be the suspicion against the accused, the guilt cannot be said to have been brought home to him. The appeal must accordingly be allowed and his conviction and sentence must be set aside and he must be acquitted.

[12] I may add that one cannot help feeling that if there had been some vigorous investigation in this case, sufficient material connecting the appellant with the crime might probably have been discovered. The death must have taken place some time on the night of 19th and the F. I. R. was lodged in the police station on 20th. The A. S. I. P. W. 14 proceeds to the spot on 21st and holds the inquest and seizes only a gunny bag which is not proved to have any connection with this case. The Sub-Inspector, P. W. 15, arrived on the scene only on 22nd. Even then he did nothing more than searching the house of the appellant in respect of some medicine which he could not find. He apparently misled himself by some theory of poisoning. Neither the A. S. I. nor the Sub-Inspector, looked for the traces of any murder that may have been committed inside the house of the appellant which they should have done in view of the ap-

parent injuries on the dead body as disclosed from the inquest report, Ex. 1. The inquest report shows serious external injuries on the head and the left side of the face appearing to have been caused by some weapon. In the face of this, it is surprising that the Sub-Inspector waited as appears from his evidence for the receipt of the post mortem report before he made any further attempts to look for traces of blood in and around the house of the appellant. In fact, he actually did search only on 26th having received the post mortem report on 24th, but by then he could find nothing of any consequence. It is also a matter for regret that sufficient efforts do not appear to have been made to trace the person who was by the side of the cart and who stated to P. W. 6 that there was a dead body on the cart. P. W. 6 has no doubt stated that he is not able to identify him and there may have been consequent difficulty. But one cannot help feeling that some further vigorous efforts might have helped to secure that person to be available either as a witness or as a co-accused.

[13] **Panigrahi J.** — I agree.

D.H. *Appeal allowed.*

A. I. R (38) 1951 Orissa 60 *[C. N. 21.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Narayan Behera and others — Defendants —Appellants v. *Ch. Narasing Charan Mohapatra, Plaintiff and another, Defendant — Respondents.*

Second Appeal No. 277 of 1947, D/- 31-8-1950.

(a) Hindu law -Religious endowment — Family endowment—Permanent lease of endowed lands — Right to avoid—Who can exercise — Sale of lands in execution of decree for cess—Auction-purchaser has no right to avoid lease.

Where a permanent lease is created by a Marfatdar of a deity in respect of *lakheraj* lands belonging to a family endowment of a private nature, the right of avoidance of the permanent lease on the ground of want of legal necessity can be exercised by the succeeding Marfatdar or the members of the family. A Court auction-purchaser in execution of a decree for arrears of road-cess against the endowed estate does not, by his purchase of the right, title and interest of the judgment-debtor, acquire the right to avoid the prior permanent lease. [Para 7]

(b) Tenancy Laws—Orissa Tenancy Act (II [2] of 1913), Ss. 3 (16) and 74 — Cess is not rent — Decree for cess against estate-holder — Execution sale—Estate does not pass to purchaser.

Though 'cess' may be realisable under S. 47, Bengal Cess Act, 1880, as if it is rent, it is not 'rent' under the Orissa Tenancy Act and a sale held in execution of a decree for arrears of cess against an estate-holder who can by no means come within the meaning of S. 74, Orissa Tenancy Act, as a permanent tenure-holder or as a tenant as defined by S. 3 (23) of that Act, does not pass the estate itself to the purchaser. [Paras 12 & 13]

B. K. Pal and G. Jagati — for Appellants; L. K. Dasgupta—for Respondents.

Jagannadhadas J. — This is an appeal by defendants 2 to 4 lessees from defendant 1, against an order of remand by the lower appellate Court. The plaintiff brought a suit for recovery of 4.68 acres of Lakhraj Bahel lands which belong to defendant 1, a Thakur represented by a Marfatdar. The plaintiff is the landlord of the Touzi to which this Lakhraj land was attached for purposes of road-cess under S. 85, Bengal Cess Act. The Lakhrajdar, defendant 1 fell into arrears with reference to road-cess for the year 1940-41. Under S. 47 of the Cess Act the Touzidar is entitled to recover such arrears as arrears of rent. The plaintiff accordingly filed a suit for the said arrears, obtained a decree and purchased the property in execution sale of, the said decree. He got delivery in pursuance thereof on 11-4-41. Defendant 1 through his Marfatdar, had previously created in favour of defendants 2 to 4, a permanent lease dated 28-8-37, marked, Ex. A. The plaintiff claims to recover possession of the land covered by the permanent lease on the footing that by virtue of his purchase in court auction the prior permanent lease has become annulled and that therefore he is entitled to recover possession free of that lease. In the alternative, he claims that the lease was created by the Marfatdar of the deity without any legal necessity and that he is entitled to prove the same and get the land freed from the permanent lease on such proof.

[2] The trial Court held that the plaintiff did not obtain any first charge by virtue of the purchase which he took in execution of the decree for arrears of road-cess and that therefore he cannot treat the previous permanent lease as annulled. He also held that since he has purchased only the right, title and interest of defendant 1 as on the date when he obtained the decree, he was not entitled to question the validity of the prior lease created by defendant 1. The suit was accordingly dismissed.

[3] The plaintiff appealed to the lower appellate Court. On appeal the point relating to the annulment of the prior permanent lease as the legal result of his purchase in execution of the decree for arrears of road-cess does not appear to have been seriously pressed. The point which appears to have been argued is as to the *locus standi* of the plaintiff to question the validity of the permanent lease on the ground that it was not executed for legal necessity. The learned appellate Judge was of the opinion that the plaintiff was entitled to challenge the validity. But in view of the fact that the question as to the existence or otherwise of the legal necessity did not form the subject-matter of a

specific issue and trial, though raised in the pleadings, be, at the request of both parties, remanded the case to the trial Court in order that an issue about the question of legal necessity may be framed and tried and decided. It is against this order of remand that defendants 2 to 4 have come up in appeal before us.

[4] The main point argued on behalf of the appellants is that the learned appellate Judge was wrong in thinking that the court-auction-purchaser, the plaintiff, was entitled to challenge the validity of the prior permanent lease by defendant 1. He argues that the validity of the lease could be challenged only by the succeeding Marfatdar of the deity and for its benefit and that the right, title and interest conveyed under the court-auction-purchase does not convey the right of the judgment-debtor to question the lease. He further urges that *Mahomed Muzami Ullah Khan* v. *Mithu Lal*, 33 ALL. 783 : (11 I. C. 220), on which the learned Judge relies cannot be applied to a case like the present. I agree with the contention of the appellant. In discussing this legal question, it is necessary to mention that it has been stated by counsel for the appellant that the property we are concerned with here, is property which belongs to what may be called a family endowment constituting a private trust and that the case has gone on that footing though there is nothing very expressly on the record to substantiate it. This assertion on behalf of the appellant's counsel has not been challenged by the respondents' counsel who agrees that, that was the impression on which the case was conducted throughout. I state this at the outset of the consideration of the legal question, because it is conceivable that if the endowment was a public endowment, different considerations may arise.

[5] The question that arises for decision is whether when in respect of a family endowment of a private nature, a perpetual lease which may be invalid for want of legal necessity, is created, the subsequent purchaser thereof in court-auction, has the right to challenge the validity of the lease. There is no doubt that the succeeding Marfatdar or other members of the family interested in the endowment and upkeep are entitled to challenge the validity for the benefit of the deity. It is said that this right of challenge is incidental to the property which has been transferred and passes to the transferee with the property transferred. It is argued on behalf of the respondents that once a property is transferred, the right to challenge any prior transaction affecting it which in any way detracts from the full enjoyment of the property is incidental to the transfer itself as being an incident of the property-right transferred. In support of this certain cases have been cited of which it is sufficient to refer to the cases in *Dickinson* v. *Burrell*, (1866) 1 Eq. 337 : (35 L J. Ch. 371) and *Khudi Ram* v. *Somnath*, A. I. R. (20) 1933 Cal. 451 : (143 I. C. 575). This legal position is undoubtedly correct. But it does not follow that where the right of challenge is a right of avoidance and where the transfer is of the right, title and interest of the judgment-debtor in court sale, such right of avoidance is necessarily incidental to the transfer of right, title and interest. That must depend upon the nature of the right of avoidance and the ambit of the right, title and interest purchased. A prior transaction may be totally void and in such a case the right of challenge and avoidance may be nothing more than the obtaining of declaration that the property is unaffected by the prior transaction. On the other hand, a prior transaction may be avoidable either in the sense that it is good until actually set aside or though invalid from its inception, such invalidity can be taken advantage of only by certain persons who have either the option to affirm or disaffirm the transaction. (See *In re Appava Naicken*, A. I. R. (18) 1931 Mad. 377 at p. 379 : (128 I. C. 695) ; *Kesheo Prasad Singh* v. *Chandrika Prasad*, A. I. R. (10) 1923 Pat. 122 at p. 128 : (2 Pat. 217) and *Hanmanthappa* v. *Dundappa*, A.I.R. (21) 1934 Bom. 234 at p. 239 : (151 I C. 1043), for the distinction between void and voidable. In such cases, the right of avoidance is in the nature of a personal right and is not necessarily implicit in the transfer of the property. The person affected by the prior transaction having the option either to ratify or affirm the transaction it cannot necessarily be assumed that that option which is personal to him has been transferred, even assuming that such a personal right can be the subject-matter of the transfer, in view of the fact that the property itself is transferred. See *Inayat Elahi* v. *Hardeo Sahai*, A. I. R. (11) 1924 ALL. 29 at p. 30 : (45 ALL. 692).

[6] Learned counsel for the respondents has drawn our attention to the case in *P. Kamaraju* v. *Gunnayya*, A. I. R. (11) 1924 Mad. 322 : (74 I. C. 1003) and similar cases, but they are cases where the prior transaction consisted of an absolute sale of the entire property under circumstances which are open to challenge and the later transfer is of that very property by the very person entitled to challenge and in such a case, the later transfer itself amounts to exercise of the right of avoidance by the very person entitled to avoid it originally. But where as in the present case, the prior transaction was only a transfer of limited interest in the property, a subsequent transfer may be merely of the outstanding

interest or it may be of the property itself under terms and in circumstances which express or imply the avoidance of the prior transaction by the transferor himself, what it actually is depends on facts.

[7] In the present case, the prior transaction sought to be challenged by the plaintiff is a permanent lease created by the Marfatdar, defendant 1 on behalf of the deity. If, as has been assumed, the endowment is a private family trust, the only persons entitled to challenge the alienation are the members of the family. They have the right either to affirm it, or disaffirm it because it is well settled that they could even withdraw the endowment from the trust by their consensus as held by the Privy Council in *Durga Nath* v. *Ramchunder*, 2 Cal. 311 : (4 I. A. 52 P. C.). It therefore follows that the right of avoidance of the permanent lease in this case could be exercised only by the succeeding Marfatdar or the members of the family. The plaintiff cannot be said to have that option vested in him as a result of his court-auction purchase. Indeed a court-auction purchase which is *in invitum* and not based on the consensus of the judgment-debtors, cannot be taken to proceed on the footing of the judgment-debtor having previously exercised his right of avoidance. There are no doubt certain cases where a court auction-purchaser has been permitted to exercise the right of avoidance which his judgment-debtor had. But all the cases of such kind which have been brought to our notice are cases relating to the purchase *in court auction of the undivided interest of a Hindu coparcener* and they stand on a special footing. The right of the court auction-purchaser in such cases to challenge a prior avoidable transaction has been based on the Privy Council decisions which recognise the equity of the court-auction-purchaser to compel the partition of the family property which his judgment-debtor could have. See *Deendayal Lal* v. *Jugdeep Narain Singh*, 4 I. A. 247 : (3 Cal. 198 P. C.), *Balgobind* v. *Narain Lal*, 15 ALL. 339 : (20 I. A. 116 P. C.). The case in *Mahomed Muzami Ulah Khan* v. *Mithu Lal*, 33 ALL. 783 : (11 I. C. 220) which has been relied on by the lower appellate Court is a case which is based on the authority of those cases. It appears to me therefore that the plaintiff in this case has not, by his purchase of the right, title and interest of his judgment-debtor, acquired the right to avoid the prior permanent lease. The question of legal necessity does not therefore arise and the order of remand by the lower appellate Court is erroneous.

[8] The respondent has filed a memo of cross-objection raising the question that by virtue of his auction-purchase in execution of decree for arrears of land-cess, he takes the property free of any prior encumbrance and is therefore entitled to treat the permanent lease as annulled. If this contention is correct, the suit is bound to succeed on this single ground alone. It appears, however, from the judgment of the lower appellate Court that this question was not pressed before that Court, though the point had been decided against the plaintiff in the trial Court. Since, however this is a pure question of law, we have allowed learned counsel for the respondent to argue it. I am satisfied, on a consideration of the relevant provisions, that his argument is untenable. It is no doubt true that the arrear of road-cess is collected by the Touzidar under S. 47, Cess Act, whereby he can collect it as an arrear of rent. Learned counsel for the respondents relies on the definition of the word "rent" in the Orissa Tenancy Act and points out that that definition for certain purposes includes also any money recoverable under any enactment for the time being in force as if it was rent. One of the purposes so specified is S. 74, Orissa Tenancy Act, under which a landlord has a first charge. It appears to me, however, that the arrear of land-cess cannot be treated as rent falling within this definition. That definition by the very connotation of the words and phrases therein applies as between persons from whom the rent as such is recoverable, for instance, as between a landlord and tenant and the like. It is unnecessary for me however to deal with it at any great length as the same will be dealt with fully by my learned brother.

[9] In the result, the appeal must be allowed and the suit must be dismissed with costs throughout.

[10] **Panigrahi J.**—I agree, and would like to add a few words. Mr. Dasgupta appearing for the plaintiff-respondent relied upon certain provisions of the Cess Act (Bengal Act IX [9] of 1880) and certain other provisions of the Orissa Tenancy Act of 1913, and contended that 'cess' is rent within the meaning of the Orissa Tenancy Act and what passed at a sale held in execution of a decree for arrears of cess is the tenure itself and not merely the right, title and interest of the judgment-debtor. As this question is of some importance, I would like to make a few observations.

[11] The contention is that under S. 47, Cess Act, the holder of an estate to whom any sum may be payable under the provisions of the Cess Act may recover the same with interest at the rate of twelve and a half percent per annum in the same manner as if they were arrears of rent due to him. It is next pointed out that the

Orissa Tenancy Act defines rent as including "also money recoverable under any enactment for the time being in force as if it was rent." It is, therefore, contended that "cess" is rent within the meaning of the Orissa Tenancy Act.

[12] It is next contended that S. 74, Orissa Tenancy Act, which creates a first charge in respect of rent on a holding is one of the sections specifically mentioned in S. 3 (16) of the said Act in defining rent. It is, therefore, argued that cess' like 'rent' is a first charge upon the holding within the meaning of S. 74, Orissa Tenancy Act. If this is correct, the rest of the provisions of the Tenancy Act would undoubtedly apply and what would pass at the execution sale is the tenure itself and not the mere right, title and interest of the judgment-debtor. If the hypothesis on which this argument proceeds is correct, the result must follow. But I am unable to accede that the hypothesis itself is right. To appreciate the position, it is necessary to refer to certain provisions of the Cess Act. Section 4, Bengal Cess Act defines an "estate" as land included under one entry in the general registers of revenue-paying lands and of revenue-free lands prepared and maintained by the Collector of a District under the Land Registration Act, 1876, or under any similar law for the time being in force. The land is admittedly registered as Lakhraj-Babel of defendant 1 recorded under special NO. 8753 and general NO. 31239 of Mauza Bichitrapur. Section 41 (1), Cess Act prescribed the mode of payment of cess by the holder of an estate. It says:

"Every holder of an estate shall yearly pay to the Collector the entire amount of the local cess calculated on the annual value of the lands comprised in such estate ....."

and S. 41 (2) prescribes how a tenure-holder is to pay the cess and S. 41 (3) prescribes how a cultivating raiyat and the holder of a chaukidari chakaran is to pay cess for every year. Section 85 of the Act makes a special provision for Orissa and lays down that

"any revenue-free estate not exceeding 500 standard bighas in extent, of which the valuation shall have been completed, shall, for the purpose of payment and levy of the cess due in respect thereof, be annexed to any other estate within the ambit of which it is situate or which it adjoins."

It would, therefore, appear on a mere reading of these provisions that defendant 1 who is the holder of an estate is liable to pay his cess to the Collector and for purpose of collection this estate has been annexed to the neighbouring estate of the plaintiff, namely, plaintiff's Touzi NO. 3797. I may also mention here that under S. 9, Cess Act, any cess payable by an estate-holder to the Collector may be realised as a public demand and would obviously come within the public demand enumerated in Sch. I, Bihar and Orissa Public Demands Recovery Act, 1914. The question, therefore, is, if the holder of the neighbouring touzi has been authorised by the Collector to collect the cess due from this estate, does he fulfil the character and role of the Collector and does the estate-holder become his tenant within the meaning of Orissa Tenancy Act? It is clear that if the Collector were to file a suit or to recover it under the Public Demands Recovery Act, what would pass to the purchaser in such a sale held by him is only the right, title and interest of the judgment-debtor and not the estate itself. See *Mahanund Chuckerbutty* v. *Banimadhub Chatterjee*, 24 Cal. 27 and *Ahsanulla* v. *Manjura Banoo*, 30 Cal. 778. Does it make any difference if that collection is made by the holder of a Tauzi to whom the right of collection has been assigned by the Collector? Section 74, Orissa Tenancy Act, on which reliance has been placed runs as follows:

"Where a tenant is a permanent tenure-holder, a *bajiaftidar*, a raiyat holding at fixed rate, a *chandnadar* or an occupany raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

Is defendant 1 who is holder of an estate, a tenure-holder, within the meaning of the Bengal Cess Act? "Tenure" is defined in S. 4 (3) of the said Act as including every interest in land, whether rent-paying or not, save and except an "estate" as above defined. *The "holder of an estate" has been in explicit terms excluded from the definition of "tenure."* Defendant 1 can by no means come within the meaning of S. 74, Orissa Tenancy Act, as a permanent tenure-holder. Nor can his status be that of a tenant as defined by the Act itself. 'Tenant' is defined in S. 3 (23) and

"means a person who holds land under another person and is, or but for a special contract would be liable to pay rent for that land to that person."

Defendant 1, as has already been pointed out, holds the land under the Collector on a revenue-free tenure and not as a tenant under the plaintiff. Section 74, Orissa Tenancy Act, therefore, cannot be invoked by the plaintiff in this case, and the definition of "rent" must apply only to such classes of people between whom there is the relationship of landlord and tenant.

[13] My conclusion, therefore, is that "cess" is not "rent," though it may be realisable as if it was rent under the Orissa Tenancy Act and a sale held in execution of a decree against an estate-holder doe not pass the estate itself to purchaser. The plaintiff must, therefore, fail on this ground also.

[14] In the result the suit must fail and the appeal allowed with costs as has been directed by my learned brother.

K.S. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 64 *[C. N. 22.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Ramachandra Tripathy, Defendant-Appellant v. *Maguni Tripathy* -- *Plaintiff—Respondent.*

Second Appeal No. 84 of 1947, D/- 28-3-1950.

(a) Hindu law— Adoption—Custom—Civil P. C. (1908), S. 100.

The adoption of a daughter's son is valid by custom though not according to general Hindu law. The question of the validity of such adoption cannot be allowed to be taken for the first time in second appeal. [Para 2]

Anno. C. P. C., S. 100 N. 21.

(b) Civil P. C. (1908), S. 9 — Right to officiate as priest.

Though the right to officiate as a priest or as a Guru *simpliciter* is not a civil right, such a right has been recognised where it amounts to an office attached to an institution such as a temple. When the question whether there is such an office is in issue, the fact that there are emoluments of a non-gratuitous character payable out of the funds of the institution, has generally been considered as relevant though the absence thereof is not always decisive. [Para 5]

Anno. C. P. C., S. 9 N. 35.

(c) Civil P. C. (1908), S. 9—Claim to office—Test.

The crucial test in considering whether the claim to the purohitship of a temple is a claim to an office or not is whether there are duties attached to the purohitship which are enforceable by law, custom or usage, whether by deprivation or other temporal sanction. [Para 15]

Anno. C. P. C., S. 9 N. 35.

R. K. Ratho and B. K. Pal—for Appellant; B. N. Das—for Respondent.

Jagannadhadas J. — Defendant is the appellant in this second appeal. It arises out of a suit brought by the plaintiff for a declaration that he is the Purohit of the deity of Kapileswar in Chonomeri, and that he is the Guru of the Archakas of the said deity, and for the issue of a permanent injunction restraining the defendant from interfering with his rights as such Purohit and Guru. Both the plaintiff and the defendant trace their title from a common ancestor, Madhab Tripathi, who had two sons, Kapila and Harekrishna The last descendant in the male line of Harekrishna was one Dasarthi who died unmarried at a young age in or about 1927. The defendant is his sister's son. The plaintiff is the descendant of the said common ancestor Madhab Tripathi, through Kapila. His father, one Agadhu, was a daughter's son in the male line of Kapila. But it is the plaintiff's case that the said Agadhu was adopted to one Lokenath, the brother of his maternal grand-father, Jugalo, was a direct agnatic descendant of Kapila so that in law Agadhu was also an agnatic descendant of Kapila through Lokanath. The plaintiff was therefore according to his case an agnatic descendant of Kapila through his father Agadhu. It is the case of both parties that for a very condsiderable time, the duties of the Purohit of this temple and of the Guru of the Archakas, were being performed by the members of the family of Madhab Tripathi. It is not very clear .rom the plaint whether the alleged right was being enjoyed by the two branches of Madhab Tripathi's family jointly or in severalty by some arrangement of partition, but in his evidence the plaintiff says that both sharers perform the service by turns and sometimes jointly. The plaint proceeds on the footing that the plaintiff as an agnate is the successor to the rights of Dasarathi Tripathi, the last agnatic descendant of Harekrishna's line in preference to the defendant who is Dasarathi's sister's son, without any clear indication whether Dasarathi was only a part-owner of the rights the rest being already vested in him. However that may be, the plaintiff would be the full owner of the said rights if his case is established. The defendant contested the suit on various grounds. He denied that the plaintiff's father Agadhu was adopted to Lokanath and asserted that plaintiff was only a cognate heir of late Dasarathi, remoter than himself. He put forward a will by the late Dasarathi in his favour. He maintained that the plaintiff's suit was not maintainable being one not appertaining to a civil right. He further contended that the suit was barred by limitation. The Courts below have held against the defendant on all these points and hence this second appeal.

[2] It cannot be disputed that if plaintiff's father Agadhu is not the son of Lokanath, he would, in relation to Dasarathi, be only the daughter's grandson of a collateral agnate and thus would be remoter in heirship than the defendant who is Dasarathi's sister's son. Both the Courts below however have held it clearly established that the plaintiff's father Agdhu, who is the Daughter's son of one Jugal, was adopted to Jugolo's brother, Lokanath, relying on the recognition of Agadhu as such adopted son in various documents, viz., Exs. 1 to 7. The factum of such adoption must therefore be taken to have been conclusively established between the parties and is not challenged in second appeal. Learned counsel for the appellant however has attempted to argue that the adoption of Agadhu by Lokanath was invalid in law inasmuch as he was the daughter's son of his own brother, Jugal. There is no trace of any such contention in the Courts below. It is no doubt true that the adoption of a daughter's son is not recognised as

being valid according to general Hindu law. (See Privy Council case in *Bhagwan Singh* v. *Bhagwan Singh*, 21 ALL 412: (26 I. A. 153 P.C.). But it is also recognised that such an adoption is valid by custom. Such a custom is now well established in South India. (see *Vayidinada* v. *Appa*, 9 Mad. 44 (F. B.), *Ranganayakamma* v. *Somasundara Rao*, A. I. R. (7) 1920 Mad. 451 : (43 Mad. 876), and *Soorathx Singa* v. *Kanaka Singa*, A. I. R (7) 1920 Mad. 648: (43 Mad. 867). The question of the validity of adoption of the daughter's son being therefore one which depends on proof of custom cannot be permitted to be taken for the first time in second appeal, when the Courts below assumed its validity without any objection being raised. It is not at all unlikely that no such objection was raised in the Courts below, because the parties are Oriya Brahmins of Ganjam District which until 1936 formed part of the Madras Province, and who presumably followed the laws and customs relating to adoption as prevalent in the Madras Province. It is noteworthy that in the case in *Ranganayakamma* v. *Somasundara Rao*, A. I. R. (7) 1920 Mad. 451 : (43 Mad. 876), where this custom was upheld on the evidence of various instances of such adoptions, 22 of such instances related to Oriya Brahmins of Ganjan District. See *Ranganayakamma* v. *Somasundara Rao*, A. I. R. (7) 1920 Mad. 451 at p. 465, Col. II : (43 Mad. 876). The attempt to raise this question therefore in second appeal must be disallowed.

[3] As regards the defence that the defendant was entitled to the rights of the deceased Dasarathi Tripathi, under the alleged will. Ex. A, the plaintiff answered the same by putting forward a release-deed, Ex. I executed by the father of the defendant as his guardian. Both the Courts below have held and, quite rightly, that Ex. A is not a will, but is a settlement deed requiring registration and that therefore the defendant can derive no rights under it. This defence has not been pressed before us. As regards the plea of limitation, raised by the defendant, both the Courts below have concurrently found that since the date of Dasarathi Tripathi's death in or about 1927, the plaintiff has been performing the duties of his alleged office and no question therefore of any limitation arises. This contention also has not been repeated before us.

[4] The only question that has been strongly argued before us in this appeal is that the rights asserted by the plaintiff in this suit are not civil rights and that the suit is not of a civil nature and therefore the suit is not maintainable. This is the only substantial question in this appeal. It is urged that there can be no civil right to officiate as a Purohit or as a Guru, that the members of the public are entitled to choose whomsoever they like to minister for them as their Purohit or as their Guru and that no declaration can be granted recognising such a right in one person, nor can any injunction be issued restraining another person from officiating as a Guru or Purohit. It has been pointed out that the Courts below have proceeded on the erroneous view that the question as to whether there is such a civil right or not depends on whether it carries any emoluments and that they assumed without any basis that the rights asserted by the plaintiff amount to an office carrying certain emoluments.

[5] There can be no doubt that the right to officiate as a priest or as a Guru simpliciter is not a civil right and that no suit lies to enforce the same. This is well settled as appears from the cases in *Hira Pandey* v. *Bachu Pandey*, A. I. R. (3) 1916 Pat 215 : (1 Pat. L J. 381) ; *Ahmed Hussain* v. *Ghulam Ali*, A. I. R. (6) 1919 Pat. 313 : (52 I. C. 866) ; *Dinanath Jha* v; *Ganesh Dutt*, A. I. R. (16) 1929 Pat. 103 : (8 Pat. 677), and *Tholappala Charlu* v. *Venkata Charlu*, 19 Mad. 62 : (5 M. L. J 209). A distinction has however been made as regards cases where the ministration of priestly services amounts in law to "property" or to an "office". Explanation to S. 9 of the Civil P. C., recognises that a right to property or an office may be one of a civil nature, notwithstanding that it may depend entirely on the decision of questions as to the religious rights or ceremonies. While therefore a right to officiate as a priest of a particular community or in a particular locality has not been normally recognised as offending against the general right of the public or of the members of a community to choose whomsoever they may like for purposes of spiritual ministration, such a right has been recognised where it amounts to an office attached to an institution such as a temple. Religious and priestly offices attached to temples and the like institutions have been in vogue in the country by long-standing custom and are recognised by law as a species of property. The restriction thereby implied, if any, on the freedom of choice of a priest or other religious minister by the person requiring ministration is one that is in the larger interests of orderly and disciplined administration of such institutions. An office so attached to an institution may exist whether with or without emoluments and whether the emoluments incidental thereto are gratuitous or obligatory. When the question whether there is such an office is in issue, the fact that there are emoluments of a non-gratuitous character payable out of the

funds of the institution, has generally been considered as relevant though the absence thereof is not always decisive. In support of what has been stated above, it is sufficient to refer to the following cases : *Krishnama* v. *Krishnaswami*, 2 Mad. 62 : (6 I. A. 120 P. C.) ; *Amrito Moyee* v. *Bhogiruth Chundra*, 15 Cal. 164 ; *Kali Kanta* v. *Gouri Prosad*, 17 Cal. 906 ; *Dino Nath* v. *Pratap Chandra*, 27 Cal. 30 ; (4 C. W. N. 79) ; *Dwarka Missar* v. *Ram Pratap Missir*, 10 I. C. 41 : (13 C. L. J. 449) ; *Debendra Narain* v. *Satya Charan*, A. I. R. (14) 1927 Cal. 783 ; (54 Cal. 614); *Bhashyam Konayamma* v. *Rangacharayulu*, A. I. R. (15) 1928 Mad. 851 : (110 I. C. 782) and *Satish Chandra* v. *Dharanidhar Singha*, A. I. R. (27) 1940 P. C. 24 at p. 28 : (I. L. R. (1940) Kar. P. C. 47). Cases have also recognised as between members of a family, a species of property in priestly services, though not amounting to an office, where it has been found that for generations past, the priestly family has developed a reputation and a sanctity which attracts to it a large body of pilgrims who on account of sentimental attachment make substantial offerings to the members of the family, who minister to their religious needs and in particular where such ministration is connected with certain large and reputed pilgrim centres such as in the cases of Gayawals, Pragwals, Gangaputras and Pandas. (See *Lachmanlal* v. *Baldeo Lal*, A. I. R. (4) 1917 Pat. 37 : (2 Pat. L. J. 705), *Mt. Sarda Kunwar* v. *Gajananda*, A. I. R. (29) 1942 ALL. 320 : (I. L. R. (1942) ALL. 821), See also *Mahadev Vajulu* v. *Mathura Suryaprakasam*, A. I. R. (2) 1915 Mad. 597 : (24 I. C. 204) (Contra). The question for consideration in this case has to be decided with reference to these well-settled principles. In the present case what is claimed by the plaintiff is not the right to officiate as the priest of a particular class or in a particular locality, but the right to officiate as a priest in a particular temple, and as a Guru of the Archakas of the temple. At this stage, it may be convenient to deal with the question of the right as a Purohit and the right as a Guru separately. It is necessary to deal with the evidence on record relating to these as the Courts below have not correctly appreciated the legal principles to the same.

[6] As regards the right to Purohitship the plaintiff's evidence is as follows :

"I receive, remuneration on different occasions when I perform Purohit work such as I receive Rs. 6 as Dakhina and Rs. 2 for cloth. On *Makar* day I receive *Prasad*. On *Sivaratri* I offer Bhog and receive *Prasad* On Mesa *Sankranti* I receive Bhog and take *Prasad*. In the *Jaistha*, I perform the marriage of the deity Kapileswar. I receive cloth, Dakhina and rice. On *Binayak Chaturthi* I get *Prasad* on performing *Puja*. All these are performed in the temple of Kapileswar and I do these works as Purohit."

He also says the remuneration for Purohit is met from the temple funds. He is supported in his evidence by one of the temple trustees, P. W. 2, an old man of 60 who though only a trustee for the last four years has been a resident of the place all along, and speaks to the plaintiff's family performing the Purohit's work in the temple for generations and speaks to the plaintiff himself doing Purohit work for about thirty years. This evidence is supported by other witnesses, P. Ws. 3, 4 and 5. The defendant both in the plaint as well as in his evidence as D. W. 4 admits this, in essence, inasmuch as it is also his case that his ancestors have been doing this Purohit service and have been getting emoluments therefor. His plea in the written statement while admitting these facts is that it was in the nature of a moral right and not a civil right. His most important witness, D. W. 3, the managing trustee of the temple also admits that the family has been performing the Purohit services from generation to generation and that the emoluments therefor are paid from the temple funds and are entered in the accounts, though he would have it that prior to Purushottam Tripathi, a person used to come from Phasiguda and work as the Purohit for the temple. On this evidence, there can be no reasonable doubt that as a fact the family to which the plaintiff belongs has been performing Purohit services in the temple for some generations at least from the time of Purushottam, and that the remuneration for the same is being paid out of temple funds. Whether this is enough to make out a hereditary claim to an office of the Purohit in the temple as against the temple authorities or not, it appears to me that as between the members of the family and the parties to this litigation, this is enough to make out that it is an office of a civil nature and is an item of property as between members of the family. Learned counsel for the appellant urges that there can be no right to an office unless it is clear that there is a compellable duty attached to it and cites *Ayyanachariar* v. *Sadagopa Chariar*, A. I. R. (26) 1939 Mad. 757 ; (189 I. C. 190). He relies on the evidence of D. W. 3, the managing trustee to show that there is no such compellable duty attached to this supposed office. It appears to me however that the plaintiff cannot be denied relief on this ground. In cases where the office has been claimed on the footing that it is attached to a temple, it must be taken as implicit in the very pleading of the plaintiff that he admits the existence of such a duty and the plaintiff in his evidence also

virtually admits the same. D. W. 3 no doubt states in his evidence that there is no compulsion to do the Purohit work and that he can appoint any person he likes to be the Purohit of the deity. He has given no instances of his having so appointed any different person at any time other than a member of this family and he admits that the Archakas and Purohits of the temple are coming from generation to generation. It is to be noticed that in the various reported cases where such religious offices attached to a temple have been recognised, there is no specific discussion as to the compellable obligation attached to such office which suggests that such obligation is assumed from the fact that the office is found to be hereditary. In the circumstances, I have no difficulty in holding that the claim of the plaintiff to the Purohitship of the temple amounts to a right to an office recognisable in law and that he has substantiated the same.

[7] As regards the claim of the plaintiff to be the Guru of the Archakas of the temple, the evidence stands on a somewhat different footing. It would appear that what he has to do as the Guru of the Archakas is to give the Karna Mantra to the Archaka and to teach him the Puja Bidhan (rules of worship) and that the person who receives this Mantra pays nothing fixed as Dakhina and that each gives according to his means. (See the evidence of P. W. 4). It would appear no doubt that the plaintiff's family have been rendering services as Guru of the Archakas hereditarily in the same way as they have been performing the duties of the Purohit of the temple. It is probably meant to be the plaintiff's case that he is the Guru of the Archakas inasmuch as he is the Purohit of the temple but this is not so specifically stated. The plaintiff himself states in his evidence as follows;

"The duties of the Guru is to give them (Archakas) Mantra and to teach them Puja Nyasa. I never force them to take Mantra, but they are bound to come to me for Mantra as there is nobody else to give them Mantra."

He also admits that defendant's forefathers have also initiated some of the Archakas. P. W. 2 says :

"In case an Archaka does not desire to take Mantra from the Guru he can take from an agnate, failing which he cannot get salvation. He can get Mantra from anybody."

There seem to be as many as nearly 100 Archakas connected with this temple according to the evidence of witnesses. While no doubt the Archakas are connected with the temple, it is not unlikely that the plaintiff's family, being the Purohit of the temple, has in fact, been ministering as the Guru of the Archakas. It may have been possible to make out such an office if it was established that no person could officiate as an Archaka of this deity unless he received the Mantra and the Puja Nyasa from a member of the plaintiff's family and accepted him as his Guru. Indeed that is what the plaintiff himself claims to be the position in his evidence, but he is not supported in it by his witness, P. W. 2. There being, therefore, no necessary connection made out on the evidence between the duties of the plaintiff's family connected with the temple and his ministration of services as the Guru for the Archakas, it cannot be held that the plaintiff has established a civil right to the Guruship which he has claimed as an office appurtenant to the temple. The trial Court has given a decree in favour of the plaintiff in respect of the Guruship also without adverting to the difference in the nature of the evidence relating to the two. The appellate Court however thinks that what the plaintiff asks is his right to be the Guru of the Archakas of the deity in his capacity as the Purohit and what he has found is this alleged limited right. In so finding, he has made a note that the plaintiff's right cannot affect or interfere, in any way with the defendant's right to minister to the spiritual needs of the Archakas by being their Guru in his own individual capacity independent of the office of the Purohit of the deity. This limitation has been incorporated in the modified decree that he has passed. It is doubtful whether such a limitation is workable. It seems to me however that, as pointed out by me above, there is no evidence in this case which establishes that there is an office of the Guru of the Archakas attached to this temple with the limitation specified or that the Guruship is incidental to the office of the Purohit. I am, therefore, of the opinion that the claim of the plaintiff to the office of the Guruship of the Archakas of the temple has not been made out. This, however, does not mean that if there is any usage of the institution whereby an Archaka receives the Mantra and the Puja Bidhan from a member of the plaintiff's family as a matter of spiritual sentiment, this is in any way intended to be affected. That is a matter for internal regulation by the appropriate temple authorities.

[8] In the result, therefore, the appeal must be allowed in so far as the claim of the plaintiff to the right of the Guru of the Archakas is concerned and must be dismissed with reference to his claim as the priest of the temple. The decree of the Courts below will be modified accordingly. In the circumstances, there will be no order as to costs of this appeal.

[9] **Narasimham J.**—I agree that the appeal should be partially allowed as suggested in the

judgment of my learned brother. The main question of law for consideration is the maintainability of the suit under S. 9, Civil P. C.

[10] The reliefs asked for by the plaintiff are (i) a declaration that he is the Purohit of the deity of Kapileswar of Chanameri village; (ii) a declaration that he is the Guru of the Archakas of the said deity.

[11] It was the common case of both the parties that the right to the Purohitship of the said deity was all along vested in the family of Madhab Tripathy, their common ancestor. They claimed it as a hereditary right and the main dispute was whether the plaintiff or the defendant had the preferential right.

[12] Certain specific duties in the temple were ascribed to the Purohit such as offering Puja and Bhog during Shibaratri, performance of marriage of the deities in the temple in Jaistha and performance of Puja on Binayaka Chaturthi day. For performing such duties the Purohit was receiving certain emoluments and perquisite from temple funds. The question for consideration, therefore, is whether the Purohitship of the temple of Kapileswar is an 'office' within the meaning of the Explanation to S. 9, Civil P. C. As early as 1879, the Privy Council in *Krishnama* v. *Krishnasami*, 2 Mad. 62: (6 I. A. 120 P. C.) approved a decision of the Madras High Court in *Narasimma Chariar* v. *Sri K. T. Chariar*, 6 M. C. R. 449 to the effect that claim to certain pecuniary benefits and payments in kind in respect of performance of certain religious services in a temple was entertainable in a civil Court. The construction of the expression 'office', however, came up for consideration later in *Srinivasa Thathachariar* v. *Srinivasa Aiyangar*, 9 M. L. J. 355, where Subrahmania Aiyar C. J. observed:

"Now the term 'office' in the sense with which we are concerned, implies, of course, a duty in the office-holder to be discharged by him as such."

and he relied on Kent's Commentaries where it was pointed out:

"Offices consist in a right, and corresponding duty, to execute a public or private trust and to take the emoluments belonging to it."

O'Farrell J., in a separate concurring judgment observed:

"In order that an office may exist there must be a duty enforceable by deprivation or other temporal sanction. Where there is no duty or a duty enforceable merely by moral or social sanctions, there can be no office."

In *Sri Ranga Chariar* v. *Rangasami Battachar*, 32 Mad. 291 : (3 I. C. 881), the question for decision was whether a suit for certain honour (First thirtham) in a temple was maintainable and it was held that where the honour in question was a remuneration for a hereditary office involving both secular and religious duties inseparable from the office, a suit was maintainable. In coming to this conclusion the High Court relied on the finding of the lower Court to the effect that the plaintiffs as office-holders were bound to perform certain duties in the temple. In *Chunnu Dattu* v. *Babu Nandan*, 32 ALL. 527 : (6 I C. 223) while dismissing a suit for declaration that the plaintiff was entitled to perform certain religious pageants in Benares, the High Court of Allahabad (at p. 588) laid emphasis on the absence of any obligation on the plaintiff to undertake any responsibility in the matter of pageants. In *Mahomed Sahib* v. *Sayed Sahib*, A. I. R. (3) 1916 Mad. 379 : (28 I. C. 459) also Tyabji J., pointed out that the "existence of something which may be described as the duties of the person holding office" is a necessary part of that which is connoted in the term 'office.' In *Lachman Lal* v. *Baldeo Lal*, A. I. R. (4) 1917 Pat. 37 : (2 Pat. L. J. 705) while discussing the case of Gayawals, Mullick J. pointed out that the essential of an office is a duty to some person enforceable by law custom or usage. To a similar effect are the following observations of Krishnan J. in *Venkatachariar* v. *Ponappa*, A. I. R. (6) 1919 Mad. 1026 : (45 I. C. 959) :

"It is clear that to constitute an office, one, if not the essential, thing is the existence of a duty or duties attached to the office which the office-holder is under a legal obligation to perform and the non-performance of which may be visited by penalties such as suspension, dismissal etc."

In *Chinnaswami Thathachariar* v. *Singaracharlar*, A. I. R. (15) 1928 Mad. 377 : (109 I. C. 771) also while discussing the duty of an office attached to the well-known temple at Conjeeveram, Srinivasa Aiyangar J., pointed out:

"An office in connection with such institutions must really be regarded as a bundle of duties liable to be performed by the same persons under a particular designation and carrying with it certain emoluments."

In a recent decision reported in *Ramaswami Goudan* v. *Lakshmana Reddi*, A. I. R. (26) 1939 Mad. 886 : (I. L. R. (1940) Mad. 40) also it was emphasised that the conception of an office involves a corresponding obligation to perform the duties of the office.

[13] There is thus sufficient authority to support the view that the expression 'office' in the Explanation to S. 9, Civil P. C., means a position which has some duties attached to it to be performed by the holder of the office and which are enforceable by law, custom or usage. It is true that generally such offices are attached to institutions like temples, muths etc. But there may be offices of a purely personal nature attached to no institution at all. In the present case, however, any discussion about an office which is not attached to an institution would be merely academic because the Purohitship in question

is claimed in respect of the temple of Kapileswar. It is therefore unnecessary to discuss how far a claim to a bare personal office would come within the scope of S. 9, Civil P. C., regarding which there seems to be some apparent conflict of authorities (see *Gour Mani Debi* v. *Chairman of the Panihati Municipality*, 6 I. C. 861: (12 C. L. J. 75) and *Debendra Narain* v. *Satya Charan*, A. I. R. (14) 1927 Cal. 783: (54 Cal. 614).

[14] Though, ordinarily, emoluments are attached to an office, and some emoluments have actually been claimed in the present litigation, there may be offices without emoluments at all (see *Sayad Hashim Saheb* v. *Huseinsha*, 13 Bom. 429 and *Ram Bayan* v. *Bapu Ram*, 15 Cal. 159.)

[15] Therefore, the crucial test in considering whether the claim to the Purohitship of the temple of Kapileswar is a claim to an office or not is whether there are duties attached to the Purohitship which are enforceable by law, custom or usage, whether by deprivation or other temporal sanction (to quote O'Farrell J.). The plaintiff stated that he has the right to perform the duties of Purohitship and if for any reason he is unable to perform the same his representative would do it. He thus admits that it is a duty cast on his family. The Managing Trustee, Mohan Bisoi (D. W. 3), doubtless stated that there was no compulsion to do the Purohit's work and that he could appoint anyone else as Purohit but no instance in which anyone outside the family has been appointed as Purohit in recent times has been proved. Though no clear evidence as to the method of enforcement of the duties of the Purohit has been led, it seems to be impliedly admitted by the parties that right claimed is a hereditary right enforceable either by custom or usage. The appellant himself elicited in the cross-examination of the plaintiff (P. W. 1) that the Commissioner of Endowments, Orissa, exercises control over the temple by appointing trustees and that "everything is in writing in the Endowment Office." Therefore, the duties of the office of a Purohit of the temple can be enforced in accordance with the provisions of S. 17, Orissa Hindu Religious Endowments Act, 1939, by the trustee or by the Commissioner of Endowments under his general powers of superintendence and control. There is thus temporal sanction behind the duty of the Purohitship in the temple and it is not a case of mere social or moral sanction. I would therefore agree with my learned brother that the claim to the Purohitship is a claim to an office and as such is maintainable in civil Court.

[16] As regards the claim to the Guruship of the Archakas I would agree with my learned brother that it is not a claim to an office.

[17] In the result I agree with the order proposed by my learned brother.

D.H. *Appeal partly allowed.*

A. I. R. (38) 1951 Orissa 69 *[C. N. 23.]*

RAY C. J.

Chandramoni Jena and others—*Petitioners* v. *Bhraman Biswal*—*Opposite party.*

Criminal Revn. No. 59 of 1950, D/- 11-8-1950.

Criminal P. C. (1898), S. 350 (1), Proviso (a) — Recommencement of trial or enquiry—Supersession of previous proceedings — Revival of such proceedings.

Once, whether at the request of the accused, or on his own motion by the Magistrate, trial or enquiry is recommenced by resummoning the prosecution witnesses for being reheard afresh, the previous proceedings are superseded and, even with the consent of the accused, they cannot be revived in complete ignorance of what took place between the first Magistrate and his successor. [Para 10]

Anno. Cr. P. C., S. 350 N. 12.

G. C. Das and S. K. Ray — for Petitioners; V. Pasayat —for Opposite Party.

Order.—The petitioners have been convicted under Ss. 380 and 418, Penal Code, for having entered into a house and carried away the stock of paddy and other properties stored therein.

[2] The complainant and the accused advanced rival claims to that house which, it must be made clear, was not ancestral house of late Radhakrushna Jena of whom the complainant is the son-in-law, but is the self-acquired house as distinct from the ancestral one. The ancestral house and other properties had admittedly been gifted to the daughter, namely, the complainant's wife, and there is no dispute about it. The dispute centres round the right and possession of the self-acquired house in which Radhakrushna Jena lived at the time of his death. The consideration of this revision involves the question whether there was illegality or irregularity causing prejudice to the petitioners in their defence in the trial.

[3] The circumstances are that the trial was held by one Sri M. B. De, Magistrate, before whom the prosecution witnesses had been examined, charge had been framed, and cross-examination after charge had been completed. At that stage, that Magistrate was transferred, and the case came to the file of one Sri S. K. Das, Magistrate. This transfer no doubt entitled the accused persons to claim that the witnesses already examined be resummoned and reheard. They exercised that right at the commencement of the trial before Sri S. K. Das. He allowed the plea and directed that the prosecution witnesses should be resummoned and reheard. Accordingly, he summoned the prosecution witnesses for 30-4-1949. On 30-4-1949, however, he

was already under order of transfer and he adjourned the case to 20-5-1949. On the latter date, Sri S. S. Roy took charge of the case. He recorded an order to this effect :

"The accused persons pray that the accused Dibyasingha Jena, who is dead, wanted *de novo* trial, when the case was transferred to Mr. S. K. Das's Court, but they do not want this case to be tried *de novo*. The accused persons to go on bail of Rs. 100 each. Posted to 18-6-1949 for statement of the accused and defence. The accused to take steps at once to summon the D. Ws. and no further adjournment to be granted."

[4] There were several adjournments in the case after this. On one of the dates, the petitioners put in a prayer for cross-examining some of the prosecution witnesses under S. 257, Criminal P. C., but this was rejected. The learned Magistrate writes :

"When this case came on transfer to my Court, the accused persons got another opportunity for demanding the resummoning and rehearing of the P. Ws. under S. 350 (a), Criminal P. C. but they waived that right. After expiry of two dates for adducing the defence they have come forward with this petition . . ."

[5] The view, that the learned Magistrate takes, is one that can be supported by *Moti Shankarlal* v. *Keshrichand*, 39 Cr. L. J. 815 : (A. I. R. (25) 1938 Nag. 288), in which Gruer J. of the Nagpur High Court held in a similar case :

"I am of opinion that each transfer gives an accused a fresh opportunity of exercising his right under the proviso to S. 350, Criminal P. C."

[6] From the facts of that case, it does not, however, appear that the second Magistrate before whom the claim for resummoning and rehearing the prosecution witnesses had been made had granted the prayer. I shall quote a passage from the judgment of Gruer J. in this connexion :

"These witnesses had been examined by the first Magistrate and the second Magistrate did nothing beyond recording on one hearing before him that the accused claimed trial *de novo*, and on the second hearing adjourning the case."

The fact, in this particular case, is, however, quite different. As it appears from the order-sheet recorded by Sri S. K. Das on 9-4-1949, he had started recommencement of the trial, if it can be so-called, for the sake of convenience. The question, therefore, in the background of this circumstance, reduces itself to whether a fresh right did accrue after the case was taken over by the third Magistrate or not. On reading S. 350, Criminal P. C., as a whole, it appears that the accused's claim is with regard to resummoning and rehearing the witnesses when the witnesses, either all or some of them, had been previously heard, or, in other words, examined and cross-examined. But when the case is transferred from one Magistrate to another at a stage when there was no examination of witnesses, there is absolutely no meaning of any right having accrued within the proviso. When the witnesses are ordered to be resummoned and reheard, that necessarily means that the accused's prayer, that the evidence already recorded be dispensed with and fresh evidence be taken in, is granted. Under the circumstances, the case came to the third Magistrate with an order that the case should proceed from the beginning, that is, by resummoning and rehearing the witnesses, in other words, the occasion for exercising the right of resummoning and rehearing the witnesses after dispensing with the previous record of the witnesses' statement did not arise. Therefore, the question of waiver is immaterial. If the third Magistrate completely ignores the proceedings before the second Magistrate and takes the case as it were transferred to him from the first Magistrate, he does commit an illegality notwithstanding a Magistrate having power to act on the evidence recorded by his predecessor. He cannot ignore the proceedings before the second Magistrate (under orders of transfer) as of no effect, or, in other words, as if there has been no change of hands before he took over the case as between the first and the second Magistrates. It is quite well known that waiver applies to a subsisting right; a right, which has already been enforced and given effect to cannot be waived because there is nothing to be waived thereby. The result, therefore, is, as it happened in this case, that the Magistrate revived the dead proceedings of recording of the evidence before the first Magistrate, and the accused persons stood by. If they waived the right in the same sense in which the learned Magistrate understood it, it would mean that they had not exercised their right before the second Magistrate and they would not require the exercise of the same right over again at the hands of the third Magistrate. It might be that their learned counsel was mistaken with regard to the law, but illegality that has come to stay cannot be overlooked. The learned counsel for the petitioners has invited my attention to several cases of the Madras and Patna High Courts. They fully support the view that I have taken.

[7] In the case of *Ramalingam Pillai* v. *Emperor*, 35 Cr. L. J. 1363 : (A. I. R. (21) 1934 Mad. 475), it was held that

"The granting of a *de novo* trial by the successor of the Magistrate had the effect of wiping out the prior proceedings and hence the old Magistrate could not proceed with the trial from the point where he had left it; where a succeeding Magistrate on taking charge, issued summons to the prosecution witnesses, he must be held to have taken cognizance of the case and that whoever is to hear the case, in such circumstances, must hear it *de novo*."

[8] Mr. Pasavat has cited a decision of the Nagpur High Court in the case of *Emperor* v. *Ganapat*, 38 Cr. L. J. 15 : (A.I.R. (23) 1936 Nag. 220) to establish that the effect of wiping out the proceedings occurs only where the Magistrate of his own accord decides to recommence the enquiry or trial under S. 350 (1), Criminal P. C. But the point, however, is not supported by the decision. The learned Judge has not drawn the contrast with the circumstance when the enquiry is recommenced by the order of the Magistrate, without any request from the accused. On the contrary, it supports the view that if according to a Magistrate the enquiry or trial is recommenced, the previous proceeding is wiped out.

[9] The case of the Patna High Court has also been cited. In the case of *Daroga Chowdhury* v. *Emperor*, 20 Cr. L. J. 638 : (A.I.R (6) 1919 Pat. 578), the accused were charged with certain offence. The case was assigned to a Joint Magistrate who was transferred before he was able to complete the case. The S.D.O. withdrew the case to his own file and heard the case *de novo* disregarding all the evidence recorded by the first Magistrate. Before the S. D. O. had concluded the case, the Joint Magistrate, who first started the trial, came back to the district whereupon the S.D.O. transferred the case to him with a direction that he should take it up from where he had left it before being transferred; it was held that the trial was illegal and must be set aside and the accused tried *de novo*; that the order of the S.D.O. was *ultra vires* and without jurisdiction because all that had taken place before the Joint Magistrate had been superseded and formed not part of the record in the proceeding then actually pending and being prosecuted as against the accused, and that as a consequence, the Joint Magistrate coming back to the district, had no authority or jurisdiction to act on the record of the proceedings which had been antecedently taken before him, the result being that the accused were gravely prejudiced in their trial.

[10] The fundamental principle, on which Madras and Patna High Courts' cases are based, is to the effect that once, whether at the request of the accused, or on his own motion by the Magistrate, trial or enquiry is recommenced by resummoning the prosecution witnesses for being reheard afresh, the previous proceedings are superseded and, secondly, even with the consent of the accused they cannot be revived in complete ignorance of what took place between the first Magistrate and the third. Looked from one aspect, the view taken in the Nagpur High Court may be fundamentally distinct, but I am more bound by the Patna view than by that of Nagpur High Court.

[11] Conceding that it is a case of irregularity but not illegality, has there been any prejudice? In my judgment, prejudice is apparent on the face of the record, because the third Magistrate (Sri S. S. Roy) refused the right to cross-examine the prosecution witnesses under S. 257, Criminal P. C. True, he was not bound to grant the prayer, but as it appears from his judgment, the core of the defence case had not been put to the prosecution witnesses, namely, whether the defence people were or were not in possession of the disputed house. Had the Magistrate who had recorded the prosecution evidence, been the trying Magistrate, he should have known under what circumstances the prosecution witnesses had been cross-examined and whether from the defence standpoint, it would not be prejudicial to deny the prayer for further cross-examination which was permissible under S. 257, Criminal P. C., under the special circumstances. It may be that cross-examination of the prosecution witnesses began under stress and strain flowing from the insistence of the first Magistrate and might have been hurriedly finished up. That may be the reason why very important questions had not been put. Being a succeeding Magistrate, who had only the dumb pages of the depositions before him, he was not then in a position to judge how the refusal to give an opportunity of further cross-examination would prejudice their defence.

[12] In these circumstances of the case, I am constrained to hold that the conviction and sentence cannot be sustained.

[13] The next step that arises is whether the accused persons should be retried. Mr. Pasavat is not very sanguine if retrial would enure to his client's benefit. But, however, I should not allow myself to be led by that fear. It is no doubt true that it is the negligence of the accused or their counsel or both that this very important feature of the case has never been put or argued either before the trial Court or before the lower appellate Court. Under the circumstances, if there has been delay in the trial they have largely contributed to that. Under the circumstances, I direct that the accused persons shall be retried. The offences, if committed, are serious. Send the records at once to the District Magistrate, Cuttack, for marking over the case to a competent Magistrate to try.

V.R.B. *Retrial ordered.*

A. I. R. (38) 1951 Orissa 71 *[C. N. 24.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Suka Misra and others —*Appellants* v. *The State.*

Criminal App. Nos. 8 and 16 of 1950, D/- 1-8-1950.

(a) Criminal P. C. (1898), S. 154—First information report in case of dacoity—Penal Code (1860), S. 395.

It is not necessary that the F. I. R. should specify every little detail and describe the specific part played by each one of the dacoits, when many of them enter into the house and commit dacoity. [Para 6]

Anno. Cr. P. C., S. 154, N. 9; Penal Code, S. 395, N. 2.

(b) Precedents—Obiter—Ratio decidendi.

The principle of a case is limited to the sum of all the facts held by the Court to be material in that case and all observations of a general nature are merely *obiter*. The distinction between what is *raticnis* and what is mere *obiter* should always be borne in mind when following a precedent. It is often embarrassing to the subordinate Courts even to ignore what is palpably *obiter* when a case is cited before them. But it must always be remembered that it is the abstract *ratio decidendi* which alone has the force of law. [Para 10]

(c) Criminal P. C. (1898), Ss. 164 (3) and 533—Failure to record all questions put to accused—Effect.

A mere failure to record all the questions the Magistrate put to the accused does not necessarily entail the rejection of the confession as inadmissible. [Para 10]

Anno. Cr. P. C., S. 533, N. 9.

(d) Criminal P. C. (1898), S. 164 (2) — Proper recording of confession.

In matters of procedure it is essential that the rules must be certain rathert han wise, flexible rather than complete. Whether a confession has been properly recorded or not must, therefore, left to be decided by the Judge before whom it is tendered as evidence. Whether it should be accepted or not will depend upon the wisdom and understanding of the trial Judge who knows the essentials of a fair trial. [Para 10]

Anno. Cr. P. C., S. 164, N. 11.

(e) Criminal P. C. (1898), S. 164 (3)—Motive for making confession—Confession, when to be presumed to be voluntary.

When the accused makes a confession, the law does not require the motive to be elicited. The only requirement laid down by the law is that the confession should be free from the blemishes of compulsion, inducement, threat or promise. If the recording Magistrate is satisfied that the confession is not tainted by any of these vitiating factors he is entitled to presume that the confession is voluntary. Whether, however, the confesion made to him is true or not will be for the trial Judge to decide. [Para 10]

Anno. Cr. P. C., S. 164, N. 14.

(f) Criminal P. C. (1898), S. 164 (3)—Accused making confession and sticking to it in committing Court—Accused more or less standing by confession also in Sessions Court—Confession held could not be rejected. [Para 10]

Anno. Cr. P. C., S. 164, N. 14.

(g) Penal Code (1860), S. 395—Conviction of less than five persons—Twelve persons put on trial—Nine of them acquitted and three convicted—Conviction held was proper. [Paras 11 and 14]

Anno. Penal Code, S. 395, N. 2, pts. 5 to 7.

P. C. Chatterji and A. K. Das—for Appellants; B. M. Patnaik—for Respondent.

Panigrahi J.—There are two appeals directed against the judgment of the Sessions Judge Bolangir Kalahandi, in Sessions Case No. 27 of 1949. There are three appellants in Cri. App. No. 8 of 1950 and one in Cr. App. No. 16 of 1950. All of them have been convicted under S. 395, Penal Code and sentenced to seven years rigorous imprisonment each. Altogether twelve persons were put on trial and eight of them have been acquitted.

[2] The case for the prosecution is that the appellants, along with certain other persons, numbering about thirty, forcibly entered into the house of the complainant Sardul Nag at about 10 P. M. on the night of 4-9-48 and committed dacoity. They were all armed with *thabies*, knives, *lathis* and torches, and carried away paddy, rice, utensils, molasses, as well as gold ornaments. On the next morning the complainant reported the matter to Dasarathi, *Gountia* of Rugurupalli, a neighbouring village and also sent word to Sribanta, *Gountia* of Nagapalli, another neighbouring village. Both the *Gountias*, along with other villagers, gathered at the house of the complainant, and thereafter Sardul Nag went to the Police Station at Sonepur and lodged F. I. R. at about 7 P. M. on 5-9.48. The Police took up investigation, recovered some properties from the houses of appellants 1, 2 and 3, viz., Suka Misra, Sabda Pujhari and Garjan Dumal (appellants in Cr. App. No. 8 of 1950) and charge-sheeted twelve persons, of whom as has been stated already-all except the four appellants were acquitted.

[3] The main incident of dacoity is spoken to by P. W. 11 (the complainant), P. W. 12 (wife of the complainant), P. W. 13 (mother of the comp'ainant), P. W. 14, Damai Gourin (an inmate of the house) and P. W. 15 (a servant of the complainant). Besides these persons, there were also in the house an infant son of the complainant, the complainant's sister and his farm servant, but these were not examined by the prosecution. The prosecution case is that some of the dacoits were known to the complainant even before the date of occurrence and that he could recogoise the others by the light of the torches that they had been flashing in the course of the dacoity. The prosecution further alleged that some trails of rice were discovered along the path leading to the house of appellant 2, Subda Pujari, and some articles were recovered from his house. Appellant 4 Shyam Keot (appellant in Cr. App. No. 16 of 1950) absconded the day after the occurrence and was arrested on 27-12-48 by the Police of Binka Police Station in connection with another offence said to have been committed by him. Shyam Keot made a confessional statement on 30-12-48 which was recorded by a Magistrate examined as P. W. 10. Thus, the case for the prosecution rests on the direct evidence of the eye-witneses' who were inmates of the com-

plainant's house at the time of the incident, the recovery of some of the articles alleged to have been stolen, the confessional statement of Shyam Keot' one of the appellants. The prosecution has also relied upon a few circumstantial details.

[4] The complainant alleged in the F. I. R. (Ex. 5) that as he was about to retire to bed on the night of 4-9-48, a person entered into his house and asked him for some fire and that he refused to give any fire at that hour of the night. Immediately, about 15 persons said to have been armed with knives and axes forced their way into the house and threatened to kill him. They forcibly opened the doors of the other rooms, and it is said that altogether about thirty persons committed theft of various articles belonging to the complainant. He could recognise, among them, appellant 1, Suka Misra, appellant 3, Garjan Dumal and appellant 4, Shyam Keot. The complainant gave a list of the properties stolen worth, according to him, Rs. 247. At the trial the complainant introduced an additional fact into the case, viz., that a pair of silver bangles was removed from the wrist of his infant son and that one silver bangle was removed from his own wrist. According to the evidence appellant Suka Misra snatched away some ornaments from the person of the complainant's wife while appellant Garjan Dumal removed the bangle from the person of the complainant himself. The complainant further stated that he was able to recognise Suka Garjan, and Shyam as he had known them from even before the occurrence. He knew the appellant, Sabda Pujari by sight from before, but as he did not know his name he could not mention it in the F. I. R. He identified the pots containing molasses and rice exhibited as M. O. Exs. I, II and II-A, as also the bell-metal cup (Ex. V) and two small cups (Exs. IV and IV-A) which were recovered from the house of appellant Suka Misra. He was also able to identify a brass-vessel (M. O. Ex. VI), a sickle (Ex. VIII), an axe. (Ex. VII), a piece of cloth (Ex. IX) and a gold ornament (Ex X) recovered from the house of appellant 3, Garjan Dumal as his property (M. O. EX. IX) and belong to his wife, while M. O. EX. VI was found concealed inside loose paddy kept in a basket. The cloth (Ex. IX) was also recovered from inside a basket of paddy. Exhibit X was in a small box along with some other ornaments, kept concealed inside the paddy. In cross-examination the complainant admitted that he did not recognise Sabda Pujari even by face during the dacoity. He said that there were bleeding scratches on the wrist of his son, and on the ear and nose of his wife, but these were not examined by any Medical Officer. This evidence is substantially corroborated by P. W. 12, the wife of the complainant, who speaks to having recognised appellants 1 (Sukadev), 3 (Garjan) and 4 (Shyam Keot). Her evidence is that appellant 1 was guarding her while the dacoity was in progress and later snatched away her nose-ring and ear-rings. She could identify the pots of rice and molasses, the axe, the brass vessels as well as the bundles of rice that had been recovered from the house of the appellants. P. W. 13 the mother of the complainant also speaks to the dacoity having taken place that night, but could not recognise any of the persons who have alleged to have taken part in it. P. W. 14 recognised appellants 1 and 3 as having participated in the dacoity and further speaks to the removal of the nose-ring and ear-rings from the person of P. W. 12 by appellant 1. P. W. 15 speaks to the main incident of the occurrence and swears that appellant 4 was the first person who came to the house and asked for some fire. He also recognised appellants 1 and 3, among others, as having entered into the house. He corroborates the other witnesses in saying that appellant 1 removed the nose and ear-rings from the person of P. W. 12 and that appellant 3, Garjan, removed the bangle from the wrist of the complainant. P. Ws. 16 and 17, the two *gountias* of neighbouring villages, who arrived at the house of the complainant early next morning, speak to having seen traces of rice scattered all over the house and also prove the statement made by the complainant to them about the dacoity that took place in his house the previous night. These two *gountias* were present at some of the searches effected by the Sub-Inspector of Police (P. W. 18). P. W. 8 is a Punch member of Kirtipur, a village within about a mile of the place of occurrence. He was watching his ground-nut crop in his field adjoining the road leading to the complainant's house and saw the appellants in the company of several others going towards that house. On his enquiry one of them is alleged to have told him that they were going to the mango grove at Rugurupalli for gambling. This witness identified appellants 3 and 4 among the persons whom he saw that night. P. Ws. 1 to 3 were present at the search of the house of appellant 2 and prove the search lists Exs. 1 and 1-A; P. Ws. 4 and 5 prove the recovery of articles from the house of appellant 1 and also prove the search lists Ex. 1-B. P. Ws. 6 and 7 are the witnesses to the search of the house of appellant 3, Garjan, and prove search list Ex. 1-C. There can therefore be no doubt on the evidence that a dacoity was

committed at the house of Sardul Nag on 4-9-1948 between 9 and 10 P. M. In fact this has not been seriously challenged by the appellants.

[5] Mr. Chatterji, learned counsel for appellants 1, 2 and 3, contends that the evidence against these appellants is not sufficient to justify their conviction for the offence of dacoity and that the articles alleged to have recovered from their houses are of such common use that their identification by the complainant cannot, in any sense, be deemed as conclusive. On behalf of appellant Shyam Keot, it is urged that his confessional statement is not admissible in evidence as it has not been satisfactorily proved that the confession was made voluntarily. And finally it is contended that there can be no conviction for dacoity, as less than five persons have been found guilty, the other having been acquitted.

[6] The case against appellant 1, Sukadev Misra, rests on the oral evidence of eye-witnesses, *viz.*, P. Ws. 11, 12, 14 and 15. He is the person, according to the evidence of these witnesses, who removed the ornaments from the person of P. W. 12. He was known to the complainant even before the date of the occurrence and was, in fact, named in the F. I. R. as one of the persons who took part in the dacoity that night. The utensils recovered from his house were identified by the complainant and other inmates of the house and there is no person to disbelieve them. Whatever may be said with regard to the identity of the pitcher of molasses, we are of opinion that the identification of the brass vessels, at any rate, stands on a different footing and we are inclined to accept the evidence of P. Ws. 11 and 12 on the point as reliable. It is argued that the F. I. R. is silent on the point as to whether the appellant removed the ornaments from the person of P. W. 12. No doubt the F. I. R. does not furnish this detail, but it mentions not only about the loss of gold ornaments but also gives a description of the articles lost, in the list. It is not necessary that the F. I. R. should specify every little detail and describe the specific part played by each one of the dacoits, when so many of them entered into the house and committed theft. We are accordingly satisfied that the appellant Sukadev Misra has been rightly convicted as the offence has been brought home to him.

[7] The appellant Sabda Pujari was not recognized by any of the witnesses nor was his name mentioned in the F. I. R. The only evidence against him is that some rice and a pitcher of molasses were recovered from his house and that a trail of rice was found leading to his backyard. This evidence is of a weak character and is not sufficient to support his conviction. His name, doubtless, figures in the confessional statement of appellant Shyam Keot, as one of the participants in the incident, but in the absence of any substantive evidence against him we are not disposed to place any reliance on the statement made in the confession of Shyam Keot and uphold Sabda Pujari's conviction. He is accordingly given the benefit of doubt and acquitted.

[8] Appellant 3 Garjan Dumal, has been named in the F. I. R. and has been identified by P. Ws. 11, 12, 14 and 15. P. W. 8 also speaks to his presence among the persons who were going in the direction of the complainant's house that night. The brass-pitcher, the axe, the sickle, the cloth and nose-ring belonging to P. W. 12 were all recovered from the house of this appellant. The brass pitcher and the gold nose-ring were found concealed inside the paddy. It is contended on behalf of this appellant that the gold nose-ring was found broken and its identification therefore could not have been satisfactory. The description of the nose-ring has been given in the F. I. R. as *Magar Muha* with Red Stone. The article was produced in Court and the appellant, if he liked, could easily have established that it did not answer the description given in the F. I. R. Nothing of the kind was done and it is too late now to complain in the appellate Court that the identification of the nose-ring could not be accepted. It is further pointed out that, according to the evidence, appellant 1 removed the gold nose-ring from the person of P. W. 12 and that he also removed the silver bangle from the wrist of P. W. 11, but that the silver bangles alleged to have been removed by him have not been recovered. The recovery of the gold nose-ring alone from the house of this appellant is, however, not inconsistent with its having been removed by one of his associates who participated in the dacoity. It may be that this article fell to the share of appellant Garjan or that it was left in his custody as it is said that his father is a man of some means in order to divert suspicion. We are, therefore, not prepared to accede to the contention raised on behalf of this appellant and to discard the identification made by P.W. 11 as unreliable. The oral evidence against this appellant is almost overwhelming and he has been rightly convicted and we see no reason to interfere.

[9] The case against appellant Shyam Keot rests on the oral evidence of P.Ws. 11, 12 and 15. He is said to have been known to the complainant from his childhood. It was this appellant who appears to have entered into the house of P. W. 11 on the pretext of asking for some fire. His name is mentioned in the F.I.R. P. W. 8 also

speaks to his presence in the company of persons proceeding towards the house of the complainant on the night of 4-9-1948 when he was watching his ground-nut crop. This appellant, as stated already, absconded immediately after the occurrence and was arrested three months later by the Binka Police. Three days after his arrest, he made a confessional statement, which was recorded by a Magistrate (P. W. 10) under S. 164, Criminal P. C. In that statement he said that he went to Rugurupalli along with appellant 1, appellant 2 and some others, and carried away articles from the house of the complainant, that these articles were kept in the house of appellant 2, Sabda Pujari, and that he was advised by appellants 1 and 2 to make himself scarce and that he, therefore, left the village and absconded. He states that he joined in the dacoity as he was asked to do so by the persons named by him. In his examination by the Committing Magistrate he repeated the above statements and added that he was asked by appellant Garjan and another person, about the evening of that day, *viz.*, 4-9-1948, to go to Banjipalli. There were others assembled at that place. Suka Misra and others were present at the house of Sabda Pujari. Others were in front of his house :

"All said : 'Let us go and commit dacoity'. I said : 'I am afraid as I have no previous experience' . . . . . Keot . . . . were present . . . . We brought all the articles from there and kept them in the house of Sabda Pujari. They told me to go away to Bargarh side and that they would look after my maintenance. I went to Barmarh. I came home and went to Seli to my aunt's house . . . . . "

When he was questioned whether it was a fact that he asked Sardul (the complainant) for some fire that night, he said he did not ask him for any fire but that he was in front of Sardul's house. He further said that he did not take a pie towards his share. In the Sessions Court he said that his statement before the committing Magistrate had been correctly recorded and added that as he was heavily drunk he lay under tree in Banjapalli and that the others went to commit dacoity leaving him behind. He named the appellants as those who went to participate in the dacoity. He also says that he made the confession as he was threatened by the Police with assault.

[10] The Magistrate who recorded the confessional statement of appellant, Shyam Keot deposed as P. W. 10 that he gave the necessary warnings and explained to the accused that he was not bound to make any confession and that he should not confess even if he was required to do so either by the police or any other person, and finally that his confession would be used as evidence against him. P. W. 10 also gave evidence to the effect that no police officer was present at the time of his recording the confession and that he was satisfied, in the circumstances, that the confession made to him was voluntary. The witness did not ask the accused why he was making a confession as he was satisfied about the voluntary character of the confession. In cross-examination P. W. 10 admitted that he did not caution the confessant that his confession would be used against him even if he retracted it later, though he repeated that he was satisfied from the answers given to his questions that the accused was confessing voluntarily. The learned Sessions Judge, however, held the confession to be inadmissible on the ground that the record made by the Magistrate (P.W. 10) did not show that the statement was voluntary, and particularly because the accused was not asked that the confession, even if retracted later, might be used against him, and relied upon the observations of the learned Chief Justice in *Gurubaru Praja* v. *The King*, I. L. R. (1949) 1 Cut. 207 : (A. I. R. (36) 1949 Orissa 67 : 51 Cr. L. J. 72). In that case it was established that the accused had been in Police custody for over a fortnight and that he was given 2½ hours time for reflection before his confession was recorded. The learned Chief Justice, delivering the judgment of the Court, observed that in the circumstances of that case the Court was not satisfied that the confessional statement, as recorded under S. 164, Criminal P. C., was admissible in evidence. The accused in that case repeated his statements before the Committing Magistrate, but that was not read out and explained to him either by the Committing Magistrate or by the Sessions Judge and on that ground the statements were excluded from consideration. After having thus ruled out the statements of the accused, his Lordship proceeded to summarise the principles of law that should guide a Magistrate in recording a confession under S. 163 and made a few general observations. The decision of the case itself proceeded entirely on the evidence of P.Ws. 2, 3 and 4 and as their evidence was found acceptable the conviction of the accused was upheld and the appeal was dismissed. It is, therefore, clear that the observations made by the learned Chief Justice in *Gurubaru Praja* v. *The King*, I L R. (1949) 1 Cut. 207: (A. I. R. (36) 1949 Orissa 67: 51 Cr. L. J. 72) regarding the procedure to be followed by a Magistrate acting under S. 164, Criminal P. C., were not necessary for the decision of the particular case and did not form a part of the *ratio decidendi*. The actual decision is not of much importance and most of the observations in the judgment—and much that is of interest in it—is *obiter*. It does not appear

to have been realised that the principle of a case is limited to the sum of all the facts held by the Court to be material in that case and all observations of a general nature are merely *obiter*. The distinction between what is *rationis* and what is mere *obiter* should always be borne in mind when following a precedent. It is often embarrassing to the Subordinate Courts even to ignore what is palpably *obiter* when a case is cited before them. But it must always be remembered that it is the abstract *ratio decidendi*, which alone has the force of law. The only thing, says Sir George Jessel in *Osborne* v. *Rowlett*, (1880) 13 Ch. D. 774 at p. 785: (49 L. J. Ch. 310), in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case is decided. Courts of Justice, therefore, take care, in their formulation of principles, to limit themselves to the requirements of the case in hand and shrink from laying down any principle which is wider than is necessary for the purpose of the case. The prerogative of Judges is not to make law by formulating and declaring it—this pertains to the Legislature—but to make law by applying it. A judicial declaration unaccompanied by a judicial application is of no authority, as Salmond puts it. The precautions that a Magistrate acting under S. 164, Criminal P. C., has to take by warning the accused before recording his confession are prescribed in the Code itself in S. 164 (3). A mere failure to record all the questions he puts to the accused does not necessarily entail the rejection of the confession as inadmissible. For, S. 533 of the Code provides for evidence being taken that the statement was duly made. Any further precautions prescribed by judicial decisions can have no statutory authority and are intended only to serve as rules for the guidance of the recording Magistrate. In matters of procedure, it is essential that the rules must be certain rather than wise, flexible rather than complete. Whether a confession has been properly recorded or not must, therefore, be left to be decided by the Judge before whom it is tendered as evidence. Whether it should be accepted or not will depend upon the wisdom and understanding of the Trial Judge who knows the essentials of a fair trial. In the web of human affairs, it will be a futile task to attempt to reduce those conditions to a mathematical formula. The learned Sessions Judge—in more cases than one that have come up before this Court—has rejected the confessions as inadmissible on the only ground that the confessant was not asked why he was making a confession and that he was not told that it may be used as evidence against him, even if retracted later. The evidence in the case before us clearly shows that the Magistrate warned the accused that his statement may be used against him; he did not go further and add that it may be so used even if the confession is retracted. I cannot see any logic or reason for a further warning anticipating a retraction of the confession. Nor can I appreciate the need for asking the accused about the motive for making a confession. He may have several or he may have none. The simplest motive is that it is most natural for a guilty person to lift a load off his mind by making a clean breast, because truth is natural and dissembling is difficult. Some people confess because they prefer jail life to normal life. The law does not require the motive to be elicited. The only requirement laid down by the law is that the confession should be free from the blemishes of compulsion, inducement, threat or promise. If the recording Magistrate is satisfied that the confession is not tainted by any of these vitiating factors he is entitled to presume that the confession is voluntary. Whether, however, the confession made to him is true or not will be for the trial Judge to decide. Having regard to the language of S. 163 (2), Criminal P. C., which says that

"no police officer or any other person shall prevent, by caution or otherwise, any person from making . . . . . any statement which he may be disposed to make of his own free will",

I am inclined to think that too much of questioning by the Magistrate or too many warnings administered by him may amount to dissuading the accused from making a confession. Under S. 164 (3) he called upon to "*explain*" to the accused that he is not bound to make a confession and that it may be used against him. If, after this explanation, the Magistrate is satisfied that the accused is disposed to make a statement *of his own free will*, he is under no further obligation to give any further caution; in fact he would be violating S. 163 (2) were he to do so. Ordinarily, Magistrates of the First Class record confessional statements of accused persons and there is no reason to presume that they cannot make up their minds, after putting a few questions, whether a person is making a confession voluntarily or under duress. I do not think therefore that it is possible to prescribe any litmus paper test for determining whether a Magistrate had reasons to believe the voluntary character of a confession made to him. That any such attempt is bound to fail is demonstrated in this very case itself. The appellant not only made a confessional statement but stuck to it in the committing Court and more or less stood by it also in the Court of Session although he attempted to water it down. To reject the confession in such a case would result in a mis-

carriage of justice. I have, therefore, no hesitation in holding that the learned Sessions Judge was in error in ruling out the confessional statement of appellant Shyam Keot, under S. 161, Criminal P. C., as inadmissible.

[11] The last point urged for the appellants is that the conviction under S. 395, Penal Code, for the offence of dacoity cannot stand as the eight persons, along with the four appellants have been acquitted. Mr. Chatterji relied upon the cases reported in *Emperor* v. *Ikram-ud-din*, 39 ALL. 348 : (A. I. R. (4) 1917 ALL. 173 : 18 Cr. L. J. 491), *Girdhar* v. *Emperor*, A. I. R. (14) 1927 Lah. 519 : (28 Cr. L. J 547) and *Abbas Ali* v. *Emperor*, A. I. R. (15) 1928 Mad. 144 : (29 Cr. L. J. 5).

[12] In *Emperor* v. *Ikram ud-din*, 39 ALL. 348: (A. I. R. (4) 1917 ALL. 173: 18 Cr. L. J. 491), the trial was by Jury and the conviction was set aside on the ground that the legal definition of what a dacoity is was not explained to the Jury. In *Girdhar* v. *Emperor*, A. I. R. (14) 1927 Lah. 519 : (28 Cr. L. J. 547), there were four persons charged for dacoity and one of the alleged dacoits was examined as an approver. The Sessions Judge definitely held that two of the accused were not concerned in the offence and convicted the other two under S. 395, Penal Code. Following the rule in *Rex* v. *Plummer*, (1902) 2 K. B. 339: (71 L. J. K. B. 805), a single Judge of the Lahore High Court held in that case that the conviction for dacoity was bad. The case reported in *Abbas Ali* v. *Emperor*, A. I. R. (15) 1928 Mad. 144 : (29 Cr. L. J. 5) is really against the point urged for the appellants. In that case three known and named persons were charged with two other unknown men. Of the three persons charged one was acquitted and the other two were convicted of dacoity. A Division Bench of the Madras High Court held that the conviction was not illegal.

[13] The learned Assistant Government Advocate appearing for the State drew our attention to the case reported in *Kapil Deo Singh* v. *The King*, 1950 S. C. J. 143 : (A. I. R. (37) 1950 F. C. 80 : 51 Cr. L. J. 1057) which was a case under S. 147, Penal Code. He also cited the case reported in *Rashid-uz-Zaman* v. *Emperor*, 12 Cr. L. J. 193 : (10 I. C. 684 Cal). It is a Division Bench case of the Calcutta High Court where their Lordships held that though all the persons charged were not convicted, it would not affect the question regarding the number of persons engaged. *Plummer's case*, ((1902) 2 K. B. 339 : (71 L. J. K. B. 805) was not followed as it related to a case of conspiracy. The last case relied upon the learned Assistant Government Advocate is *Mohd. Ahsan* v. *Emperor*, A. I. R. (17) 1930 Lah. 263 : (31 Cr. L. J. 112). This was a Division Bench case and Tekchand J., who delivered judgment in *Girdhar* v. *Emperor*, A. I. R. (14) 1927 Lah. 519 : (28 Cr. L. J. 547) was a party to this judgment. In this case the identity of four out of five persons was established, while the fifth man remained unidentified. It was held that the conviction of the four accused under S. 395, Penal Code, was correct though it was not possible to trace and identify the fifth man.

[14] The preponderance of authority, therefore, is against the contention raised on behalf of the appellants. I have accordingly no hesitation in overruling that contention.

[15] In the result the conviction and sentence of appellants Sukdev Misra, Garjan Dummal, and Shyam Keot under S. 395, Penal Code, are upheld and their appeals dismissed. We give the benefit of doubt to appellant Sabda Pujari and acquit him. The sentence of seven years rigorous imprisonment is, however, reduced to five years rigorous imprisonment in the case of appellants Sukdev Misra and Garjan Dummal, and to four years rigorous imprisonment in the case of appellant Shyam Keot as he has already been in Jail trial for over a year and a half.

[16] **Jagannadhadas J.**— I agree with my learned brother that the conviction and sentence of the appellants Sukdev Misra, Garjan Dummal, and Shyam Keot, should be upheld and that the appellant Sabda Pujari should be given the benefit of doubt and acquitted.

[17] I wish, however, to say that I am not satisfied that in the circumstances of this case the conviction under S. 395, Penal Code, was correct. In the Sessions Court twelve persons were put on trial. Eight out of them have been acquitted by the Sessions Judge and we have given the benefit of doubt to another so that in the result only three out of the twelve persons are convicted. As the offence of dacoity requires the conjoint participation of five persons, the question has been raised before us that the appellants can be convicted only of robbery under S. 392. It is no doubt perfectly true that, in spite of the acquittal of a number of persons, if it is found as a fact that along with the persons convicted there were other unidentified persons who participated in the offence, bringing the total number of participants to five or more, the conviction of the identified persons though less than five is perfectly correct. But the difficulty in this case is that certain named twelve persons were charged with having committed dacoity by conjointly doing various acts. The charge does not say that these twelve persons along with other unidentified persons committed the dacoity conjointly. If, therefore, 9 out of 12 persons are acquitted, the question arises whether the

remaining three can be said to be conjoint participants with another two or more persons not identified. Is the Court to find that some persons outside the individuals charged participated or some out of the very persons charged but acquitted? To find the former is to give a decision on a fact of which the accused have no notice through the specific terms of the charge. To find the latter is to assume that some of the very persons that have been acquitted by giving the benefit of doubt have, in fact, been the participants. I find difficulty in arriving at either of these conclusions. Certain cases bearing on this matter have been brought to our notice. The cases in *Rashid-uz-Zaman* v. *Emperor*, 12 Cr. L. J. 193 : (10 I. C. 684 Cal), *Narayan Dinba* v. *Emperor*, 47 Cr. L. J. 832 : (A. I. R. (34) 1947 Nag. 57) and *Mohd. Ahsan* v. *Emperor*, A. I. R. (17) 1930 Lah. 263 : (31 Cr. L. J. 112) have been cited in favour of the legality of a conviction under S. 395 under such circumstances; while *Emperor* v. *Ikram-ud-din*, 39 ALL. 348: (A. I. R. (4) 1917 ALL. 173: 18 Cr. L. J. 491), *In re Koila Thevan*, 11 Cr. L. J. 249 : (5 I. C. 797 Mad.), *Girdhar* v. *Emperor*, A. I. R. (14) 1927 Lah. 519 : (28 Cr. L. J. 547) and *Abbas Ali* v. *Emperor*, A. I. R. (15) 1928 Mad. 144 : (29 Cr. L. J. 5) have been shown to us as being against the propriety of such a conviction. It has also been said that *Kapil Deo Singh* v. *The King*, A. I. R. (37) 1950 S. C. 80 : (1950 S. C. J. 143 : 51 Cr. L. J. 1057) concludes the matter. I am not satisfied that it does. I do not propose, however, to go into this matter at any length for the purpose of this case and to dissent from the view taken by my learned brother that the conviction under S. 395 is to be maintained in this case. For even if I held that the appellants other than Sabda Pujari were to be convicted only under S. 392, I should not have been inclined to reduce the sentences beyond what has been indicated in the judgment of my learned brother.

[18] I desire also to add that I propose to express no opinion, in this case, as to the correctness of the observations in the ruling reported in *Gurubaru Praja* v. *The King* I. L. R. (1949) 1 Cut. 207 : (A. I. R. (36) 1949 Orissa 67 : 51 Cr. L. J. 72) and as to whether or not they are *obiter* because I am satisfied that even if the confession of the appellant Shyam Keot is excluded, as the learned Sessions Judge has done, the evidence of P. Ws. 11, 12 and 15 is quite sufficient for his conviction.

V.R.B. *Order accordingly.*

A. I. R. (38) 1951 Orissa 78 *[C. N. 25.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Khalli Behera — Accused — Appellant v. *The State.*

Criminal Appeal No. 25 of 1950, D/- 16-8-1950.

(a) Criminal P. C. (1898), S. 164 — Retracted confession—Evidence Act (1872), S. 24.

That a confession, though retracted, can be the basis of a conviction, cannot be disputed as a matter of law. The Courts, however, look for corroboration of the statements made in the retracted confession, before acting upon it, as a rule of prudence. [Para 4]

Anno. Cr. P. C., S. 164 N. 18 Pts. 1, 2 and 3; Evi. Act, S. 24 N. 9.

(b) Criminal P. C. (1898), S. 164 (3)—Confession —Warning to accused.

A confession is not invalidated on the mere ground that the accused was not specifically warned by the Magistrate recording his confession that his confessional statement, even if retracted later, may be used as evidence against him. [Para 6]

Anno. Cr. P. C., S. 164 N. 13.

(c) Criminal P. C. (1898), S. 164 — Confession taken at Magistrate's house—Validity.

Per *Panigrahi J.*—There is no specific rule which prohibits a Magistrate from recording a statement under S. 164 either at his house or in camp, wherever it may suit him. In fact it may be necessary in some cases to record a statement outside the Court so that the accused may be altogether free from any influence or fear. [Para 6]

Per *Jagannadhadas J.*—It is quite improper on the part of a Magistrate to record the confessional statement of the accused under S. 164 at his house without assigning any reason. [Para 10]

Anno. Cr. P. C., S. 164 N. 11.

(d) Criminal P. C. (1898), S. 339 (2) — Nature of provision.

The provision contained in S. 339 (2) is in the nature of an exception to S. 164, Criminal P. C. and S. 24, Evidence Act. [Para 7]

Anno. Cr. P. C., S. 339 N. 9.

Dibyasinga Misra — for Appellant; *Asst. Govt. Advocate—for the State.*

Panigrahi J. — This is an appeal directed against a conviction under S. 302/149, Penal Code, by the Additional Sessions Judge, Ganjam-Nayagarh. The occurrence in respect of which the appellant, Khalli Behera, was charged took place on the night of 11-10-1949 at about 7 P. M. on the Grand Trunk Road between Berhampur and Golanthra when the deceased, a *jutka* driver by name Kalia Behera, was attacked by a number of persons and done to death. The appellant, along with a number of other persons, was arrested on 12-10-1946, the day after the occurrence. Two days later, he was produced before a Magistrate as he was willing to make a confession. On 15-10 1949 his confessional statement was recorded. On 19-11-1946 he was charge-sheeted along with the other accused. On 19-12-1949 he was tendered pardon and he executed a bond agreeing to make a true and full disclosure of all the facts he knew about the occurrence and that he was willing to be exa-

mined as an approver. He was actually examined as an approver on 17-2-1947 in the Court of the Committing Magistrate. The case was later committed to the Court of Session and the approver was again examined as a witness (P. W. 13) in that Court, in Sessions Case No. 10 of 1947. The appellant was examined on 3-7-1947 in the Sessions Court when he went back completely upon his earlier statements. The Public Prosecutor of Ganjam thereupon certified, under S. 339, Criminal P. C. that the appellant had forfeited the pardon and that he was liable to be put on his trial. The case which has given rise to this appeal is a sequel to the failure of the appellant to abide by the terms of the bond which he had executed. The appellant pleaded that he had not forfeited the pardon and that he was not guilty of the charge of murder.

[2] The learned Additional Sessions Judge who tried the case held that the confession of the appellant made three days after his arrest was true and was supported by the other evidence in the case. He therefore accepted the appellant's confessional statement as evidence against him in spite of the fact that it was retracted later. He also relied upon the deposition of the appellant before the Committing Magistrate on 17-2 1947 as the facts mentioned therein had been corroborated by the other oral evidence. He held that the reasons given by the appellant for retracting the confession and the deposition were a tissue of falsehood and accordingly found the appellant guilty of the charge of murder and sentenced him to transportation for life.

[3] Mr. Dibyasinga Misra who appeared *amicus curiae* for the appellant has urged in an able and painstaking argument that the confessional statement should be ruled out as inadmissible as it was not voluntary, that the deposition made by the appellant as approver amounts to a departure from the facts stated in his confessional statement inasmuch as it makes mention of a large number of details omitted in the confession and that the deposition itself, having been induced by the hope of a pardon, should not have been admitted in evidence.

[4] That a confession, though retracted, can be the basis of a conviction, cannot be disputed as a matter of law. The Courts, however, look for corroboration of the statements made in the retracted confession, before acting upon it, as a rule of prudence. It is not necessary to refer to all the cases that were cited at the Bar as the point has been well recognised by all the High Courts. As the learned Sessions Judge has summarised the evidence relating to the factum of the occurrence, as alleged by the prosecution, I shall only briefly give an outline of the broad facts deposed to by the witnesses.

[5] It is established that the deceased Kalia Behera was decoyed by Dhanu, who was one of the persons charged along with the appellant, from Berhampur and that the deceased was also accompanied by one Nartu Jagayya when he started on his ill-fated journey. That a number of people had been waiting on the road—apparently anticipating the arrival of the *jutka* is spoken to by Jagayya. The appellant, in his confessional statement, said that Bhubani, Trinath, Bhima, Mangulu and Matta Sima were waiting for the *jutka* with *lathis* at the scene of occurrence and that Dhanu came in the *jutka* and got down at the spot. This is corroborated by Jagayya's evidence though he does not give the names of the people assembled at the spot. The appellant's further statement that the cloth of the deceased slipped from him and that Bhubani picked it up and threw it by the side of a screwpine bush nearby is corroborated by the recovery of the cloth itself from the identical spot where, according to the appellant, it had been thrown away. The cloth has also been identified to be that of the deceased by the father of the deceased who was examined in the case. The confessional statement further states that after the deceased fell down he was stabbed with a knife. The *post-mortem* certificate shows that the deceased had received not only *lathi* blows but also knife injuries. According to the appellant, Dhanu gave a knife blow and a shirt belonging to Dhanu, suspected to contain blood-stains, was seized. The Serologist has certified those blood stains to be of human origin. In the confession the appellant states that he gave a stick blow. In his deposition before the Committing Magistrate he said:

> "Accused Bhubani gave us *lathis* and I was given a *khantabadi* by him . . . . I subsequently gave the *khantabadi* to Trinath and he handed over the *Khantabadi* at Bhubani's house."

The *khantabadi* was subsequently recovered from Bhubani's house and exhibited in the case. In his confessional statement the accused implicated Dhanu and Bhima. It was proved at the trial that a shirt belonging to Dhanu and a white cloth and a bundle of thread belonging to Bhima were seized and later certified by the Serologist to have contained human blood. It would thus appear that not only have the broad facts attending the death of the deceased Kalia Behera been proved but also the part actually taken by the appellant in the murder has also been corroborated by the evidence on record. The confessional statement of the accused has therefore been corroborated in material particulars not only with regard to the occurrence and the general aspects of the murder, but also with regard to the part played by the appel-

lant. His presence at the scene of occurrence and his complicity in the crime have been satisfactorily established by the evidence on record.

(6) In his examination before the Court of Session in S. C., 10 of 1947 (Ex. 19-4) the appellant completely denied any knowledge of the occurrence but he admitted that his statement of confession made to the Magistrate had not been made under the influence of the Police. He said :

"I made a statement before the Magistrate three days after the occurrence. I told him that I did not know anything about the occurrence. By that time nobody tutored me."

At another place he said :

"It was only in connection with my examination at the Committing Court that I was tutored."

It cannot therefore be seriously contended that the statement that he made before the Magistrate under S. 164, Criminal P. C. was not voluntary or that it had been brought about by any undue influence or pressure. The Magistrate who recorded the confession and who was examined as P. W. 18, says that he warned the appellant that he was not bound to make a statement and that whatever he said may be used as evidence against him. The appellant is said to have replied: "I am going to make a voluntary statement of all that I know". The appellant was again asked by the Magistrate "Why do you agree to confess your guilt before me"? and he replied: "whatever I know I will speak". It is pointed out by the learned counsel for the appellant that inasmuch as the appellant was not specifically asked that his statement might be used as evidence against him, even if he retracted, the confession could not be voluntary and should not have been acted upon. Our attention was drawn to the case reported in *Gurubaru Praja* v. *The King*, 1 Cut. 207: (A. I. R. (36) 1949 Orissa 67: 51 Cr. L. J. 72). That case is no authority for invalidating a confession on the mere ground that the accused was not specifically warned by the Magistrate recording his confession that his confessional statement, even if retracted later, may be used as evidence against him. Section 164, Criminal P. C., says that the Magistrate is bound to explain to the accused that the statement which he makes may be used as evidence against him. I see no reason to superimpose a further qualification to what is already contained in the Statute. It was also urged that the statement was taken at the house of the Magistrate (P. W. 18) and that on that ground it is vitiated. There is no specific rule that I know of which prohibits a Magistrate from recording a statement under S. 164 either at his house or in camp, wherever it may suit him. In fact it may be necessary in some cases to record a statement outside the Court so that the accused may be altogether free from any influence or fear.

[7] Whatever may be said with regard to the admissibility of the confession recorded under S. 164, the statement of the appellant, as approver, made in the Court of the Committing Magistrate cannot be assailed on any ground. This statement is marked as Ex. 19. It was recorded in the course of the enquiry by the Committing Magistrate and not under S. 164. Section 337 (2), Criminal P. C. lays down that :

"Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any."

Exhibit 19 is, therefore, a statement of a witness and not the confession of an accused. Admittedly this was preceded by pardon tendered and accepted. There is no substance in the contention that this evidence is also tainted because the accused made the statement with the hope of getting release from the charge. Section 337 is enacted to meet a contention like the one urged before us. A person who accepts the tender of pardon accepts also the grave risk of not departing from the truth, on pain of being charged with the offence if he abused the privilege granted to him. Section 339 (2), therefore, provides that

"the statement made by a person who has accepted a tender of pardon may be given in evidence against him at such trial."

This provision is accordingly in the nature of an exception to S. 164, Criminal P. C., and S. 24, Evidence Act. I am, therefore, satisfied that Ex. 19 could be legitimately used against the accused though retracted later. In this statement, the appellant repeated what he had stated before the Magistrate under S. 164 and added one more detail. He repeated the statement that he had been given a *khantabadi* by Bhubani, that he along with his associates waited on the road for the arrival of the *jutka* from Berhampur, that Dhanu came along with the deceased *jutka* driver, and that along with others he himself beat the deceased with a *lathi*. He implicates Bhima as having assaulted the deceased with a *lathi*. He says that the cloth worn by the *jutka* driver slipped and that it was thrown away by Bhubani and that Dhanu stabbed the deceased on his abdomen with a knife. The only new fact that he added for the first time was the receipt of Rs. 25 from Bhubani. He has also confirmed his earlier statements that he gave the *khantabadi* to Trinath and that Trinath later handed it over at Bhubani's house. His presence at the scene of occurrence and that part he took in the occurrence have been corroborated, as I have already indicated earlier. The cloth of the deceased was

actually seized from the place where, according to the appellant, Bhubani had thrown it. With regard to the weight to be attached to the find of the cloth I may quote the observations of the Judicial Committee in *Bhuboni Sahoo* v. *The King*, 1949-2 M. L. J. 194 at p. 197 : (A. I. R. (36) 1949 P. C. 257 : 50 Cr. L. J. 872) :

"With regard to the cloth, as already noticed, the evidence of the approver was that the appellant threw the cloth over a hedge and it was proved at the trial that the cloth was found in the place pointed out by the approver. This fact no doubt was of value as supporting the credibility of the approver's story."

So far as the approver's story relating to the *Khantabadi*, is concerned, it is an equally valuable piece of evidence against himself though it was not of much evidentiary value against Bhubani from whose house it was recovered. The presence of human blood on the clothes of Dhanu and Bhima is another important piece of evidence which implicates the appellant and proves beyond doubt his participation in the crime.

[8] We are satisfied that the appellant has forfeited the pardon tendered to him and that his confessional statement and his later statement, as approver, though retracted, have been corroborated in material particulars. Agreeing with the learned Sessions Judge, therefore, we uphold his conviction and sentence and dismiss this appeal.

[9] **Jagannadhadas J.** — I agree that the conviction and the sentence should be upheld and the appeal dismissed.

[10] I wish, however, to add that I consider it quite improper on the part of the Magistrate to have recorded the confessional statement of the accused under S. 164 at his house without assigning any reason. This is all the more a matter for comment, since it appears that the learned Judge on that very date recorded the confessional statement of another accused in the main case, named, Dhanu in open Court just only 20 minutes earlier. The confession of Dhanu appears to have been recorded at 2 p. m. and that of this accused at 2. 20 p. m. on the same day. No reason for the same has been elicited either in the examination or cross-examination of the Magistrate, P. W. 18. Rule 11, sub-r. (2), General Rules and Circular Orders, Criminal, which I presume was in force at the time within the confession was taken states as follows :

"Confessions should be recorded in open Court and during the court hours except when unusual circumstances require a different procedure, as for instance, when an open record will be detrimental to public interest or when the recording of the confession in open Court is rendered impracticable by reason of the fact that the Court is closed for two or more successive days on account of holidays."

[11] In spite, however, of room for the above comment, I have satisfied myself that on the record there is no ground for rejecting the confession as not being voluntary. There also the clear evidence afforded against himself by the deposition of the accused as approver in the Committing Magistrate's Court.

V.R.B. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 81 *[C. N. 26.]*

RAY C. J. AND NARASIMHAM J.

Raghunath Patnaik — Petitioner v. *State Transport Authority, Orissa and another — Opposite Party.*

M. J. C No. 118 of 1950, D/- 18-9-1950.

(a) Motor Vehicles Act (1939), Ss. 44 (3) (a) and (4) and 45 — Scope of sections — Resolution of P.T.A. D/ 3-10-1947 — Validity.

There is a clear distinction between disposal of an application for a permit and filing of such an application. Section 45 deals with the forum for filing such applications. It has nothing to do with their disposal and for the latter purpose the Provincial Transport Authority can issue appropriate direction under S. 44 (3) (a) and (4). [Para 4]

The resolution of the Provincial Transport Authority dated 3 10 1947 which said that applications for permit should be made to the Regional Transport Authority within whose jurisdiction the longest stretch of the route lies goes against the provisions of S. 45 and cannot, therefore, be a valid direction under S. 44 (4). [Para 4]

(b) Motor Vehicles Act (1939), S. 44 (3) (a) and (5) — Power to take over inter-district route — Delegation to Chairman, P. T. A. — Absence of rules under sub-s. (5) — Resolution D/- 15-1-1946 — Validity.

The power to take over any inter-district route cannot be delegated to the Chairman, Provincial Transport Authority, except under the rules framed under sub-s. (5). In the absence of such rules, such delegation itself becomes invalid and consequently the resolution of the Provincial Transport Authority dated 15-1 46 authorising the Chairman to take over any inter-district route if the circumstances justify unitary control must be held to be ineffective. As the Provincial Transport Authority had no jurisdiction to delegate its functions to its Chairman, even if the latter takes over the control of any route his action cannot oust the jurisdiction of the Regional Transport Authorities of the regions through which such route passes. [Para 5]

(c) Motor Vehicles Act (1939), Ss. 57 (4) and 64 (f) — Objection to grant of permit filed after period fixed by S. 57 (4) is over — Such person, if has right to appeal.

Where a person files an objection to the grant of a permit to another person long after the period fixed by S 54 (4) is over, he has no right of appeal. Consequently, the Chairman of the Provincial Transport Authority has no jurisdiction to hear the appeal filed by such a person and to set aside the order of the Regional Transport Authority. [Para 7]

(d) Constitution of India, Art. 226 — Order in appeal of Chairman, Provincial Transport Authority — Writ of certiorari if lies against order — Motor Vehicles Act (1939), S. 64.

The Chairman, Provincial Transport Authority, is not a Court as ordinarily understood. But where he passes an order in appeal after hearing the parties and after deciding between a proposal and an opposition, a writ of *certiorari* lies against his order.

[Para 8]

K. Patnaik and S. C. Parija—for Petitioner; Advocate-General and P. V. B. Rao—for Opposite Party.

Narasimham J.—This is an application for the issue of a writ of *certiorari* under Art. 226 of the Constitution for quashing an order dated 27-7-50 passed by the Chairman, State Transport Authority while purporting to decide an appeal under S. 64, Motor Vehicles Act, 1939, against an order of the Regional Transport Authority, Puri, granting a permit for stage carriage on the route from Banpur to Berhampur to the petitioner Sri Raghunath Patnaik. The said route lies in the districts of Puri and Ganjam but a major portion of the route lies in the latter district. On 16-4-49 the R. T. A., Ganjam gave a permit for stage carriage on the said route to the opposite-party Somanath Patro. On the same day, the R. T. A., Puri granted a stage carriage permit conditionally to the petitioner, Sri Raghunath Patnaik, the condition being that his vehicle should be inspected and certified by the Motor Vehicles Inspector. On 16-7-1949 the R. T. A., Puri after perusing the fitness certificate issued by the Motor Vehicles Inspector confirmed the grant of the permit in favour of the petitioner. Some time in May 1949, the opposite party Sri Somanath Patro on coming to know about the conditional grant of permit to the petitioner by the Puri authorities filed an objection before them against the grant of permit to the petitioner. But his objection was not looked into because it was filed long after the period prescribed for filing objections under S. 57 (4), Motor Vehicles Act. The opposite-party thereupon filed an appeal before the Chirman, State Transport Authority who by his order dated 27-7-1950 set aside the order of the R. T. A., Puri mainly on the ground that the application for permit made by Sri Raghunath Patnaik before the R. T. A., Puri was incompetent in view of a direction issued by the Provincial Transport Authority under sub-s. (4) of S. 44 of the M. V. Act.

[2] It is necessary to describe briefly the functions of the R. T. A. and the P.T.A. under the M. V. Act. Both the said authorities are constituted by the State Government under S. 44 of the Act and while the jurisdiction of the R. T. A. ordinarily extends over a district, the jurisdiction of the P. T. A. extends over the whole State of Orissa. The function of granting a stage carriage permit is primarily that of the R. T. A. (S. 47) and it has to follow certain principles and procedure described fully in Ss. 47 and 57. A permit issued by a R. T. A. is not valid in another district and consequently where a route lies in two districts, the permit issued by the first R. T. A. requires validation by the R. T. A. of the second district in accordance with the procedure prescribed in S. 63 of the Act. In the present case that section has been complied with and the counter-signature of R. T. A. Ganjam obtained to the permit issued by R. T. A, Puri in favour of the petitioner. Section 64 provides for an appeal against some of the orders of the R. T. A to a prescribed authority and it is admitted that the Chirman of the P. T. A. has been notified by the Government as the appellate authority over the decisions of the R T.A. The P.T.A. is a superior body which ordinarily does not take upon itself the function of the R. T. A., though under cl. (b) of sub-s. (3) of S. 44 it may perform the duties of the R.T A. if it thinks fit in respect of a route common to two or more regions. Its main function however is to co-ordinate and regulate the activities and policies of the R. T. A. and for that purpose it is empowered to issue directions from time to time for their guidance (see sub-s. (4) of S. 44). By an amendment made in 1942, a new sub-section (sub-s. (5)) was inserted in S. 44 of that Act and the P. T. A. was given the power to delegate such of its powers and functions to such authority or person as may be prescribed by the rules framed by the State Government. It was not challenged before us that no rules have yet been made by the State Government under sub-s. (5) of S. 44 and consequently this power of delegation could not be validly exercised by the P. T. A

[3] On 15-1-1946 the P. T. A., passed the following resolution:

"Resolved further that the Chairman is authorised to take over any other inter-district route or routes if the circumstances justify unitary control."

In pursuance of this resolution the Secretary of the P. T. A., issued the following letter to all the R. T. As.

"

No. 150 (4) PTA
Dated Cuttack, the 9th March 1946

To

The Regional Transport Authority,
Cuttack/Puri/Ganjam/Sambalpur.

Subject:—Control of routes by Provincial Transport Authority.

It has come to notice that some of the Regional Transport Authorities are granting or renewing permits over the routes, the control of which has been taken over by the Provincial Transport Authority. As the Provincial Transport Authority is not consulted before the grant or renewal of such permits, it is not convenient to introduce efficient control over the management of the various services in order to give better facilities to the public and to avoid uneconomical and rival competitions. The Regional Transport Authority

should, therefore, consult the Provincial Transport Authority before the grant of renewal of any permit or change of timings or fares of the existing and future service for any part over these routes. The following routes are under the Provincial Transport Authority's control :

(1) Cuttack-Berhampur.
(2) Cuttack-Puri.
(3) Sambalpur-Meramundali.
(4) Cuttack-Sambalpur."

The Advocate-General urged that by virtue of the aforesaid resolution read with the subsequent letter, the P. T. A. in exercise of its powers under cl. (b) of sub-s. (3) of S. 44 took over the duties of the R. T. A. in respect of inter district routes such as Cuttack-Berhampur. The route from Banpur to Berhampur lies on this route except for a few miles near Banpur and hence that route also may be said to have been taken over by the P. T. A. In 1947 the P. T. A. found the work of granting permits over inter-district routes to be unmanageable and therefore passed the following resolution on 3-10 1947.

"2. The granting of original permits and counter-signature of permits by the P. T. A. :—

Discussed the question of application for original permits and applications for counter-signature of permits coming to the P. T. A. Resolved that in view of the large volume of work it involves which can conveniently be done by the R. T. As. application for original permits and for counter-signature permits should be made to the R. T. A. in whose jurisdiction the longest stretch of the route lies. Applications for extension of the existing permits or extension of any permit that will be granted in future should be made to the R.T.A. of the region in which the extended route lies."

The Advocate-General further urged that by the aforesaid resolution of 3-10-1947 the P. T. A. divested itself of its power of issuing permits over Cuttack-Berhampur route but it directed that applications for orignal permits and for counter-signature of permits should be made to the R. T. A. in whose jurisdiction the longest stretch of the route lies. In accordance with this direction an application for a permit over Banpur-Berhampur route ought to have been made before the R. T. A. Ganjam within whose jurisdiction a major portion of the route lies and that consequently the R. T. A., Puri had no jurisdiction either to receive the application or to grant a permit. This argument appears to have weighed with the lower Court.

[4] In my opinion this argument is untenable. It is true that under sub-s. (4) of S. 44 the P. T. A. has the power to issue directions for the guidance of the R. T. As. But such directions should be consistent with the other provisions of the M. V. Act. Section 45 of the Act is as follows :

"*General provision as to applications for permits* : Every applications for a permit shall be made to the Regional Transport Authority of the region or of one of the regions in which it is proposed to use the vehicle and, if the applicant resides or has his principal place of business in any one of those regions, to the Regional Transport Authority of that region."

This section therefore says that if a route lies in two regions an application for a permit may be made to the R. T A. of either of the two regions; but that if the applicant resides or has his principal place of business in any of those regions the application shall be made to the R. T. A. of that region. The petitioner Sri Raghunath Patnaik is a resident of Puri district and consequently under S 45 he is entitled to apply to the R. T. A., Puri for the grant of a permit over the Banpur-Berhampur route. This right conferred by S. 45 cannot be taken away by any direction that may be issued by the P. T. A. under sub-s. 4 of S. 44. But this does not mean that the P. T. A. cannot issue directions regulating the disposal of such applications. Under cl. (a) of sub s. (3) of S. 44 the P. T. A. has the power to co-ordinate and regulate the activities of the R. T. As. and in exercise of that power the P. T. A. could have directed one R. T. A. to send such applications for disposal to another R. T. A. within whose jurisdiction the longest stretch of the route lies. There is a clear distinction between *disposal* of an application for a permit and *filing* of such an application. Section 45 deals with the forum for filing such applications. It has nothing to do with their disposal and for the latter purpose the P. T. A. could have easily issued appropriate directions. But the resolution of the P. T. A. dated 3-10-1947 says that applications should be made to the R. T. A. within whose jurisdiction the longest stretch of the route lies, thereby clearly going against the provisions of S. 45 Hence that resolution cannot be a valid direction under S. 44 (4), M. V. Act so as to oust the jurisdiction of the R. T. A., Puri to receive the application of Sri Raghunath Patnaik. As there was no further direction from the P. T. A., regarding the disposal of such applications the R. T. A., Puri was within its powers in disposing of it in accordance with the other provisions of the M. V. Act.

[5] It is now necessary to examine how far the resolution of the P. T. A. dated 15-1-1946 took away the power of the R. T. As. to grant permit over inter-district routes. The resolution has been already quoted and it merely authorises the Chairman to take over any inter-district route if the circumstances justify unitary control. The power to take over such routes is conferred on the P. T. A. by cl. (b) of sub-s. (3) of S. 44, M. V. Act. That power cannot be delegated to the Chairman except under the provisions of sub-s. (5) of that section. But as already pointed out, the exercise of the power of delegation is dependent on the existence of rules framed by the Government under that sub-section. In the absence of such rules such delegation itself becomes invalid and consequently

the aforesaid resolution of the P. T. A. must be held to be ineffective. The letter of the P. T. A. dated 9-3-1946 doubtless implies that the P. T. A. has taken over control of Cuttack-Berhampur route. But the learned Advocate-General has not placed before us any other resolution of the P. T. A. between 15-1-1946 and 9-3-1946 to show that the P. T. A. itself took over that route. Apparently, in pursuance of the January resolution, the Chairman took over that route and this was considered to be an act of the P. T. A. itself and then instructions were issued to all R. T. As. As the P. T. A. had no jurisdiction to delegate its functions to its Chairman, it is obvious that even if the latter took over the control of the Cuttack-Berhampur route his action cannot oust the jurisdiction of the R. T. As. of the regions through which the said route passes.

[6] It must therefore be held that neither the resolution of the P. T. A. dated 15-1-1946 nor its letter dated 9-3-1946 nor its subsequent resolution dated 3-10-1947 had the effect of taking away the jurisdiction of the R. T. A., Puri to receive the application of the petitioner for a permit over Banpur-Berhampur line and to grant the same. It is true that the permit issued by the R. T. A., Puri will be valid only within the limits of Puri district and to validate the same in Ganjam district the petitioner was required to apply to the R. T. A., Ganjam under S. 63. This was also done and the counter-signature of the R. T. A., Ganjam was obtained.

[7] The aforesaid conclusion vitally affects the competence of the Chairman, P. T. A. to hear the appeal which was filed before him by opposite party 2 Somanath Patro. The right of appeal is conferred by cl. (f) of S. 64, M. V. Act, on a person who having opposed the grant of a permit is aggrieved by the grant thereof. The said Somanath Patro did not oppose the grant of a permit to Sri Raghunath Patnaik prior to 16-4-1949. It is true that he filed an objection some time in May 1949. But that was long after the period fixed for filing objections under sub-s. (4) of S. 57. Consequently he had no right of appeal and the Chairman, P. T. A. had no jurisdiction to hear the appeal and set aside the order of the R. T. A. The Chairman was fully aware of this difficulty; but he tried to get round it by saying that as the R. T. A., Puri was not the proper authority for receiving applications for permits in view of the resolution of the P. T. A. dated 15-1-1946 the opposite party could not file a valid objection before him. But in view of what has been said above it is clear that the R. T. A., Puri was competent to receive the application and grant permit and consequently the objection of Somanath Patro ought to have been filed before him within the prescribed time as required by S. 57 (4).

[8] It was not seriously contested before us that a writ of *certiorari* would lie in a case of this type. It is true the Chairman, P. T. A. is not a Court as ordinarily understood. But it has been laid down in (*The King* v. *Londons County Council*; *Ex parte The Entertainment Protection Association*, (1931)-2 K. B. 215: (100 L. J. K. B 760), by Scrutton L. J. following previous decisions that a writ of *certiorari* would lie against the order of a tribunal exercising judicial functions even though such a tribunal may not be a Court. To a similar effect are the following observations of Viscount Simon L. C. in *Ryots of Garabandho* v. *Zemindar of Parlakhimedi*, A. I. R. (30) 1943 P. C. 164: (I. L. R. (1944) Kar P. C. 119).

"This writ does not issue to correct purely executive acts, but on the other hand, its application is not narrowly limited to inferior 'Courts' in the strictest sense. Broadly speaking, it may be said that if the act done by the inferior body a judicial act, as distinguished from being a ministerial act *certiorari* will lie.

The order of the Chairman, P. T. A is clearly a judicial act inasmuch as it purports to be an order passed in appeal after hearing the parties and after deciding between a proposal and an opposition In *Vedachala Mudliar* v. *Central Road Traffic Board Madras*, A. I. R. (35) 1948 Mad. 454 (I. L. R. (1949) Mad. 194) this power was exercised for quashing an order passed by the Central Road Traffic Board Madras (which corresponds to the P. T. A. in Orissa) on an incompetent appeal.

[9] I would therefore make the rule absolute and quash the order dated 27-7-1950 passed by the Chairman, State Transport Authority in M. V. Apps. Nos. 32 and 37 of 1949. The petitioner should get costs and hearing fee of two gold mohurs to be apportioned equally between the two opposite parties.

[10] **Ray C. J.**—I agree.

V.R.B. *Rule made absolute.*

A. I. R. (38) 1951 Orissa 84 *[C. N. 27.]*

RAY C. J. AND NARASIMHAM J.

Bansidhar Patnaik and others—*Petitioners* v. *Province of Orissa* — *Opposite Party.*

Criminal Revn. Ptn. No. 477 of 1949, D/- 29-9-50.

(a) Penal Code (1860) S. 188—Complaint by public authority is essential—Criminal P. C. (1898), S. 195 — Criminal Law Amendment Act (1932), S. 10.

The effect of S. 10 of the Criminal Law Amendment Act making offence under S. 188, Penal Code, cognizable does not render the provisions of S. 195, Criminal P. C. nugatory; nor is there any conflict between the

two provisions in their essentialities. Non-compliance with S. 195 is fatal to the prosecution under S. 188. Complaint by the public authority concerned is essential. [Para 4.]

Anno. Penal Code S. 188, N. 5; Cr. P. C., S. 195, N.3.

(b) Penal Code (1860) Ss. 145, 188—Trial for offences under—Non compliance with S. 195, Criminal P. C., in respect of offences under S. 188—Conviction under S. 188 set aside—Conviction under S. 145 held did not stand—Criminal P. C. (1898), S. 195.

The accused was convicted under Ss. 188 and 145, Penal Code. Prosecution for offence under S. 188 was found vitiated on account of want of a complaint by public authority as required by S. 195, Criminal P. C. As regards his conviction under S. 145:

Held, that on vitiation of the trial under S. 188 and therefore its exclusion from trial there would remain no unlawful assembly and therefore the order for disposal of such an assembly would have not legal validity. Without unlawful assembly, offence under S. 145 could not be said to have been committed. (Conviction and sentence quashed). [Para 10]

Anno. Cr. P. C., S. 195, N. 3; Penal Code, S. 145, N. 1

V. Pasayat and R. N. Das—for Petitioners; Advocate-General—for Opposite Party.

Ray C. J.—The petitioners seek review of the orders of the Court below convicting them under Ss. 145 and 188, Penal Code, for having violated an order under S. 144, Criminal P. C., promulgated by the Magistrate and having failed to disperse the unlawful assembly after having been commanded to do so.

[2] The petitioners' contention is that the prosecution under S. 188, Penal Code, is bad in law as no complaint was filed by the public authority concerned according to the provisions of S. 195, Criminal P. C. Secondly, that the trial, being bad in law as to S. 188, Penal Code, is bad in its entirety.

[3] These contentions are sought to be met by the learned Advocate-General, appearing for the State, in two ways: (i) that the offence under S. 188, Penal Code, has been declared cognisable under S. 10, Criminal Law Amendment Act, 1932, and hence compliance with S. 195, Criminal P. C. is not necessary; and (ii) that even if the trial be bad with regard to offence under S. 188, it is not so with regard to the offence under S. 145, Penal Code. The latter is an independent offence. The prosecution therefore is not subject to prerequisite of complaint by the public authority concerned.

[4] The effect of the Criminal Law Amendment Act, does not render the provisions of S. 195 nugatory nor is there any conflict between the two provisions in their essentialities. Cognisable offences are those in which the police may arrest without warrant. It has not been pointed out to us how this would obviate the necessity of a complaint by the public authority concerned. Arrest by the police does not necessarily amount to cognisance of an offence by the Magistrate. Section 195, Criminal P. C. interposes a barrier between commission of an offence and cognisance by the Magistrate. This barrier can be removed only by a complaint being filed before the Magistrate. It has been held in the case of *Magan Lal* v. *Emperor*, 35 Cr. L. J. 1097 at p. 1100: (A. I. R. (21) 1934 Nag. 71):

"The fact that no proceedings may be instituted for an offence under S. 19 (f) of the Arms Act without the permission of the District Magistrate does not make the offence non-cognisable."

This contention, on behalf of the State, has found favour with the Court below. We hold that non-compliance with S. 195, Criminal P. C. is a fatal defect.

[5] The next contention that remains to be considered is whether the conviction under S. 145, Penal Code, would stand. A large number of authorities has been cited on both sides in support of their respective contentions. In all the cases, it has generally been accepted that evasion of S. 195, Criminal P. C., should not ordinarily be allowed. The larger question whether where an accused is convicted in one trial of several offences, the trial of some of which is bad in law for the non-fulfilment of certain primary conditions, the entire trial shall be held invalidated for such non-fulfilment and the conviction set aside, need not be decided in this case. There are some decisions which would support the contention that even though the trial is bad in relation to one or more offences, the conviction for other offences could be maintained. In the case of *Guru Prasad Rim Gupta* v. *Rameswar Marwari*, A. I. R. (25) 1938 Cal. 527: (39 Cr. L. J. 730), their Lordships of the Calcutta High Court, relying upon a Full Bench decision of that Court reported in *Satish Chandra* v. *Ram Dayal* A. I. R. (8) 1921 Cal. 1: (22 Cr. L. J. 31 SB) held:

'Since the Legislature has not chosen to include S. 500, I. P. C. amongst those sections, in which the prosecution must be initiated by the Court, in connection with which the offence has been committed, there is no provision of law by which the Court can refuse to permit a prosecution under S. 500 where the facts appear to justify such a prosecution, on the ground that the proceedings have not been initiated under S. 476, Criminal P. C. by the Court before which the offence is alleged to have been committed and that the prosecution is designed to evade the provisions of S. 195, Criminal P. C."

[6] In a Patna case, *Sheo Ahir* v. *Emperor*, A. I. R (25) 1938 Pat 548: (40 Cr. L. J. 71), Noor J. sitting with Rowland J. held:

"If in course of one transaction, a number of offences are committed some requiring sanction for prosecution of some authority or the other, and others not requiring such sanction, it is not necessary that the prosecution of those offences which do not require such

sanction would depend upon the obtaining of the sanction for prosecution for those offences which required, such sanction. The law requires that for the prosecution of a number of offences sanction of the Court should be obtained; but it does not say if in course of commission of an offence which requires sanction for prosecution, other offences are committed, the magistracy or the police are helpless in proceeding to prosecute the offender for these offences, unless the Court sanctions the prosecution of the former."

[7] Some support to this contention is also obtained from a decision of the Federal Court in the case of *Dr. Hori Ram Singh* v. *Emperor*, A. I. R. (26) 1939 F. C. 43: (40 Cr. L. J. 463). In this case, a public servant was tried jointly for offences under Ss. 409 and 477-A, Penal Code. Of the two, the latter offence was said to have been committed in course of discharge of his public duty and the prosecution for the offence necessitated, under S. 270, Government of India Act, 1935, previous consent or sanction of the Government. Their Lordships of the Federal Court held, with regard to the order of acquittal of both the offences:

"If the prosecution is defective for want of proper consent, the proceedings would be void and hence the proper order to pass is that the complaint should be dismissed. Order directing acquittal is wrong."

[8] Taking this view, their Lordships set aside the order of acquittal passed by the High Court and sent the case back to the Sessions Judge for rehearing the appeal against the conviction under S. 409 holding that the conviction under S. 477 A was, in any account, bad in law. They further observed that it was quite open to the learned Sessions Judge to grant the accused a retrial if he found that the accused was prejudiced in his trial for the offence under S. 409 on account of his being jointly tried for the offence under S. 497-A without previous consent of the public authority concerned. This conveys to my mind that according to their Lordships the accused in that case could be tried only for the offence under S. 409, Penal Code, and the trial cannot be held to have been vitiated as a whole on account of the joinder with it, of the charge, in the same trial, under S. 477-A without the requisite consent, unless it caused prejudice to him in defending himself against the charge under S. 409.

[9] I would, however, accept and adopt, with respect, the distinction between cases and cases as pointed out by Sir George Rankin C. J. in the case of *Ibrahim* v. *Emperor*, 111 I. C. 433 (Cal.) I would quote the headnote of this case which summarises accurately the finding of his Lordship:

"Where the offence committed is really one under S. 471, Penal Code, it is illegal to reduce the charge to one under S. 474, Penal Code, and prosecute the accused without a complaint under S. 476, Criminal P. C."

In course of argument, the Full Bench decision of the Calcutta High Court, already referred to, was relied upon for the contrary view. His Lordship said:

"It is said that in a Full Bench case reported as *Satis Chandra* v. *Ram Dayel De*, 42 C. L. J. 94: (22 Cr. L. J. 31 F. B), the contrary of this doctrine was laid down. In that case, however, the view taken was that the offences defined in Ss. 211 and 499 were fundamentally distinct in nature."

[10] In the present case, however, the commission of offence under S. 188 is the common object of the unlawful assembly. Exclude S. 188 from the trial, and there would be no unlawful assembly and therefore the order for dispersal of such an assembly (not being an unlawful assembly) will have no legal validity. Without an unlawful assembly, an offence under S. 145, Penal Code, cannot be said to have been committed.

[11] Under the circumstances, the trial for the offences, the facts constituting which are intimately, rather inextricably intertwined, is bad in law without a complaint in writing of the public authority concerned in relation to one of the offences charged.

[12] In the result, the conviction and sentences are quashed. The rule is made absolute. The petitioners should, forthwith, be discharged from their bail bonds.

[13] **Narasimham J.**—I agree.

R.G.D. *Rule made absolute.*

A. I. R. (38) 1951 Orissa 86 *[C. N. 28.]*

RAY C. J. AND NARASIMHAM J.

Ismail and another — Petitioners v. *State of Orissa—Opposite Party.*

Criminal Misc. Nos. 21, 22, 32, 33 of 1950, D/-11-9-1950.

(a) Public Safety—Orissa Maintenance of Public Order Act (X [10] of 1950), Ss. 2 (1) (b) and 3—Provisions, if void under Arts. 13 (2) and 21 of Constitution—Constitution of India, Arts. 13 (2), 19 (1) (d), (e) and (5) and 21.

In considering the reasonableness of restrictions contemplated by Art. 19 (5) of the Constitution, a Court has to consider whether the fundamental principles of natural justice, which require that no party ought to be condemned, or to have a decision given against him unless he has been given a reasonable opportunity of putting forward his case before an impartial tribunal, have been contravened. Judged by this standard, the provisions of S. 2 (1) (b) and S. 3 of the Orissa Act of 1950 cannot be held to authorise the imposition of reasonable restrictions on the fundamental rights guaranteed to a citizen under Art. 19 (1) (d) and (e) of the Constitution and consequently those provisions must be held to be void. [Para 7]

Per *Ray C. J.*—Provisions are void also as inconsistent with Art. 21 of the Constitution as they do not provide for the essentials of a legal procedure. [Para 15]

(b) Criminal P. C. (1898), S. 491—Order of internment—Writ of habeas corpus, if applies.

A writ of *habeas corpus* will not apply against an order of internment which is not 'detention' as ordinarily understood. [Para 10]

Anno. Cr. P. C., S. 491 N. 7.

(c) Constitution of India, Art. 226—Scope.

Article 226 empowers the High Court to issue necessary directions for the enforcement of any of the rights conferred by Part III of the Constitution even though such directions may not strictly conform to one of the writs specifically mentioned in that Article. [Para 10]

(d) Constitution of India, Art. 19 (5)—Reasonable restrictions—If matter of substance or of procedure.

Per *Ray C. J.*—Consideration of reasonable restrictions in the interests of the public necessarily gives rise to a question whether the social control delimiting personal liberty as provided in a particular legislation is reasonable. Reasonable restriction is more a matter of substance than of procedure in the background of the Constitution of India. The restriction must be so scaled as to ensure that the execution of the law will not generally entail greater restrictions than are required for protection of the general public. In this respect the Act should be more or less self-contained so that the person restricted may avail of it, granted that he is also provided with a procedure of being apprised of the cause against him and having an opportunity to be heard in an impartial tribunal in answering the charge against him. [Paras 14 and 15]

S. M. Mohanty and R. K. Ghose—for Petitioners, Government Advocate—for Opposite Party.

Narasimham J.—These four petitions have been filed under Art. 226 of the Constitution against certain orders of the District Magistrate of Kalahandi directing the internment of the petitioners within the limits of Nawapara subdivision of that district in exercise of the powers conferred on him by Cl. (c) of sub-s. (1) of S. 2, Orissa Maintenance of Public Order Act, 1948.

[2] Petitioner Ismail is the son of the petitioner Khan Sahib Adam Hazi Saleh Mohammed and the family have extensive business with headquarters in Nawapara sub-division. They have also extensive agricultural lands in that sub-division. Affidavits were filed on their behalf to the effect that they were nationals of the Indian Union and in the counter-affidavit filed by the Government this citizenship was not challenged and we would therefore take it as well-established that the two petitioners are citizens of the Indian Union. On 17-7-49 the then District Magistrate of Sambalpur, (within whose jurisdiction Nawapara subdivision was then included) issued two orders on the two petitioners under S. 2 (1) (c) of the said Act directing that they should not move out of Nawapara sub-division for a period of six months from the date of the orders. Against these orders the petitioners applied for a writ of *habeas corpus* under S. 491, Criminal P. C., to the High Court (Cr. Misc. Case Nos. 155 and 156 of 1949). The High Court rejected their petitions on 19-12-49 on the ground that the order of internment was not 'detention' as contemplated by S. 491, Criminal P. C. Then on 12-1-50 the District Magistrate of Kalahandi (within whose jurisdiction Nawapara subdivision was transferred meanwhile), issued two further orders extending the period of internment of the two petitioners for a further period of three months from the date of expiry of the previous orders. Against these extension orders Cri. Misc. Cases Nos. 21 and 22 were filed. In the meantime however for some inexplicable reason the District Magistrate issued two fresh orders on 7-3-1950 cancelling his previous orders dated 12-1-50 and directing the internment of the two petitioners within the limit of Nawapara sub-division for a period of six months from the date of his last orders. Criminal Misc. Cases Nos. 32 and 33 were filed against the last two orders and they alone are very material for the purpose of this judgment. On 31-3-1950, the Orissa Legislature passed a new Act known as the Orissa Maintenance of Public Order Act, 1950 (Act X [10] of 1950) omitting all provisions relating to preventive detention and in other respects re-enacting the provisions of the Orissa Maintenance of Public Order Act, 1948. Apparently this new Act was passed in view of the self-contained Preventive Detention Act, 1950, made by Parliament. Under the new Orissa Act, the power to intern any person was conferred by S. 2 (1) (b) and that provision is identical with S. 2 (1) (c) of the old Act. The old Act was repealed by S. 29 of the new Act. But sub-s. (2) of that section expressly saved all orders issued under the old Act by stating that those orders "shall continue in force and be deemed to be made or done under the corresponding provisions" of the new Act. Therefore though the two internment orders on the petitioners dated 7-3-1950 were actually passed in exercise of the powers conferred by S. 2 (1) (c) of the old Act, they should now be deemed to be orders passed under S. 2 (1) (b) of the new Act by virtue of the deeming provisions of S. 29 (2) of the new Act. The old Act and the new Act differ in one important particular, namely, in the old Act the duration of an order of internment was only six months in the first instance. If the Government wanted to extend the term they were required to consult an Advisory Council after giving the internee an opportunity of making his representation in writing. The learned Advocate-General has filed an affidavit to the effect that in the present two cases the Advisory Council was in fact consulted when the last orders dated 7-3-1950 were passed. But under the new Act an order of internment is to remain in force for a period of one year (see S. 3) and there is no provision either for consulting the Advisory Council or for even giving the petitioner an opportunity of making his repre-

sentation. We are now concerned mainly with the provisions of the new Act under which the two petitioners are constructively deemed to have been interned.

[3] The petitions were originally heard sometime in April 1950. But at the conclusion of the arguments our attention was invited to the petition of Dr. N. B. Khare which was then pending in the Supreme Court in which one of the main points in these petitions was also for consideration. We therefore thought it advisable to postpone the delivery of the judgment till the receipt of the decision of the Supreme Court on the petition of Dr. N. B. Khare. That judgment has since been received and the learned counsel for both sides were given further opportunities for argument in the light of that judgment. Many of the contentions advanced by Mr. Mohanty on behalf of the petitioners in his first argument need not therefore be considered now in view of the judgment of the Supreme Court (Original Jurisdiction Petn. No. 37 of 1950) dated the 26th May, *Dr. N. B. Khare* v. *State of Delhi*, (A. I. R. (37) 1950 S. C. 211.)

[4] Mr. Mohanty's arguments may be briefly summed up thus: The orders of internment passed by the District Magistrate deprive the petitioners of their fundamental rights to move freely throughout the territory of India and to reside and settle in any part of the territory of India, which rights were guaranteed to them under sub-cls. (d) and (e) of cl. (1) of Art. 19 of the Constitution. The provision of S. 2 (1) (a) of Orissa Act X [10] of 1950 which authorises the imposition of such restrictions is not saved by cl. (5) of Art. 19, inasmuch as restrictions authorised by the said provision are not 'reasonable' restrictions. Therefore, the said provision is void under Art. 13 (2) of the Constitution. In support of this argument he has not only relied on the Supreme Court judgment mentioned above but also on a Full Bench decision of the Patna High Court reported in *Brajnandan Sharma* v. *State of Bihar*, A. I. R. (37) 1950 Pat. 322 (F. B.) and an unreported Full Bench decision of the Bombay Court in *Jeshingbhai Ishwarlal* v. *State of Bombay*, Cri. Appln. No. 114 of 1950: (A. I. R. (37) 1950 Bom. 363 F. B.).

[5] The relevant provisions of the Orissa Act authorising internment of a person are quoted below.

"2. (1) The State Government, if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order it is necessary so to do, may make order:

(a) .....

(b) requiring him to reside or remain in such place or within such area in the State of Orissa as may be specified in the order and if he is not already there to proceed to that place or area within such time as may be specified in the order."

It will be noticed that the Act does not make it mandatory on the part of the appropriate authority to furnish the internee with a copy of the grounds on which the decision is taken to intern him nor is he given any opportunity of making a representation against the order. Moreover, there is absolutely no provision for referring the whole case to an impartial tribunal such as an Advisory Council. In this respect the new Orissa Act is much more drastic, than the old Act of 1948. As already pointed out, in that Act an order of internment for a period of six months can be passed without consulting an Advisory Council and without giving the internee an opportunity of making a representation. But if it is desired to extend the period of internment for a further term, consultation with the Advisory Council was made mandatory and the internee was given a statutory right of making a representation. Any discussion as to how far the provisions of the old Act are *intra vires* of Art. 19 of the Constitution seems academic in view of the fact that the new Act came into force on 31-3-1950 and the impugned orders of internment have to be taken as having been passed under the new Act.

[6] Article 19 (5) of the Constitution has been fully explained in the aforesaid decision of the Supreme Court in which the Chief Justice of India made it clear that in considering the reasonableness of restrictions on the liberty of a person imposed by any law the Court is entitled to consider the substantive as well as the procedural provisions of that law. He further pointed out that the minority view taken in the two Full Bench decisions of the Patna and Bombay High Courts overlooked this aspect of the question. In the judgment of Mukherjea J. however this point has been further elaborated and it was pointed out:

"One could understand that the exigencies of circumstances might justify the vesting of plenary powers on certain authorities which could pass orders on their own personal satisfaction temporarily and for short period of time; but if these orders are to continue indefinitely, it is only fair that an opportunity should be given to the person against whom such order is made to say what he has to say in answer to the allegations made against him. There may not be an investigation by a regular Court but it is necessary that the aggrieved person should be given a fair hearing and that by an impartial tribunal."

Mahajan J. concurred with this view and the other Judges of the Supreme Court have not dissented from this view. On the other hand my Lord the Chief Justice of India examined the relevant provisions of the East Punjab Public Safety Act under which Dr. N. B. Khare was externed and held that those provisions made

the furnishing of grounds to the externee mandatory and that there was also a provision for referring the whole case for the consideration of an Advisory Board. Therefore his view regarding the validity of the East Punjab Public Safety Act was not based on his dissenting from the view expressed by Mukherjea and Mahajan JJ. regarding the principles laid down about but solely because he held that in the statute in question those principles have been followed.

[7] Therefore the decision of the Supreme Court may be taken as sufficient authority for the view that in considering the reasonableness of restrictions contemplated by Art. 19 (5) of the Constitution, a Court has to consider whether the fundamental principles of natural justice which require that no party ought to be condemned, or to have a decision given against him unless he has been given a reasonable opportunity of putting forward his case before an impartial tribunal, have been contravened. Judged by this standard the provisions of S. 2 (i) (b) and S. 3 of the Orissa Act of 1950 cannot be held to authorise the imposition of reasonable restrictions on the fundamental rights guaranteed to a citizen under Art. 19 (1) (d) and (e) of the Constitution. The District Magistrate as the delegated authority has the power to pass an order of internment which shall remain in force for a period of one year. There is no duty cast on him to furnish the grounds of such internment to the internee so as to enable the latter to make a representation against the order. There is absolutely no provision for referring the whole case to an impartial tribunal such as an Advisory Board which has been constituted to deal with cases under the Preventive Detention Act, 1950 or an Advisory Council as was constituted under the old Orissa Act. Consequently those provisions must be held to be void.

[8] There were several other arguments advanced in support of Mr. Mohanty's contention. But these have been fully noticed in the majority judgments of the Patna and Bombay High Courts referred to above and also in the Supreme Court judgment. I, therefore, do not consider it necessary to discuss them in this judgment in view of the principles laid down by the Supreme Court mentioned in the preceding paragraph. The Advocate General, however, urged that as the majority Judges of the Supreme Court held that the impugned provisions of the East Punjab Public Safety Act were valid the minority judgment of Mukherjea J. should not be taken as binding on this Court. I have, however, shown how as regards principles laid down by Mukherjea J. no dissentient view has been expressed by the other Judges of the Supreme Court and consequently those principles bind the subordinate Courts. Even if it be held that those views are not binding on this Court, I would with great respect, adopt the principles laid down by Mukherjea J. which have not been expressly dissented from by the majority of Judges of the Supreme Court.

[9] The result is that the petitioners have been interned under the provisions of a law which are void.

[10] The next question is what is the nature of relief that can be granted to the petitioners? In their applications they prayed for the issue of a writ of *habeas corpus*. But strictly speaking such a writ will not apply against an order of internment which is not 'detention' as ordinarily understood. But in their applications they have clearly referred to Art. 226 of the Constitution which empowers the High Court to issue necessary directions for the enforcement of any of the rights conferred by Part III of the Constitution even though such directions may not strictly conform to one of the writs specifically mentioned in that Article. This view has been accepted by the Full Bench decisions of the Patna and Bombay High Courts mentioned above. I would, therefore, issue a direction on the State Government prohibiting them and any of their officers from taking any action for enforcement of the orders in question.

[11] **Ray C. J.**—I have had the advantage of perusing the judgment of my learned brother. I have no hesitation in agreeing with the conclusion reached by him. The point of law involved in the subject-matter before us is substantially concluded by a binding authority, I mean, the judgment of the Supreme Court in Original Jurisdiction Petn. No. 37 of 1950 dated 26-5 1950 *Dr. N B. Khare* v. *State of Delhi*, (A. I. R. (37) 1950 S. C. 211).

[12] At the time of the aforesaid decision their Lordships of the Supreme Court had before them two decisions of two State High Courts dealing with the same point, namely *Brajanandan Sharma* v. *State of Bihar*, A I. R. (37) 1950 Pat. 322 F. B. and the unreported Full Bench decision of the Bombay High Court in *Jeshingbhai Ishwarlal Modi* v *The State of Bombay*, Cri. Appln. No. 114 of 1950: (A. I. R. (37) 1950 Bom. 363 F. B.). As pointed out by my learned brother in his judgment, the decisions in the two State High Courts consisted of both majority and minority view of the learned Judges of those Courts who decided them. The minority view pivoted on that the word 'reasonable' qualifies the word 'restrictions' in the phrase "making any *law* imposing, *reasonable restrictions*" and it has no reference to the word 'law'. In that background they held that the law imposing such restrictions did not con-

tain any provision enjoining upon the State administrative or executive authorities to furnish the grounds of the restrictions imposed and affording the person restricted to make a representation either to the State Government or to any other tribunal of whatsoever character, either known by the name of Advisory Council, or Board or otherwise, do not have material bearing on the reasonableness of the restrictions. The difference of views consisted in that, according to the majority view, the absence of the aforesaid provisions in the impugned Act would make the restrictions unreasonable or not reasonable, while, according to the minority, denial of such a procedural right would not make the restrictions, the less reasonable. The minority took the view that it was for the Legislature either to afford opportunities to be heard to the persons restricted or not. According to them denial of such opportunities on account of the lack of such remedial provisions, in the concerned (impugned) Acts may make the law unreasonable, but it is not within the jurisdiction of the Court to throw it out on that ground.

[13] In the decision of my Lord the Chief Justice of India, the majority view of the two State High Courts has not been approved of and the minority view not accepted. His Lordship observes:

"Similarly, if the law provides the procedure under which the exercise of the right may be restricted, the same is also for the consideration of the Court, as it has to determine if the exercise of the right has been reasonably restricted. I do not think by this interpretion the scope and ambit of the word 'reasonable' as applied to restriction on the exercise of the right, is in any way unjustifiably enlarged. It seems that the narrow construction sought to be put on the expression, to restrict the Court's power to consider only the substantive law on the point, is not correct. In my opinion this aspect of the construction of Art. 19 (5) has escaped the minority judgments in the two matters mentioned above. I am not concerned with the conclusions of the two Courts about the invalidity of the provisions of the Acts they were asked to consider. To the extent they help in the interpretation of Art. 19 (5) only, they are helpful."

[14] Under the circumstances we are bound to hold that the impugned Orissa Act which deprives the person restrained of the remedial right is inconsistent with Art. 19 cl. 1 (d) read with cl. 5 and, to that extent void under the provisions of Art. 13 (1) of the Constitution of India. Free of authority I would, however, come to the same conclusion by a different process of ratiocination. I would say, if I was so permitted, with great respect, that reasonableness of the restrictions should be determined with reference to

'the interests of the general public or the protection of the interests of any scheduled trible for the protection whereof restrictions are imposed."

The constitutional requirement that the law delimiting a citizen's right to move freely throughout the territory of India should impose reasonable restrictions in the interests of the general public etc., can be identified with personal liberty protection by due process of law *as a matter of substance* in the rule obtaining in the United States of America accruing from due process clauses of the 5th and the 14th amendments. The 5th amendment so far as is material contains, "No person . . . . be deprived of life, *liberty* or property without due process of law; . . . . .". The 14th amendment so far as is relevant, reads:

"Section I—All persons born or naturalised in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State. . . . . ; nor shall any State deprive any person of life, *liberty* or property, without due process of Law; . . . . . ".

The Supreme Court of the United States started interpreting *due process clause* protecting personal liberty against delimitation, not only where the agencies of Government had no jurisdiction, but where the law imposing such delimitation did not afford a person the essentials of due process as to legal procedure. About the eighties the Supreme Court brought into existence the constitution guarantee of personal liberty by extending the due process clause to matters of substance :

"Prior to that time there had been no such guarantee. There had been a due process clause, in the 5th amendment, limiting the powers of the Federal Government, and a due process clause in the 14th amendment limiting the powers of the State Governments, but up to the eighties the due process clause had guaranteed only due process as a matter of legal procedure and due process as a matter of jurisdiction." (Hugh Evender Willis: Constitutional law of the United State.)

In this context the settled position in American law is that personal liberty has protection by due process of law as a matter of substance. Whatever mode the Government may undertake to follow, there is some personal liberty which cannot be limited. Due process of law, as a matter of substance, *does not forbid all social control* but it protects personal liberty against social control unless such social control is reasonable either because of a constitutional exercise of the police power or otherwise. If any legislation delimiting personal liberty is held to be outside the reasonable exercise of police power, it amounts to taking all personal liberty without due process of law and is unconstitutional. In short, due process of law protects personal liberty against unreasonable social control, but does not protect against all social control. I would hold consideration of reasonable restrictions in the interests of the public necessarily gives rise to a question whether the

social control delimiting personal liberty as provided in a particular legislation is reasonable. In other words "reasonable restrictions" is more a matter of substance than of procedure in the background of the Constitution of India. The framers of this Constitution have done their best to run away from the due process of laws as understood in the American Court. I would in this connection quote a passage from Willis Constitutional Law (at p. 709—Remedies) :

"The common law remedies as well as common law antecedent rights are protected by the due process of laws. A person who has *an antecedent right has the right to some remedial right*: to say that a person has no property right in a remedy does not help. Property rights are subject to the police powers and to the power of taxation, and the power of eminent domain. Consequently, in the same way, a person is entitled to the protection of the common law remedies unless changing them is a proper exercise of the police power. If all remedies were abolished, it would be very difficult to hold such action to be a proper exercise of the police power, but if some one remedy is abolished, it is possible to find a social interest for doing so and therefore, to hold it to be a proper exercise of the police power."

In the same way remedy may be taken away, a new remedy may be created if there is social reason for it. In our Constitution, however, a right to procedure for remedial measures has, if at all, been provided for in Art. 21. An impression has gone out that words *personal* in Art. 21 has reference only to liberty of the *person*. This, in my view, is a very narrow construction. A procedural guarantee, given by the Article, would apply to all liberties personal to an individual. "Personal liberty" in its legal connotation may include, or rather should include, the rights enumerated in Art. 19 (1) and something more. In this connection I would invite attention to a passage from Willis Constitutional Law at p. 710.

"Does the personal liberty protected by the due process of laws as a matter of substance include the rights, powers, privileges and immunities of the bill of rights? The answer apparently is that it includes some of them but not all, but the tendency is towards including more and more of the bill of rights. It includes the rights to protection of the *eminent domain clause*. It includes the rights to protection of the equality clause. It includes the right to protection of the contract clause. Many other guarantees in the bill of rights are procedural. Some of these are protected by due process as a matter of the procedure and some of them are not. This, in short, envisages the ambit of "personal liberty."

Bill of right, as such, is not known to us but the passage is quoted to illustrate the meaning of the word. From this arises the question if the impugned Act that imposes reasonable restrictions, in the interest of the general public or otherwise within the meaning of sub-cl. 5 of cl. 19, provides for no remedial right, should it be not inconsistent with Art. 21 of the Constitution? In my opinion, it would be inconsistent. I am aware of the compelling view that procedure established by law means procedure established by statute law. But where the particular statute does not provide any procedure at all, can it be said that the person, the victim of the law restricting his movements, is deprived of his personal liberty according to the procedure established by law? I should say, no. I would understand the Article to mean not total denial of any sort of procedure whatsoever. The article means that the citizen has no right to any specific or particular kind of procedure but he has a right to some sort of procedure which would ensure the observance of the rule of natural justice that nobody should be condemned without being heard. By way of comparison as to how this branch of law is understood in the United State of America, I would quote another passage from Willis Constitutional Law, at p. 663:

"Due process, as a matter of procedure, always applies in the case of a judicial tribunal performing judicial functions, and the usual rule is that it applies to executive and administrative action whether the Governmental power exercised is a tax power, or the power of eminent domain, or the police power."

The essentials of procedure, in the minimum, are essentials of notice, opportunities to be heard and a tribunal. Essential of notice requires to apprise the victim of the nature of the cause against him in order to afford him sufficient opportunity to prepare and to make his answer. Opportunity to be heard is the second essential of procedure established by law. To condemn without hearing is repugnant to natural justice. Any procedure which does not guard against this requirement is no procedure by law. The essentials of such opportunities do not, however, consist in any particular form or method of hearing. All that is required is a reasonable opportunity to be heard. The opportunity does not guarantee a person a right to an appeal. One hearing is all that is required. Tribunal as the third essential of procedure does not necessarily mean a judicial tribunal. Any impartial tribunal will meet the requirement.

[15] To conclude, I find that there is nothing in the impugned Act which would guarantee that the restrictions sanctioned under it are reasonable. We are not concerned with the reasonableness of particular order restricting the movement of a citzen. We must be sure that the restrictions considered in the light of 'the interest of the general public' for the protection of which they are imposed, are reasonable, that is to say, that the restrictions are so scaled as to ensure that the execution of the law will not generally entail greater restrictions than are required for such protection. In this respect the Act should be

more or less self contained so that the person restricted may avail of it, granted, that he is also provided with a procedure of being apprised of the cause against him and having an opportunity to be heard in an impartial tribunal in answering the charge against him. The impugned Act does not stand the tests and is, in my opinion, therefore, void. Secondly it is void as inconsistent with Art. 21 of the Constitution as it does not provide for the essentials of a legal procedure.

[16] This approach to the question of validity of the impugned Act may attract criticism that it is not realistic. But I would say that such a criticism is wholly unfounded. The reasons are: that though personal liberty of a citizen is no doubt subject to social control, one of the forms of the social control is *valid exercise of the police power against which personal liberty is not protected.* The police power is the legal capacity of sovereignty, or one of its agents to delimit personal liberty for the protection of other more important social interests *by means which bear a substantial relation thereto.* There are two main requirements for a proper exercise of the police power: (1) There must be a social interest to be protected which is more important than the social interest in personal liberty, and (2) there must be, as a means for the accomplishment of the purpose, something which bears a substantial relation thereto. It may be noted that it is the substantiality of this relation which would determine the reasonableness of the restrictions in relation to the interest of the general public.

[17] *Certificate* —A Certificate under Art. 132 (1) of the Constitution to the effect that this case involves a substantial question of law as to the interpretation of the Constitution is granted.

V.R.B. *Order accordingly.*

A. I. R. (38) 1951 Orissa 92 *[C. N. 29.]*

NARASIMHAM J.

Madhusudan Mahapatra — Petitioner v. *State—Opposite Party.*

Criminal Revn. No. 347 of 1949, D/- 10-5-1950.

(a) Criminal P. C. (1898), S. 561A—Objectionable remarks in judgment — Power to expunge when no appeal or revision is filed.

The High Court has power under S. 561A to expunge objectionable remarks in a judgment of an inferior Court which has not been brought before it in regular appeal or revision. [Para 4]

Anno Cr. P. C., S. 561 A. N. 7, Pt. 3.

(b) Criminal P. C. (1898), S. 561-A—Adverse remarks of sweeping nature against witness—Expunging of such remarks.

Doubtless Magistrates should be free to make bold and fearless comments on the evidence before them while writing their judgments so that they may be able to discharge their duties effectively. But they should use restrained language while commenting on the character and credibility of witnesses, who unlike the accused persons, do not get adequate opportunities to defend themselves. If the Magistrates overstep the limits and make adverse remarks of a sweeping nature against witnesses unsupported by the evidence on record, the High Court, for the ends of justice, has to interfere. [Para 5]

Anno. Cr. P. C., S. 561 A, N. 7, P. 10.

H. Mohapatra—for Petitioner; *Govt. Advocate—for Opposite Party.*

Order.—This is a petition under S. 439 read with S. 561A, Criminal P. C., for expunging certain remarks made against the character of the petitioner by Sri P. N. Sarkar, Magistrate, 1st Class, Berhampur in his judgment in G. R. No. 10 of 1947.

[2] The petitioner is a resident of village Pitala P. S. Aska in Ganjam district. He is also a member of the Orissa Legislative Assembly and belongs to the Congress Party. On 8-12-46 one Chori Santra of village Raisinghpur which is very close to village Pitala lodged a station diary entry at Aska Police Station at about 10 A. M. to the effect that one Sibarama Patnaik, the Karanam of village, had been assaulted and wrongfully confined by several persons of Pitala village led by Haribar Panda. The police did not take any immediate action thinking that it was a non-cognisable offence. Subsequently, however, a petition was sent to the Superintendent of Police on the basis of which the S. I. of Aska instituted a regular F. I. R. on 26-1-47 and after due investigation submitted charge-sheet against Haribar Panda, Biswanath Panda and six other persons who were all tried for offences under Ss. 147, 342/149 and 355, Penal Code in the Court of Sri P. N. Sarkar Magistrate, 1st Class, Berhampur. In that case the petitioner figured as one of the eye-witnesses (P. W. 5). Chori Santra (P. W. 1) and Sibaram Patnaik (P. W. 2) also deposed in support of the prosecution case. The substance of the allegations made against the accused persons in that case was that the said Sibaram Patnaik (P. W. 2) wrote a love-letter to a female inmate of the house of accused Haribar Panda which, however, fell into the hands of the accused persons. Thereupon, they were so much enraged against Sibaram Patnaik that they collected in a mob and wanted to kill him. He hid himself in the village Pathaghar for some time but subsequently on the assurance given by the petitioner he came out. The accused persons thereupon tied his hands, put an earthen pot on his head and led him in a procession in a humiliating way throughout the village. In the end, however, the petitioner succeeded in persuading Haribar Panda and his men to release Sibaram Patnaik.

[3] The learned Magistrate while acquitting the accused persons observed that the prosecution case appeared to be an exaggerated and inflated account of some alteration or misunderstanding between Sibaram Patnaik (P. W. 2) and the accused's party. He further observed:

"P. W. 2 having done a wrong and indecent act which brought general denunciation from the public must have taken the help of the enemies of the accused in saving his face some how."

He pointed out that all the eye-witnesses were interested persons inimically disposed towards the accused persons and held that the charges were not brought home against them. While discussing the evidence of P. W. 5 (the petitioners) who claimed to be an eye-witness to the occurrence, the learned Magistrate made the following comments:

"Besides the aforesaid facts this witness has made a number of admissions which go to show that the witness has evinced extraordinary interest in the case from its inception and during trial. *He has often misused his position as a public man in trying to influence the police and officers in getting a verdict against the accused persons.*"

The passage underlined (here italicised) has been taken exception to and I have been asked to expunge those remarks on the ground that they were not justified from the evidence on record. The learned Magistrate was called upon to show cause why these remarks should not be expunged and he has submitted an explanation pointing out extracts from the evidence from which he thought that those remarks were justified.

[4] The first question for consideration is whether the High Court has power under S. 561A, Criminal P. C., to expunge these remarks when no appeal or revision has been filed in the High Court against the order of acquittal passed by the trying Magistrate. In *P. J. Rogers* v. *Shrinivas Gopal*, A. I. R. (27) 1940 Bom. 266 : (41 Cr. L. J. 855), Beaumont C. J. (as he then was) took the view that the High Court has no jurisdiction to expunge passages from the judgment of an inferior Court which has not been brought before it in regular appeal or revision. This decision has been followed in a later Single Bench decision of the Patna High Court reported in *Bhutnath Khawas* v *Dasrathi Das*, A. I. R. (28) 1941 Pat. 544 : (42 Cr. L. J. 516). On the other hand, several other High Courts have held that whatever might have been the law prior to 1923 the effect of the insertion of S. 561A, Criminal P. C. by the amendment of 1923 was to make it clear beyond any doubt that the inherent powers of the Court can be invoked for expunging objectionable remarks from a judgment when they are not justified from the evidence on record, *Panchanan* v. *Upendra Nath*, A. I. R. (14) 1927 ALL. 193 : (27 Cr. L. J. 1407); *Emperor* v. *Atta Ullah Shah*, A. I. R. (23) 1936 Lah. 429 : (37 Cr. L. J. 661); *Lachhman Das* v. *Jai Gopal*, 40 Cr. L. J. 214 : (A. I. R. (25) 1938 Lah. 793); *Ghumanmal* v. *Emperor*, A. I. R. (31) 1944 Sind 133: (46 Cr. L. J. 85); *In re Public Prosecutor*, A. I. R. (31) 1944 Mad. 320 : (45 Cr. L. J. 763) and *Mohd. Fazal Shah* v. *Muhammad Asghar*, 51 Cr. L. J. 500 : (A. I. R. (37) 1950 Lah. 66). The law on the subject has been fully discussed in those decisions and with respect I am inclined to follow the reasonings given therein. As pointed out in *Ghumanmal* v. *Emperor*, A. I. R (31) 1944 Sind 133 : (46 Cr. L. J. 88).

"One of the inherent powers of the highest Court of a Province is to prevent grave injustice and injury being caused to a person, who, though not a party, has as a witness been called before the Court upon a summons which he cannot disobey and who has nevertheless been made the subject of defamatory remarks by a Magistrate or Judge, which remarks can in no way be justified from the record and the making of which, therefore, must involve the abuse of the judicial office. To expunge any such passage at the instance of a person aggrieved is 'otherwise to secure the ends of justice' within the meaning of S. 561A, Criminal P. C. Once it is considered that the High Court has this power, it must be conceded that it has the necessary ancillary power to call for the record so that its inherent power may be exercised."

[5] The main question therefore for consideration now is whether the remarks made against the character of the petitioner by the learned Magistrate were justified from the evidence on record. That they are of a highly defamatory nature and are likely to damage the petitioner's reputation amongst the public admits of no doubt whatsoever. The petitioner is a member of the Orissa Legislative Assembly and a prominent Congress worker of Ganjam district. If a Court of justice says that 'he has often misused his position as a public man in trying to influence the police and officers in getting a verdict against the accused persons' such remarks would lower him in public estimation and may prove fatal to his whole political career. Doubtless Magistrates should be free to make bold and fearless comments on the evidence before them while writing their judgments so that they may be able to discharge their duties effectively. But they should use restrained language while commenting on the character and credibility of witnesses, who, unlike the accused persons, do not get adequate opportunities to defend themselves. If the Magistrates overstep the limits and make adverse remarks of a sweeping nature against witnesses unsupported by the evidence on record, the High Court, for the ends of justice has to interfere.

[6] The petitioner was admittedly on inimical terms with the accused persons though they were both related. There seems to be no doubt that the petitioner took an active part during police

investigation. The earliest information about the occurrence was lodged at Aska Police Station not by the aggrieved party Sibaram Patnaik (P W. 2) but by one Chori Santra (P. W. 1) who is a son of Purohit of the petitioner himself. The police did not take any action on that information and thereupon a report was sent to the Superintendent of Police with a covering letter forwarded by the petitioner himself. It was on the basis of this report that under the orders of S. P. further investigation started. The petitioner admitted that he sent a latter to the Circle Inspector of Aska to investigate this case. The Inspector of Police (P. W. 8) deposed that during police enquiry the petitioner (P. W. 5) was present and that he was putting questions now and then to the witnesses. He tried to persuade P. W. 8 to file charge sheet in the present case and in two other connected cases and he went to the length of requesting P. W. 8 to arrest the accused persons and not to grant them bail. Apart from these facts, there is also the admission of P. W. 5 to the effect that after the completion of the investigation of this case he sent a report to the Hon'ble Prime Minister complaining against the S. I of Aska. From these proved facts the learned Magistrate was undoubtely justified in saying that the petitioner took extraordinary interest in the case. It is true that as an eye-witness it was his duty to narrate all that he knew about the occurrence to the police during investigation. But his extraordinary action in forwarding a complaint against the local police to the S. P., in putting questions to the witnesses now and then during investigation and in asking the Police Inspector (P. W. 8) to arrest the accused persons and not to grant them bail and also trying to persuade him to submit charge-sheet in the case—all tend to support the view that the petitioner was anxious to exploit to the full the advantage derived from a case of this type against his rivals. Doubtless if the occurrence is substantially true there is nothing wrong in a public worker trying to help the police in bringing the offenders to justice; but even for that purpose, the petitioner being a member of the Legislative Assembly need not have taken such an extraordinary interest which, he must have known, would embarrass and overawe the local official. But I am unable to understand why the learned Magistrate observed that the petitioner' often misused his position as a public man in trying to influence the police and officers in getting a verdict against the accused persons'. The use of the words 'often' and 'misused,' seem to indicate that the petitioner was deliberately concocting several false cases against the accused persons with a view to get them convicted. But even the Magistrate does not say in his judgment that entire prosecution case is false. On the contrary he gave the benefit of the doubt to the accused persons though he seems to have recognised that there was some sort of altercation and misunderstanding between P. W. 2 and the accused persons due to the former's indecent action. There is no evidence to show that apart from this case and the other connected cases there was any other criminal case against the accused persons in which the petitioner played any part. Thus when the occurrence is not held to be false and when there is no evidence of similar conduct by the petitioner against the accused persons it is not proper to say that the petitioner 'often misused his position as a public man' even if it be held that he tried to influence the police to submit charge-sheet in this case.

[7] The learned Magistrate further observed that the petitioner tried to influence officers also in getting a verdict against the accused persons. This portion of the remarks seems to be based on the admission made by the petitioner to the effect that while the present case was being tried by a Magistrate of Aska the petitioner as a public worker saw him several times though not in connection with this case. There was also a suggestion to the effect that the trying Magistrate actually went to the house of the petitioner on 18-9-1947. But this suggestion was denied. The Magistrate, however, felt highly embarrassed while these questions were put to the petitioner during his cross-examination. Therefore, in the order-sheet dated 6-9-1947 he himself suggested to the District Magistrate for the transfer of the case from his file. The case was eventually transferred to the file of a Magistrate at Berhampur. The evidence on record only shows that while the present case was going on in the Court of the Magistrate at Aska the petitioner saw him several times in connection with some other matter. This conduct of the petitioner has been sought to be justified on the ground that as a public worker, there might have been a necessity for him to see the Magistrate who was also an Executive Officer. But as his action was likely to be misconstrued, the trying Magistrate rightly himself suggested for the transfer of the case from his file. But from these facts it is not fair to infer that the petitioner misused his position as a public man by trying to influence the Magistrate to give a verdict against the accused persons. For such a sweeping statement there must be stronger evidence on record. Apparently the learned Magistrate was, to some extent, influenced by the contents of a letter said to have been written by the petitioner to the Hon'ble Prime Minister of Orissa on 9 4-1947, a copy of which

was reproduced in the 'Observer' dated 20-4-1947. That letter has not been proved in this case and a copy of the 'Observer' has merely been marked as 'X' for identification. The petitioner has not admitted the contents of the letter though his answers in cross-examination with reference to that letter are evasive and unsatisfactory. Whatever that may be, so long as that letter has not been proved properly in the case and admitted as evidence it should not have been taken into consideration.

[8] I am, therefore, of the opinion that though the Magistrate was justified in observing that the petitioner took an extraordinary interest in the case from its inception and that his evidence should be viewed with suspicion in view of his admitted enmity with the accused persons, he was not justified in saying 'he has often misused his position as a public man in trying to influence the police and officers in getting a verdict against the accused persons'. It may be that the petitioner's conduct during police investigation was not prudent and his seeing the trying Magistrate at Aska while the present case was pending in his Court was also not proper. As a prominent public worker and a Congress member of the Legislative Assembly the petitioner should have known that any extraordinary interest that he might evince during police investigation of this case and his repeated interviews with the trying Magistrate while the case was pending in his Court are likely to be misconstrued by the public and are also likely to embarrass and sometimes overawe the local officials. It may be that the petitioner had absolutely no intention of interfering with their discretion so far as the investigation or trial of this case was concerned. But in view of his peculiar position, he might have kept himself strictly aloof except to the limited extent of stating to the police and the Magistrates what he knew personally about the occurrence. But mere impropriety of conduct is not sufficient to justify a sweeping remark to the effect that 'he often misused his position as a public man'.

[9] I would, therefore, allow the petition and expunge the passage complained of from the judgment of the lower Court.

V.R.B. *Petition allowed.*

A. I. R. (38) 1951 Orissa 95 *[C. N. 30.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Reghu Singh and others — Plaintiffs — Appellants v. *Government of Orissa and others — Defendants — Respondents.*

First Appeal No. 38 of 1948, D/- 4-4-1950.

(a) C. P. Land Revenue Act (XVIII [18] of 1881), Ss. 65A and 80 — Protected status of thekadar — Evidence—Admission by defendant.

If the Settlement Officer has declared certain thekadar to be a protected thekadar he is bound in law to mention that fact in the khewat in view of S. 80 read with the rules framed under that section. [Para 6]

The protection under S. 65A can be granted only to those thekadars who have obtained the proper declaration from the Settlement Officer under that section. Mere admission by some of the defendants cannot confer that status. [Para 9]

(b) C. P. Land Revenue Act (XVIII [18] of 1881), S. 65-A—Power to confer protected status.

Under S. 65-A the Settlement Officer alone has the power to confer the status of a protected thekadar, subject of course to appeal or revision by the superior Revenue authorities, and the special incidents of a protected thekadar such as non-saleability in execution of any decree as specified in sub-s. (4) of S. 65-A apply only to those thekadars who have been declared to be protected under that section. [Para 8]

(c) Civil P. C. (1908), O. 14, R. 1—Specific issue raised notwithstanding admission — Evidence by plaintiff to prove his case.

Where a specific issue is raised on a question notwithstanding the admission by some of the defendants, the plaintiff is bound to lead evidence to prove his case on the question. [Para 9]

Anno: C. P. C., O. 14, R. 1, N. 2.

(d) Civil P. C. (1908), O. 41, R. 27 — Appeal — Additional evidence.

Where to allow additional evidence during the hearing of the appeal would involve a rehearing of the suit and there is no good reason given for failure to adduce such evidence in the trial Court itself, the prayer for adducing additional evidence in appeal can be refused. [Para 10]

Anno: C. P. C., O. 41, R. 27, N. 8.

(e) C. P. Land Revenue Act (XVIII [18] of 1881), Ss. 4 (9), 116 — Zamindar — If entitled to claim benefit of S. 116.

For the purposes of the C. P. Land Revenue Act there is no distinction between a Zamindar and a Malguzar so far as the assessment of land-revenue and realisation of land-revenue from inferior proprietors are concerned. From a mere construction of cl. (9) of S. 4 he would come within the definition of the expression 'Malguzar'. Consequently, S. 116 which confers on a Malguzar a right to realise arrears of revenue due to him from an inferior proprietor with the help of the Deputy Commissioner would apply to a Zamindar also. [Para 11]

(f) Tenancy laws—C. P. Tenancy Act (XI [11] of 1898), S. 45 (1) — Sale of village for arrears of land revenue—Occupancy rights in sir lands—Acquisition of by proprietor — Withdrawal of balance by proprietor—If extinguishes those rights—Evidence Act (1872), S. 115—C. P. Land Revenue Act (XVIII [18] of 1881), S. 108 (c).

From a scrutiny of sub-s. (1) of S. 45 it follows that when a proprietor loses his proprietary right in the village by sale for arrears of revenue due thereon, on the same day he gets occupancy right over his *sir* lands and the person who has newly acquired the proprietary right from him is entitled only to realisation of fair rent from him in respect of those lands. This occupancy right can be given up by him only on an application made by him to the Revenue officials for transfer of his *sir* lands without reservation of the right of occupancy as provided in sub-s. (2) of S. 45. That right cannot be extinguished by a decree even of a

Revenue Court in view of the clear words of sub-s. (1) of S. 45. The mere conduct of the proprietor and his other co-sharers in withdrawing the balance of the sale proceeds will not have the effect of extinguishing that right. An occupancy right, once it has accrued, can be extinguished only in the manner provided in the C. P. Tenancy Act and not by mere rule of estoppel based on subsequent conduct. [Para 12]

(g) Civil P. C. (1908), O. 41, R. 1 — Appeal — Question of law — Right to raise.

Where a pure question of law arises it is not open to the party to object to the raising of that question for the first time in first appeal. [Para 14]

Anno: C. P. C., O. 41, R. 1, N. 12.

(h) C. P. Land Revenue Act (XVIII [18] of 1881), S. 4 (1) (a) — Proprietor.

When the Settlement authorities entered some lands as the *sir* lands of a person it necessarily follows that his status was recognised as that of a proprietor. [Para 15]

P. C. Chatterji and B. Dube—for Appellants; S. Misra, B. Mohapatra and Advocate-General — for Respondents.

Narasimham J. — This is an appeal from the judgment of the Subordinate Judge of Sambalpur, dismissing the plaintiff-appellants' suit for recovery of possession of village Pandripathar together with its Sir and Khudkast lands as given in Schedule 'A' to the plaint.

[2] Pandripathar village is a village within Rampur zamindary in Sambalpur district, the present Zamindar being Mohan Brajaraj Singh defendant 7. In the Khewat (Ex. 2) of the last settlement of Sambalpur district (known as Hamid's Settlement) which took place in 1921 25 the whole village excluding some lands of the B. N. Rly., was entered in the name of Dasarath Singh (defendant 3) as Kharposdar (maintenance-holder) under the Khewat of the Zamindar of Rampur to whom the said Dasarath Singh was liable to pay an annual revenue of Rs. 144 8-0. In 1930, the Zamindar of Rampur applied to the Sub-divisional Officer of Sambalpur for the sale of the right of Dasarath Singh (see Ex. 9) for realisation of the arrear revenue due to him. His application was made under S. 116, Central Provinces Land Revenue Act, 1881 under which any arrear due to a Malguzar can be recovered through the Deputy Commissioner as if it were an arrear of revenue payable directly to Government. The procedure for realising arrears of revenue payable directly to Government is described in S. 94 of the said Act and one of the methods of such realisation is by the sale of the mahal in respect of which an arrear accrued (see cl. (f) of S. 94). But such a sale requires the sanction of the Board of Revenue and consequently the Sub-divisional Officer in his order dated 18-7 1931 (Ex. A 1) submitted a note to the Deputy Commissioner requesting that the Board of Revenue be moved for sanctioning the sale of the property of Dasarath Singh under S. 116 read with proviso (1) to S. 94, C. P. Land Revenue Act. From a subsequent order (Ex. B-1) dated 11-3-1932 it appears that the sanction of the Board of Revenue was communicated in letter No. 407R dated 8-3-1932 from the Commissioner to the Deputy Commissioner, Sambalpur. The sale was first held on 7-6-1932 and the price fetched was only Rs. 700. On 27-6 1932 a petition was filed (Ex. 7) by one Durjodhan Singh claiming to be the guardian brother of Dasarath Singh said to be insane, objecting to the sale on the ground that the sale proclamation was not properly served on the spot and that the property was sold for a grossly inadequate sum. The S.D.O. apparently felt that there was much force in this objection and, therefore, issued a fresh sale proclamation (Ex. G-1) on 22-9-1932 for the sale of the sixteen annas Kharposh right in Mouza Pandripathar together with the Sir and Khudkast lands attached to the same belonging to the said Dasarath Singh. In the proclamation, however, it was specifically noted that the sale was subject to the provisions of S. 108, C. P. Land Revenue Act, and a list of the encumbrances known to exist on the property was also appended to it. In due course the sale was held and the property was purchased at an auction by one Mangal Mistri on 21-10-1932 for Rs. 4000. The auction-purchaser was required to pay a further sum of Rs. 1433 4-0 before the confirmation of the sale. After the confirmation of the sale by the Deputy Commissioner a sale certificate (Ex. J-1) was issued in favour of Mangal Mistri under the signature of the Deputy Commissioner himself on 10-1-1933. After some obstruction by some of the co-sharers of Dasarath Singh delivery of possession of the village was given to the auction-purchaser on 2-9-1932 (Ex. I-1). On 28-7 1936 the said Dasarath Singh and some of his co-sharers (who are defendants in this suit) applied to the Deputy Commissioner (Ex. A 2) and withdrew the balance of the sale proceeds amounting to Rs. 1,742-13-0.

[3] The plaintiffs are also some of the co-sharers of Dasarath Singh who were, however, not signatories to the petition (Ex A 2) dated 28-7-36 for withdrawal of the balance of the sale-proceeds. Their present suit is for recovery of possession of the whole village including its sir and khudkast lands on the main ground that the sale held by the S D.O. on 21-10-32 (Ex. C-1) was invalid inasmuch as the property was inalienable and non-transferable. They impleaded as defendants the auction-purchaser (defendant 2), the Government of Orissa (defendant 1) Dasarath Singh (defendant 3) and other co-sharers who had withdrawn the balance of the sale-proceeds (defendants 4, 5 and 6) the zamindar of Rampur (defendant 7) and a subsequent

transferee from the auction-purchaser (defendant 8). The impleading of the Government of Orissa was clearly wrong inasmuch as it is not the case of the plaintiffs that either the Government or its subordinate Revenue Officials entered into a fraudulent conspiracy with the other defendants with a view to defraud the plaintiffs by misusing their powers under S. 116, C. P., Land Revenue Act and thus bring about a sale of the property. The Revenue Officials merely exercised their statutory powers under the said Act and there is absolutely nothing to suggest that their action was not *bona fide*. At the commencement of the hearing of the appeal Mr. Dube on behalf of the appellants properly conceded that he claimed no relief against the Government and that the latter was not a necessary party to the litigation. In view of this concession, it is unnecessary to consider the various points regarding the maintainability of the suit against the Government and the adequacy of the notice under S. 80, Civil P. C., which have been discussed at great length by the trial Court.

[4] From the foregoing narrative, it will be clear that the crucial point for consideration is whether the sale of the village held by the S.D.O. on 21-10-32 (Ex. C-1) was invalid. A second point which was strenuously pressed before us is whether even on the assumption that the sale was valid, the right of Dasarath Singh and his co-sharers to the sir lands of the village which ripened into an occupancy right under S. 45 (1), Central Provinces Tenancy Act, 1892 was also transferred to the auction-purchaser by the said sale or else whether that right remained unaffected by the sale.

[5] I shall deal with each of these points separately.

[6] The validity of the sale dated 21.10 32 was challenged on three grounds; ((i) the judgment-debtor Dasarath Singh was insane at the time of the sale and he was not properly represented before the S.D O. in the proceeding; (ii) the right of the said Dasarath Singh was that of a protected thekadar under S. 65-A, C. P. Land Revenue Act and that consequently his tenure was not saleable in execution of any decree in view of cl. (a) of sub-s. (4) of that section; and (iii) the Zamindar of Rampur is not a Malguzar within the meaning of S. 116, C. P. Land Revenue Act and consequently the S.D.O. acted without jurisdiction in selling the tenure while purporting to act under S. 116 of that Act.

[7] None of these grounds is sustainable. The plea that Dasarath Singh was insane in 1932 has not been substantiated. (After discussing the evidence, the judgment proceeded:) I would, therefore, in agreement with the lower Court, hold that the plea of insanity must fail as it is not supported by reliable evidence.

[8] As regards the second ground, there is absolutely no evidence on record to show that Dasarath Singh's right in the village was that of a protected thekadar under S. 65A, C. P. Land Revenue Act. That section confers on a Settlement Officer the power to declare certain thekadars to be protected for the purposes of that section. No such declaration of the Settlement Officer was proved before the Court. On the other hand, from the settlement khewat (Ex. 2) already referred to it appears that the only right of Dasarath Singh recognised by the Settlement authorities was his right as a maintenance holder (Kharposdar). If the Settlement Officer had declared Dasarath Singh to be a protected thekadar he was bound in law to mention that fact in the Khewat in view of s. 80, C. P. Land Revenue Act, read with the rules framed under that section. The special reasons as to why these maintenance-holders were not given the status of a protected thekadar would be found at p. 30, Para. 34 of Hamid's Settlement Report where the Settlement Officer relied on a decision of a Munsif in a suit from Rampur zamindari in 1907 to the effect that the declaration of certain maintenance holders as protected thekadars was *ultra vires*. That decision was upheld in appeal by the Subordinate Judge and also by the High Court in the case reported in *Hedayet Ali* v. *Kalanand Singh*, 20 I. C. 332 : (17 C.L.J. 411). The Settlement Officer relying on this view of law regarding the construction of S. 65-A, refused to recognise the maintenance-holders as protected thekadars. It was certainly open to the aggrieved party to take up the question on appeal or revision before the superior Revenue Officials challenging the correctness of the aforesaid decision. But it was not done. Mr. Dube on behalf of the appellants, however, suggested that subsequent to the settlement operations the parties might have applied to the Deputy Commissioner who under S. 132 (i), C. P. Land Revenue Act, exercises the powers of a Settlement Officer for certain limited purposes and that the Deputy Commissioner might have given the status of a protected thekadar to Dasarath Singh. Though there is no legal objection to the Deputy Commissioner giving such protected status the question for consideration is whether in fact he did so. No order of the Deputy Commissioner to that effect has been produced either before the lower Court or before us. Consequently not only is there no evidence on record in the nature of a certificate or order either by the Settlement Officer or by the Deputy Commissioner or any other superior Revenue Officer recognising Dasarath Singh as the protected

thekadar of the village but on the other hand the entry in the Khewat specifying the right of Dasarath Singh to be that of a mere Kharposdar coupled with the reasons given by the Settlement Officer at p. 30 of Hamid's Settlement Report for refusing to recognise maintenance-holders as protected thekadars would indicate that Dasarath Singh was not given that status by the Settlement Officer deliberately. In the present litigation it is unnecessary to consider whether the Settlement Officer's view about S. 65-A, C. P. Land Revenue Act, which is based on a judicial decision of a Munsif of Sambalpur in respect of some other villages though within the same zamindari is correct or not. Under S. 65-A the Settlement Officer alone has the power to confer such a status, subject of course to appeal or revision by the superior Revenue authorities, and the special incidents of a protected thekadar such as non-saleability in execution of any decree as specified in sub-s. (4) of S. 65-A apply only to those thekadars who have been declared to be protected under that section. The plaintiffs cannot claim the benefit of cl. (a) of sub-s. (4) of S. 65-A in view of their failure to show that Dasarath Singh was declared to be a protected thekadar under that section.

[9] Mr. Dube, however, contended that from the pleadings of the parties it was clear that they all admitted the status of Dasarath Singh to be that of a protected thekadar and that in view of this admission no evidence on this point was necessary. In support of this argument he has invited our attention to Para. 8 of the plaint in which such status was claimed by the plaintiffs and Para. 1 of the written statement of defendants 2 to 7 where also it was specifically admitted that Dasarath Singh's status was that of a protected thekadar. But the Government of Orissa in Para. 5 of their written statement challenged this fact and one of the principal issues raised by the parties was issue 8 which ran as follows:

"What was the status of Dasarath Singh? Whether he was protected Thekadar or Kharposdar and did his status affect the liability of the plaintiffs on the sale of the tenure for default in paying the thika jama?"

Thus when a specific issue was raised on the question notwithstanding the admissions made by defendants 2 and 7, it is clear that the plaintiffs were bound to lead evidence to show the status of Dasarath Singh as protected thekadar. The admission of defendants 2 and 7 is not unambiguous and in any case the protection under S. 65-A, C. P. Land Revenue Act, can be granted only to those thekadars who have obtained the proper declaration from the Settlement Officer under that section. In the absence of any proof of such declaration and in view of the other circumstances already referred to, I would hold that the plaintiffs have failed to prove that the status of Dasarath Singh was that of a protected thekadar and consequently the sale cannot be challenged on the ground that the tenure is non saleable.

[10] During the hearing of the appeal a petition was filed by Mr. Dube, the learned counsel for the appellants, for admitting as additional evidence the Khewat of the village in Dewar's Settlement of 1906 in which Dasarath Singh's predecessor-in-interest was recorded as a protected thekadar of the village. Mr. Dube submitted that this document was not adduced in evidence in the trial Court chiefly because of the admissions made in the pleadings and that consequently he should be given an opportunity to prove the protected status of Dasarath Singh from Dewar's Settlement Khewat. Mr. Mohapatra on behalf of the respondents, however, objected to the admission of this document at this belated stage on the ground that it would be highly prejudicial to the opposite-party unless they are given a further opportunity to adduce rebutting evidence. He submitted that even if Dasarath Singh's predecessor had been recognised as a protected thekadar during Dewar s Settlement, such protection might have been withdrawn subsequently prior to Hamid's Settlement and that had this document been proved in the trial Court they (Mr. Mohapatra's clients) would have had an opportunity to show how by subsequent events the effect of the entry in Dewar's Settlement has been practically removed. We are satisfied that Mr. Mohapatra's objection is based on good grounds. To allow additional evidence at this stage would involve a rehearing of the suit inasmuch as in fairness to the other side they should be given an opportunity to adduce rebutting evidence. Moreover, we are not satisfied with the reasons given by Mr. Dube, for the failure of his clients to prove Dewar's Settlement Khewat in the trial Court itself. As already pointed out the question about Dasarath Singh's protected thekadari status was one of the issues in the suit notwithstanding the guarded admission in the pleadings. The plaintiffs were therefore bound to adduce all possible evidence to prove this protected status. In fact they proved the Khewat of Hamid's Settlement (Ex. 2). But for some inexplicable reason they did not care to prove the Khewat of Dewar's Settlement. We have, therefore, decided to reject the prayer for adducing additional evidence at this belated state.

[11] The third ground of attack of the sale depends on whether the Zamindar of Rampur is a Malguzar within the meaning of S. 116, C. P. Land Revenue Act. The expression 'Mal-

guzar' has been defined in cl. (9) of S. 4 of that Act as follows:

"'Malguzar' means a person who, under the provisions of this Act, has accepted, or is to be deemed to have accepted, the assessment of a mahal, and includes his representatives and assigns, and also any person with whom a settlement has been made before this Act comes into force, and his representatives and assigns."

The expression 'mahal' has also been defined in cl. (7) of the same section as follows:

"'Mahal' means any local area held under a separate engagement for the payment of the land-revenue direct to Government, and includes also any local area declared, under the provisions of this Act, to be a mahal but does not include a survey number."

There is no definition of the expression 'Zamindar' nor does that expression appear in any of the provisions of the C. P. Land Revenue Act. Doubtless in the *Wajib-ul-arz* prepared by the Settlement Officers under that Act villages in Sambalpur were divided into Malguzari villages and Zamindari villages. But the *Wajib-ul-arz* deals with other incidents of such villages and as regards assessment of land-revenue, collection of land-revenue and realisation of revenue by Malguzars from inferior proprietors etc., the Act itself makes exhaustive provisions. The Act does not make any separate provision for a Zamindar as distinct from a Malguzar. The main difference between a Zamindar and a Malguzar will be clear from a perusal of Chap. VI of Dewar's Settlement Report of 1906. Zamindars are bigger proprietors having an ancient historical origin and the revenue they pay to the Government usually known as Takoli is generally not based on full assessment due to various reasons. Their estates are impartible and not transferable except to a limited extent and each estate is held by a Zamindar under the Government under separate terms. Malguzars appear to be recent creations. But for the purposes of the C. P. Land Revenue Act there is no distinction between a Zamindar and a Malguzar so far as the assessment of land revenue and realisation of land-revenue from inferior proprietors are concerned. The Zamindar also holds a 'mahal' "under separate engagement for payment of land-revenue direct to Government" and from a mere construction of cl. (9) of S. 4, C. P. Land Revenue Act, he would come within the definition of the expression 'Malguzar'. Consequently S. 116, C. P. Land Revenue Act, which confers on a Malguzar a right to realise arrear of revenue due to him from an inferior proprietor with the help of the Deputy Commissioner would apply to a Zamindar also. The Revenue officials were therefore justified in selling the property under S. 116 read with S. 94, C. P. Land Revenue Act.

[12] I now take up the second main point urged by Mr. Dube regarding the accrual of right of occupancy in the sir lands of the village by Dasarath Singh and his co-sharers. The sale proclamation (Ex. G-1) makes it absolutely clear that the sale of the village was subject to the provisions of S. 108, C. P. Land Revenue Act. That section says that unless the Chief Commissioner (in the present case the Board of Revenue) otherwise directs a purchaser of any land sold for arrears of revenue due in respect thereof acquires the proprietorship free of all leases, liens and other encumbrances. In the sale proclamation, however, certain encumbrances were specified and the sale was made subject to those encumbrances. But cl. (c) of S. 108 further says:

"Nothing in this section shall deprive any defaulter whose property is sold of the rights in respect to his sir land conferred by any law for the time being in force."

This section, therefore, makes a difference between leases, liens and other encumbrances on the one hand and the special rights over the sir lands conferred by any law for the time being in force on the other. That law for the purpose of the present case will be found in S. 45 (1), C. P. Tenancy Act* which says:

"Notwithstanding any agreement to the contrary and save where sanction has been given under sub-s. (2) a proprietor who, after the commencement of this Act, temporarily or permanently loses (whether under decree or order of a Civil Court or a Revenue Officer or otherwise) or transfers his right to occupy sir land as a proprietor, shall at the date of such loss or transfer become an occupancy tenant of that sir land, and the rent payable by him as such shall be the sum determined by the current settlement as the rental value of such land, unless and until, on the application of either landlord or tenant, the rent is fixed by a Revenue-Officer."

From a scrutiny of sub-s. (1) of S. 45, C. P. Tenancy Act, it follows that when a proprietor loses his proprietary right in the village by sale for arrears of revenue due thereon, on the same day he gets occupancy right over his sir lands and the person who has newly acquired the proprietary right from him is entitled only to realisation of fair rent from him in respect of those lands. This occupancy right can be given up by him only on an application made by him to the Revenue Officials for transfer of his sir lands without reservation of the right of occupancy as provided in sub-s. (2) of S. 45, C. P. Tenancy Act. That right cannot be extinguished by a decree even of a Revenue Court in view of the clear words of sub-s. (1) of S. 45, C. P. Tenancy Act. Therefore when in the sale proclamation of the village (Ex. G-1) it was expressly stated that the sale was subject to the provisions of S. 108, C. P. Land Revenue Act and when cl. (c) of that section saves the right which the defaulting proprietor may have in

[* Act XI of 1898—*Ed.*]

respect of his sir lands by any law for the time being in force it must follow that when the village Pandripathar was sold on 21-10-32 on the very same day Dasarath Singh acquired occupancy rights over his sir lands by virtue of sub-s. (1) of S. 45, C. P. Tenancy Act. That occupancy right can be extinguished only on an application made by him under sub-s. (2) of S. 45, C. P. Tenancy Act to the Revenue authorities. Admittedly this has not been done and mere conduct of Dasarath and his other co-sharers in withdrawing the balance of the sale proceeds, on 28-7-36 (*vide* Ex. A-2) will not have the effect of extinguishing that right. An occupancy right, once it has accrued, can be extinguished only in the manner provided in the C. P. Tenancy Act and not by mere rule of estoppel based on subsequent conduct as proved by Ex. A-2.

[13] Mr. Mohapatra on behalf of the respondents raised the following points in reply to this contention. (i) The appellants were not entitled to raise the question of applicability of S 45 (1), C. P. Tenancy Act, for the first time in the appellate Court; (ii) Dasarath Singh was not a proprietor within the meaning of S. 45 (1), C. P. Tenancy Act and (iii) in any view of the case though Dasarath might have had occupancy rights in the sir lands the plaintiffs are not his co sharers joint with him and consequently their suit must fail.

[14] As regards the first point, though there is some force in the contention of Mr. Mohapatra I think where a pure question of law arises it is not open to him to object to the raising of that question for the first time in a first appeal. It is true that the pleadings do not show that the plaintiffs claimed occupancy right in respect of the sir lands only under S. 45 (1), C. P. Tenancy Act, and the lower Court's udgment also does not show that this point was pressed before the Court. But this is a pure question of law and in view of the clear terms of cl. (c) of S. 108, C. P. Land Revenue Act, and S. 45 (1), C. P. Tenancy Act I fail to see how any objection can be taken to it at the first appellate stage. The point was raised clearly in the grounds of appeal (see para. 11) and there can be no question of any prejudice to any party. In the plaint, the relief asked for was the recovery of possession of the whole of village Pandripathar together with its sir and khudkast lands. A list of the sir lands of the village was appended to the plaint. Thus recovery of possession of the sir lands was a portion of the relief sought, and if the plaintiff is entitled to that part of the relief by virtue of S. 45 (1), C. P. Tenancy Act, it may not be proper to deny him that relief merely because the legal basis on which it was claimed was not set forth in the plaint.

[15] Next as to whether Dasarath Singh is a proprietor within the meaning of S. 45 (1), C. P. Tenancy Act I think the Khewat (Ex. 2) furnishes a satisfactory answer. The expression 'proprietor' has not been fully defined either in the C. P. Land Revenue Act or in the C. P. Tenancy Act and the definition given in cl. (8) (a) of S. 4, C. P. Land Revenue Act being of an inclusive nature is not helpful. But Ss. 49, 50, 51 and 108 and other sections of the C. P. Land Revenue Act speak of 'superior proprietors and inferior proprietors' and they seem to indicate that the position of Dasarath Singh was that of an inferior proprietor. Moreover under S. 4 (1) (a), C. P. Land Revenue Act, sir lands are the home-farm lands of a proprietor and when the Settlement authorities entered some lands as the sir lands of Dasarath Singh, (see Ex. 3) it necessarily follows that his status was recognised as that of a proprietor.

[16] The third objection of Mr. Mohapatra requires some investigation of facts. In the plaint it was clearly stated that the plaintiffs were joint with Dasarath and other co-sharers (defendants 4, 5 and 6) though the sir lands were being possessed by them separately for their maintenance. In the written statement of Dasarath Singh and his other co-sharers (defendants 3, 4, 5 and 6) this statement about the jointness of the parties was admitted. Defendants 2 and 7 being stranger auction-purchasers were not in a position to affirm or deny this plea of jointness. But on the contrary from para. 2 of their written statement it would appear that they also admitted the jointness of the plaintiffs and defendants 3, 4, 5 and 6. In fact their main defence was that Dasarath fully represented the family in the revenue proceedings. The Government of Orissa doubtless put the plaintiff to a proof of this fact and one of the issues raised was issue 12 which ran as follows : "whether the statements made in paras. 2, 3 and 4 of the plaint are true". The learned lower Court instead of giving a clear finding on this issue refused to record any finding without giving reasons. Here I think the lower Court made a mistake. Perhaps he was somewhat misled by the confused language used in the issue. Whether defendants 3, 4, 5 and 6 are joint or separate with the plaintiffs is of much importance both on the question of their right to sue which was fully agitated in the lower Court and also on the question of the applicability of S. 45 (1) (a), C. P. Tenancy Act as I shall show presently. As this is a first appeal I have thought it necessary to give a

separate finding both from the pleadings as well as from the evidence recorded. From the pleadings of the plaintiffs and the contesting defendants it is clear that the parties admitted their joint status. In the order-sheet dated 21-10-1932 (Ex. C-1) the Sub-divisional Officer wrote that Mudgar Singh (defendant 4) was joint with Abhiram (defendant 6), Lokanath (defendant 5) and Durjodhan Singh (since dead) In the petition for withdrawal of money dated 28-7-1936 (Ex. A-2) defendants 3, 4, 5 and 6 jointly applied and withdrew the money. This shows clearly the jointness of defendants 3, 4 and 6. The plaintiffs are none else but the sons and brothers of these defendants as will be clear from a perusal of the pedigree appended to the plaint. For instance plaintiffs 1, 2, 3 and 4 are brothers of defendant 4 and plaintiff 8 is the son of defendant 4. Plaintiffs 6 and 7 are sons of Dasarath Singh and plaintiff 5 is the brother of defendant 6 and plaintiff 9 is the son of defendant 5. In fact defendants 3, 4, 5 and 6 are senior members of each of the branches of the original joint family and as they have been proved to be joint, their jointness with their own sons and brothers seems to be beyond question. The only witness to prove the jointess is P.W. 1, who though not expressly mentioning this fact, speaks throughout as if the whole property belonged to all of them. From the aforesaid evidence and pleadings I would, therefore, hold that the plaintiffs and defendants 3,4,5 and 6 are members of a joint family though each of the members is in separate possession of a small portion of the sir lands for maintenance as described in the Settlement Parcha (Ex. 3).

[17] Therefore, though Dasarath Singh's name alone appears in the Khewat as the proprietor of the village, from his own admission in his written statement it is clear that he was only representing the whole joint family. When he lost his proprietorship over the village by the sale dated 21-10-1932 he on behalf of the family acquired occupancy right over the sir lands on the same day and the whole family is, therefore, entitled to that right. In the present litigation it is unnecessary to consider the rights of the members of the family as amongst themselves. This right of occupancy over the sir lands is not extinguished by the sale and consequently the auction-purchasers (defendants 2 and 8) were not justified in dispossessing Dasarath Singh and his co-sharers from their sir lands. All that they are entitled to is the right to get a fair rent fixed for such lands and to realise the same.

[18] As regards the khudkast lands, however, no special right can accrue to Dasarath and his co-sharers after the sale and consequently the auction-purchaser (defendant 2) was entitled to full possession.

[19] I would, therefore, allow the appeal to the following limited extent only It should be declared that plaintiffs and defendants 3, 4, 5 and 6 acquired occupancy rights over the sir lands of village Pandripathar as described in schedule 'A' to the plaint from 21-10-1932 by virtue of sub-s. (1) of S. 45, C. P. Tenancy Act, and the auction-purchaser Mangal Mistri and his vendee defendant 8 acquired only the right to realise rent from those sir lands after it is fixed by a Revenue Officer as provided in that sub-section. Plaintiffs and defendants 3, 4, 5 and 6 are, therefore, entitled to recover actual possession of those lands only. Their claim in respect of the khudkast lands and in respect of the proprietary right in the whole village is not maintainable and is accordingly dismissed.

[20] As there has been partial success of both the parties, each party will bear its own costs both in the lower Court and in this appeal. The appeal against the Government of Orissa is dismissed with costs and the plaintiffs should pay costs to the Government both in the lower Court and in this appeal.

[21] **Jagannadhadas J.**—I agree.

V.B.B. *Appeal partly allowed.*

A. I. R. (38) 1951 Orissa 101 *[C.N. 31.]*

RAY C. J. AND NARASIMHAM J.

Dake Bagarti and others — Appellants v. *Mukunda Khamari and another — Respondents.*

Second Appeal No. 52 of 1949, D/- 12-10-1950.

(a) Sonepur State Code (Vol. I), Bhumi Bidhi Rules (Corrected upto Aug. 1939), Rr. 22 and 23 — Transfer of occupancy holding without consent of Gountia — Validity of transfer — Rights of transferee — Tenancy Laws—Orissa Tenancy Act (II [2] of 1913), S. 31.

Occupancy holdings are not inalienable, but are alienable under limited and specified circumstances, namely, for reasonable cause, as defined in note (1) to Cl. (b) of R. 22. If such reasonable cause exists, the other deficiencies of validating circumstances, such as, consent, signature of Gountia or certificate by the Revenue Department as to its fitness, can be removed on the mere asking for it. On the whole, till the transaction is set aside for absence of such reasonable cause in a suit at the instance of either the Gountia or the successor of an occupancy tenant or till so declared by the Revenue Department in a proceeding specifically drawn up for the purposes and carried on in the presence of the transferor the transferee and the person entitled to avoid a transfer, the transaction binds the whole world including the parties or privies to it. This right of avoidance is exercisable by a suit within the period of limitation of two years, even though the person entitled to sue, be a minor at the time fixed for instituting the suit. Gountia cannot avoid the transaction by accepting a surrender from the occupancy tenant and entering upon the land. The transferor

having represented to the transferee that there was reasonable cause for the sale, he cannot be allowed to avoid it on the ground that he had no right to transfer. Subsequent transferee who derives his title from the occupancy tenant stands on no better footing. Simply because a process of surrender to the Gountia and settlement by the latter has been gone into, would not improve their posi ion. Gountia too cannot enter upon the lands on the mere fact that the recorded tenant has transferred it. He must, in Court, establish that the transfer is voidable at his instance and is avoided. If it is not avoided within the period of two years, the transfer becomes binding against the persons entitled to avoid it, or persons deriving title through them. The fact that the transferee has not applied within 6 months for mutation under R. 23 (2) does not affect the character and status of his purchaser so far as his relationship with his transferor and the Gountia is concerned. [Paras 6 and 7]

(b) Administration of Orissa States Order (1948), Ss 10, 12 — Effect — Tenancy Laws regarding transfer of occupancy holding already in force, how far affected by Order — Pending suits — Law governing — Sonepur State Code (Vol. I), Bhumi Bidhi Rules.

After the integration of Sonepur State into the Province of Orissa, the Bhumi-bidhi stands modified by S. 10 of the Admini-tration of Orissa State Order 1948. While allowing the tenancy laws in force in any of the Orissa States prior to the commencement of the order to continue, it provides that it shall continue to remain in force subject to the provisions of this Order. Therefore, so much of it as interferes with the very transfer of an occupancy holding is no longer a good law. [Para 9]

Suits pending on 31-12-1947 must be decided in accordance with the laws continued in force under sub-para. (b) of para. 4 of S. 12 of the Order. This means that the occupancy holding which is the subject-matter of such suit shall be taken to be one free to be transferred in an ordinary manner. [Para 10]

G. G. Das —for Appellants; G. K. Misra —for Respondents.

Ray C. J.—This is an appeal by defendant 2 in a suit for recovery of possession of certain lands appertaining to *raiyati* holding No. 70 of mouza Sahala, described in all material details in a schedule attached to the plaint.

[2] Defendant 1 was the owner of the said lands. He transferred them on 23-4-1941 by a sale deed to the plaintiff for consideration. The plaintiff stepped into possession of the said lands along with other lands similarly sold to him by defendant 1 aforesaid. Defendant 1 later gave the same lands to defendant 2 who has since taken possession thereof and inspite of repeated demands did not give it up. The suit was contested by both defendants 1 and 2. The present contest mainly centres round the priority of title of either the plaintiff or defendant 2. Defendant 2's case is that defendant 1 and his son surrendered the suit lands to Lambardar Gountia on 30-5-1941 who, in his turn, on 31-5-1941 for consideration settled the suit lands and other lands with this defendant and that ever since, he has been in possession of the same. The trial Court had dismissed the plaintiff's suit. The learned lower appellate Court reversed the trial Court's decree and decreed the suit granting him reliefs of declaration of title and restoration of possession. The alleged deed of surrender is Ex. A and the deed of settlement for the *raiyati patta* in favour of defendant 2 is Ex. B. The dispute, whether the suit lands form the subject-matter of transfer in the sale deed Ex. 1, has been at rest in the learned lower appellate Court who finds :

"In these circumstances, there cannot be any manner of doubt that suit lands which are known as *Pankel At* as also as *Mahul At* had been sold by defendant 1 to plaintiff under Ex. 1, the sale deed."

The contention relating to this has not been reiterated before us in the second appeal.

[3] The fact that the plaintiff got possession in pursuance of the sale deed in his favour, has also been set at rest and has not been agitated at the bar. The learned lower appellate Court observes :

"I find therefore that plaintiff purchased the suit lands and other lands from defendant 1 under Ex. 1, the sale deed and was in possession of the suit lands for about a year and subsequently he was dispossessed from the same by defendant 2."

[4] The next question that remains to be determined is whether the sale performed by execution and delivery of Ex. 1 for consideration accompanied with making over possession to the plaintiff, is binding against the contesting defendants. Admittedly, at the time of this transaction, the law governing was the Rules known as "Sonepur State Code, vol. I. The Bhumi bidhi", (corrected up to August, 1939). The relevant rules or Paras. are 22 and 23. According to R. 22 (b), an occupancy tenant may transfer his holding by a written deed of conveyance to a person who is his next heir according to law. If, however, any transfer, either of the whole or part of his holding, by sale or mortgage, be made for reasonable cause by the occupancy tenant, it shall have to be done by executing a regular deed of conveyance on a properly stamped paper. The deed aforesaid shall not be valid in law if in addition to at least two witnesses to the deed the Gountia does not sign his name by way of giving his consent to the transaction. No transfer by way of gift or dowry is allowed to be made by the occupancy tenant.

Note—(1) The reasonable cause mentioned in the section denotes—need for paying off rightfully incurred debts for reasonable expenditure for household management and for expenses necessary to conduct agricultural operations.

Note—(2) The occupancy tenant desiring to part with a portion of his holding by sale or desiring to mortgage a portion of his holding shall have to obtain the sanction of the Ruler through the Revenue Department that the hold-

ing may be sub-divided with separate survey numbers as desired by the tenant.

Note—(3) If the holder of the village declines to sign his name on the deed aforesaid by way of giving consent, the occupancy tenant may move the Ruler through the Revenue Department by showing the reasonableness of the transfer for obtaining the validating signature and the Ruler on being satisfied with the reasonableness of the transaction may pass the order that the deed in question is fit to be validated; the occupancy tenant by obtaining a certified copy thereof may attach the copy to the deed to make the transaction valid.

Note—(4) It has been provided that to make the deed of transfer mentioned in this section valid the signature of the village holder by way of consent is necessary. The village holder shall not demand more than ten per cent. of the consideration money for giving his consent. It is contended that the present deed of conveyance in favour of the plaintiff, which does not contain the signature of the Gountia (the village holder) by way of giving his consent to the transaction, is invalid and confers no title on the plaintiff and that the plaintiff cannot recover possession from the defendant without proving a superior title. The validity of the learned lower appellate Court's judgment is challenged on the ground that he is in error in applying the rule of limitation provided for in S. 23, as such a rule is not available to the plaintiff.

[5] The crux of the question, therefore, is if the sale deed without Gountia's signature or consent is void *ab initio* or if it is merely a defect, a defect curable by any other means. Note (3) above makes it clear that the consequence of the absence of such a signature can be avoided by moving the Ruler through the Revenue Department and by obtaining a ruling that the transaction was supported by reasonable cause and was a fit one to be validated. Secondly, according to sub-s. (2) of S. 23, any transferee under a transaction which does not fulfil the requirements of s. 22, may apply according to general rules for mutation within six months by serving notices through the Revenue Department on the Gountia, on the transferring occupancy tenant and on such a person who would have been the next successor of the transferring occupancy tenant, for mutation of his name. The initiation of this proceeding shall afford the parties concerned a fresh opportunity for examination of the validity of the transaction in accordance with which a fresh proceeding shall then be drawn up in the Revenue Department. The Revenue authority shall be the final arbiter to decide if the transactjon is illegal. On such finding the person concerned shall be liable to be evicted forthwith and a new occupancy tenant shall be settled on the holding in question with the sanction of the Ruler.

[6] If it was intended by the law-making authority that a transaction of sale gone into in accordance with the formalities prescribed in S. 22 (b), apart from Gountia's signature by way of consent, was void *ab initio*, nothing should have been simpler for it to say so. That it is not void *ab initio*, is justified by the fact that the right to avoid the transaction of sale or mortgage on ground of its illegality is limited to either the Gountia or the heir or successor of the occupancy tenant. This right of avoidance is exercisable by a suit within the period of limitation of two years, it having been said in sub-s. (2) of S. 23 that the institution of such a suit (suit for avoiding an illegal transaction) shall be barred by limitation (after two years) even though the person entitled to sue, be a minor at the time fixed for instituting the suit. The words "avoid", "entitled to sue" and a specific and express provision in the body of S. 23 limiting the power of avoidance to the heir or successor of occupancy tenant or the Gountia, make it clear that none of them can take the law into their own hands and forcibly dispossess a person holding under such "an illegal" transaction.

[7] A comprehensive view of the entire law contained in the Bhumi-bidhi' conveys to my mind that occupancy holdings are not inalienable, but are alienable under limited and specified circumstances, namely, for reasonable cause, which according to note (1) to cl. (b) of S. 22, means,

"need for paying off rightfully incurred debts, for reasonable expenditure, for household management and for expenses necessary to conduct agricultural operations."

If such reasonable cause exists, the other deficiencies of validating circumstances, such as, consent signature of Gountia or certificate by the Revenue Department as to its fitness, can be removed on the mere asking for it. On the whole, till the transaction is set aside for absence of such reasonable cause in a suit at the instance of either the Gountia or the successor of an occupancy tenant or till so declared by the Revenue Department in a proceeding specifically drawn up for the purposes and carried on in the presence of the transferor, the transferee and the person entitled to avoid a transfer, the transaction binds the whole world including the parties or privies to it. Gountia cannot avoid the transaction by accepting a surrender from the occupancy tenant and entering upon the land. To permit him to do so would amount to setting the law providing the sole means of

avoidance at naught. The Gountia, far less the occupancy tenant's successor cannot be judges of their own cause, until it is declared in Court or by the sole arbiter, namely, the Ruler that reasonable cause did not exist for the sale or mortgage, nor can challenge it and entitle himself on its mere assertion, to dispossess the transferee. Defendant 1, the transferor, having represented to the plaintiff transferee that there was reasonable cause for the sale, he cannot be allowed to avoid it on the ground that he had no right to transfer. His right to transfer is there, but is restricted in the sense that it is exercisable only when reasonable cause defined in note (1) of S. 22 (b) exists. Defendant 2 who derives his title from defendant 1 stands on no better footing. Simply because a process of surrender to the Gountia and settlement by the latter has been gone into, would not improve their position. Gountia too cannot enter into the lands on the mere fact that the recorded tenant has transferred it. He must, in Court, establish that the transfer is voidable at his instance and is avoided. In this view of the matter, I would hold that the learned Subordinate Judge in appeal decided rightly in favour of the plaintiff. It may be noted that for him to say that two years period of limitation having passed, the transaction was not challengeable by the Gountia or the successor of the occupancy tenant, did not amount to grant to the plaintiff a decree by applying the rule of limitation. What he meant to decide was that only persons entitled to avoid and that by a suit to be instituted within two years, having failed to do so, the transaction became binding against them as well. Thus he meets the contention of defendant 2 that he derives his title from the Gountia. It may be noted that under sub-s. (2) of S. 23 the Revenue Department had been made the sole arbiter after the expiry of the period of limitation of two years for avoidance of the transaction by the Gountia or the successor. They are not bound by any rule of limitation. The transferee is, no doubt, required under the said sub-section to apply mutation of his name within six months from the date of the transaction. But that is a matter between him and the Revenue Department. The latter may condone the delay when they are satisfied with the reasons, that the period of six months has passed, does not affect the character and status of the plaintiff's purchase, so far as it governs the relationship between him and the defendants.

[8] Mr. G. G. Das has urged that non-compliance with the forms prescribed for effecting sale of an occupancy holding to a person other than the occupancy tenant's next heir according to law, can be compared to non registration of a compulsorily registrable deed of conveyance for the purpose of determining their consequences on affectation or otherwise of the title by the transfer. I cannot accede to this contention. As I have already shown, by reference to the various provisions in the two Ss. 22 and 23 of the Code of Sonepur, the formalities prescribed there are divided into two classes. The irregularity of not obtaining Gountia's consent as a formality is a curable one. His consent is obtainable on payment of 10 per cent. of the consideration money. On his failure to grant it, a certificate could be granted by the Revenue Department. This cannot be compared with the compulsory nature of registration under the Registration Act I should say that if the deed is not on a properly stamped paper and is not attested by two witnesses, it would be an invalid document which would not effect the transfer of title as between the transferor and the transferee. On the contrary, transfers without Gountia's consent, can be compared to transfers of occupancy holdings, without the consent of the landlord or proprietor under S. 31 of the pre-amendment, Orissa Tenancy Act. Such transfers, though not valid and binding against the landlord for purposes of proceedings for realisation of rent, were always considered to be binding against the transferor and his successors-in-interest. I do not think that in the circumstances of this case a different view can be taken. It is contended by Mr. G. K. Misra, the learned counsel for the respondent that since after the integration of the States including the Sonepur State into the province of Orissa, as it then was, occupancy holdings have become freely transferable. He relies upon S. 10, Administration of Orissa States Order, 1948. The section provides (so much of it as is material for our purposes),

"Notwithstanding anything contained in the Tenancy laws of the States as continued in force under sub-para. (b) of Para. 4 an occupancy tenant shall be entitled—(i) to freely transfer his holding subject to the restriction that no transfer of a holding from a member of an aboriginal tribe to a member of a non-aboriginal tribe shall be valid unless such transfer is made with the previous sanction of the Sub-Divisional Magistrate concerned."

Sub-para. (b) of Para. 4 reads:

"as respects to those matters which are not covered by the enactments applied to the Orissa States under sub-para. (a), all Laws in force in any of the Orissa States prior to the commencement of this Order, whether substantive or procedural and whether based on custom and usage or statutes, shall, subject to the provisions of this Order, continue to remain in force until altered or amended by an Order under the Extra-Provincial Jurisdiction Act, 1947 (XLVII [47] of 1947)."

[9] According to this paragraph, the Bhumibidhi should stand modified by S. 10 of the Order already quoted. While allowing the ten-

ancy laws in force in any of the Orissa States prior to the commencement of the Order to continue, it provides that it shall continue to remain in force subject to the provisions of this Order. Therefore, so much of it as interferes with the very transfer of an occupancy holding is no longer a good law.

[10] The question arises whether it is retrospective in its operation. Regarding that our attention is drawn to the proviso to cl. (c) of S. 12 of the Order. The proviso reads :

"That the law to be followed by such Courts shall be the law applied or continued in force under Para. 4."

The laws applied are those contained in schedule of the Order and dealt with in sub-para. (a) of Para. 4 and the laws continued in force are those referred to in sub-para. (b). As has already been shown, the laws in force either under the statute or under custom or under any rule should continue in force subject to the provisions of the order. Therefore, laws continued in force under Para. 4, within the meaning of the proviso, should be the laws in force prior to the commencement of the Order subject to the variations introduced into it by this Order. Sub-paragraph (c) enumerates the proceedings in which such laws have to be followed. The sub-paragraph says,

"all appeals, revision petitions and other proceedings that were pending before any civil criminal or revenue Court on 31-12-1947, shall be heard and disposed of by the appropriate civil, criminal or revenue Court constituted or continued by or under this Order and exercising jurisdiction which, as far as may be, corresponds to the jurisdiction of the Court before which such appeals and petitions were filed and such proceedings were commenced."

and according to the proviso, such Court in dealing with such appeals or proceedings etc. should follow the laws continued in force under Para. 4. This suit, at some stage or other, was a pending one on 31-12-1947 and it must, therefore, be decided in accordance with the laws continued in force under sub-para. (b) of Para. 4. This means that the occupancy holding which is the subject-matter of this appeal shall be taken to be one free to be transferred in an ordinary manner. The question of registration of the document does not arise as the consideration for the sale is less than Rs. 100 and it was accompanied with delivery of possession.

[11] In the premises aforesaid, I am clear in my mind that the appeal has been rightly decided by the learned lower appellate Court.

[12] I would, therefore, dismiss the appeal and decree the suit with costs throughout.

[13] **Narasimham J.**—I agree.

B.G.D. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 105 *[C. N. 32.]*

FULL BENCH

JAGANNADHADAS, PANIGRAHI AND NARASIMHAM JJ.

Krishna Chandra Misra — *Appellant* v. *Sushila Mitra* — *Respondent.*

A. F. A. O. No. 42 of 1948, D/- 3-11-1950.

(a) Houses and Rents—Orissa House Rent Control Act (V [5] of 1947), S. 1 (4)—Notification under —Extension of Act—Validity (Constitutional Law —Delegated legislation).

Per *Full Bench*.—The extension of the Orissa House Rent Control Act, 1947 for a period of one year from 21-3-1950 by Orissa Government Notfn. No. 2080 Dev. D/- 25-2-50 issued under S. 1 (4) of the Act amounts to exercise of delegated legislative power and as such is *ultra vires* and therefore the said Act is no longer validly in operation in Orissa: A. I. R. (36) 1949 F. C. 175, *Foll.* [Paras 4, 31 and 41]

(b) Civil P. C. (1908), S. 100 — New plea — Plea not raised in lower Courts — Plea depending on further investigation of facts—Plea cannot be allowed to be raised for first time in second appeal — (Per *Das J.*). [Para 8]

Anno. C. P. C., Ss. 100 & 101 N. 55.

(c) Houses and Rents — Orissa House Rent Control Act (V [5] of 1947), Ss. 5 and 13—Scope—Permission under S. 13 if should be in addition to exemption order under S. 5.

Per *Das and Narsimham JJ., Panigrahi J. dissenting*.—The word 'proceeding' in S. 13 is wide enough to cover 'execution proceeding.' [Paras 11, 47]

The use of the word 'tenant' in S. 13 must be meant to refer to an ex-tenant. [Para 13]

An order for exemption under S. 5 cannot obviate the necessity for obtaining permission under S. 13. The requirement of S. 13 is in addition to the exemption contemplated by S. 5 and applies equally to a suit as well as an execution proceeding for eviction of tenant. It applies to month to month tenancies contemplated by S. 5, in respect of which a previous application for exemption would be necessary, that is to say, it does not apply to proceedings for eviction for non-payment of rent or breaches of conditions of tenancy which do not fall within the prohibition of S. 5 (a). [Paras 15 and 49]

Section 13 can be construed as requiring the permission either for a suit or for a proceeding by reading the word 'or' disjunctively and not as necessarily requiring a permission at every stage. [Paras 15, 50]

Per *Panigrahi J.*—The two sections must be read as mutually exclusive and as applicable to two different sets of circumstances. To hold that an exemption order, as well as a certificate to sue, would be required in the same case would be unreasonable. [Para 34]

The clause beginning with the words "in which the ground specified in the second proviso to cl. (b) of S. 5 has been taken as a ground for such eviction" in S. 13 governs both suit and proceeding, and the application of S. 13 should be restricted only to those proceedings initiated in areas after the Act was subsequently extended to those areas, and not to those areas in which the order or Ordinance had already been applied before. [Para 36]

(d) Houses and Rents—Orissa House Rent Control Act (V [5] of 1947), S. 13—Permission under is condition precedent to institution of proceeding.

Per *Das J.* — Section 13 is mandatory and it prohibits a Court from entertaining a suit or proceeding unless the conditions are satisfied. The requirement as

to permission is a condition precedent for the filing of the suit or proceeding itself and the document constituting the proof of such permission has to be produced along with the institution of proceeding. The word 'entertain' connotes the stage of taking cognizance of the proceeding rather than the stage of granting relief. [Para 16]

(e) Interpretation of Statutes — Retrospective operation.

Per *Panigrahi J.* — Statutes should be interpreted, if possible, so as to respect vested rights. It is not to be presumed that interference with existing rights is intended by the Legislature, and if a statute be ambiguous the Court should lean to the interpretation which would support existing rights. In the absence of anything in an Act to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act is passed. [Para 24]

Anno. C. P. C., Pre. N. 3.

(f) Houses and Rents—Orissa House Rent Control Act (V [5] of 1947), S. 13—Section if retrospective and applies to pending proceedings — Orissa House Rent Control Ordinance, 1946, S. 13.

Per *Panigrahi J.* — Neither the Ordinance of 1946 nor the Act of 1947 has any retrospective effect on pending proceedings or on the decree for eviction obtained when the House Rent Control Order of 1942 was in force. The language of S. 13 contemplates suits or proceedings that are to be filed in future and the section is prospective in its operation. It does not require a decree-holder who is proceeding with his execution to withdraw his execution and obtain a certificate and again start execution afresh.

[Paras 24 & 25]

Per *Narsimham J*: Though the Act cannot be said to apply to pending proceedings it must be held to apply to execution cases filed after its commencement, and thereby affect decrees passed prior to its commencement. By S. 13 the Legislature has deliberately interfered with a decree passed prior to the commencement of the Act. [Para 48]

(g) Interpretation of Statutes — Proviso—Repealing statute.

Per *Panigrahi J*: A proviso in a repealing statute "except as to acts done under it" will operate to preserve to parties all rights if the action is brought before the repealing statute passes. [Para 27]

Anno. C. P. C., Pre N. 14.

(h) Houses and Rents — Orissa House Rent Control Act (V [5] of 1947), Ss. 13 and 20—Decree for ejectment passed when Orissa House Rent Control Order, 1942 was in force—Execution filed after commencement of 1947 Act without permit required under S. 13—Maintainability—Law applicable—Orissa House Rent Control Ordinance (1946), Ss. 13 and 18.

A decree for ejectment of a tenant was obtained after an exemption order under S. 4 of the Orissa House Rent Control Order, 1942, was obtained. When the execution of the decree was pending the Order of 1942 was repealed and replaced by Ordinance of 1946 which in its turn was repealed and replaced by the Act of 1947 which came into force on 3-5-1947. The execution was dismissed on 7-5-1947 and the decree-holder filed a second execution application on 10-5-1947. The judgment-debtor objected that the execution was not maintainable as the permit required by S. 13 of the Act of 1947 was not obtained:

Held (Per *Das and Narsimham JJ., Panigrahi J. dissenting*) that the law applicable to the execution application was the Act of 1947 and not the 1942 Order and therefore, the execution was not maintainable for want of permission of the Rent Controller under S. 13 of the Act of 1947. [Para 17]

Per *Panigrahi J*: That the Act of 1947 did not in any way affect the decree-holder's right to execute the decree which was saved by S 20 of the Act of 1947 and by S. 18 of the Ordinance of 1946. [Para 29]

(i) Houses and Rents—Orissa House Rent Control Act (V [5] of 1947), S. 21—Expiry of Act—Effect on pending proceeding—Liability, meaning of.

Per *Das and Narsimham JJ*: The Act was purely a temporary Act and the effect of expiry of such temporary Act on pending proceedings is essentially a matter of construction.

The expression 'liability' in S. 21 (b) of the Act must necessarily be other than the penalty contemplated by the Act. It would include the liability to have the execution case dismissed for want of proper permit as required by S. 13 and therefore that liability would continue by virtue of S. 21 notwithstanding the expiry of the Act. [Paras 6, 42]

Per *Panigrahi J*: After the expiration of a statute, in the absence of a provision to the contrary, no proceedings can be taken on it and proceedings already taken *ipso facto* determine. Section 21 does not save the expiration of the Act and the only consequence is that the objection proceedings started by the judgment-debtor as to the maintainability of the execution by reason of bar under S. 13 *ipso facto* terminates with the Act. [Para 37]

(j) Civil P. C. (1908), S. 107 and O. 41, R. 33—Power of appellate Court to take notice of subsequent events.

Per *Panigrahi J*: The appellate Court is entitled to take into account even acts and events which have come into existence after the decree appealed against and decide the appeal on that basis. [Para 32]

Thus, where an application for execution of a decree for ejectment of a tenant is not maintainable according to S. 13, Orissa House Rent Control Act, 1947, which is the law in force at the time of filing of the execution and the Act has expired and is no longer in force when the appeal in the case is pending, the appellate Court will take notice of this fact and grant relief to the decree-holder irrespective of the fact whether the decision of the trial Court is correct or not. [Para 32]

Anno. C. P. C. O. 41, R. 27, N. 16; O. 41, R. 33 N. 4.

B. N. Das, M. S. Rao, G. B. Mohanty, S. C. Chakrabarty and R. K. Das—for Appellant; L. K. Das Gupta—for Respondent.

Das J.—This appeal arises in execution of a decree for ejectment obtained by the respondent against the appellant, in respect of a house situated in the town of Cuttack. The respondent is admittedly the owner of the house. The appellant was occupying the house on a monthly tenancy under her. During the time when the House Rent Control Order of 1942 was in force, she obtained from the House Controller, an order dated 15-3-44 exempting her from the operation of S. 4 thereof. On 13-9-44, she gave the tenant a notice, requiring him to vacate the premises by 1-10-44 and also calling upon him to pay up the arrears of rent by then due. She filed a suit for ejectment O. S. No. 71/45 on 26-2-1945 and obtained a decree on 17-12-1945. She proceeded to execute the decree by execu-

tion case NO. 230/46 filed on 30-4-1946 which was adjourned from time to time by arrangement between the parties and was ultimately dismissed for default on 7-5-1947. On 10-5-1947, the decree-holder respondent filed a fresh execution case, namely, E. C. NO. 247/47. The judgment-debtor raised the objection that without a permission in writing by the Rent Controller under S. 13, House Rent Control Act of 1947, for the filing of the execution proceedings the same was incompetent. This objection was overruled by both the lower Courts and hence this appeal by the appellant judgment-debtor.

[2] As already mentioned, at the date when the respondent obtained the order of exemption, dated 15-3-1944, and took further steps based thereon, and obtained her decree for ejectment on 17-12-1945, it was the House Rent Control Order of 1942 that was in force. This was superseded by the House Rent Control Ordinance of 1946, which came into operation on 30-9-1946. This, in turn, was repealed by the House Rent Control Act of 1947, which came into operation on 21-3-1947. It is not disputed that these various statutory enactments relating to house rent control were successively in force in the town of Cuttack without a break. The Ordinance and the Act re-enacted all the provisions of the House Rent Control Order with certain additions and modifications. One of such additions is the present S. 13, House Rent Control Act which finds a place in the House Rent Control Ordinance of 1946 as well as in the Act of 1947. This new section was not in operation by the time the 1st E. C. NO. 230/46 was filed on 30-4-1946, but came into operation by the time the second E. C. NO. 247/47, was filed on 10-5-1947. It is accordingly contended by learned counsel for the appellant that the present execution application is incompetent.

[3] In the course of the arguments on this question, it has been brought to our notice that the orginal term of three years of the House Rent Control Act of 1947 had expired by 21-3-1950, and that the life of the Act purports to have been extended for one year with effect from that date by Government Notfn. NO. 2030-Dev., dated 25-2-1950. This notification was issued in exercise of the power of the Provincial Government under sub-s. (4) of S. 1, House Rent Control Act which provides that:

"The Provincial Government may, from time to time, by notification extend the continuance of this Act for a further period or periods not exceeding in the aggregate two years, if in their opinion it is expedient so to do."

The recent decision of the Federal Court reported in *Jatindra Nath* v. *Province of Bihar*, 1949 F. L. J. 225 : (A. I. R. (36) 1949 F. C. 175 : 50 Cr. L. J. 897), has been brought to our notice in which it has been held that such a power of extension of the life of an Act by a notification by Government is *ultra vires* the Provincial Legislature. The question has accordingly been raised that the House Rent Control Act of 1947 is no longer validly in force to enable the appellant to rely on the same. As this raised a serious question relating to the valid continuance in operation of the House Rent Control Act of 1947, we issued notice to the Advocate-General to find out whether the life of the Act had been extended by any fresh Act, or whether it has been purported to be extended only by the notification above-mentioned and if so, how he would maintain the validity of the said notification. The Advocate-General has appeared on notice, and has informed us that the life of the Act has been sought to be extended only by this notification and not by any fresh legislation. He contended, however, that the notification was valid having regard to the terms of sub-s. (4) of S. 1, House Rent Control Act of 1947, and that the decision of the Federal Court above cited in so far as it relates to the validity of such a clause giving power of extension to Government by notification is *obiter* and not binding on this Court. We have carefully and anxiously considered the matter but it seems to us that in the face of the clear decision of the Federal Court on this question, it is not open to us to treat it as a mere *obiter dictum*.

[4] In *Jatindra Nath* v. *Province of Bihar*, 1949 F. L. J. 225 at p. 227 : (A. I. R. (36) 1949 F. C. 175 : 50 Cr. L. J. 897) the question arose in the following circumstances. The Bihar Maintenance of Public Order Act of 1947 came into force on 16-3-1947 by sub-s. (3) of S. 1 thereof. Its operation was limited to one year from the date of its commencement with a proviso that:

"The Provincial Government may by a notification on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council direct that the Act shall remain in force for a further period of one year, with such modifications, if any, as may be specified in the notifications."

On 11-3-1948, after the resolution of both the Houses, the Government issued a notification extending the life of the Act for one year from 16-3-1948 to 16-3-1949. By Bihar Act, V [5] of 1949, which came into force on 15-3-1949, in sub-s. (3) of S. 1 of the Act of 1947, for the words "for a period of one year from the date of its commencement" the words and figures "till the 31st March, 1950" were substituted. The point which arose in the case, however, was not with reference to the validity of these various steps in their application to the regular area in the

Province of Bihar, but with reference to Chhota Nagpur Division, which is a partially excluded area. The Governor of Bihar by virtue of the powers vested in him under S. 92 (1), Government of India Act, issued a notification on 16-3-1947, directing that the Bihar Act, of 1947, should apply to the Chhota Nagpur Division. On 7-3-1949, the Governor of Bihar issued a further notification in exercise of the same powers, directing that the Bihar Maintenance of Public Order Act of 1947, shall apply and shall always be deemed to have applied to the Chhota Nagpur Division with effect from 16-3-1948. The appellants before the Federal Court were arrested in the Chhota Nagpur Division in January and February of 1949 under the Bihar Act of 1947 as extended to Chhota Nagpur Division by the notification of 16-3-1947 and as prolonged in duration by the notification of 11-3-1948, and the question was whether their arrest and detention were legal. Their Lordships of the Federal Court by majority held that the detention and arrest were illegal, only Fazl Ali J. dissenting. While, no doubt, the validity of the extension of the Bihar Act of 1947 by a notification, in so far as its operation in the regular area of the Province of Bihar was concerned, was not the matter directly in issue in that case, their Lordships had to consider the validity of that extension for the purpose of determining whether in January and February of 1949 ,when the detenus were arrested and on 7-3-1949 when the Governor purported to issue a notification under S. 92 (1), Government of India Act, applying the Bihar Act to Chhota Nagpur Division, the said Bihar Act of 1947 was validly in operation so as to be capable of being applied and invoked. All the four Judges came to the unanimous opinion that the Bihar Act of 1947 was not validly in operation after the expiry of the period of one year, from the date of its commencement, and that the proviso vesting the power in the Provincial Government to extend its operation by a notification was illegal and *ultra vires*. It is no doubt true that the proviso which was under consideration there, is somewhat different from sub-s. (4) to S. 1 which we are called upon to consider here. Under that proviso, the Provincial Government was given the power by a notification not only to extend the period for which the Act was to remain in force but also the power so to extend, with modifications if any, while under sub-s. (4) to S. 1 with which we are concerned, the power is only the power to extend the duration of the Act. It has been suggested that if what was given was only the power of extension, without the power of modification, the decision of their Lordships might conceivably have been different. I am unable to agree with this contention. It is true that the learned Chief Justice Mukherjea J. and Patanjali Sastri J. lay some stress on the fact that the power given is a power of extension with modifications if any and also that so far as Patanjali Sastri J. is concerned his Lordship specifically left this particular question open, though inclined in favour of the majority view even on this. But it is clear that their Lordships, who were in the majority, expressed an unequivocal and decisive opinion that the power to extend the operation of an Act cannot come within the purview of conditional legislation, and that it amounts to a delegation of legislative power which is invalid. The following passages from the judgment of their Lordships establish this. His Lordship the Chief Justice says at p. 230 :

"The power to extend the operation of the Act beyond the period mentioned in the Act *prima facie* is a legislative power. It is for the Legislature to state how long a particular legislation will be in operation. That cannot be left to the discretion of some other body."

Again at the same page :

"Even keeping apart the power to modify the Act, I am unable to construe the proviso, worded as it is, as conditional legislation by the Provincial Government. Section 1 (3) and the proviso read together cannot be properly interpreted to mean that the Government of Bihar in the performance of its legislative functions had prescribed the life of the Act beyond one year. For its continued existence beyond the period of one year it had not exercised its volition or judgment, but left the same to another authority, which was not the legislative authority of the Province."

Patanjali Sastri J. says as follows at p. 233 :

"The proviso leaves it to the discretion of the Provincial Government and the two Chambers of the Provincial Legislature, to prolong the duration of the Act for a further period of one year with such modifications as they may think fit. This, in my opinion, is also a legislative power and not a matter of mere administrative discretion."

His Lordship points out later on at p. 234 that in *Queen* v. *Burah*, 5 I. A. 178: (4 Cal. 172 P. C.) their Lordships of the Privy Council held that the power vested in the Local Government by S. 39 of Act XXIII [23] of 1861 to extend the Code of Civil Procedure of 1859 to certain areas "subject to any restriction, limitation or proviso which the Local Government may think proper," as an instance of valid conditional legislation and that the power of modification may only be a more comprehensive term for the phrase "restriction, limitation or proviso" indicating thereby that his Lordship was inclined to think that if the power of extension of duration was not there, the validity of the proviso may have been supported on the ground that it was a mere conditional legislation. A careful reading of his Lordship's judgment seems to me to show that it was because the power of extension of the duration was specified in the proviso that his

Lordship considered that it amounted to a delegation of legislative power. Turning to the judgment of Mahajan J., his Lordship laid down at p. 239 as follows :

"In cases of conditional legislation, on fulfilment of the condition the legislation becomes absolute. But in cases of delegated legislation, the delegate has to take a decision whether that legislation is to continue or has to be modified, amended or varied."

Then again at p. 240 his Lordship says as follows :

"I am further of the opinion that the power given to extend the life of the Act for another year in the context of the language of S. 1 (3) also amounts to an Act of Legislation and does not fall under the rule laid down in *Queen* v. *Burah*, 5 I. A. 178 : (4 Cal. 172 P. C.). The Act in a mandatory form stated that it shall be in force for one year only. That being so, the power given in the proviso to re-enact it for another year is legislative power and does not amount to conditional legislation."

Mukherjea J. also has expressed himself in the same unequivocal terms at p. 251 as follows : "The duration of a statute is a matter for determination of the Legislature itself." In the face of these unequivocal pronouncements of their Lordships, it is impossible for us to uphold the contention that the decision of the Federal Court on this matter is merely *obiter* and not binding on us. Under Art. 141 of the Constitution, the law declared by the Supreme Court is binding on all the Courts within the territory of India. Even if it were possible for us to say that these unequivocal expressions of opinions quoted above are *obiter*, we are bound to attach the greatest weight to such pronouncements when they directly arose for consideration in the case and we should in any case have followed the same. In my view, therefore, the extension of the House Rent Control Act of 1947 by notification dated 25-2-1950 is *ultra vires* and it must be held that the said Act is no longer validly in operation.

[5] It has, however, been argued that this does not affect the question that has been raised before us in this case, namely, whether the execution application made by the decree-holder in this case on 10-5-1947 at a time when the Act was undoubtedly in force, was valid, and whether the decree-holder could get an order for delivery on the basis of that application. This raises the question as to the effect of the expiry of a temporary Act.

[6] It was held in some of the old English cases that where an Act expired, or was repealed, it was to be regarded, in the absence of provision to the contrary as having never existed except as to matters or transactions past and closed. (See Maxwell on Interpretation of Statutes, Edn. 8, p. 347). The rigour of this rule was subsequently modified by S. 38, (English) Interpretation Act of 1889, which provided for the effect of repeal in respect of pre-accrued rights and liabilities and proceedings in respect of the same. Similar provisions have now been made in India by S. 6, Central General Clauses Act (X [10] of 1897). This section, however, applies only to repealed Acts and not to temporary Acts, whose duration expires by lapse of time. The English cases have in later years evolved a different rule as regards the effect of expiry of temporary Acts. In *Stevenson* v. *Oliver*, (1841) 151 E. R. 1024 at p. 1027 : (8 M. & W. 225) this distinction has been pointed out by Baron Parke in the following terms :

"There is a difference between temporary statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction."

In that case the question that arose was the following : By 6 Geo. 4, C. 133, S. 4, it was provided that every person who held or thereafter should hold a commission or warrant as surgeon or assistant surgeon in His Majesty's navy or army, should be entitled to practise as an apothecary in any part of England or Wales without having undergone the examination or received the certificate required by a previous statute. The Act was in terms temporary and was to continue until 1-8-1826. The question arose whether the certificate of the plaintiff who had not passed the requisite examination, but who held a warrant as assistant surgeon in the navy during the period when the expired Act was in force enabling him to practise as an apothecary continued valid after the expiry of the Act and it was held that it did so continue to be valid. In 96 E. R. 259 : (1 Black W. 451) in Note 'B' under *Miller's case* it is stated as follows :

"A contract declared by statute to be illegal, is not made good by a subsequent repeal of the Statute."

Hvaing regard to these principles, it appears to me in this case that the expiry of the House Rent Control Act of 1947 has no effect on the question we are called upon to consider on the contention of the appellant. What we are asked to say is whether the respondent's application filed on 10.5.47 was not a valid application at the time. This is not the same thing as treating the expired Act as continuing in force for any present purposes. It appears to me also that the fact that the Courts below have not upheld the plaintiff's contention on the construction of S. 13 and that the matter is now pending before us in appeal does not, as has been suggested, alter the situation. For instance, it could not be contended that if the Courts below gave effect to the judgment-debtor's contention

and the decree-holder came up in appeal before us, he could invite the Court to say that the application filed by him became validated by the expiry of the Act even though this Court came to the conclusion that the lower Courts were right in the view that they took, with reference to the law as it then stood. The matter is also, I think sufficiently covered by S. 21 of the very Act which has expired. That section provides for the effect of the expiry of the Act and states that

"the expiration of the Act shall not affect any liability incurred under the Act and shall not affect any legal proceeding in respect of any such liability."

If the contention of the appellant as to the scope and effect of S. 13, namely, that the execution proceeding was incompetent without the previous written permit of the House Rent Controller for the same, be correct, it follows that the proceeding was liable to be dismissed on that ground. That liability has not in any way been affected by the expiry of the Act. See *Kashmiri Lal* v. *Kishan Dei*, A. I. R. (11) 1924 ALL 563 : (26 Cr. L. J. 90). If the Courts below have not given effect to that liability by a wrong construction of the section, a Court of Appeal which has to pass the order which the lower Courts were bound to pass, has to give effect to that liability and dismiss the execution proceeding and in so doing is giving effect to the expired Act for the limited purpose of determining this liability.

[7] Learned counsel for the respondent urges that S. 13, House Rent Control Act, does not, in any view, affect the jurisdiction of the Court to entertain the application for execution, and that it therefore renders an execution application not complying with it, liable to be dismissed. It is urged that what at most can be said is that the permit of the Controller is required, before the relief by way of eviction can be granted. That, however, is a contention which relates to the merits of the construction of S. 13 and has no bearing on the question whether the appellant can urge the points that have been raised before us having regard to the expiry of the Act. The merits of the appellant's contentions based on the House Rent Control Act of 1947, have therefore, to be considered notwithstanding the expiry of the Act.

[8] Before dealing with the question of construction of S. 13, some comparatively minor arguments raised on both sides may be dealt with. The respondent urges that even with reference to the provisions of the House Rent Control Act, his suit for eviction and the subsequent proceedings thereunder are not hit either by S. 5 or S. 13. He points out that the appellant judgment-debtor was in arrears of rent by the date of the filing of the suit and that having regard to the wording of sub-s. (a) of S. 5, the liability for eviction of the tenant on the ground of non-payment of rent under the general law is not affected by any of the provisions of the Act. He relies on certain observations of this Court in *Banschhanidhi Samantrai* v. *Lachmi Narain*, I. L. R. (1949) I Cut. 231: (A. I. R. (37) 1950 Orissa 1). This question, however has not been raised in any of the Courts below and has been for the first time raised before us at this late stage. A perusal of the plaint, no doubt, shows that non-payment of rent has been alleged and it would appear from the subsequent proceedings that it was a fact. But a perusal of the written statement gives an indication that there was a dispute between the parties prior to the date of the suit arising out of the demand of the landlord for increased rent, and it appears not unlikely that the rent remained unpaid on account of this dispute. It is not in every case of non-payment of rent under the general law that there is a liability for eviction of the tenant. In order that it may be available as a ground for eviction, it must be a condition of the tenancy. The question as to whether the condition is fulfilled is not concluded by the bare factum of non-payment; but is to be determined with reference to the circumstances attending such non-payment. For instance, if the non-payment is not wilful, but has been brought about by any unreasonable conduct of the landlord, it may not bring about liability for eviction. Whether, therefore, the appellant judgment-debtor in the present case incurred any liability for eviction merely on the ground of non-payment and whether the plaint in the case which was distinctly based on the order for exemption obtained from the Rent Controller, is to be treated as falling outside the scope of the House Rent Control Act, merely because non-payment is also alleged, are matters that must depend upon further investigation of facts, as to circumstances under which the non-payment may have occurred. The contention, therefore, cannot be allowed to be raised at this stage.

[9] The appellant urges that over and above the previous exemption order of the Rent Controller dated 15-3-44 a fresh exemption order was necessary, apart from any permission under S. 13 of the Act. The respondent's advocate on the other hand contends that the previous exemption order gives him a vested right to obtain his remedy by way of eviction of the tenant by taking proceedings for the same and continuing them to their effectual termination. It appears to me that both the contentions are

unsustainable. The appellant points out than in S. 5 (a), House Rent Control Act, the phrase "in execution of a decree or otherwise" is an addition, which is not to be found either in S. 5 of the previous Ordinance of 1946 or the corresponding S. 4, House Rent Control Order, 1942. He, therefore, urges that the exemption order already obtained is not effective for purposes of execution. On the other hand the respondent says that having regard to S. 18, House Rent Control Ordinance of 1946, and S. 20, House Rent Control Act of 1947, an order of exemption obtained by him under the provisions of the House Rent Control Order of 1942 must receive its full effect and operation, so as to entitle him to obtain actual eviction through Court on the basis of said exemption order. So far as the appellant's contention in this behalf is concerned, it appears to me to be clear that by virtue of S. 20 of the Act, taken in conjunction with S. 18 of the Ordinance, the previous exemption order must be treated as an exemption order obtained under the corresponding provision of the present Act. There can be no doubt that in spite of the addition of the phrase "in execution of the decree or otherwise," cl. (a) of S. 5 of the Act, corresponds to S. 4 of the Order, at least in so far as suits for eviction filed subsequent to the coming into force of the House Rent Control Order of 1942 are concerned. As regards the respondent's contention, the only effect of S. 20 is that the prior order of exemption is to be treated as one passed under the corresponding provisions of the present Act, and not that it is to have the same operativeness as it had under the prior Act which is quite a different matter. Indeed, this argument proceeds on a misconception of the scope of an exemption order. Such an order merely exempts the landlord from the disability imposed on him by sub-s. (a) of S. 5 and enables him to pursue his remedies under the general law, and relegates the parties to the general law, but cannot have the effect of guaranteeing to the parties that that general law may not once again be altered by a competent Act of the Legislature and a fresh disability imposed. Learned counsel for the respondent also attempted to argue that the exemption order obtained under the House Rent Control Order must be taken to be a combined order under Ss. 5 and 13 of the present Act treating Ss. 5 and 18 together as the provision corresponding to the old S. 4, House Rent Control Order. This argument is clearly without any substance.

[10] The only substantial question on the merits raised in the case is as to the correct interpretation of S. 13, and its applicability to the present case and this remains to be considered. The appellant contends that (1) the requirement under the section is in addition to the requirement under S. 5; (2) the requirement is applicable as much to execution proceedings as to suits; (3) it is a condition precedent to the institution of a suit or execution proceeding. The respondent controverts each and every one of these propositions.

[11] As regards the first two of the above contentions, the respondent points out certain difficulties in the way of adoption of the construction of the section which the appellant urges. The difficulties that he relies on, arise from (a) the use of the word "tenant" in the section and the definition of the word "tenant" as given in S. 2, sub-s. (5) of the Act; (b) the use of the clause

"in which the ground specified in the second proviso to cl. (b) of S. 5 has been taken as a ground for such eviction."

It is urged that when a suit is filed for eviction after obtaining an order of exemption under S. 5 (proviso), the only ground for eviction is that the tenancy has been validly terminated by a notice to quit after the exemption order has been obtained and not any of the grounds referred to in second proviso to cl. (b) of S. 5. Similarly when an execution proceeding is filed to enforce a decree for ejectment already obtained after an exemption order, no ground is or need be specified for the execution excepting the fact of the decree having been obtained. It is therefore urged that the section which, in terms, applies only to suits or proceedings of a particular category, namely, those in which particular grounds are specified as grounds for eviction, is wholly inapplicable to cases where an exemption order has already been obtained. It is, therefore, urged that this section is meant to apply only to the limited class of cases where eviction proceedings have been already initiated without the exemption order either because the Act itself was not in force at the time, or because the Act had not been brought into operation in the particular area. This argument necessarily implies that the section is applicable only to fresh execution proceedings where there has been no exemption obtained prior to the institution of the suit, since every suit to be filed after the Act came into force would be preceded by an exemption order, as a matter of course, at least, in so far as month to month tenancies are concerned. So to limit the construction of the section would, however, make the word "suit" in the section completely devoid of any operation and would also not obviate the objection that no execution proceeding is based on any particular

ground excepting the fact that a valid decree for eviction had already been obtained. If the word "suit" is not to be completely obliterated from the section, by difficulties of construction, it must obviously apply to all future suits for eviction which would be preceded, as a matter of course, by an exemption order in respect of month to month tenanciee. It would, therefore, appear to be clear that in respect of, at least, future suits for eviction, as regards month to month tenancies, the permission under S. 13 is over and above and independent of an exemption order. Having regard to the absolute and mandatory language of S. 13 and the opening words of S. 5 which says that that section is "subject to the other provisions of the Act" which of course includes S. 13, it cannot reasonably be contended that an order of exemption under S. 5 obviates the necessity for obtaining the permission under S. 13. It appears to me, therefore, that the limited construction urged for by the appellant's counsel restricting the operation of S. 13 to cases, where an exemption has not already been obtained is not permissible. Whether a suit for eviction can be maintained merely by obtaining a written permission of the Rent Controller without having previously obtained any exemption is different matter and does not arise for decision. I am, however, inclined to think that an order of exemption in the first instance and a distinct order for permission to institute a suit at the time of such institution are both required under the Act. This appears to be a fair inference from the fact that S. 13 is a specific addition by the Ordinance of 1946 and the Act of 1947, to the pre existing corresponding provision under the Order of 1942. The two appear to me to serve two different purposes. As already pointed out above, the exemption order is meant merely to remove the disability relating to the operation of the general law imposed by S. 5 (a). Such a removal of the disability enables the landlord to terminate the tenancy and get possession without having to go to Court if he can, and also absolves him from any penalty for contravention of the provisions of the Act under S. 15 thereof. When, however, the landlord is obliged to seek the help of a Court by instituting proceedings, a fresh permission may well be required to ensure that the circumstances with reference to which exemption has been granted, continue to apply and justify eviction through Court. It is to be remembered that a suit for eviction may be filed long after the tenancy has been terminated and the execution proceedings based on the eviction decree may be kept alive for years. The Act itself was, no doubt, intended to be operative for a temporary period. But having regard to the prevailing conditions relating to pressure for residential house, in urban areas the Legislature might have been anxious to provide an additional safeguard for the tenant and might have well thought that the safeguard against the abuse of exemptions provided under S. 10 (2) read with the proviso to S. 5 was not enough. However this may be, so far as the present argument is concerned, I can see no reason for not giving full effect to the language of S. 13, merely because there is scope for saying that the phrase in the section viz.,

"in which the ground specified in second proviso to cl. (b) of S. 5, has been taken as a ground for such evictions,"

is inappropriate, if strictly understood. It appears to me that the said phrase is merely intended to be descriptive of the class of cases to which S. 13 applies and not to imply the requirement of any such ground being a necessary part of the allegations on which that proceeding is instituted. Thus, for instance, the section will not apply where the ground for eviction is non-payment of rent or breach of conditions of tenancy, which takes it out of the operation of S. 5, sub-s. (a) itself. To give effect to the contention of the respondent in this behalf, would either make the section completely otiose or at least have the effect of deleting the word "suit" in the section, which is not permissible. It may be mentioned, in connection with this portion of the argument that it has also been urged that the word "proceeding" in the section must apply only to what may be called an "original proceeding" for eviction and not to an execution proceeding, which is merely a proceeding to enforce the decree in a suit already obtained. Such a construction again, however, would make the word "proceeding" absolutely otiose having regard to what is admitted before us, viz., that in the Province of Orissa, no mere original proceeding for eviction of tenants otherwise than by a suit are available under the law. The word "proceeding" in my opinion is wide enough to cover an execution proceeding. See *Gurupadapa Basapa* v. *Virbhadrapa*, 7 Bom. 459 and *Deb Narain* v. *Narendra*, 16 Cal. 267 (FB) at pp. 279, 280.

[12] The next objection relating to the construction of the section based upon the use of the word "tenant" has to be noticed. "Tenant" has been defined in the Act as

"including a person continuing in possession after the termination of his tenancy otherwise than under the provisions of this Act."

It has been pointed out that when an exemption order has been obtained and a valid notice to quit has been given, the tenancy has been terminated thereby, under the provisions of the Act

and, therefore, a person continuing in possession thereafter is not a tenant within the meaning of the Act. In such a case, therefore, neither the suit against him for eviction, nor any execution proceeding taken against him can be said to be against a "tenant." This objection appears at the first sight to have considerable force, but once again the difficulty is that if the word "tenant" used in S. 13 is construed as above, the entire section becomes devoid of any operation and is rendered otiose. To avoid this, it has been suggested on the other side that the phrase "continuing in possession after termination of the tenancy otherwise than under the provisions of this Act" in the definition of the word "tenant" must be taken to mean a person continuing in possession until evicted under the provisions of the Act and that the termination contemplated is only by the actual eviction. I am not prepared to adopt this construction, which appears to me to be a complete substitution of different words in the definition of the word "tenant" for the words actually used. The solution, however, of this difficulty to my mind lies in the fact that the definition in the section, as appears from the opening sentence of S. 2, applies only when there is nothing repugnant in the subject or context. To construe the word "tenant" in the light of the definition, would be repugnant to the subject or context, inasmuch as it renders S. 13 absolutely otiose. On the other hand, there is another way of looking at this matter.

[13] A suit or a proceeding by a landlord against a tenant for eviction is a well-known category of suit. It is obvious that at the date of the institution of such a suit, or proceeding, the person against whom it is instituted, is not strictly in law a tenant, an ex-tenant whose tenancy has already terminated under the law, but it is still permissible to designate it as a suit by a landlord against a tenant. This has been clearly pointed out by their Lordships in *Karnani Industrial Bank Ltd.* v. *Satyaniranjan Shaw*, A. I. R. (15) 1928 P. C. 227 : (56 Cal. 80). In that case their Lordships construing S. 15 (1), Calcutta Rent Act, which provides for the Controller granting a certificate as regards the standard rent on the application made to him by any landlord or tenant, held that this provision was not applicable where the application was made by a tenant whose tenancy had expired by forfeiture or efflux of time. Their Lordships held that this was not the correct interpretation and stated as follows:

"Their Lordships are of opinion that this adopts too narrow a construction of the words. In order to give any working effect to the Act it is necessary that the words 'landlord and tenant' must include, as they often do in ordinary parlance, ex-landlord and ex-tenant. An action by ex-landlord against ex-tenant might ordinarily be described as an action of landlord against tenant . . . . . ."

This agrees with the decision of the English Court of Appeal in *Remon* v. *City of London Real Property Co.*, (1921) 1 K. B. 49 : (89 L. J. K. B. 1105), where with reference to similar words in S. 15 (1), Increase of Rent Act Scrutton L. J. says:

"Whom did they mean to include in the term 'tenant'? if a tenant by agreement whose tenancy had expired was not within those terms, the whole purpose of the Act would have been defeated."

It, therefore, appears to me that the use of the word 'tenant' in S. 13, does not create any serious difficulty and must be meant to refer to an ex-tenant.

[14] Learned counsel for the appellant strongly urges that to give effect to the section by construing the word 'tenant' as 'ex-tenant' and by understanding the clause

"in which the ground specified in the second proviso to cl. (b) of S. 5 has been taken as a ground for such eviction."

As referring to the class of suits or proceedings to which it is intended to apply, is to adopt a strained and forced construction and that there is a way of giving effect to the Act by holding that it applies only to cases where an exemption order has not already been granted so far as month to month tenancies are concerned under S. 5 of the Act, and where an order disallowing extension has not been passed so far as term tenancy is concerned under S. 10 of the Act. It appears to me that to take S. 13 as having so extremely limited an operation cannot be justified on the actual language used by the section.

[15] My conclusion, therefore, on this part of the case is that the requirement of S. 13, is in adddition to the exemption contemplated by S. 5 and applies equally to a suit as well as an execution proceeding for eviction of a tenant and that it applies to month to month tenancies contemplated by S. 5, in respect of which a previous application for exemption would be necessary, that is to say, that it does not apply to proceedings for eviction for non-payment of rent or breaches of conditions of tenancy which do not fall within the prohibition of S. 5 (a). A question might arise whether where a permit has already been taken for the institution of a suit, a fresh permit under S. 13 is required for every succeeding execution proceeding. That question does not directly arise in this case because admittedly no permission under S. 13, has at all been obtained either for the suit or for the first execution petition inasmuch as S. 13 was not then a part of the Rent Control Order. Therefore, it appears to me clear that the permit contemplated by S. 13 was clearly necessary for the execution application filed by the respondent

on 10 5-1947. I may add, however, that to construe the section as requiring a permit for each succeeding execution application or indeed for an execution application when the suit itself has been filed after obtaining permission, may be considered unreasonable. It may be possible to interpret the section as requiring such a permission either for a suit or for a proceeding by reading the word 'or' disjunctively and not as necessarily requiring a permission at every stage.

[16] The further question that has yet to be considered is whether the requirement by way of permission is a condition precedent for the filing of the suit or proceeding or is only required before granting of the relief. For, if the latter is the correct interpretation, it would be obvious that since as held above the Act itself has already expired, we cannot now ask that the permit should be obtained before the decree is actually executed by warrant of delivery. Here again, there seems to be no reasonable scope for any doubt on the matter. The section is mandatory. In specific terms it says:

"No suit or proceeding shall be entertained by any Court unless the landlord has been permitted by the controller by an order in writing to institute such a suit or proceeding and has produced before such Court proof that such permission has been granted."

This seems clearly to mean that the permission is required for the institution of the suit or the proceeding itself and that proof of the same should be produced before such Court which seems to imply that the document constituting the proof has to be produced along with the institution of the proceeding. The section prohibits a Court from entertaining a suit or proceeding unless the conditions are satisfied. It is not possible to construe the word 'entertain' merely as meaning the granting of relief at the time of the disposal of the proceeding. The word 'entertain' as appears from the Oxford Dictionary Vol. 11, p. 213 under the alphabet "E" is shown to mean "to admit to consideration." The word connotes, therefore, the stage of taking cognizance of the proceeding rather than the stage of granting relief and thus appears to hit at the power of the Court to admit the proceeding even at the very initial stage. I may also add that no objection can be taken to S. 13 as affecting the normal power or the jurisdiction of the Court under the Civil P. C., because it appears that the Orissa House Rent Control Act of 1947 had received assent of the Governor-General on 8-3-1947, before it was brought into force.

[17] It therefore follows, in my opinion, that the objection of the appellant to the maintainability of execution application filed by the respondent on 10-5-1947 as E. C. No. 247/47 as the law then stood, must succeed and the appeal must accordingly be allowed. I must, however, note that I have come to that conclusion with reluctance, in its application to the facts of the present case. The record clearly shows that from the moment the suit has been instituted and during the pendency of the first execution application, the judgment-debtor has been repeatedly taking extensions of time from the respondent for vacating the premises and has in fact been able to continue in the premises virtually on account of the indulgence of the respondent. He now derives an unexpected and probably unfair advantage by virtue of the provisions of law which have ceased to be operative at any rate for the time being. These considerations, however, are beside the point so far as the issues arising in the appeal are concerned.

[18] The appeal is, therefore, allowed and the E. C. No. 247/47 must be dismissed. In the circumstances the appellant will have no costs at any stage of the proceedings here or in the Courts below.

[19] I may take this opportunity of adding that since in the view we have expressed that the House Rent Control Act is no longer in force fresh legislation is almost inevitable. The Legislature may well take that opportunity to make its intention clear on the matters debated in this case without leaving room for difficulty of construction.

[20] **Panigrahi J.**—Two points arise on this appeal: first, what is the law in force at the time of the filing of E. C. No. 247 of 1947; and secondly, what is the law applicable now, when the appeal arising out of that execution is being heard.

[21] A few facts are necessary to be stated in order to elucidate the first point. Under Para. 4 of the Orissa House Control Order of 1942, the decree-holder (respondent) obtained an order of exemption from the Controller on 15-3-44 and terminated the tenancy of the appellant by a notice to quit issued on 13-9-44. Suit No. 75 of 1945 was thereafter filed on 26-2-45 and a decree in ejectment was obtained by him on 17-12-45. In pursuance of this decree the first E.C. No. 230 of 1946 was filed on 30-4 46. While that execution case was pending the House Rent Control Ordinance of 1946 was published in the Orissa Gazette Extraordinary on 1-10-46. The Ordinance introduced a new clause which was not to be found in the House Rent Control Order of 1942 which it replaced. Clause 13 of the Ordinance enacted that no suit or proceeding by a landlord against a tenant for eviction from a house, in which the ground specified in the second proviso to cl. (b) of S. 5 thereof has been taken as a ground for such eviction, shall be entertained by any Court unless the landlord has been permit-

ted by the Controller by an order in writing to institute such suit or proceeding and has produced before such Court evidence that such permission has been granted. There was a saving clause in the Ordinance which enacted that :

"Notwithstanding the expiry of the Orissa House Rent Control Order 1942, all orders passed and other things done in pursuance of the said order, shall be deemed to have been validly passed and done under the corresponding provisions of this ordinance."

On 1-11-1946, the judgment-debtor filed a petition, Ex. A, for granting him time till 21-12-46 to vacate the house and stated therein that :

"The petitioner has agreed to vacate the house on or before 1-1-47 failing which writ of possession will issue without further reference."

By a similar petition dated 13-2-47, Ex. A 1, the appellant stated that the decree-holder accepted the amount of compensation decreed against him upto the end of February, and agreed to allow the appellant to remain in the house till the end of February and deliver vacant possession of the house on 1-3-1947. The appellant further agreed that if he failed to vacate the house on 1st March the writ of possession would issue. The writ was actually issued on 11-3-47 but was returned unexecuted for want of identification. The execution case was dismissed, on part satisfaction, on 7-5-47.

[22] On 21-3-1947 the Orissa House Rent Control Act (V [5] of 1947) was first published in the Orissa Gazette. Sub-s. (3) of S. 1 of the Act enacted that it shall come into force in such areas, and on such dates, as the Provincial Government may by notification appoint and different dates may be so appointed for different areas. The Provincial Government did not notify the application of the Act to Cuttack till 3-5-1947 on which date Notfn. No. 5177-D dated 3-5-1947 was published in an Extraordinary issue of the Orissa Gazette. The notification reads:

"In exercise of the powers conferred by sub-s. (3) of S. 1, Orissa House Rent Control Act 1947 (Act V [5] of 1947), the Governor of Orissa is pleased to direct that it shall come into force in the areas specified in the schedule annexed hereto on the date of this notification."

Item 3 of the schedule annexed to the notification mentions Cuttack municipal area including the adjoining villages of Khannagar, Sankarpur, etc. Meanwhile the authorities have taken action under the Act as if it had been in force from 21-3-1947. It was, therefore, felt necessary to validate all such actions purporting to have been taken under the Act and accordingly Orissa Act XXI [21] of 1947, the Orissa House Rent Control (Amendment and Validation) Act was passed and published in an Extraordinary Gazette issued on 12-7-1947. This Act amended sub-s. (3) of S. 1, House Rent Control Act (V [5] of 1947) by providing therein that it shall come into force at once in the towns and areas specified in the schedule; and the schedule attached to the notification of 3-5-1947 was carried into this Act.

[23] Three days after the dismissal of the E. C. No. 230/46, that is on 10-5-1947, the decree-holder filed a second E. C. No. 247 of 1947. On 16-7-1947, that is four days after the Validation Act was passed, the judgment-debtor filed a miscellaneous case under S. 47, Civil P. C. objecting to the maintainability of the execution petition on the ground that S. 13, House Rent Control Act was a bar. It will be noticed that the notification extending the application of the House Rent Control Act to the town of Cuttack was published at a time when the first E. C. No. 230/1946 was pending in the Court and the Validating Act was passed at a time when the second E. C. No. 247 of 1947 was pending. The question for decision, therefore, is whether the notification dated 3-5-1947 or the Validating Act of 12-7-1947 would affect pending proceedings or render the institution of the execution case invalid retrospectively.

[24] It is a well-recognised rule of construction that statutes should be interpreted, if possible, so as to respect vested rights.—*Hough* v. *Windus*, (1881) 12 Q. B. D. 224 at p. 237—and such a construction should never be adopted if the words are open to another construction. It is not to be presumed that interference with existing rights is intended by the Legislature, and if a statute be ambiguous the Court should lean to the interpretation which would support existing rights. In the absence of anything in an Act to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act is passed, *Leeds and County Bank* v. *Walker*, (1883) 11 Q. B. D. 84 at p. 91: (52 L. J. Q. B. 590). So careful are the Courts in endeavouring to protect vested rights that we find that in several cases Judges have refused to allow statutes to have retrospective operation although their language seemed to imply that such was the intention, of the Legislature, because if the statutes had been so construed, vested rights would have been defeated. See Craies, p. 335 and the cases cited therein.

"It is a general rule', said Jessel M. R. in *In re Joseph Suche & Co., Ltd*, (1875) 1 Ch. D. 50, "that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they applied to pending actions, do not affect them."

In accordance with this principle it was held in *Ex parte Pratt*, (1884) 12 Q. B. D. 331 that proceedings pending during an earlier Act were saved. In *Delhi Cloth & General Mills* v. *Income-tax Commissioner*, A. I. R. (14) 1927 P. C. 242:

(9 Lah. 284), the same rule was applied to Indian cases and the Judicial Committee held:

"Provisions which touch a right in existence at the passing of a statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Provisions which if applied retrospectively would deprive of their existing finality orders which, when the statute came into force were final, are provisions which touch existing rights."

In *United Provinces* v. *Mt. Atika Begum*, A. I. R. (28) 1941 F. C. 16 : (I. L. R. (1941) Kar. F. C. 72), it was laid down that if there are two possible interpretations it is the duty of the Court to accept that one which is more reasonable, more consistent with ordinary practice, and less likely to produce impracticable results. Sulaiman J. observed at p. 37 as follows :

"Undoubtedly an Act in its operation may be retrospective and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have undoubtedly leaned very strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so. It is a well recognised rule that the statutes should, as far as possible, be so interpreted as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or takes out the power or jurisdiction of a Court in enforcing the law, as it stands, its retrospective character must be clearly expressed. Ambiguities in it should not be removed by Courts nor gaps filled up in order to widen its applicability."

An exception is made in cases of provisions dealing with matters of procedure which may properly be retrospective in effect, but even here an exception is made in cases where such construction would be textually inadmissible: *Delhi Cloth & General Mills* v. *Income-tax Commissioner*, A. I. R. (14) 1927 P. C. 242 : (9 Lah. 284). All these cases are based on the leading case of *Colonial Sugar Refining Co.* v. *Irwing*, (1905) A. C. 369 : (74 L. J. P. C. 77). In that case the creation of the High Court of Australia by the Australian Commonwealth Judiciary Act of 1903 took away the right of appeal from the Supreme Court of Queensland to His Majesty in Council. The question that fell to be considered was whether such right of appeal in a pending action which the party had before the Act was passed, could be deemed to have been taken away by the new Judicature Act, in other words, whether a litigant could be deprived of a vested right of appeal by a new enactment which withdrew such right and whether the statute was to be construed so as to operate retrospectively. Lord Macnaughten laid down the two following propositions in this connection; (1) if it was a matter which was more than one relating to procedure, that is if it touched a right in existence at the passing of the Act, it could not be deemed to be retrospective in its effect according to a long line of decisions extending from Coke; and (2) to deprive a suitor in a pending action of a right of appeal to a superior Court which belonged to him, was a very different thing from one regulating procedure In *Pannirselvam* v. *Veeriah Vandayar*, 54 Mad. 627 : (A. I. R. (18) 1931 Mad. 83) the contention that Act XI [11] of 1930 amending the Madras Local Boards Act ousted the jurisdiction of the Subordinate Judge who had entertained an election petition before the Act had come into force, was negatived on the general ground that it was a fundamental rule of interpretation that a statute, other than one dealing with procedure, should not be construed so as to have retrospective effect. In *Makar Ali* v. *Sarfaddia*, A. I. R. (10) 1923 Cal. 85: (50 Cal. 115) the question was whether an auction-purchaser at a court sale held under the old Civil Procedure Code of 1882 who discovered after the sale that the judgment-debtor had no saleable interest, could proceed only by an application under O. 21, R. 93, Civil P. C. of 1908 or could file either a suit or an application which were both available to him under the old Code. It was held that the auction-purchaser had, on the date of the sale which was held under the old Code, a vested right to secure a refund of the purchase money by a suit as well and the same could in no way be deemed to have been extinguished by the Code of 1908. It was pointed out in that case that if the new Code were held applicable the remedy under the old Code might be barred by limitation and in such a case the enactment could not be given a retrospective operation so as to impose an impossible condition on pain of forfeiture of a vested right. It was similarly held in *Promotha Nath* v. *Mohini Mohan Pal*, 47 Cal. 1108 : (A. I. R. (7) 1920 Cal. 435) that the old Code governed a suit for declaration of title against a purchaser at an execution sale which took place before 1.1.1909 after the new Civil Procedure Code came into force though the sale certificate was issued later. It was held in *Ajit Singh* v. *Bhagabati Charan*, A. I. R. (9) 1922 Cal. 491 : (70 I. C. 370) that if the application of the provisions of an amending Act makes it impossible to exercise a vested right of suit, the Act should be construed as not being applicable to such cases. In *Punyabrata Das* v. *Monmohan Ray*, A. I. R. (21) 1934 Pat. 427 (153 I. C. 520), the Patna High Court refused to give retrospective effect to Bihar Act XXX [30] of 1923 which affected rights to property, as it was pointed out that the consequences of so holding would be disastrous. In *Gursaran Das* v. *Parmeshwari Charan*, A. I. R. (14) 1927 Pat. 203 : (6 Pat. 296), a suit for possession which was instituted after the amendment of Bengal Act VI [6] of 1908 in its application to Chhota-Nagpur had

come into play, but where the cause of action arose before that amendment had come into operation was held to lie in a civil Court as the plaintiff had acquired a vested right in regard to the same, and the summary procedure as provided in the Amending Act was not the only remedy open to him. Section 26-C, Bihar Tenancy Act (VIII [8] of 1934) was held not to take away the right which had vested in a party under a decree passed by a Court of competent jurisdiction on the ground that a new law should be so construed as to interfere as little as possible with vested rights as, otherwise, a valid decree would automatically become invalid which consequence could not be supported on general principles of justice : *Shiva Janaki* v. *Kirtanand*, A. I. R. (23) 1936 Pat. 173: (160 I. C. 606). The right of treating a judgment as final and conclusive is a vested right, and the right to enforce it is equally a right conferred by law, as proceedings in execution are but a continuation of the suit. I have, therefore, no hesitation in holding that neither the Ordinance of 1916 nor the Act of 1947 had any retrospective effect on pending proceedings or on the decree that had been obtained by the respondent.

[25] Although by the Validating Act passed in July 1947 the Legislature regularised certain actions and proceedings taken in purported exercise of authority under the Act, it did not, in express terms, apply to pending proceedings. In my opinion, therefore, E. C. No. 247 of 1947 filed by the landlord decree-holder is not affected by the House Rent Control Act having been applied to Cuttack town retrospectively, by the Validating Act passed in July 1947. Section 13 of the Act says that no suit or proceeding shall be entertained unless the landlord has been permitted by the Controller by an order in writing to institute such a suit or proceeding. The language contemplates suits or proceedings that are to be filed in future and the section is prospective in its operation. It does not require a decree-holder who is proceeding with his execution, as in the present case, to withdraw his execution and obtain a certificate and again start execution afresh.

[26] The word 'proceeding' has not been defined in the Act, but it has received judicial interpretation. In *Ratanchand* v. *Hanmantrav*, 6 Bom. H. C. A. C. 166, Coutts C. J. and three other Judges of the Bombay High Court held that a suit is a judicial proceeding and that the word 'proceeding' should be taken to include all the proceedings in the suit, from the date of its institution to the date of its final disposal and would, therefore, include proceedings in appeal. In *Deb Narain* v. *Narendra*, 16 Cal. 267 (F.B.), Wilson J. delivering the judgment of the Court held that an appeal is a part of the same proceedings as the thing appealed against and that therefore if the thing appealed against is a decree in a suit, the appeal is a part of the same proceeding as the earlier steps in the suit. In *Mungul Pershad* v. *Grija Kant Lahiri*, 8 I. A. 123 : (8 Cal. 51 P. C.), their Lordships of the Privy Council held that "an application for the execution of a decree is an application in the suit in which the decree was obtained"; and execution proceedings are merely a continuation of the suit: 14 I. A. 37, *Ram* v. *Roop*,* Section 5, Orissa General Clauses Act says that

"when any Orissa Act repeals any enactment hitherto made, or hereafter to be made, then unless a different intention appears the repeal shall not . . . . . (e) affect any investigation, legal proceeding or remedy in respect of such right, privilege, obligation, liability, penalty, forfeiture, or punishment, as aforesaid, and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed."

This provision is made applicable to the interpretation of Ordinances as well by S. 32 of the Act. In *Ismail* v. *Leslie*, 24 Cal. 399: (1 C. W. N. 188), the plaintiff filed a suit in the High Court for the recovery of a sum of over Rs. 2000 which before the hearing was reduced to a sum of less than Rs. 2000 and therefore below the limit for suits cognizable by Small Cause Courts. Section 22 of Act XV [15] of 1882 deprived the plaintiff in a suit cognizable by a Small Cause Court of his costs, if he obtained a decree "for less than Rs. 2000" unless the Judge certified, it was a fit case to be tried in the High Court. The suit was decided after the passing of Act I [1] of 1895, viz., the Presidency Small Cause Courts Act, which deprived the plaintiff of costs in cases in which he obtained a decree for less than Rs. 1000. The Judge allowed the plaintiff costs of the suit without certifying that the case was fit one to be brought to the High Court: It was held that the amending Act did not govern the case. Maclean C. J. observed that the new Act did not relate to procedure only and that it was retrospective. The Court adopted the dictum of Wilson J. in an earlier case which was as follows :

"The third class of cases consists of those in which the law is changed by a mere repeal of a previously existing law and the repealing enactment contains no special rule for its own interpretation. Such cases are governed by S. 6, General Clauses Act."

Trevelyan J. observed:

"The matter is, I think, concluded by S. 6, General Clauses Act, and the English Acts as to the effect of an alteration in the law of procedure upon pending proceedings have no application."

Even assuming that the word 'proceeding' occurring in S. 13, Orissa Rent Control Act, refers

*Note :— The case cited seems to be wrong. The correct reference cannot be traced—*Ed.*

to an execution proceeding, it cannot affect pending execution proceedings.

[27] I arrive at the same conclusion by a reference to S. 20 (1) of the Act, which is a repealing and saving clause. It reads as follows:

"(1) The Orissa House Rent Control Ordinance, 1946 is hereby repealed.

(2) Any order made or deemed to be made and anything done or deemed to be done under the said Ordinance and in force immediately before the commencement of this Act, shall continue in force and be deemed to be made or done under the corresponding provisions of this Act."

The Ordinance of 1946 had a similar savings clause, in cl. 18 which says:

"Notwithstanding the expiry of the House Rent Control Order 1942, all orders passed and other things done in pursuance of the said order, shall be deemed to have been validly passed and done under the corresponding provisions of this Ordinance."

I have already pointed out that the Ordinance was not in force when the first execution case was filed and had expired when the second execution case was filed. Section 20 of the Act validates all actions taken under the Ordinance and S. 18 of the Ordinance in its turn validated all actions taken under the Order of 1942. The Act as well as the Ordinance lay dawn that anything done or deemed to be done and in force immediately before the commencement of the Ordinance or the Act, as the case may be shall continue in force and be deemed to be made or done under the corresponding provisions of the Act or the Ordinance. A proviso in a repealing statute "except as to acts done under it" will operate to preserve to parties all rights if the action is brought before the repealing statute passes. In *Foster* v. *Pritchard*, (1857) 26 L. J. Ex. 215 (5 W. R 610) an action for trespass had been brought against the bailiff of a county Court while 9 and 10 Victoria Chap. 95 was in operation. Section 139 of this Act enacted that no costs shall be awarded to the plaintiff unless the Judge so certified. This Act was repealed by 19 and 20 Victoria, Chap. 108 when the litigation was pending. Section 2 of the repealing Act runs: "The enactments specified are repealed except as to acts done under them". It was argued in that case that the words, "acts done under" meant "acts done in pursuance of the repealed statutes." Bramwell B., pointed out during arguments in that case that the expression may be read thus:

"except as to acts for which actions were brought while the repealed statute was in operation."

The words "done under" may mean "done while the statute was in operation." Martin B observed:

"A fair meaning of the provision is—except as to acts done 'under the protection of the former statutes'."

Pollock C. B., said:

"The object of such a proviso is to prevent the hardship which might arise if parties were left without protection for acts done under a statute which is afterwards repealed. The proviso is a common one being introduced into most repealing statutes and it is important to give it a liberal construction so as to carry out its object."

The rule of construction in such a case, therefore, is that if a right has been once acquired it will not be taken away again by the repeal of the statute under which it was acquired. The words of S. 20 are large enough to save vested rights both against the operation of repeal clause itself and also against the previous clauses of the Act. This was the construction put upon the repeal and saving clauses in *Hough* v. *Windus*, (1882) 12 Q. B. D. 224 at p. 236; (53 L. J. Q. B. 165), cited above.

[28] It was pointed out that there might be some difficulty in giving effect to the words 'corresponding provisions' as there was no provision in the Order of 1942 corresponding to S. 13 of the Act. The Legislature intended that the repealed Order should be harmonised with the repealing Ordinance and 'correspond' means 'suitable to' as laid down in *Sackville West* v. *Holmesdale*, (1870) 39 L. J. Ch. 505 at p. 520: (L. R. 4 H. L. 543). If, therefore, there was no provision corresponding to S. 13 in the Control Order of 1942, it would not apply. Nor would it render invalid what was valid under the repealed Order as the saving clause expressly says that it "shall continue in force and be deemed to be done under the Act" It is by a legal fiction that anything done under a prior statute is deemed to be done under a later statute; and it is by just another legal fiction that we have to hold that although a provision corresponding to S. 13 was not to be found in the earlier Order any action validly taken under the earlier Order should be deemed to have been validly done under the later one. It could not have been the intention of Legislature that immediately the Act come into force, all suits and proceedings which arose under the provisions of the earlier Order and which were pending should be withdrawn and the conditions laid down in S. 13 should be complied with. A saving clause —unlike exceptions from an enacting clause—is liberally construed; See Halsbury, Vol. 31, p. 485. The effect of the saving clause is that those provisions of the House Rent Control Order which did not deter the plaintiff from executing his decree remained in force as if the succeeding Ordinance and Act had not been passed.

[29] I have, therefore, arrived at the conclusion that the Orissa House Rent Control Act of 1947 does not in any way affect the plaintiff-decree-holder's right to execute his decree as that right was still being litigated, and that the law applicable at the time when the execution was filed is the House Rent Control Order of 1942.

Under that Order, the judgment-creditor had acquired the right to get delivery of his property and the duty was imposed on the Court to deliver it to him. That right and that duty are expressly saved.

[30] The second question posed at the beginning of this judgment is—what is the law applicable now to the appeal that is before us?

[31] Sub-section (4) of S. 1, Orissa House Rent Control Act, says:

"It shall remain in force for three years but the Provincial Government may from time to time by notification extend the continuance of this Act for a further period or periods not exceeding in the aggregate two years."

The period of three years fixed by the Act expired on 21-3-1950 and the Provincial Government issued a notification extending the life of the Act for one year. This notification is dated 21-2-1950. The case reported in *Jatindranath* v. *Province of Bihar*, 1949 F.L.J. 225 : (A.I.R. (36) 1949 F. C. 175: 50 Cr. L. J. 897) is clear authority for the position that the extension of an Act by notification is *ultra vires* and is of no effect. The position, therefore, is that there is no House Rent Control Act now in force in the State. We are bound to take notice of this fact and decide the appeal accordingly.

[32] It is well established that an appeal is a re-hearing. The adjudication of the rights of the parties is not yet final. Courts have, in numerous cases, recognised that in respect of any relief to be granted in a case on appeal, the Court of Appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against. In *K. C. Mukherji* v. *Mt. Ramrattan Kuer*, 63 I. A. 47 : (A. I. R. (23) 1936 P. C. 49), Lord Thankerton in the course of arguments observed that the duty of a Court is to administer the law of the land at the date when the Court is administering it. In *Lachmeshwar Prasad* v. *Keshwarlal*, A. I. R. (23) 1941 F. C. 5 : (20 Pat. 429) it was held that the appellate Court is competent to take into account the legislative changes since the decision under appeal was given and its powers are not confined only to see whether the lower Court's decision was correct according to the law as it stood at the time when that decision was given. To the same effect are the cases reported in *Shyamkanta* v. *Rambhajan*, A.I.R. (26) 1939 F.C. 74 : (I.L.R. (1939) Kar. F.C. 165), where the following observation is made at p. 77 : "There is no doubt that a High Court possesses such power in dealing with appeals from Courts subordinate to it." *See* S. 107 and O. 41, R. 33, Civil P. C. I have, therefore, no hesitation in holding that whatever be the law applicable at the time the execution case was filed and irrespective of whether the decision of the Court below is correct or not, there is no restraint now on the decree-holder to evict his tenant. The appeal is, therefore, liable to be dismissed on this ground alone.

[33] As much discussion centred round the construction of Ss. 5 and 13 of the Act, I should like to place my views on these sections. It may be remembered that the House Rent Control Order, 1942 was applied only to a few municipal areas in the province. But the House Rent Control Act of 1947 was applied to a number of other Union Board areas in addition to the areas to which the House Rent Control Order had been applied. Section 13 applies only to such other areas as had been brought under the operation of the Act in March 1947. It, therefore, says that no suit or proceeding shall be entertained by a Court without a permission being granted by the Controller to institute such a suit. Section 5 is restricted to tenancies from month to month and says that a tenant shall not be liable to be ejected whether in execution of a decree or otherwise, except for non-payment of rent or breach of the conditions of the tenancy, and provides that the Controller may grant exemption from this provision in certain circumstances. This section opens with the words "*Subject to the Provisions of this Act*" and is, therefore, undoubtedly subject to the provisions of S. 13. It is clear that S. 5 is to be read as subordinate to S. 13. The effect of this would be that if a landlord obtains a decree in compliance with S. 13, S. 5 (a) will not apply and he can straightway proceed to execute his decree and obtain possession. The two sections are mutually exclusive. Otherwise there would be an apparent inconsistency between the two. It cannot be supposed that after the landlord has filed a suit with the permission of the Controller, under S. 13 and obtained a decree, the tenant shall not be liable to be evicted in execution of that decree unless a further permission is obtained from the Controller under S. 5. Conversely, if the landlord obtained an exemption order from the Controller under proviso 2 to sub-s. (b) of S. 5, he will be at liberty to execute his decree obtained subsequent to this exemption, though the requirements of S. 13 with regard to the institution of a suit or proceeding may not have been complied with. The words "whether in execution of a decree or otherwise" occurring in cl. (a) of S. 5 should, in my opinion, be restricted to those decrees which had been obtained in areas prior to the extension of the Act to those areas.

[34] The next question is whether both an exemption and a permission are required before a landlord can evict his tenant. When an exemption order is obtained under proviso 2 to

cl. (b) of S. 5, the bar created by S. 5 (a) is removed and it would be unreasonable to hold that the landlord should again apply to the Controller for permission to sue. I can see no purpose in such a course. The object of the exemption is to enable the landlord to get back possession of his house howsoever he can, whether by a suit or otherwise. If the Controller does not grant him exemption under proviso 2 to cl. (b) of S. 5, he has to give him a certificate as required in S. 13, permitting him to file a suit and satisfy the Court that the house is reasonably and in good faith required for his own occupation, or that he has any other good and sufficient reason for ejecting his tenant, as laid down in proviso 2 to S. 5 (b). I am, therefore, inclined to read the two sections as mutually exclusive and as applicable to two different sets of circumstances. To hold that an exemption order, as well as a certificate to sue, would be required in the same case would be unreasonable, besides involving inconvenience to the landlord and waste of public time of the authorities concerned. The Legislature could not have intended such an unreasonable course.

[35] A literal reading of S. 13 would mean that every time a proceeding is instituted a permission from the Controller for the institution of such proceeding would be necessary. An order of dismissal of a suit for default, a petition for attachment before judgment, for discovery or inspection, would all be proceedings in the suit. Is it expected that the landlord should obtain a permission every time such proceeding is instituted? That would be a futile and absurd course. The Legislature does not intend to enact any provision or law which, in its application, would lead to an absurdity, nor does the law require a man to do that which is futile or fruitless. To get over this difficulty, it is suggested that the words "in which the ground specified in proviso 2 to cl. (b) of S. 5" occurring S. 13, should be read as governing only the words "no suit" and that the words "or proceeding" occurring after "no suit" may be read disjunctively. If the suit has been filed on the ground specified in proviso 2 to cl. (b) of S. 5 and a decree obtained, after complying with the requirement of permission laid down in S. 13, a further permission for execution of that decree would be superfluous. The Civil Procedure Code does not contemplate any grounds to be given in a petition for execution. Why then did the Legislature prescribe in S. 13, that a proceeding

"in which the ground specified in proviso 2 to cl. (b) of S. 5 has been taken as a ground for such eviction,"

shall not be entertained by any Court without a permission from the Controller? I can think of two possible explanations. It may be that the words "on proceedings" have been used *ex abundanti cautela* so as to include every proceeding in the nature of a suit. It may also be, which I think is more likely, that in respect of decrees for eviction which had been obtained on grounds other than those specified in proviso 2 to cl. (b) of S. 5, the Legislature intended that the decree-holder should not be entitled to evict unless he satisfied the executing Court that the house is reasonably and in good faith required for his own occupation or that he has any other good and sufficient cause. In such a case, the Controller's permission would be required. It is open to the landlord to terminate his lease on any of the grounds mentioned in S. 111, T. P. Act, but these grounds would not be enough to justify the eviction of a tenant because S. 5 (a) is a bar and the decree-holder should obtain a permission in writing from the Controller and satisfy the Court that the conditions mentioned in proviso 2 to cl. (b) of S. 5, are also complied with. In my judgment, therefore, the expression "or proceeding" applies to a case where a suit has been decreed on grounds other than those mentioned in S. 5 (b), proviso 2 and such a suit could be filed in areas to which the rent control enactment did not apply. Executions filed after the extension of the Act to such areas will not be entertained unless the decree-holder obtains the permission in writing from the Controller and satisfies the Court that the grounds specified in proviso 2, cl. (b) of S. 5, are also present. I fail to understand how the principle of distributive construction can be applied in the present case. The maxim *reddendo singula singulis* applies where a sentence contains several antecedents and several consequents and they are to be read distributively each phrase being referred to its particular subject. If that principle were to be applied to the language of S. 13, it would read as follows:

"No suit .... by a landlord against a tenant .... in which the ground specified in the second proviso to cl. (b) of S. 5 has been taken as a ground for such eviction, shall be entertained by any Court, etc."

"No proceeding .... shall be entertained by any Court ...,"

which would be absurd.

[36] In my opinion, the clause beginning with the words

"In which the ground specified in the second proviso to cl. (b) of S. 5 has been taken as a ground for such eviction"

governs both suit and proceeding, and the application of S. 13 should be restricted only to those proceedings initiated in areas after the Act was subsequently extended to those areas, and not to those areas in which the order or Ordinance had already been applied before.

[37] The last argument that remains to be noticed is whether on the expiry of the Act any action can be taken under the provisions of the expired Act. The rule is that, after the expiration of a statute, in the absence of a provision to the contrary, no proceedings can be taken on it and proceedings already taken *ipso facto* determine. See Halsbury, vol. 31, p. 512. It is suggested, however, that the proceedings are kept alive by virtue of the provision in S. 21. Sub-section (b) of S. 21 says :

"The expiration of this Act shall not .....

(b) affect any liability incurred under this Act or any punishment incurred in respect of any contravention of this Act or any rule or order made thereunder."

It is said that the liability incurred in the present case is the liability of the execution petition to be dismissed and this liability is kept alive by S. 21 (b) The section says 'liability incurred under this Act or any punishment incurred in respect of any contravention of this Act." Liability is that condition of affairs which gives rise to an obligation to do particular thing to be enforced by action. It applies to a person who incurs an obligation which can be enforced by law. The question is: did the decree-holder in this case incur any such liability ? The word 'incur' means 'to become liable by act or operation of law'. In *Waghela Rajsanji* v. *Shekh Masludin*, 14 I. A. 89 : (11 Bom. 551 P. C.) the Judicial Committee of the Privy Council observed at p. 100 :

"'Incur' means 'to run into', but it is constantly used in the sense of 'meeting with,' 'of being exposed to,' 'of being liable to'."

A person incurs a liability under the Act to be punished if he contravenes any of its provisions, and the punishment follows the liability. If he incurs the liability to be prosecuted he may incur the punishment prescribed by the Act. I cannot persuade myself to agree with the contention that the words 'liability incurred' should be understood as referring to the petition having incurred the liability to be dismissed. That would be straining the expression from its ordinary meaning. If anybody incurred any liability it was the Court which entertained the execution without the Controller's permission. In my judgment, therefore, S. 21 does not save the expiration of the Act, and the only consequence is that the miscellaneous case started by the appellant under S. 47, Civil P. C., objecting to the maintainability of the execution on the ground that S. 13 of the Act was a bar, *ipso facto* terminated along with the Act.

[38] To put my views in a nut shell, the Act has expired, and with it the objection raised by the judgment-debtor also fails. With all deference to my learned brothers, who take the contrary view, I am bound to dissent. I am in favour of giving a construction which will harmonise all the sections which appear to be repugnant to each other, without doing violence to the language employed by the Legislature. In this case, but for the leniency shown by the decree-holder in granting time to the judgment-debtor to vacate the house, the writ of delivery which was first issued on 18-9-46 would have been executed. But the judgment-debtor took time again and again till 7-5-1947 when the execution petition was dismissed on part satisfaction. He represented to the Controller that he had no objection to vacate the house provided he was given time till 30-4-44 and he represented to the Court more than once that he would vacate the house. In these circumstances, to hold that the language of the Act justifies the Court in arriving at the conclusion that the execution petition is untenable for want of a permission from the Controller cannot be a true construction of the Act or the intention of the Legislature underlying it. I trust I have correctly interpreted the intention of the Legislature and if I am wrong in my interpretation, I have erred in the company of the great masters of Law.

[39] In the result the appeal must be dismissed with costs.

[40] **Narasimham J.**—Having given my anxious consideration to the differing judgments of my learned brothers, Das and Panigrahi JJ., I have come to the conclusion that the appeal must be allowed and E. C. No. 247 of 1947 dismissed with costs.

[41] All the three of us are agreed that the House Rent Control Act, 1947 expired on 21-3-1950 and that the notification of the Government of Orissa (No. 2280-Dev. dated 25-2-1950) extending the said Act for one year more is invalid in view of the recent decision of the Federal Court in *Jatindra Nath* v. *Province of Bihar*, 1949 F. L. J. 225 : (A. I. R. (36) 1949 F. C. 175 : 50 Cr. L. J. 897) to the effect that the extension of the life of an Act by a notification of the Executive Government would amount to exercise of delegated legislative power and as such invalid. Therefore it may be taken as well established that the House Rent Control Act, 1947 (hereinafter referred to as the Act) is no longer in force in the State of Orissa.

[42] The difference, however, between my learned brothers is mainly on the question as to whether this execution case (No. 247 of 1947) which was filed on 10-5-1947 when the Act was in force should be disposed of in this appeal on the basis of the law as it stood at the time of the filing of the execution case or else on the basis of the law as it stands now at the time of the hearing of the appeal. The Act was a purely

temporary Act and the effect of the expiry of such an Act on pending proceedings is essentially a matter of construction: *R.* v. *Wicks*, (1946) 2 ALL E. R. 529. Section 21 expressly says that the expiration of the Act shall not affect any liability incurred under the Act. One view is that the word 'liability' occurring in S. 21 (b) means liability for punishment under the penal provisions of that Act (*See* S. 14). This construction not only narrows very much the meaning of the expression 'liability' but it overlooks the fact that cl. (b) of S. 21 also refers to punishment incurred in respect of any contravention of the Act. The 'liability incurred under the Act' and 'any punishment in respect of any contravention of the Act,' have both been expressly stated in that clause and consequently the 'liability' must necessarily be other than the penalty contemplated by the Act. I would agree with my learned brother Das J. that 'liability' would include the liability to have the execution case dismissed for want of proper permit as required by S. 13 and that liability would, therefore, continue by virtue of S. 21 alone notwithstanding the expiry of the Act.

[43] Out of respect for my learned brother Panigrahi J., I think it necessary to briefly give my reasons for my inability to agree with the other views expressed by him in his judgment. In Paras. 4 and 5 (Paras. 23 and 24 of this report) of the judgment he has pointed that an Act should not be so construed as to affect pending proceedings in the absence of any express provision to that effect and that consequently E. C. No. 247 of 1947 (out of which the present appeal arises) would not be in any way affected by any of the provisions of the Act. If I may say so with respect, the initial assumption that the said execution case was a 'pending proceeding' at the time of the commencement of the Act is incorrect. The Act was published in the Gazette on 21-3-1947. It was brought into force in the town of Cuttack by a notification dated 3-5-1947. Therefore after that day the Act validly came into force in the town of Cuttack. Execution Case No. 247 of 1947 was actually filed before the executing Court on 10-5-1947, seven days after coming into force of the Act. How can it be said that the said execution case was 'pending' on the date of the coming into force of the Act in Cuttack town? It is true that there was a previous execution case (No. 130 of 1946) filed on 30-4-1946; but that was ultimately dismissed for default on 7-5 1947. Execution Case No. 247 of 1947 is a separate case filed three days later and it was never contended even by the learned counsel for the respondent that the second execution case is a mere continuation of the first execution case. Such a contention cannot be seriously advanced because the first one was clearly dismissed for default on 7-5-1947 and limitation for filing a fresh execution case commenced from that date. If a second petition for execution of a decree after dismissal of the first execution petition is considered to be a mere continuation of the first petition cl. (5) of Art. 182, Limitation Act, would be meaningless.

[44] Presumably my learned brother Panigrahi J., considers that E. C. No. 247 of 1947 should also be held to be a 'pending proceeding' because the Legislature passed a Validating Act (Orissa Act XXI [21] of 1947) on 12-7-1947 more than two months after filing of that execution petition. But if the provisions of that Validating Act are carefully scrutinised it will be found that they deal with acts done from 21-3-1947 till 3-5-1947 and validated the same by giving retrospective effect to the aforesaid notification dated 3 5-1947 from 21-3-1947 itself. But as regards any action taken under the Act after 3-5-1947, no validation was necessary at all and Orissa Act XXI [21] of 1947 does not either expressly or by implication deal with those acts. Therefore, with great respect, I feel constrained to dissent from the view that E. C. No. 247 of 47 was a 'pending proceeding' when the Act was brought into force in Cuttack town on 3-5-1947.

[45] I entirely agree with my learned brother Panigrahi J's observations regarding the effect of a new Act on a 'pending proceeding'. But any discussion about it is beside the scope of the present case.

[46] The limited question for consideration is whether the Act would operate so as to deprive a decree-holder of a right which accrued to him prior to its commencement. It is true that ordinarily retrospective effect should not be given to an Act so as to affect vested rights which might have accrued to a decree-holder. But if there are express provisions in the Act which indicate that the Legislature deliberately interfered with decrees obtained prior to its commencement, the Court is bound to give such retrospective effect. The jurisdiction of the Orissa Legislature to legislate even in respect of decrees cannot be seriously questioned. The subject 'Civil Procedure' is an item in the Concurrent Legislative List (Item 4 of Part I of List III) and the Act was assented to by the Governor-General. Consequently sub-s. (2), S. 107, Government of India Act 1935 would apply and even if there is any repugnancy between any provision of the Act on the one hand and any provision of the Civil Procedure Code directing an executing Court to execute a decree without any modification or restriction the former would prevail.

[47] An examination of some of the provisions of the Act shows that the Legislature clearly intended that the Act should apply to decrees passed prior to its commencement. In cl. (a) of S. 5 are the words 'whether in execution of a decree or otherwise'. These words were not found in the original House Rent Control Order, 1942. They indicate unmistakably that notwithstanding any decree for ejectment passed prior to the coming into force of the Act such a decree cannot be executed except in accordance with the provisions of S. 5. Similarly in S. 13 both the words 'suit' and 'proceeding' have been used. I entirely agree with my learned brother Das J. that a proceeding must include an execution proceeding. As an execution proceeding must be preceded by a decree and as S. 13 expressly forbids such a proceeding to be entertained in the absence of permit by a Controller it follows that in S. 13 also the Legislature deliberately interfered with a decree prior to the commencement of the Act.

[48] Therefore though the Act cannot be said to apply to pending proceedings it must be held to apply to new execution cases filed after its commencement, and thereby affect decrees passed prior to its commencement.

[49] As regards the construction of Ss. 5 and 13 and the necessity of harmonising the two, I am in entire agreement with my learned brother Das J. Section 13 was newly inserted by the House Rent Control Ordinance, 1946 and it was not found in the original House Rent Control Order which remained in force from 1942 to 1946. Simultaneously with the insertion of S. 13 in the Ordinance a restriction was put on S. 5 by the opening words 'subject to the provisions of the Act'. There can be no doubt, therefore, that S. 5 is subject to S. 13, and an exemption obtained under proviso 2 to S. 5 cannot dispense with the necessity of obtaining a permit under S. 13. I am, therefore, unable to accept the view that the two sections should be read "as mutually exclusive and as applicable to two different sets of circumstances". When a new section (S. 13) was deliberately inserted in the Ordinance of 1946 and in the Act of 1947 though there was then in existence S. 5 requiring the obtaining of an exemption from a Controller and simultaneously with such insertion S. 5 was made 'subject to the other provisions of the Act' it will be against all well-established rules of statutory construction to say that Ss. 5 and 13 are two independent sections mutually exclusive. It may be that as a matter of policy the Legislature wanted such double check on the eviction of a tenant—a first check at the time of obtaining an exemption under S. 5 and a second check at the time of either instituting a suit for ejectment or filing an application for execution of an ejectment decree already obtained, under S. 13. However, unreasonable such double check may be it is not the function of the Court to question the wisdom of the Legislature.

[50] It has been pointed out that if S. 13 is literally considered it will lead to 'a fatal and absurd course,' inasmuch as every time a proceeding is instituted permission from the Controller for the institution of such a proceeding will be necessary. It is further said that an order of dismissal of a suit for default, a petition for attachment before judgment, for discovery or inspection, would all be proceedings in the suit. I am, however, unable to accept the view that the expression 'proceeding' in S. 13 should be so widely construed as to include every proceeding after the filing of the execution petition or the suit as the case may be. The word 'or' which connects the two words 'suit' and 'proceeding' is ordinarily disjunctive and it cannot be construed in a conjunctive sense unless there are compelling reasons for taking that view. As pointed out by Lord Atkin in *Brown & Co.* v. *V. T. J. Harrison*, (1927) 96 L. J. K. B. 1025 : (137 L. T. 549),

"it is generally disjunctive, but it may be plain from the collocation of the words that it is meant in a conjunctive sense, and certainly where the use of the word as a disjunctive leads to repugnance or absurdity it is quite plain within the ordinary principles of construction adopted by the Court to give the word a conjunctive use."

It will be reversing the process to give the expression 'or' a conjunctive meaning and then inferring an absurdity by such construction. If the normal rule of disjunctive construction of the word 'or' is adopted it seems plain that a permit under S. 13 is required only at one stage; that is to say either at the stage of the institution of the suit for eviction or at the stage of filing a petition for executing of a decree for eviction already obtained. This aspect of the case has been fully discussed in the judgment of my learned brother Das J. with whom I am in entire agreement. But as on this point he has given his views in a somewhat guarded manner I would emphasise that a reasonable construction of S. 13 by interpreting the word 'or' in a disjunctive sense would lead to no absurdity and would be in consonance with the true intention of the Legislature.

[51] In para. 14 (Para. 35 of this report) of the judgment of my learned brother Panigrahi J. occur the following passages:

"In my judgment, therefore, the expression 'or proceeding' applies to a case where a suit has been decreed on grounds other than those mentioned in S. 5 (b), second proviso, such a suit could be filed in areas to which the Rent Control enactment did not apply. But executions filed after the extension of the Act to such

areas will not be entertained unless the decree-holder obtains the permission in writing from the Controller and satisfied the Court that the grounds specified in proviso 2, cl. (b) of S. 5 are also present."

* * * * *

"The application of S. 13 should be restricted only to those proceedings initiated in areas after the Act was subsequently extended to those areas, and not to those areas in which the Order or Ordinance had already been applied before."

[52] These passages clearly indicate that inspite of his strongly expressed views against construing S. 13 so as to interfere with vested rights already obtained under a decree and against construing the expression 'proceeding' as including an 'execution proceeding' my learned brother himself has been obliged to construe S. 13 as applying to some execution proceeding and as interfering with vested rights under some decrees. Thus, when it is conceded that S. 13 must apply to some execution proceedings and would also affect vested rights under a decree there seems to be no logical reason for restricting it to those areas where the Order and the Ordinance were not in force and the Act was brought into force for the first time. With great respect to my learned brother, I may say that there is no justification in the language of S. 13 or of S. 5 to support such a narrow construction. My learned brother would perhaps strain the language of the sections in view of the supposed unreasonableness and hardship. But with respect, I consider that the primary rule of construction is to gather the intention of the Legislature from the language used and give full effect to it irrespective of the supposed consequences.

[53] In other respects, I am in entire agreement with the judgment of my learned brother Das J. and therefore, think it unnecessary to discuss the other points raised in this appeal.

[54] **By the Court.** — In accordance with the majority view, the order of the Court is that the appeal is allowed and E. C. No. 247/47 is dismissed. In the circumstances, the appellant will have no costs at any stage of the proceedings, here or in the Courts below.

K.S. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 124 *[C. N. 33.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Chairman, District Board, Puri and others —*Defendants-Appellants* v. *C. H. Achaya* — *Plaintiff-Respondent.*

A. F. A. D. No. 179 and 180 of 1948, D/-10-10 1950.

(a) Bihar and Orissa Local Self-Government Act (III [3] of 1885), Ss. 73 to 76 — Road — Nature of property of District Board in road—Road-side land, if held in any different manner—Highway.

The vesting of a road in a local authority vests no property beyond a special property in the surface of the road and such portion above and below the surface as may be necessarily incidental to the use of the surface as a road and for its proper upkeep and management. It does not vest the soil or the land in the local body or its owner so as to enable it to treat the soil as its private property and to put it to any use it likes. In respect of roads which are not vested in the District Board, but which are merely under the administration and control of the District Board, the nature of the property is obviously much more limited. [Para 4]

Road-side lands are *prima facie* part of the road and are vested in the local authority in the same way as the roads and subject to the same kind of use thereof and subject to the same rights and incidents as the road except in so far as any specific statutory provision provides to the contrary expressly or by necessary implication. [Para 7]

(b) Bihar and Orissa Local Self-Government Act (III [3] of 1885), S. 139 — By-laws framed under (Notfn. No. 3438-S. G.-(8)/34 dated 29-8-1944)—Right of access — Substantial interference—Leasing of road-side land by District Board — Bihar and Orissa Local Self-Government Act (III [3] of 1885), S. 138—Rules under—Rr. 94 and 97—Highway.

An abutting owner of a road, including therein the road-side lands which form part of the road, has the undoubted right of access to the road from all points of his property but the right cannot be construed as entitling him to insist upon leaving the road absolutely free from any other kind of use than for mere passing and repassing of the members of the public. If such a use is otherwise reasonable and is within the scope of the purposes of the Local Self Government Act, an abutting owner has an actionable right (unless such right is taken away by the Statute) only when his right of access has been substantially interfered with and whether that is so or not is a question of fact to be determined having regard to all the circumstances of the case. On a question whether any particular use of the road-side land amounts to a substantial interference with the right of access of an abutting private owner, the fact that it is a road-side land and not the regular road carrying the traffic may conceivably make a difference on a consideration of the question as one of fact, and on the question whether there has been any unreasonable conduct on the part of the local authority and whether, in any case, the abutting owner is entitled to an injunction for the removal of the interference or obstruction. [Para 8]

Held on facts of the case that the leasing of a portion of a road-side land by the District Board and the actual use to which the lessees put it and were contemplating to put it amounted to substantial interference with the plaintiff's right of access from his adjoining land to the land leased and to the road. [Para 11]

(c) Bihar and Orissa Local Self-Government Act (III [3] of 1885), S. 139 — By-laws framed under (Notfn. No. 3438-S. G. (8)/34 dated 29-8-1944)—By-laws are not *ultra vires.* [Para 10]

S. N. Sengupta and S. Misra—for Appellants; H. Sen—for Respondent.

Das J.—The defendants are the appellants in these two second appeals. They arise out of two suits O. S. 11/46 and O. S. 32/46 on the file of the District Munsif of Puri tried analogously (simultaneously?). The plaintiff and the defendants are the same in both the suits and they relate substantially to the same matter. There was a common judgment in both the suits and

the appeals therefrom to the lower appellate Court were also heard analogously (simultaneously?) and dealt with by a common judgment. The suits had been decreed by the trial Court and the said decrees were confirmed in appeal. Defendant 1 in both the suits who is appellant in these appeals is the Chairman, District Board of Puri. Defendants 2 and 3 in both the suits who are appellants 2 and 3 before us are lessees from the District Board of a portion of plot No. 736 in Mouza Kudiarai. Defendant 2 is a minor represented by his mother and guardian, defendant 3. That plot is a road side land abutting on the District Board road running from Pipli to Khurda. The plaintiff (respondent in both the appeals) is the present owner as has been found by the Courts below—of plot No. 737. He has started constructing a house on his plot which he was entitled to do. His case is that defendants 2 and 3 have some time ago put up another structure on the portion of plot No. 736 leased to them and that this interferes with his right of access from all points of his plot to all points of the Khurda Pipli road through every part of the road side plot No. 737. He accordingly brought the suits for a declaration, (1) that the action of defendant 1 in leasing out the road-side land to defendants 2 and 3 is without jurisdiction and *ultra vires*; (2) that the lease is void; (3) that the plaintiff has got right of access and view to the District Board road to every part of the road side which abuts his land; (4) for the requisite mandatory and permanent injunctions against defendants 2 and 3 in respect of the structure already put up and contemplated to be put up. It may be mentioned that O. S. 11/46 related only to the fresh structure intended to be put up by defendants 2 and 3 and that O. S. 32/46, which was filed later, relates to the pre-existing structure already put up by defendants 2 and 3. Both the suits, however, raise the same questions. The defence of the defendants in both the suits are, (1) that the plaintiff has no such right as claimed of access to the road from all points of the road-side land; (2) that the District Board had the right to lease out the road-side land and the said leasing is not *ultra vires*; and (3) that as a fact the plaintiff and his predecessors were all along having access to the road from plot No. 737 only through a portion of plot No. 736 and that in any case the right of access has not been substantially interfered with. The Courts below have concurrently held that the plaintiff is entitled to the same right of access in respect of road-side lands as to the road and to right of access to the road through road-side land and that the leasing by defendant 1 of plot No. 736 to defendants 2 and 3 is invalid and that certain by-laws framed by the District Board with the sanction of the Government authorising such leases are *ultra vires*, inasmuch as the leasing and the by-laws are in derogation to the right of access of the abutting owners. Hence these two second appeals by defendant 3 which have been heard analogously (simultaneously.?)

[2] The main contention of learned counsel for the appellants is that road-side lands are not part of the road and that the plaintiff whose plot does not abut the road has not got any such private right of access either to the road or to the road-side land which he claims and that in any case the leasing of the road-side land was authorised by by-laws which have a statutory force and that the view taken by the Courts below that the said by-laws are *ultra vires* and that the leasing by the District Board in pursuance thereof is invalid is erroneous.

[3] The questions, therefore, that arise in the case are (1) whether road-side lands form part of the road for purposes of the Local Self Government Act and are subject to the same rights and incidents as regards members of public and abutting private owners and if so, whether the road-side lands can be put to any use in derogation of such rights. It may be mentioned at the outset that there is no allegation of plaintiff in this case that the particular road-side land in question is owned and possessed by the District Board as ordinary private property distinct from the road. For instance, if the road-side land in question had been purchased by the District Board from private owners, or acquired for the District Board at its cost by the Government or obtained in some other way as ordinary private property, which it might well do under S. 29, Bihar and Orissa Local Self-Government Act, the considerations and legal implications applicable to roads as such may not be applicable to the road-side. But the plaint and the written statement do not give any indication that the road-side land in the present case is owned as such private land or indeed in a manner different from the road. D. W. I. says: "The road and the road-side land belong to the District Board" giving no indication that they are owned in different ways and implying in fact the contrary. The word "road" is not defined in the Act, nor is there any reference therein to "road-side lands". In order, therefore, to determine whether there is any difference between "road" and "road-side land" as regards the rights and incidents to which they are subject to, it is necessary to consider what the nature of the property of the

District Board in a road is and whether a road-side land is held in any different manner.

[4] It is well settled that so far as a road is concerned, the District Board is not in any sense the owner of the soil of the road to enable it to treat it as its own private property and to put it to any use it likes. The ownership of the road by the District Board arises under Ss. 73, 74, 75 and 76, Bihar and Orissa Local Self-Government Act. Under Ss. 75 and 76, Local Self Government Act, roads constructed by the District Board from the District Board Funds or roads belonging to private parties and transferred to District Board are vested in the District Board. Under Ss. 73 and 74, roads vested in the Government or roads previously under the control and administration of the District Road Committee or Branch Committee may be placed under the control and administration of the District Board. Both in English as well as in Indian law, which, in this respect follows the English law, it is now settled by a series of decisions of the highest authority that the vesting of a road in a local authority vests no property beyond a special property in the surface of the road and such portion above and below the surface as may be necessarily incidental to the use of the surface as a road and for its proper upkeep and management. It has been held that it does not vest the soil or the land in the local body as its owner. (See *Sydney Municipal Council* v. *Young*, 1898 A. C. 457 at p. 459: (67 L. J. P. C. 40) and *Man Singh* v. *Arjunlal*, A. I. R. (24) 1937 P. C. 299 : (I.L.R. (1937) ALL 901)) In respect of roads which are not vested in the District Board, but which are merely under the administration and control of the District Board, the nature of the property is obviously much more limited.

[5] This leads us to a consideration as to what, in a road-side land, (not being the private property of the District Board) is the nature of the property of the District Board and whether it is in any way higher than that in the roads. There are no specific provisions in the Act indicating an answer to this in terms. The only provisions, if at all they may be applicable, are Ss. 73 and 74; but that would be so, only if road-side lands are part of the road. On this question, a consideration of some of the English cases is instructive. The English law shows that *prima facie* the lands on either side of the road, which are not the private property of the abutting owners, are held by the local authority as part of the road itself. The question has arisen with reference to the determination of what are the limits of a road and whether the road is confined to the portion actually and normally used as highway for the passing and repassing of the public, or extends also to the waste lands on either side. In *King* v. *Wright*, (1832) 110 E. R. 248 : (3 B. & AD. 681), it was laid down that:

"When a road runs through a space of fifty or sixty feet between enclosures set out by an Act of Parliament, it is public though it may not all be used or kept in repair as a road. (See headnote)."

In *Elwood* v. *Bullock* (1844) 115 E. R. 147 at p. 156: (6 Q. B. 383) it is stated that:

"Where a highway passes through an inclosed country it is not the formed road merely, but the whole space from fence to fence is the highway. The extent of a highway where it passes over a common, is frequently still more indefinite to the right and left of what may be the ordinary passage."

In *Turner* v. *Ringwood Highway Board*, (1879) 9 E. Q. 418 at p. 422: (21 L. T. 745), it is stated as follows:

"The right of the public is to have the whole width of the road, preserved free from obstructions and is not confined to that part which was used as the *via trita*."

In *Harvey* v. *Truro Rural Council*, (1903) 2 Ch. 638 at p. 643: (72 L. J. Ch. 705), dealing with the question of the right of the public over the road-side waste, it was laid down as follows:

"In the case of an ordinary highway running between fences, although it may be of varying and unequal width, the right of passage or way *prima facie*, and unless there be evidence to the contrary, extends to the whole space between the fences and the public are entitled to the entire of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot-passengers."

This position is also affirmed in *Office* v. *Rochford Rural Council*, (1906) 1 Ch. 342: (75 L. J. Ch. 348) and *Rowley* v. *Tottanham Urban District Council*, (1914) A. C. 95: (83 L. J. Ch. 411). Thus, it appears to be well settled in English law that *prima facie* and in the absence of any specific evidence to the contrary, road-side waste land is part of the road and is vested in the local authority in the same way. The limit of the road, as so extended by the abutting waste, is the entire width between the fences or the enclosures, which in terms of the corresponding conditions in this country, may be taken to mean the boundaries of the next adjoining private land or property on either side. So far as it has been brought to my notice, there is no specific case in the Indian Courts deciding what exactly are the limits of a road, apart from any statutory definition of that word in certain enactments. But the position as above indicated from the English law is assumed in *Nihal Chand* v. *Azmat Ali Khan*, 7 ALL. 362: (1885 A. W. N. 56), *Municipal Board, Agra* v. *Sudarshan Das*, A. I. R. (1) 1914 ALL. 341: (37 ALL. 9), *District Board of Manbhum* v. *B. N. Rly. Co.*, A. I. R. (32) 1945 Pat. 200; (23 Pat. 931) and in Peacock on

"Law of Easements" 3rd Edn. p. 240. Since the Indian law follows the English law in respect of roads, it is reasonable to hope that "road" even in Indian law is not confined to that portion of it which is the frequented solum of the highway, used for passing and repassing of the public, but includes also the wastes lands on either side of the road belonging to the local authority, (otherwise than as absolute private property), and extending to the boundary limits of the properties of private owners on either side. This is the view that has been adopted for the definition of the word "road" in the Bihar and Orissa Municipal Act of 1922, and in other Municipal Acts of various provinces and also in some Local Self-Government Acts of other provinces. (See Madras Local Boards Act).

[6] That the property in a road-side land follows the property in the road and is therefore of the same nature, also appears from the English cases. The question in English Courts has arisen in a form rather different from what we are concerned with in the present case, but the principle thereof is instructive and strengthens the above conclusion. It is well-settled in English law that, subject to the limited kind of property in the local authority in respect of the road connoted by the word 'vesting', the soil of the road *usque ad medium filum viae* is in the abutting owners on the two sides. With reference to this principle, the question has arisen as to who is the owner of any adjoining waste land in between the formed road and the boundary of the adjoining owner, that is to say, whether the soil belongs to the Lord of the Manor in which the road and the adjoining waste land are situated or to the private owner of the abutting property. It has been held that since the soil in the road up to the middle belongs to the abutting owners and to the Lord of the Manor, the intermediate waste land also belongs to the same private owner. This has been laid down in *Doe* v. *Pearsey*, (1827) 108 E. R. 737: (7 B. &. C. 304) as follows: (See head-note)

"The presumption is that waste land which adjoins the road, belongs to the owner of the adjoining enclosed land, whether he be a free-holder, or lease-holder or copy-holder, and not to the Lord of the Manor."

Similarly it has been held in *Steel* v. *Prickett*, (1819) 171 E. R. 706: (2 Stark 463), that the presumption is that the waste lands which adjoin road belong to the owner of the adjoining freehold and not to the Lord of the Manor. These propositions must be understood in the sense, not that the surface belongs to them, but only the sub-soil. This position, which is well-established, in English law, therefore, implies clearly that the surface, both in respect of the road and the road-side waste, is vested in the Local authority in exactly the same manner. This is another reason for saying that the road-side land forms part of the road. It is unnecessary to discuss here, for the purpose of the present case, whether in Indian law as in English law, the soil of the road or the road-side land belongs to the abutting owners *usque ad medium filum viae*. The position may conceivably be different in view of the fact that lands abutting roads are generally held only by tenants or *ryots* under the Government or a proprietor and it may well be that the sub-soil of the roads and road-side lands may be vested either in the Government or the proprietor and not in the abutting tenant. See *Nihalchand* v. *Azmat Ali Khan*, 7 ALL. 362: (1885 A.W N. 56); 30 Cal. 17(?); 26 Cal. 732 (?) *Sundaram Aiyar* v. *Municipal Council, Madura*, 25 Mad. 625 at p. 648: (12 M. L. J. 37) and *Munisami Chetty* v. *Rajah of Karvetnagar*, 30 Mad. 193 at p. 199: which all assume that the soil is vested either in the Government or in the Zamindar, though the question of the right of the tenant has not been in terms raised.

[7] The above considerations establish that road-side lands are *prima facie* part of the road and are vested in the local authority in the same way as the roads and subject to the same kind of use thereof and subject to the same rights and incidents as the road, except in so far as any specific statutory provision provides to the contrary expressly or by necessary implication. The only statutory provisions having a bearing that have been brought to my notice are the statutory rules, relating to the power of the local authority to transfer property belonging to it, framed by Government under S. 138, Bihar and Orissa Local Self-Government Act. (See Bihar and Orissa Local Self-Government Reference Book, by Rohini Kumar Roy Chowdhury, 2nd Edn., p. 242). These rules have statutory force by virtue of the express terms of S. 138. Rules 91 to 97 have a bearing on the matter. Rule 91 shows that for the purpose of transfer of property the property is divided into two categories, namely, (1) that which is vested in the Board, and (2) that which is under the control and administration of the Board. Amongst other matters, the Board is given the power to lease both kinds of properties subject to certain conditions. Rules 94 and 97 show that in respect of the latter category of properties, the lease is normally not beyond one year, while in respect of the former for a term not exceeding five years. But it is obvious that the lease-making power is intended to be exercised in a manner which will not in any way hamper the primary purpose for which the property in question is intended under the Act. The word "property" in the rules may be wide enough to include roads and road-side

lands, see *Patna City Municipality* v. *Dwarka Prasad*, A I.R. (26) 1939 Pat. 683 at p. 685, Col. 1: (18 Pat. 735), as regards the similar word "land" in S. 62 of the Municipal Act. These rules, however, in their application to roads or road-side must be so construed as not to substantially interfere with the rights, either of the public or of private abutting owners, with reference to roads or road-side lands which, on the above view, form part of the road. It has also to be mentioned that defendant 1, the District Board of Puri, has framed certain by-laws relating to these matters with the sanction of the Local Government under the powers vested in the Board by virtue of S. 139, Local Self-Government Act, and such by-laws have also statutory force. These by-laws which have been published at p. 224, Part III of the Orissa Gazette, dated 8-9 1944, under Notfn. No. 3438 S. G. (8)/34, dated 29-8-1944, in specific terms, authorise the leasing of road-side lands. It is obvious that these by-laws also if they are to be valid, must be such as not to interfere substantially with the rights of the public or of the abutting private owners in respect of the road or road-side lands. This leads us to a consideration of what such rights are.

[S] A road is a highway for the passing of all the members of the public. The public have a right of passing and repassing therein and can exercise that right in a reasonable way without transgressing the usual mode in which such right is normally exercised, (See Smith's Leading Cases, Vol. II, 13th Edn., p. 166). A road is also meant to provide access to and from the tenements which abut on it on either side. For the purposes of this case, it is this latter right that has to be considered. That right has been generally laid down in the following terms:

"An owner of lands adjoining a highway is entitled to access to the highway at all points where his land adjoins the highway, whether or not the soil of the highway be his.' (See Smith's Leading Cases, Vol. II, 13th Edn. 172.)

This right of immediate access from private property to a public highway is a private right distinct from the right of the owner of that property to use the highway as one of the public, as has been pointed out in *William Lyon* v. *The Wardens & Co., of the Fish Monger's Co., etc.* (1875-76) A. C., p. 662 (?), a case relating to the rights of an owner of a wharf on the bank of a navigable river which in this respect are the same as those of an owner of land abutting a public highway. Such a right of access belongs to the proprietor of the adjoining land as a natural incident to the right to the soil itself of such adjoining lands and he is entitled to the benefit of it as he is to all the other natural advantages belonging to the land of which he is the owner. (See p. 74 of the report of the above-mentioned case). In *Marshall* v. *Blackpool Corporation*, 1935 A. C. 16 at p. 22 (103 L. J. K. B. 566), the House of Lords has explained that right in the following terms:

"The owner of land adjoining a highway has a right of access to the highway from any part of his premises. This is so whether he or his predecessors originally dedicated the highway or part of it and whether he is entitled to the whole or some interest in the ground subjacent to the highway or not. The rights of the public to pass along the highway are subject to this right of access just as the right of access is subject to the rights of the public and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway. Apart from any statutory provision, there is no obligation upon an adjoining owner to fence his property from the highway."

This right of access has also been recognised in the Indian law as appears from the following decisions: *Dwarka Prasad* v. *Patna City Municipality*, A. I. R. (25) 1938 Pat 423: (177 I. C. 315), *Municipal Committee Delhi* v. *Mahomed Ibrahim*, A. I. R. (22) 1935 Lah. 196: (16 Lah. 517) and *Patna City Municipality* v. *Dwarka Prasad*, A. I. R. (26) 1939 Pat. 683: (18 Pat. 735) this has been referred to as a right of road frontage and it has been said that

"the right of road frontage no less than right of access, is implicit in the position of the land."

It is unnecessary to discuss for the purpose of this case whether the right of frontage is or is not wider than the right of access and whether such right also arises with reference to the position of the land. There can, however, be no doubt that the owner of the abutting land has an actionable right if his right of access to the frontage is infringed. But as has been laid down by their Lordships of the Privy Council in *Bell* v. *Quebec Corporation*, (1879) 5 A. C. 84 at p. 100: (49 L. J. P. C. 1.)

"whether an obstruction amounts to an interference with the access to frontage would be a question of fact to be determined by the circumstances of each particular case."

It is also well settled that while the abutting owner has the right of access it is not in the case of every interference with such a right that is actionable or that he is entitled to obtain a remedy by way of injunction. In *Sellors* v. *Local Board of Health for Matlock Bath*, (1885) 14 Q. B. 928 at p. 934: (52 L. T. 762) the plaintiff who was an abutting owner, claimed injunction in respect of two matters (1) the erection and continuance of a public urinal adjacent to his property and alleged to be a nuisance; (2) the placing and continuing of kerb stones in front of plaintiff's property so as to prevent her access by carriages to that property. An injunction was granted in respect of the first,

but was refused with reference to the second with the following observations:

"As to the rest of the plaintiff's claim, I think it is much less substantial. Besides the triangular piece of land, she has some land and buildings abutting upon the same high road consisting of an inn and some stables. These stand back from the road and in front of them is a space which has been left open to, and on a level with, the road until recently, when the defendants made a foot-path on the road outside the plaintiff's land with raised kerb stones, but left openings so that carriages can still go in from, and out into, the road, but not at every part of the boundary as heretofore. The plaintiff contended that this was interference with her right to have access for all purposes to every portion of the highway adjoining her property.

** ** **

I think it cannot be contended that wherever any person has land adjoining the road which has remained undistinguished from the road, ... he can as a matter of course restrain the local authorities from making raised foot-path for the accommodation of the public on a part of the road, which is vested in them merely because by so doing they may render it impossible, for the time, for the owner of the land to draw up a carriage close to the exact boundary of his land or to enter his land, at every inch of the boundary. ** ** **

I am of opinion that this is a case in which the land owner's remedy at all events in the absence of any unreasonable conduct on the part of the local authority is, to claim compensation."

In 1901 A. C. 329(?) the owner of an abutting premises, brought an action for injunction to restrain a local authority from putting certain lamp-posts in the road near their premises on the ground that it interfered with and obstructed the business, they were carrying on these premises. The Court in dismissing the action said :

"The plaintiffs set up a right to have a particular portion of the highway so kept that they shall be in a position to exercise an alleged right of using it to the maximum of their own convenience. It does not seem to (me ?, that they have any such right."

It would therefore seem to follow from these cases that an abutting owner of a road, including therein the road-side lands which form part of the road, has the undoubted right of access to the road from all points of his property but the right cannot be construed as entitling him to insist upon leaving the road absolutely free from any other kind of use than for mere passing and repassing of the members of the public. If such a use is otherwise reasonable and is within the scope of the purposes of the Local Self-Government Act, an abutting owner has an actionable right (unless such right is taken away by the Statute) only when his right of access has been substantially interfered with and whether that is so or not is a question of fact to be determined having regard to all the circumstances of the case. It appears to me also that on a question whether any particular use of the road-side land amounts to a substantial interference with the right of access of an abutting private owner, the fact that it is a road-side land and not the regular road carrying the traffic may conceivably make a difference on a consideration of the question as one of fact, and on the question whether there has been any unreasonable conduct on the part of the local authority and whether, in any case, the abutting owner is entitled to an injunction for the removal of the interference or obstruction.

[9] It is in the light of these principles, that the claim of the plaintiff in the present case has to be considered, and that the legality of the action of the defendants as well as of the validity of the by-laws under which they purport to have acted has to be judged.

[10] Both the Courts below have come to a conclusion that the by-laws above referred to are *ultra vires* and invalid. Their reason for saying so is that the by laws authorise leasing which is an interference with the right of access. As has already been noticed, these by-laws were framed by virtue of the powers vested in the District Board under S. 139, Bihar and Orissa Local Self-Government Act, with the sanction of the Local Government. The by-laws only purport to regulate the conditions on which leases of land vested in or under the control and administration of the District Board, are to be granted. The power of leasing itself as already pointed out is derived from the statutory Rr. 94 and 97 made by the Government under S. 138 of the Act. The by-laws define the phrase "road-side lands" as including "all lands attached to a road as vested in or under the control and administration of the District Board". A by-law framed under statutory power has, by the very terms of that power in S. 179, the force of law. But such by-laws, must be consistent with, and be framed for the purposes of the Act and can be pronounced to be *ultra vires* only if they transgress these limits or if they unreasonably interfere with the recognised rights of the members of the public or private owners which the Statute itself does not take away expressly or by necessary implication. In a consideration as to the validity of such by-laws, it is well to remember the principle laid down in *Kruse* v. *Johnson*, (1898) 2 Q. B. 91 : (67 L. J. Q. B. 782) that where the power to make by-laws is vested in public representative bodies "they ought to be supported if possible and benevolently interpreted." (See p. 99 of the report). The lease authorised under the rules and by-laws referred to above, cannot be said to be necessarily inconsistent with the rights of private persons as above indicated. Rules 94 and 97, Statutory Government Rules, authorise only leasing for short periods. The by-laws relating to leasing in specific terms provide, that the lease shall not

be for more than a year, that no permission for erection of permanent structures will be granted under the leases, and that if the land be required for the use of the District Board before the expiry of the term on the lease, the lessee should, on one month's notice, surrender the land without any claim for compensation. These clearly show that the leasing contemplated is only for very temporary and short-living non-permanent purposes. The rules and by-laws themselves are of general application to all lands to be vested in the District Board and cannot be declared to be *ultra vires* merely because in their application to roads or road-side lands any particular lease granted thereunder might affect the rights of a private individual. All that can be said is that in their application to road-side lands the actual leasing under the by-laws must be subject to the limitations arising from the nature and use of the property leased. Any lease which constitutes a substantial interference with such rights is invalid and will constitute an actionable wrong. This would imply that the leasing power under the rules and the by-laws cannot be used for putting up any permanent or substantial structures, nor for putting the land to any use which would have the effect of materially altering the nature of the land as one intended for use as a road, or substantially affecting the natural advantages of access and frontage which the abutting owner has got. But I am not prepared to agree with the view expressed in the judgments of the Courts below that the by-laws in themselves are *ultra vires*. What has to be considered is whether the actual use that the property, is put to or is likely to be put to by virtue of a lease granted in exercise of the power under the by-laws is an infringement of the private or public rights. The facts of the present case now remain to be considered. The plaintiff's land is plot No. 737 in Khata No. 726 and the disputed road-side land is plot No. 736 in Khata No. 1129, both in Mouza Kudiari. The road-side plot No. 736 abuts the Pipli-Khurda road which runs at this place from east to west. Plot No. 736 abuts just to the north of it and plot No. 737 abuts plot No. 736 to its north. It is in the evidence of the District Board clerk, D. W. 1, that both the plots Nos. 736 and 737, are 130 feet in length running side by side. A sketch indicating the positions of the road and the two plots have been filed as part of the plaint, and its correctness has not been disputed. The sketch shows that plots Nos. 736 and 737 virtually form a rectangle abutting north of the road, the southern portion of which is plot No. 736 and the northern portion is plot No. 737. It is in the evidence of D. W. 1, that plot No. 736 has a width of 25 feet. As appears from the sketch plot No. 737 has a much larger width, but the exact measurement is not in evidence. It further appears from the evidence of D. W. 1 that what has been leased out to defendants 2 and 3 is the eastern portion of plot No. 736 covering a length of 60 feet, from the extreme extremity of that plot and that the western portion of the plot of the length of 70 feet is not the subject-matter of any lease and is vacant. The defendant appears to have held under two leases. The first is the lease deed, Ex. B, dated 24-6-42, for a period of five years and covering an extent of two decimals out of plot No. 736. The second is stated to be of the date 8-1-46 as appears from the allegations in the plaint. The lease itself is not in evidence and has not been filed by the defendant. The lease Ex. B has already expired and there is no clear evidence whether the defendants 2 and 3 hold under a renewal thereof. The fact, however, that defendants 2 and 3 continue to hold the disputed portion of plot No. 737 from the District Board as its lessees, is the common case of defendants 2 and 3 as well as of the District Board. It must, therefore, be taken that they are lessees under the District Board of the eastern portion of plot No. 736, 60 feet × 25 feet under a lease whose duration and terms are not in evidence. The admitted case is that on the portion of plot No. 736 covered by Ex. B, defendant 3 had constructed a house during the currency of that lease and sometime prior to the institution of the suits. That house is admittedly still standing on the plot. In the rest of the plot under the occupation of defendant 3 as the lessee, she recently dug foundations for the construction of a building according to the allegations of the plaintiff. Defendant 3, however, denies this. In view of the principles of law indicated above, the question for consideration is whether the leasing of the portion of plot No. 736 by defendant 1 to defendants 2 and 3 and the actual use to which defendants 2 and 3 have put it and are contemplating to put it, is an actionable infringement of the plaintiff's right of access from his plot No. 737 to plot No. 736 and to the road.

[11] So far as the lease is concerned since, as above stated, there is no evidence of the duration of the terms of the lease under which defendants are at present in occupation, it is not possible to say whether the lease itself is invalid or not and no declaration to that effect can be given. As regards the actual use to which the defendants have put the lands or are proposing to put it, the Courts below have not given any definite finding on the matter.

[After considering the evidence his Lordship continued.] It is clear, therefore, on the evidence, that the existing structure as well as the contemplated structure on plot No. 736 must be taken to interfere with the right of access of the plaintff and that the whole of plot No. 736 would remain water-logged at least for some time on account of these constructions. This undoubtedly amounts to substantial interference with the plaintiff's right of access.

[12] In the trial Court, the plaintiff asserted that there was previously a house on his plot No. 737, which he had demolished for constructing a new house and that he was accustomed to use whole of plot No. 736 for access to and from that house. The defendants denied it and gave evidence that plot No. 737 was only a paddy field with a temporary hut thereon, for some time, for watching of crops. It was also the case of the defendants that there was a thorny fence all along between plots Nos. 737 and 736 and that the owner of plot No. 737 used to pass by a *Tati* gate on the southern side, at the south-western corner of plot No. 737, and also that they were passing through the western plot No. 736 which is just to the south of the *Tati* gate, in coming from and going to the District Board road. The trial Court has accepted the case of the defendants on this part of the case. It is accordingly urged that, in view of the fact that even at present as much as 70 feet length of plot No. 736 is still available to the plaintiff for passing on to the District Board road, the plaintiff can have no grievance and therefore has no actionable right. This contention cannot be accepted. The right of access does not depend upon, whether there has been previously on plot No. 737 any a structure at all. The plaintiff is entitled to the beneficial enjoyment of his plot in any manner he pleases and to access therefrom. Neither the fact that there may have been a fence between the two plots Nos. 736 an 737, nor the fact that the previous owner of plot No. 737 was actually using only a restricted portion of plot No. 736 for his access, can take away the plaintiff's right of access in its full measure in *Dwarka Prasad* v. *Patna City Municipality*, A. I. R. (25) 1938 Pat. 423 : (177 I.C. 815) the fact of the existence of a compound wall was held insufficient to restrict the right of access. The only question in such a case is whether the right of access has been substantially interfered with. Though no doubt in the present case, as much as half of plot No. 736 is open, still in view of the evidence, that even that portion would at least for some time in the year get water-logged on account of the defendant's construction, and that the structures actually put up, or to be put up, would completely block access to plaintiff's house property to be constructed, and in view of the claim of the defendants by way of having a fence in between the two plots, it is quite clear that there has been a substantial interference with the plaintiff's right of access. The plaintiff is accordingly entitled to a mandatory injunction as regards the existing structure and a permanent injunction restraining defendants 2 and 3 from putting up a substantial building on the plot in his occupation as a lessee of the Board.

[13] The Court below have in addition to these two above injunctions, also granted declarations that the action of defendant 1, the District Board, in leasing out to defendants 2 and 3 is invalid and that the plaintiff has got the right of access to the Khurda Pipli road through plot No. 736 from every point of his plot No. 737 and that the defendants are restrained from interfering with that right of the plaintiff. It appears to me that in the circumstances of this case no declaration regarding the lease which is not in evidence before the Court can be given, nor can it be generally declared that the District Board has no right to lease the land for any purposes. It is also unnecessary to make any declaration about the right of access to the road in the terms in which the Courts below have done since it is too vague to be enforceable. The plaintiff can always vindicate his right of access, if he proves at any time that the same has been substantially interfered with and infringed and no declaration is required for that purpose. It is also unnecessary to say whether the defendants as lessees can use the land under their occupation in any way other than by putting up a substantial structure thereon so as not to interfere with the right of access of the plaintiff.

[14] In the result therefore, in substitution for the decrees passed by the trial Court and confirmed by the lower appellate Court, fresh decrees will be passed on the following terms.

[15] In *O. S. No. 11 of 1946*:

"That the suit be decreed on contest with costs and pleader's fee at 5 per cent. The defendants are hereby restrained from interfering with the right of access of the plaintiff to plot No. 736 and to the Khurda-Pipli road by putting up or allowing the putting up of any permanent substantial structure on plot No. 736"

[16] In *O. S. No. 32 of 1946*:

"That the suit be decreed on contest against the defendants with costs and pleader's fee at 5 per cent. Defendants 2 and 3 are hereby ordered to remove the structure raised by them on the disputed land, before 15-1-51. In default the plaintiff shall get the structures removed by application through Court, and realise the costs thereof from defendants 2 and 3 in execution."

[17] Subject to the above modification regarding the terms of the decrees, the appeals are dismissed with costs throughout.

[18] It may be mentioned that before hearing the appeals we gave notice to the Advocate-General, on behalf of Government, with a view to get his assistance in the shape of any other rules, by-laws, or notifications that may be relevant and may have a bearing on the consideration of the questions involved. But nothing beyond what is mentioned above has been brought to our notice.

[19] **Panigrahi J.**—I agree.

V.R.B. *Decrees modified.*

A. I. R. (38) 1951 Orissa 132 *[C. N. 34.]*

RAY C. J. AND PANIGRAHI J.

Narasingh Charan Mohapatra—*Appellant*

v. *Radhakanta Mohapatra*—*Respondent.*

A. F. O. D. No. 16 of 1946 and Misc. Appeal No. 76 of 1948, D/- 11-5-1949.

(a) Trust—Constitution of—Trust, if fails for want of trustee—Test of completeness—Voluntary declaration of trust when binding.

Where the settlor constitutes himself the trustee, the question of acceptance of the position of a trustee does not arise. A trust may be constituted without communication to a trustee and a trust is not affected by the fact that the trustee is unable or unwilling to act. A trust does not fail for want of a trustee, and if a trustee refuses to accept before the trust takes effect, the person in possession becomes a constructive trustee. Even a disclaimer by a trustee does not avoid a trust. If the settlor has done everything that is required to be done under the law the trust takes effect at once, the test of completeness being whether anything, in fact, remains to be done on the part of the donor. A trust in the accepted sense of the word is the creation of an obligation by the owner to the intent that he may hold the property for the benefit of some other person or object. As soon as the trust is declared according to the requirements of the law, the legal ownership passes to the trustee and he is bound to apply the income arising out of the property to the use and benefit of the *cestui que trust.* As a general rule, in order to make a voluntary declaration of trust binding upon the author of the trust, he must have completely parted with all his interest in the property to the trustee or declared himself to be a trustee of the property for the benefit of the *cestui que trust.* [Para 6]

(b) Trust — Charitable purpose — Study of karmakanda.

A gift to a general public use which extends to the poor as well as to the rich is a charitable gift. Even a gift for a religious purpose is a good charitable gift, if it involves religious instruction or edification of the public. Hence the study of *Karmakanda* is as much a charitable purpose as the study of physical science. [Para 7]

(c) Trust — One of conditions not executed — Validity of trust.

A trust is none the less a trust though one of its conditions is not executed. [Para 8]

(d) Trust—Person, if may both be trustee and cestui que trust.

A person may both be a trustee and a *cestui que trust* or one of the trustees and one of the *cestui que trusts.* [Para 9]

(e) Trust—Constitution of—Communication to trustee—Trust, if affected by trustee's refusal or inability to act.

A trust may be constituted without communication thereof to the trustee or to the *cestui quo trust* and a trust is not affected by the fact that no trustee is named or by the fact that the trustee who is named either refuses or is unable, through death or otherwise, to act. A trust of the property does not depend on the immediate existence of a legal estate in a trustee to support it. [Para 10]

(f) Trust—Revocability.

A trust is generally irrevocable unless a power of revocation is expressly reserved. [Para 10]

(g) Transfer of Property Act (1882), S. 126 — Revocation of gift—Mistake of law.

A mere mistake of law would not be sufficient to revoke a deed of gift. [Para 10]

Anno. T. P. Act, S. 126 N. 11.

(h) Trust—Charitable gift — Particular application of, postponed—Failure of purpose—Doctrine of cypres.

The fact that the particular application of a charitable gift is postponed does not render the gift void where the gift as distinguished from its application is immediate. If the purpose itself were to fail, the Court may none the less apply the cypres doctrine and give effect to the object of the trust. The settled principle is that if the donor declares his intention in favour of a defined object which happens to fail from whatever cause, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness or failure of its immediate object, be carried into effect. [Paras 12 and 15]

(i) Trust—Property capable of being ascertained.

If the property is capable of being reasonably ascertained or is sufficiently clearly designated a trust will be raised. [Para 17]

(j) Trust—Validity and completeness—Question of intention.

Per *Ray C.J.*—In the case of a trust which is the result of a series of negotiations between two parties, the question of intention and common understanding between them that might go to determine the nature and extent of the trust is not entirely foreign to the consideration of its validity and completeness. [Para 21]

In No. 16 of 1946.

S. K. De; M. S. Rao and H. Mohapatra — for Appellant; P. Mahanti, D. S. Das, B. N. Das and N. K. Das—for Respondent.

In No. 76 of 1948.

M. S. Rao; H. Mohapatra and A. N. Purhit — for Appellant ; S. K. De—for Respondent.

PANIGRAHI J.— These two appeals arise out of proceedings in a suit filed in the Court of the Subordinate Judge. Cuttack, by one Radhakanta Mohapatra, son of the appellant, Choudhury Narasingh Charan Mohapatra, for a partition of the joint family properties belonging to himself and his father. The suit was registered as O. S. No. 9 of 1945 and was ultimately compromised on 18-1-1946 by a deed of compromise the parties agreeing to have the partition of their properties in equal shares through the mediation of Bhadraloks and undertaking to file allotment lists in Court within one month from the date of compromise. The allotment, however, did

not materialise for some reason or other and the plaintiff thereupon filed a petition praying for the appointment of a commissioner. The learned Subordinate Judge, by his order dated 23-4-46, overruled the objection raised on behalf of the defendant-appellant that the comprosmise decree was in the nature of a final decree and directed the preparation of a preliminary decree. It is against this order of the Subordinate Judge that the No. 1 6 of 1946 has been preferred.

(2) On 21-5-1946 the defendant addressed a letter to the Vice-Chancellor of the Utkal University proposing to "place his share of whole estate' at the disposal of the University for the purpose of establishing a Sanskrit College at Jaipur where Ayurved, Jyotish, Karma Kanda, Vyakarna and Sahitya, and such other similar subjects as the University may think fit may be taught. The defendant also undertook to give Rs. 20,000/- for the putting up of buildings and for acquiring lands for the purpose. In his letter dated 21-5-1946 (Ex. 2) he wanted the approval of the Syndicate for giving effect to his proposal and desired that he may be informed immediately and the sowrk may be undertaken without delay". The Syndicate, by its resolution dated 22-5-46 (Ex. 7) resolved to accept "the generous offer" made by Rai Bahadur Narsingh Charan Mohapatra for the establishment of a Sanskrit College at Jaipur in accordance with his wishes and recommend to the Senate to approve the specific purpose for which the offer was made. The Syndicate also appointed a committee to settle the details of the gift and to have a proper transfer deed executed. On 2-7-46 the defendant wrote a letter (Ex. 3-A) to Mr. C. M. Acharya requesting him to have a draft deed of gift prepared. Mr. Acharya appears to have prepared a draft which was submitted to the committee appointed by the Syndicate and the Registrar of the Utkal University by his letter dated 16-7-1946 (Ex. 8-A) requested the defendant to attend the meeting of the Committee that was summoned to discuss the terms of the draft gift deed. As the defendant could not be present on 26-7-46 which was the date fixed for the meeting, the meeting was adjourned to 14-8-46, to enable Choudhury Nursing Charan to put forward a new proposal suggesting the creation of a trust of his properties for the benefit of the University instead of conveying them by a deed of gift. The reason for the suggested new proposal is given in his letter dated 20-8-46 (Ex-4) wherein he says:

"I now find that there are certain difficulties by a deed of gift. In a deed of gift I have to deliver present possession to the University but in a partition suit between me and my son, though the preliminary decree has been passed on 18-1-46, the final decree has not been passed as yet, as you know the Law's delay; and I do not like to involve the University into a litigation.....So I propose as follows, to the acceptance of the University authorities....."

Briefly stated the proposal made is that (1) He will create a trust and execute and register a deed of trust in respect of his immovable properties in favour of the University, as the 'cestui que trust', shall be the sole-owner and take possession of the properties. (2) During his lifetime the defendant shall pay Rs. 5000/- annually to the University from out of the lands conveyed to the University, the first instalment being payable after the Sunia day of 1947. (3) The defendant shall pay a sum of Rs. 25,000/- to the University in cash, Rs. 10000/- being payable on 23-8-46 and the remaining Rs. 15000/- in two instalments by the end of December 1946.

(3) Finally, the letter says:

"As soon as the University accepts the above proposal in its meeting of the Syndicate, I will execute and register a deed of trust and make it over to you".

(4) The proceedings of the Committee of the Syndicate which met to consider the above proposals are exhibited as Ex. P and show that the discussion took place in the presence of the defendant, Narasingh Charan Mohapatra and Rai Sahib Bemdev Misra, who was taking great interest in the matter on behalf of the defendant. The Committese accepted the various suggestions made in the new proposal and resolved to recommend the same to the Syndicate provided the defendant deposited Rs. 10,000/- by 23-8-1946. In pursuance of this resolution the defendant paid a sum of Rs. 10,000 on 23-8-1946 and a draft trust deed prepared by the defendant's lawyer was placed before the Syndicate and and the terms were settled by its resolution No. 164 of 12-9-1946, exhibited as Ex. Q. The deed of trust was thereafter actually executed by the defendant and registered on 14-10-1946. Thereafter there was an exchange of letters between the defendant and the University on account of the defendant's failure to pay the balance of Rs. 15000/- out of the promised donation of Rs. 25,000/- and on account of his failure to hand over the deed of trust after its registration. After much unnecessary correspondence the defendant wrote a letter to the Registrar of the Utkal University on 8-1-47 (Ex. 3-H) proposing some changes in the objects of the trust and suggesting that the gift of his landed properties and cash might be bettdr utilised if an institution for imparting technical and vocational training were started. He also suggested that in lieu of the landed property which he had settled with the University he would contribute such amount in cash as may be reasonably required for starting the aforesaid technical institution. By a subsequent letter dated 10-2-1947 (Ex. 1-F) addressed to the Vice-Chancellor he expressed the same desire to divert the purpose of the trust to the establishment of a technical and vocational training school while protesting that he is "not at all unwilling to establish an Ayurvedic College at Jaipur as contemplated by me". Finally he sent a registered letter, dated 6-5-47 (Ex. 1) to the Vice-Chancesllor intimating to him that he revoked the proposal for the establishment of the proposed College and calling upon the University to refuud the sum of Rs. 10,000/- deposited by him on 23-8-46 "for utilizing the same for other edu-

cational purposes". A few months later, by another registered letter Ex. J dated 5-9-47 the defendant made a new proposal to the effect that in lieu of immovable property he would pay Rs. 50,000 to establish an Ayurvedic College in 1948. The Syndicate by its proceedings dated 1-10-47 decided to take up the matter to Court and to enforce the terms of the trust deed that had already been executed by the defendant. On 15-10-1947 the University put in a petition under O. 22, 10, Civil . C. to be substituted in place of the defendant in O. S. No. 9/1945 and this petition having been dismissed by the Additional Subordinate Judge, by his order dated 31-8-48, Mis. A. No. 76 of 1948 has been filed by the Utkal University challenging the correctness of the order of the Subordinate Judge. The University had also filed a similar petition in F. A. No. 16 of 1946 much to the same effect. These two appeals were heard together and lengthy arguments were addressed to us by Mr. S. K. De appearing for the defendant-appellant, Narasingh Charan and Mr. M. S. Rao appearing for the Utkal University. At the conclusion of the arguments we intimated to the parties that the petition of the Utkal University would be allowed and that the appellant should be described as defendant 2, Narsingh Charan, Trustee for the Utkal University and that the University should be added as defendant 3 in the suit. We now proceed to give the reassons for our decision.

(5) Mr. De's contention in First Appeal is that the Order No. 56, dated 23-4-46 of the learned Subordinate Judge and his subsequent order, dated 30-4-46, signing the decree, amount to the passing of a final decree and he submits that the Court had no jurisdiction to pass a fresh decree after the recording of the compromise on 18-1-46 which terminated in a decree which was itself final in all respects. It was however conceded by him that the compromise decree passed on 18-1-46 contemplated further proceedings to be taken by the Court after the filing of allotment lists prepared by Bhadraloks. There was also something more to be done by the Court, namely, the actual allotment of the properties according to the lists prepared by the Bhadraloks, drawing up of the final decree and putting each of the parties in possession of his share. It cannot, therefore, be contended that the decree passed on 18-1-46 was anything other than a preliminary decree and that further proceedings had to be taken by the Court in order to give effect to the intention of the parties. In fact, Mr. De abandoned this contention and conceded that First Appeal may be treated as a civil revision. The Subordinate Judge's order in appointing a commissioner is not open to challenge on any other ground.

(6) The main controversy between the parties, however, centers round the competency of the Utkal University to be brought on the record in pursuance of the terms of the trust deed and the liability of the appellant, Narasingh Charan, to be described as a trustee in view of his express revocation of the trust deed. The points urged bq Mr. De may be briefly summarised as follows: (1) There is no valid trust created as the defendant has not acecpted the position of a trustee. (2) The University is incompetent to accept a religious trust, as the teaching of Karma Kanda contemplated by the settlor is a religious purpose and the endowment amounts to a religious endowment. (3) The contemplated trust has not been accepted by the Senate and the promised donation has not been fully paid. (4) There is no devolution of interest 'in praesenti' and so the settlor could revoke the trust which in fact he has done. (5) Since the University is not a party to the deed there is no valid creation of the trust. (6) The property which is the subject-matter of the trust is not ascertainable and an undivided interest cannot be the subject-matter of a gift. The trust is, therefore, invalid for uncertainty. It is well-settled that where the settlor constitutes himself the trustee the question of acceptance of the position of a trustee does not arise. A trust may be constituted without communication to a trustee and a trust is not affected by the fact that the trustee is unable or unwilling to act. A trust does not fail for want of a trustee, and if a trustee refuses to accept before the trust takes effect, the person in possession becomes a constructive trustee. Even a disclaimer by a trustee does not avoid a trust. If the settlor has done everything that is required to be done under the law the trust takes effect at once, the test of completeness being whether anything, fact, remains to be done on the part of the donor. A trust in the accepted sense of the word is the creation of an obligation by the owner to the intent that he may hold the property for the benefit of some other person or object. As soon as the trust is declared according to the requirements of the law, the legal ownership passes to the trustee and he is bound to apply the income arising out of the property to the use and benefit of 'cestui que trust'. As a general rule, it may be laid down that in order to make a voluntary declaration of trust binding upon the author of the trust he must have completely parted with all his interest in the property to the trustee or declared himself to be a trustee of the property for the benefit of the 'cestui que trust'—See 'Agnew's Trusts, p. 53'. It follows from the above that if the defendant was legally constituted a trustee by his being designated as such by the instrument of the trust, and if he did, in fact, act in the execution of the trust, there was no further need for anything more to be done by him. The evidence shows that the defendant paid Rs. 10,000/- in execution of the trust he created and that in his subsequent letters (Ex. 3-H and -J) he only suggests an alteration in the scheme for carrying out the trust and does not allege that there was no trust already. Mr. De's contention that the appellant did not accept the position of a trustee is, therefore, legally untenable ansd is unsound in fact.

(7) The next contention is that the teaching of Karma Kanda being one of the objects of the trust, the whole endowment fails as the University is incapable of accepting or administering a religious endowment. This argument involves two assumptions neither of which is correct. The teaching of Karma Kanda is a charitable purpose and it is intended to impart education and advance

knowledge. It is not for the performance of any particular ritual that the gift is made. Knowledge of Karma Kanda is altogether different from the performance of certain ceremonies or rituals, and I have no doubt in my mind that the study of Karma Kanda is as much a charitable purpose as the study of physical sciences. A gift to a general public use which extends to the poor as well as to the rich is a charitable gift. Even a gift for a religious purpose has been held to be a good charitable gift, if it involves religious instruction or edification of the public. In 'Dunne v. Byrne'—(1912) Ac. 407: (81 LJPC). Lord Machaughten delivering the judgment of the Judicial Committee stated that charity in its legal sense comprises, among other trusts, trusts for the advancement of religion. But the trusts must be such as tend either directly or indirectly towards benefiting the public. It was next urged that the trust was not completed as the proposal of the donor did not receive the sanction of the Senate and the payment of the sum of Rs. 15,000/- (the balance out of the Rs. 25000/- promised by the appellant) contemplated in the deed of trust was not carried out. The settlor did not stipulate that the trust should fail in case of non-acceptance by the Senate when he made his proposal. In his first letter to the University he solicited the approval of the Syndicate and expressly stated in his letter (Ex. 2) that in case the Syndicate approves he may be informed immediately and the work map be undertaken without delay. In his letter Ee. 4 suggesting the creation of a trust he reiterated his earlier proposal and said

"As soon as the University accepts the above proposal in its meeting of the Syndicate I wills execute and register a deed of trust and make it over to you".

It is therefore idle to contend that the acceptance of the proposal by the Senate was a condition precedent to the commencement of the trust. Nor is it necessary under the Utkal University Act that the University should accept the endowment through the Senate. Section 9, Subs (6), Utkal University Act lays down that

"The Syndicate shall on behalf of and subject to the control of the Senate manage the funds, concerns, property and affairs of the University"

and S. 8 sub- (5) lays down

"Subject to the provisions of this Act and the Statutes, the Senate shall be the supreme Governing Body of the University, shall have power to review the actions of the Syndicate and of the Academic Council and shall exercise control over the Syndicate in its management of the funds, concerns, property and affairs of the University".

The Senate is empowered to make statutes and in exercise of this power has framed Chapter IX of the Statutes defining the powers of the Syndicate. 2(2) sub-clause (g) expressly provides that the Syndicate shall have power

"to accept endowments, bequests, donations and transfer of any moveable property to the University on its behalf, subject to a report being made at the next meeting of the Senate".

It is therefore the Syndicate that is the proper authority to accept the endowment and the Syndicate did, in fact, accept the appellant's proposal at its meeting as evidenced by Ex. 7 and Q. The action of the Syndicate was later reported to the Senate which, by its meeting held on 25-10-48, approved of the action of the Syndicate.

(8) I am also not convinced that the payment of Rs. 15,000 was a condition precedant to the creation of the trsust, the non-performance of which would invalidate the gift. Paragraph 2 of the trust deed recites that the settlor has already paid to the Utkal University Rs. 10,000/- and shall pay Rs. 15,000/- by 31-12-1946. The non-payment of Rs. 15,000/- would make the appellant and his estate liable for its payment and would not affect the creation of the trust. A trust is none the less a trust merely because one of its conditions is not executed. Mr. De's contention therefore fails.

(9) It was next pointed out that there was no devolution of interest 'in praesenti' and that, therefore, its was open to the settlor to revoke, Reliance was placed in para 10 and 14 of the trust-deed in support of this contention. Para 10 says that after payment of the sum of Rs. 5000/- annually out of the income of the immovable properties which constitute the subject-matter of the trust, the balance of the income shall be retained by the settlor or shall be paid to him during his lifetime for his maintenance. Mr. De argues from this that as a substantial portion of the income is retained by the donor and as the donor is referred to as the "Settlor" instead of as "Trustee" there is no vesting of interest in the University by the execution of the trust deed. A person may both be a trustee and a 'cestui que trust' or one of the trustees and one of the 'cestui que trusts'. Under the terms of the deed both the University and the appellant are constituted trustees, the defendant being the trustee in charge of the management of the immovable properties and the University being the trustee for carrying out the object of the trust. The defendant is also the 'cestui que trust' in respect of the balance of the income arising out of the properties after payment of Rs. 5000/- annually during his lifetime. The use of the expression 'settlor' is not only appropriate but any other expression would be inconsistent with the creation of the trust. Mr. De argues that if the defendant became a trustee under the deed, the use of the word 'settlor' would negative any such intention. But if the word 'trustee' were used in place of the word 'settlor' the balance of the income would go to the trustee, whoever he might be, and would not be available to the donor for his his lifetime, as it was the donor's express intention that he should enjoy only for his lifetime the balance of the income. Para 14 says that the settlor and the University agree to carry out the terms and conditions set forth above. That the University did agree to accept the proposal and establish a College, as desired by the donor, is proved by the proceedings of the Syndicate and para 14 merely

recites what had already been done towards the carrying out of the trust. I am, therefore, unable to appreciate the contention of Mr. De that the University should have been one of the executants of the trust deed.

(10) The trust is created by the defendant in favour of the University and para 14 of the deed of trust merely recites that the University had already accepted the proposal to discharge the functions of a trustee. A trust may be constituted without communication thereof to the trustee or to the 'cestui que trust' and a trust is not affected by the fact that no trustee is named or by the fact that the trustee who is named either refuses or is unable, through death or otherwise, to act. A trust of the property does not depend on the immediate existence of a legal estate in a trustee to support it. See Halsbury's Laws of England Vol. 33. p. 103.

A trust is generally irrevocable unless a power of revocation is expressly reserved. If a man executes a voluntary conveyance and does not reserve a liberty to himself by a power of revocatsion the, Court will not loose the fetters he has put upon himself—See Villers v. Beaumont, (1682) 1 Vern 100. The presumption is that a charity is charitable and not fraudulent. Section 126, Transfer of Property Act lays down that a gift cannot be revoked except under circumstances in which, if it were a contract, it might be rescined—such as fraud, undue influence, coercion, etc. It cannot be stated, in fact it is not even suggested, that the defendant was the victim of any fraud or undue influence or coercion such as would vitiate a contract. Nor would a mere mistake of law be sufficient to revoke a deed of gift, for Courts of Equity strongly incline against remedying mere mistakes of law. In 'Abhayachari v. Ramachandrayya', 1 Mad H C R 393 the settlor brought a suit to cancel an instrument of gift executed by him in favour of the defendant, on the ground that the deed of gift was invalid under the Hindu the donee could perform his obsequies. The Law and that he had erred in supposing that Court held that even where the deed is voidable on the ground of fraud or mistake it is always a question for the discretion of the Court whether cancellation and delivery up of a deed are to be ordered. The case is simply one of the plaintiff's choosing to alter his mind, and the Court refuses to remedy a mere mistake of law. A similar case where all the authorities are discussed is reported in Raja-Ram v. Khandu Balu, (15 I C 529.) In Pullayya v. Vedachala, 1911-2 M W N 376: (11 I C 24) one L executed a registered trust deed intending title to pass thereby and it was held that the subsequent destruction and non-delivery of the deed to the trustees did not prevent the passing of the title to them. In another case reportd ein the same volume at p. 382 'Mahadeva v. Sankara, 1911-2 M W N 382 (12 I C 546) certain immoveable properties were settled on charitable trusts by a registered deed and the settlor appointed himself as Hukdar for life and provided that, after his death, his grandson should succeed him as Hukdar. It was held that the acquired under the deed a vested right to the trusteeship which took effect in possession at the death of the settlor and the settlor had no power to revoke the appointment of the grandson before his death. In 'Krishnaswamy v. Kothandarama Naiken, 27 M L J p. 582 (A I R 12) 1915 Mad 380, the donor executed a deed of trust by which she settled certain properties on a temple. She constituted herself trustee during her lifetime and provided in the said deed for the carrying out of the trust by ecrtain individuals after her death. On the day previous to her death she executed a will by which she purported to revoke the trust and to make a new disposition of her properties. The dispositions themselves were in favour of the temple to which she had given the properties comprised in the trust deed. The trustees appointed under the earlier trust deed filed a suit for a declaration that the subsequent will was inoperative and had not the effect of revoking the trust. The document was all along with the settlor as, under the terms of the trust, she was herself to be the trustee during her lifetime and the Court held that the fact that the deed of trust was not handed over was no indication of the terms of the trust not having been given effect to. It was also held that, as there was a complete dedication of the property to the temple on the execution of the deed of trust, it was not open to the settlor to revoke the dedication by the will which she executed immediately prior to her death.

(11) Mr De's justification for revoking the gift is based on what he considers to be the inactivity of the University in giving effect to the object of the trust and an apprehension that the University may not carry out the purpose of the trust at all. This apprehension is hardly justified. The defendant promised to pay Rs. 15,000/- before December 1946 so that the building of the College amy be started. Actually, however, the document was not handed over for one reason or another, after its execution in October 1946. When the University demanded delivery of the payment of Rs. 15,000/- which was required for starting construction of the building the defendant proposed a change in the objects of the trust. In the middle of the year 1947 he expressed his desire to revoke and in September of that year the Syndicate rejected the proposal of the defendant in which he wanted to bring about a change in the terms of the trust deed. In October 1947 the petition out of which this appeal arises was actually filed challenging the action of the defendant in attempting to wriggle out of the terms of the trust deed. There was no validly constituted Senate during this period and when the newly-constituted Senate met the Syndicate reported its action for approval. It is thus celar that the delay in giving effect to the object of the trust is attributable to the defendant alone, and even assuming that the University was guilty of laches I am unable to see how the trust, as such would be affected.

(12) The fact that the particular application of a charitable gift is postponed does not render the gift void where the gift, as distinguished from its application, is immediate. The Charitable purpose is the donee, the establish-pious purpose is to be effected. If the pur-

pose itself were to fail, the Court may none the less apply the 'cypres' doctrine and give effect to the object of the trust. In 'Chamberlayne v. Brockett, (1872) 8 Ch. A 206 the settlor bequeathed her personal property to trustees upon trust to invest in consols and to make out of the dividends certain fixed annual payments, for charitable purposes. She further directed that when and so soon as the lands should at any time be given for the purposes as thereinafter mentioned almhouses should be built and that the surplus remaining after building alm-houses should be appropriated to making allowances to the inmates. It was held that there was an immediate gift to charity ,the mode of execution being only dependent upon further events and an enquiry directed as in 'Sinnet v. Herbert, (1872) Ch A 232. Lord Selborne LC held:

"If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject in our judgement to the same rules and principles of any other estate dependent for its coming into existence upon a condition preceednt. If the condition is never fulfilled the estate never arises.'

On a construction of the deed it was held that

"there was nothing undisposed of and there was no resulting trust for the next of kind. The intention in favour of the charity is absolute. The gift and the constitution of the trust is immediate. The only thing which is postponed or made dependent for its execution upon future and uncertain events, is the particular form or mode of charity to which the testatrix wished her property to be applied".

Similarly in Attorney General v. Craven (1856) 21 Beav 392, it was held that when lands are given to charity on the happening of a particular event, there is a resulting trust in the meanwhile, but where real estate was vested in trust out of the rents, to keep it ready for the reception of plague patients during their sickness, it was held that this was a present gift to charitable purposes and not merely a gift contingent upon the re-apperaance of the plague; and secondly that there was no resulting trust in the meanwhile for the donor or his heirs though the plague had not re-appeared for more than 180 years.

(13) In Edwards v. Hall, (1855) 43 E R 1158: (6 D C G M L G 74) it was held that a gift applicable to churches to be hereafter created is good. The word "endow" means giving a benefit to some existing thing; it supposes something to exist either at the time when the gift is made or when the endowment is to take place

(14) A gift is not bad because it may be applied not only to cha.pels that already exist but also to chapels that may come in esse afterwards. By the endowment of a school or chapel is only understood not the building or purchasing of a site for a school or chapel, but the providing of a fixed revenue for the support of those institutions. The word "endow" was construed as not meaning to purchase or build.

(15) The settled principle is that if the donor declares his intention in favour of a defined object which happens to fail from whatever cause, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness or failure of its immediate object, be carried into effect. For instances where the gift was held to be impracticable see 'Hayter v. Thego' (1830) 5 R M S 113: (38 E-R 970) and Loscombe v. Solicitor-General for New Zealand, 1903 A C 173: (72 L J P C 37) the very same contention was put forward by the Solicitor-General as is now made by Mr. De, that upon failure of the object and purposes of the grant the property would revert to the donor and it was negatived by the Judicial Committee of the Privy Council. In this case certain Maori Chiefs, who were in possession of certain lands called "Witeria", gave up possesion for the use of the place as a college for the Bishop of the Church of England. The grant was made in 1859. No school or college had been erected till 1898 when the suit was filed by the trustees. The rents and profits of the land were being accumulated. The Solicitor-General contended that the funds and lands had reverted to the Crown either absolutely or as trustee upon failure of the objects and purposes of the Crown grants and are not subject to administration by or under the direction of the Court 'cypres'. It was held that an expres gift of land and money for charitable purposes is not invalidated by the fact that the particular obligation directed cannot immediately take effect or will not of necessity take effect within any definite limit of time and may never take effect at all and that the doctrine of 'cypres' was applicable.

(17) The last contention of Mr. De is that the subject-matter of the trust is not capable of being ascertained as it is an undivided interest in joint property and that the trust is accordingly void for uncertainty . If the property is capable of being reasonably ascertained or is sufficiently clearly designated a trust will be raised. The settlor in this case transferred absolutely the properties set forth in the schedule atached to the deed of trust and describes the properties as those in which he owns an eight-annas interest after the preliminary decree. He further says:

"After the final allotment of the properties which will come to the settlor's share shall form the subject-matter of the trust".

It is, therefore, clear that the interest in the property conveyed is specifically designated and the half-share of the properties that will be allotted to the donor after the final decree, is equally capable of specific ascertainment.

(18) All the contentions raised by the defendant are, therefore, overruled and as we have already intimated at the conclusion of the hearing, the defendant shall be added in the suit in his capacity of trustee as defendant 2 . The University is also a joint trustee under the terms of the deed and is entitled to be brought on the record. Even if the properties were to vest in the University, subsequent to hte death of the settlor,

the University has a present vested right and is entitled to be represented in the suit. Even otherwise, we would have held that having regard to the facts disclosed during arguments the University should properly be represented in the proceedings as a relator.

(19) It is much to be regretted that unnecessary controversy should have arisen between the settlor and the University so soon after the execution of the trust deed. It is not for this Court to apportion the blame and determine as to who is responsible for this state of affairs. Much may be said on both sides. The University was unnecessarily insistent on the delivery up of the deed of trust which, under the terms of the trust, should be with trustee, voz: Narsingh Charan. The settlor, it appears to us, is also unnecessarily apprehensive that the University will not carry out the purpose of the trust. There was undoubtedly some delay in giving effect to the Resolution of the Syndicate owing to the non-existence of a legally constituted Senate. The University had to make certain arrangements for holding the elections for the first elected Senate and the delay is perfectly understandable. We can only hope that the cloud of distrust and suspicion which has been generated by circumstances for which neither party in particular is responsible, will soon be dispelled and the object of the trust carried into effect.

(20) The petition filed by the University in No. 16 of 1946 and the Misc. No. 76 of 1948 are allowed. The First Appeal filed by the defendant, which is treated as Civil Revision, is dismissed, but in the circumstances there will be no order as to costs.

(21) RAY C. J. I agree with the broad outlines of the reasons as formulated by my learned brother. As the order passed by us is an interlocutory one as between the parties, I refrain from adding my own reasons 'in extenso' as they might embarrass one party or the other in the likely future litigation between them. I should, however, add that in the case of a trust which is the result of a series of negotiations between two parties, the question of intention and common understanding between them that might go to determine the nature and extent of the trust is not entirely foreign to the consideration of its validity and completeness.

V.R.B. *Order accordingly.*

A. I. R. (38) 1951 Orissa 133 *[C. N. 35.]*

JAGANNADHADAS AND PANIGRAHI JJ.

The State of Orissa — Appellant v. *Oria Sama Majhi — Accused-Respondent.*

Government Appeal No. 6 of 1949, D/- 27-7-1950.

Criminal P. C. (1898), S. 195 (a) — S. 188, Penal Code, made cognizable and non-bailable — Effect.

A Court cannot take cognizance of an offence under S. 188, Penal Code except upon the complaint in writing of the public servant concerned or of some other public servant concerned or of some other public servant concerned or of some other public servant to whom he is subordinate and the fact that by a notification of the State Government S. 188, Pena Code is mads cognizable and non-bailable under S. 10, Criminal Law Amendment Act 1932, does not, in any way, affect the operation of S. 195, Criminal P. C. [Paras 4, 5]

Anno. Cr, P. C., S. 195 N. 3.

B. M. Patnaik — for Appellant; G. G. Das — for Reepondent.

PANIGRAHI, J. This is an appeal by the State of Orissa Against an order of acquittal recorded by the Learned Sessions Judge, Mayurbhanj, in a case arising under S. 188 Penal Code.

(2) The case for the prosecution is that the accused Oriya Sama Majhi disobeyed an order under S. 144 criminal P. C. promulgated on 5-2-49, in the Bamangati Subdivision of Mayurbhanj District, prohibiting the residents therein from carrying bows and arrows or any deadly weapons. It is alleged that the accused was moving about on 31-3-49 in his village, Maranda, with a bow, arrows, and a sword shouting that he would kill his enemies with these weapons. The order under S. 144 was duly promulgated on 5-2-49, and it is proved that the accused had knowledge of the ban imposed under this order. The trying magistrate recorded a finding that the accused intentionally disobeyed the order and that the disobedience caused danger to human life and safety.

He accordingly convicted the accused of an offence under S. 188, Penal Code and sentenced him to undergo rigorous imprisonment for four mon.ths and to pay a fine of Rs. 100/-, in default, to undergo r.gorous imprisonment for one month more. The learned Sessions Judge, Mayurbhanj, who heard the appeal against this conviction, while agreeing with the trial Court on his finding of facts held that the prosecution was defective and that the Magistrate had no jurisdiction to take cognizance of an offence under S. 188, Penal Code without a complaint in writing by the Subdivisional Magistrat.e who passed the order under S. 144 Criminal P.C. as required by Section 195 (1) (c), He accordingly directed the accused to be acquitted on the ground that prosecution was incompetent.

(3) The question that falls to be determined is whether S. 195 (1) (a) applies to the facts of this case. An offence under S. 188 Penal Code was non-cognizable and non-bailable by a notification of the State Government in exercise of the powers conferred on them by S. 10 (1), Criminal Law Amendment Act, 1932 (XXIII (23) of 1932). Section 10(1) provides:

"The provincial Government may, by notification in the official Gazette, declare that any offence punishable under S. 186., 188 and 189.. of the Indian Penal Code when committed in any area specified in the notification, shall, notwithstanding anything contained in the Code of Criminal procedure, 1898, shall, while such notification remains in force, be deemed to be amended accordingly".

(2) The provincial Government may,in like manner and subject to like conditions and conditions and with like effect, declare that an offence punishable under section 188 on section 506 Indian Penal Code shall be nonbailable".

Acting under this section, the State Government in the Home Department issued a notification, dated 14-8-48 (No. 2946-C) which reads as under:

"In exercise of the powers conferred by sub-section (1) of section 10 of the Criminal Law Amendment Act 1932 (XXIII(23 of 1932) as applied to theOrissa States by Notification of the Government of Orissa in the Home Department No. 2-A dated 1-1-1948, as subsequently amended, the Governor of Orissa is pleased to declare that any offence punishable under section 188 of the Indian Penal Code when committed in any part of the Orissa States, shall, notwithstanding anything contained in the Code of Criminal Procedure 1893 (V of 1898) be cognizable". :

By another notification of the same date, Viz.,No. 2 948-C., dated 14-8-48,the offence was made non-bailable also. When the State of Mayurbhanj was merged with Orissa, the Criminal Law Amendment Act 1932 and the notifications thereunder were extended to that State by the Administration of Mayurbhanj State Order, 1949 on 1-1-1949. The prosecution, therefore, contends that as the offence under S. 188, Penal Code has been made cognizable, cognizance can be taken of it by a Magistrate on a report in writing of such facts made by the Police Officer, as provided in S. 190 (1) (b), Criminal P.C. It is accordingly urged that S. 195 (1) (a) stands amended by implication by reason of S. 10, Criminal Law Amendment Act read with the notification issued by the State Government. On the other hand, it is urged for the accused that the requirement that a prosecution for an offence under S. 188, Penal Code should be initiated by the officer — whose order has been disobeyed — by a complaint in writing, is not inconsistent with the police being invested with power to investigate and arrest without warrant.

(4) Chapter XV of the Code of Criminal Procedure deals generally with the jurisdiction of the criminal Courts in enquiries and trials and is divided into two parts. Part A deals with the place of enquiry or trial while Part B lays down the conditions requisite for initiation of proceedings. The group of sections commencing with S. 190 is dealt with in Part B. This section lays down in what circumstances a Magistrate can take cognisance of an offence. Section 193 deals with the procedure relating to the cognisance of an offence by Courts of Session and S. 194 by the High Court. Section 195 prescribes the procedure to be adopted in prosecutions for contempt of lawful authority of public servants, of certain offences relating to documents given in evidence . Section 196 and S. 196-A deal respectively with the procedure for prosecution, for offences against the State and for certain classes of criminal conspiracy. Section 197 deals with the prosecution of Judges and public servants and S. 198 and 199 deal with prosecutions for offences against marriage. In the case of these latter offences, dealt iwth in S. 195 to 199, the Code lays down an additional requisite to the initiation of proceedings in the form of a complaint in writing by the public servant concerned or the previous sanction of the Court or the Local Government. Section 910 prescribes the three modes in which cognizance may be taken by a Magistrate and says:

"190 (1) 'Except as hereinafter provided' any Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or any other Magistrate specially empowered in this behalf, may take cognisance of any offence —

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police officer; and

(c) upon information received from any person other than a police officer or upon his own knowledge or suspicion that such offence has been committed.

Thus, complaint, report and information are cognizance of an offence. In the present case the three modes in which a Magistrate can take the prosecution commenced with a report in writing by the police officer and the Magistrate purported to take cognizance under S. 190 (1)(b).

The opening words of S. 190 (1) "except as hereinafter provided" indicate that this section is to be read subject to the other sections of the Code and is controlled by S. 195. Section 195 (1) (a) however lays down that no Court shall take cognizance of any offence punishable under S. 172 to 188, Penal Code except on

"a complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate".

Cognizance of an offence under S. 172 to 188 has, therefore, been regarded as an exception to the general powers of cognizance vested under S. 190 (1). It may also be noticed that while S. 190 (1) makes a distinction between a "complaint' and a 'report in writing' of a police officer the expression used in S. 195 (1) is 'complaint' only. 'Complaint' is defined in S. 4 (1) (h), Criminal P.C. as follows:

"'Complaint' means the allegation made orally or in writing to a Magistrate, with a view to taking action under this Code, that some other person, whether known or unknown, has committed an offence, but it 'does not include the report of a police officer".

The word 'complaint' used in S. 195 (1) and 190 (1) (a) must be presumed to have been used in the sense in which that owrd is defined in S. 4 (1) (h) and, therefore, should be held to exclude the report of a police officer. On a plain reading of different provisions I arrive at the conclusion that a Court cannot take cognizance of an offence under S. 188, Penal Code except on a complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate.

(5) The next question is whether by reason of the notification of the State Government declaring S. 188, Penal Code to be a cognizable and non-bailable offence, the operation of S. 195 has in any way been affected. It is pointed out by the learned Government Advocate that the notification expressly says that an offence punishable under S. 188, Penal Code shall notwithstanding anything contained in the Code of Criminal Procedure, 1898, be cognizable and that as S. 10(1), Criminal Law Amendment Act 1932 expressly provides that on the issue of the notification the Code of Criminal Procedure 1898 shall while such notification remains in force, be "deemed to be amended accordingly", S. 195 (1), Criminal P.C. has been impliedly amended by this provision and that consequently a prosecution for an offence under S. 188 Penal Code need not fulfil the condition laid down in S. 195. It is further alleged that if the

offence becomes cognisable and non-bailable the police can investigate the offence under S. 156, and exercise all the powers vested in the police officer under Chapter XIV of the Code. If they can investigate under S .156, they would be entitled to send up a report containing the result of their investigation under S. 173 and the Magistrate is thereupon bound to take cognisance under S. 190 (1) (b). I need not pause to examine the flaws in this syllogism. Assuming it to be correct, I do not agree with the conclusion. The power of the police to investigate and send up a report is not inconsistent with the additional requisite of a complaint in writing of the public servant concerned whose order has been violated. The Notification of the Govt. merely empowers the police to arrest without warrant and to conduct an investigation. After the investigation is completed it is open to the police to refer the matter to the public servant whose order has been disobeyed and leave it to him to decide whether prosecution should be started. It is for the public servant concerned to make up his mind whether in the public interest the offender should be brought to trial. It is in order to prevent vexations prosecutions that the bunch of sections beginning with S. 195 have been incorporated in the Code. The propriety of prosecution is guaranteed by the Legislature in requiring the public servant or Court to make themselves the complaint. Whether the offence is cognizable or non-cognizable is beside the point and has no relevancy to the policy of the Code in requiring the complaint of the public servant concerned of the Court. That this is the idea underlying this group of Sections in the Code will be clear from a reference to the following sections. Section 196 deals with offences against the State and offences relating to elections. It cannot be said that these offences are less serious than an offence under S. 188, Penal Code. Yet the Code requires that the complaint should be made by an order of or under the authority of the State Government or by some officer empowered by the State Government in this behalf. The policy of the Code is that a prosecution for such serious offences should not be initiated without due deliberation and consideration about its expediency by the State Government itself. But the weakness of this argument, advanced on behalf of the State, will be palpable when we refer to S. 196 (A) which deals with prosecutions for the offence of criminal conspiracy under E. 120 B, Penal Code. If the object of the conspiracy is to commit a cognizable offence, then the conspiracy itself becomes cognizable by the police and yet 196-A would require a complaint in writing to be made by an order of or under the authority of the Provincial Government. Section 197 makes the point even clearer. If the cognizable offence is committed by a Judge or a public servant (who is not removable from his office except by or with the sanction of Government) in the discharge of his official duties, cognizance could be taken by the Court only with the previous sanction of the Governor-General or the Governor of the province as the case may be. It does not, therefore ,follow that in each and every cognizable case, cognizance could be taken if there is a report in writing by a police officer. In all these sections, the word 'complaint' is used designedly but nowhere is a reference made to "a report in writing by a police officer". There is therefore no conflict between S. 190 and S. 195 even after the issue of the notification by the State Government. The words in S. 10 Criminal Law Amendment Act 1932 that the Code of Criminal Procedure" shall be deemed to be amended accordingly" can have reference only to those provisions which indicated that S. 188, Penal Code was non-cognizable and bailable before the notification. These words occur in S. II of the Code. Section 188, Penal Code was, before the notification, shown as non-cognizable and bailable and the offence under that section was deemed to .have become cognisable and non-bailable by reason of the notification read with S 10, Criminal Law Amendment Act. It may well be that a particular offence may be non-cognisable and yet non-bailable. See for instance S. 194, 195 and 476, Penal Code which are dealt with in S. 195 (b) and 195 (c), Criminal P. C. and for which a complaint in writing is required by the Court. Section 195 therefore requires a complaint in writing in respect of some non-bailable offences as well. The argument that cognizable and non-bailable offences are wholly excluded from the operation of S. 195 therefore stands on a week crutch.

A police officer making an arrest without warrant is obliged under S. 60, Criminal P C to take or send the person arrested before a Magistrate having Jurisdiction in the case. It is contended that if the Magistrate has no jurisdiction to try the case, unless the complaint in writing is made by the public servant concerned, then the accused is liable to be detained in police custody indefinitely. This argument proceeds upon a wrong reading of the provisions of the Code relating to the jurisdiction of a Magistrate and his powers. The word 'jurisdiction' is used throughout the Code as defining a local area within which a Magistrate may exercise any of the powers with which he may be invested. Sections 10 and 12 lay down the respective jurisdictions of the District Magistrate and the Subordinate Magistrates. The powers of Court are defined in Chap III and are divided into ordinary and additional powers which are given in greater detail in S. III and IV. Section 190 refers to a Magistrate who is "empowered" to take cognizance. On receiving a complaint a Magistrate does not automatically take cognizance, but if he does choose to take cognizance, he has to follow the procedure laid down in Chap. XVI. When, however, he receives a complaint by a Court of a public servant, S. 200 (a) dispenses with the examination of the complainant. He can thereafter either choose to issue process or dismiss the complaint. Taking cognisance does not involve any formal action, but occurs as soon as the Magistrate takes legal notice of the commission of an offence with a view to decide whether he can take judicial action. by issuing or refusing process. The power to take cognisance therefore is not the same thing as the power to enquire into or try, for a Magistrate may be empowered to take cognisance of, but not to enquire into and try offences. Similarly, a Court is not empowered to take cognisance may try a case if it is transferred to its file. Under S. 201 if the Court is not empowered to take cognisance he returns the complaint for presentation to

the proper Court. Taking cognisance therefore may be either in the form of initiating or refusing to initiate proceedings as the Magistrate thinks proper. The expansion 'taking cognisance' is however often times confused with 'cognisable offence' and 'cognisable case'. 'Cognizable offence' is defined as an offence in which a police officer may arrest without warrant and is described in S. II. While therefore an offence may be cognizable by the police the Magistrate, within whose jurisdiction the offence is committed, may not be empowered to tak.e cognizance of the same. I do not, therefore, see any inconsistency between the police officer being enabled to conduct investigation into an offence under S. 188, Penal Code and the Magistrate not being competent to take cog.nizance of the case until some other formality is complied with. It was open to the investigating officer to place the result of his investigation before the public servant concerned and request him to file a complaint in writing.

Our attention has been drawn to the cases reported in 'Emp v. Ganesh Vasudev 55 Bom 322: (AIR (18) 1931 Bom 135: and 'Latchmi Devi v. Emp 58 Cal 971: (AIR (18) 1931 Cal 122. Both these cases arose under ordinance V (5) of 1930 which was the precursor of the Criminal Law Amendment Act, 1932. Section 10, Criminal Law Amendment Act, 1932 merely reproduces the language of S. 11 of that Ordinance word for word. Both these cases lay down that an offence being cognisable by the police does not 'ipso facto' make it cognisable by a Magistrate. I have no doubt, in my mind, on a plain reading of the Sections of the Code, that S. 190 is controlled by S. 195 and a search for an exact precedent is a sterile pursuit.

(8) I would only refer to one other instance where the powers of the police to investigate and the power of the Magistrate to try are kept separate and are not necessarily interdependent. Section 3 of Prevention of Corruption Act (XI (11) of 1947) makes an offence under S. 161 or S. 165, Penal Code a cognisable offence for the purposes of the Code of Criminal Procedure. But Section 6 of the same Act lays down that no Court shall take cognizance of such offences except with the previous sanction of the Government servant concerned. It would therefore be an idle parade of familiar learning to investigate all the cases which lay down that where a statute prescribes a condition precedent such as a complaint or sanction of an authority ,any prosecution launched without fulfilling the requisite condition is incom.petent. I cannot therefore persuade myself to treat the police charge-sheet as a complaint within the meaning of S. 190 (1) (a). The officer hwo promulgated the order under S. 144 in this case is the Sub-divisional Magistrate and he has not made any complaint. I have, therefore, no hesitation in accepting the view of the learned Sessions Judge as corre.ct and in holding that the accused has been rightly acquitted. This appeal is dismissed.

[9] **Jagannadhadas J.** — I agree.

D.H. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 141 *[C. N. 36.]*

RAY C. J. AND NARASIMHAM J.

Kamal Nayan Ramanuj Das — Petitioner v. Bira Naik and another—Opposite Party.

Second Appeal No. 5 of 1949, D/- 23-8-1950.

Constitution of India, Arts. 133, 135 — Applicability — Retrospective operation — Civil P. C. (1908), S. 110 (Supreme Court — Leave to appeal).

Article 133 has no retrospective effect. Where an application for leave to appeal had been filed long before the Constitution came into force and the decree involved a claim with respect to property of the value of Rs. 10,000 or upwards, Art. 135 and not Art 133 applies and the certificate giving leave to appeal to the Supreme Court must be granted. [Paras 4 and 5]

Anno: C. P. C. S. 110 N. 2.

P. C. Chatterji and M. S. Rao — for Petitioner; S. N. Sengupta & R. N. Singha — for Opposite Party.

Order.—This is an application for leave to appeal to the Supreme Court against the judgment of this Court in *Bira Naik* v. *Sidha Kamal Nayan* S A. NO. 172 of 1945 : (I. L. R. (1949) 1 Cut. 121).

[2] On the filing of the application, we sent for a finding of the valuation of the property in suit. The trial Court returned a finding opining that the landed property in dispute is valued at a figure more than Rs. 5,000 Besides, the plaintiff-respondent had been given a decree for recovery of mesne profits to the extent of Rs. 5,000 and odd The decree, therefore, involves rather directly some claim or question with respect to the property of the value of Rs. 10,000 or upwards within the meaning of para 2 of S. 110, Civil P. C. As this is a decree which reverses the judgments of the Courts below, the appellant has an unrestricted right of appeal to the Supreme Court. The question whether it involves any substantial question of law within the meaning of para 3 of S. 110 of the Code does not arise in this case The only difficulty that presented to us in course of hearing was that according to Art. 133 of the Constitution the right of appeal to the Supreme Court is restricted to cases in which property in dispute is of the value of Rs. 20,000 or upwards. The question that emerged was whether this article should govern the present appeal. On very high authorities it has been held that the right to appeal is a vested right which vests in the litigant at the time the suit is instituted. By subsequent alteration of the law, either relating to the form or to the other limitations to the right of appeal, it cannot be taken away, unless the law purporting to take it away is, either expressly, or by necessary intendment, given a retrospective operation. We have no doubt that Art. 133 has no retrospective operation. The only point that has to be clarified is whether this fixation of

higher valuation relates to a matter of procedure or a question of substantive right. If it is the latter, it should be governed by the law pre-existing the Indian Constitution. We have been referred to a decision of a Special Bench of the Calcutta High Court, in the case of *Sadar Ali* v. *Dolimuddin*, 56 Cal. 512 : (A. I. R. (15) 1928 Cal. 610 F. B.). In that case, the Letters Patent of the Calcutta High Court was amended, and the amendment came into effect on 14-1-1928. The amendment made it a condition precedent that no appeal from a decision of a Single Judge of the High Court should lie except with his leave. In that particular case, it so happened that the Single Judge's decision had been passed before the amendment took effect. In pursuance of the amended provision of the Letters Patent, an application was filed to the Single Judge concerned to give a leave to appeal. The learned Single Judge refused it. Notwithstanding the refusal, an appeal was filed and the question arose whether the appeal was competent. By the Special Bench of which Sir George Rankin C. J. was a party, it was held that

"the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings connected by an intrinsic unity..... The date of presentation of second appeal to the High Court is not the date which determines the applicability of the amended Clause of the Letters Patent and as the matter now stands, the date of institution of the suit in each case is the determining factor."

This decision has been followed by the Full Bench of the Patna High Court* to which Fazl Ali J. of that Court (as he then was) was a party and delivered the leading judgment. There, the question arose if a criminal case which was instituted before an Ordinance known as Special Criminal Courts Ordinance (II [2] of 1942) could attract the provisions of the Ordinance either in the matter of trial or in the matter of competency of the High Court in its revisional or other like jurisdiction. Following the Calcutta case already cited, his Lordship held that the jurisdiction of the High Court must be taken to have been left in tact notwithstanding the Ordinance and so also of the Magistrate who had taken cognisance of the case inasmuch as the criminal proceeding had started before the Ordinance was made. They, therefore, held that the trial by the special Magistrate under the Ordinance amounted to no trial, and their Lordships exercised their power under S. 491, Criminal P. C. and came to a decision that the accused was being detained without a trial. They, therefore, ordered his release forthwith.

[3] Similar view repelling retrospectivity of laws in relation to its interference with the pre-existing right of appeal has been taken by a Special Bench case of the High Court of Allahabad, in the case of *Ram Singh* v. *Shankar Dayal*, 111 I. C. 6 : (A. I. R, (15) 1928 ALL. 437 F. B.)

[4] I think the question is put beyond any doubt by Art. 135 of the Constitution. It reads: "Until the Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of Art. 133 or Art 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law." As I have already said, Art. 133 does not apply to the facts of this case. In the circumstances, Art. 135 must govern, that is the law that defines the jurisdiction of the Federal Court should apply.

[5] It may also be noted that this application for leave to appeal had been filed long before the Constitution came into force. We should therefore, grant the petitioner the necessary certificate giving leave to appeal to the Supreme Court. The learned counsel for the opposite parties has behaved before us in an ideal manner and invited our attention to the most of the authorities on which we have acted. Under the circumstances, we make no order for costs of this proceeding. Each party should bear its own costs.

[6] The prayer for stay of execution is rejected. The opposite parties shall be entitled to take out execution on furnishing security to the satisfaction of the Court below so as to safeguard restitution by the petitioner in case he succeeds in the Supreme Court.

D.H. *Order accordingly.*

A. I. R (38) 1951 Orissa 142 *[C. N. 37.]*

RAY C. J. AND PANIGRAHI J.

K. Joggayya — Accused-Appellant v. *King.*

Criminal Appeal No. 49 of 1948, D/- 31-3-1949.

(a) Penal Code (1860), S. 366 — Intention of compulsion to marry.

Even repeated requests to a girl who knew her limitations, namely, that she was completely within the grip of the requester where she was imprisoned and was given no food and drink, certainly amounts to forcing her to consent. Even if consent in such circumstances would have been given, that would not amount to consent in law. This is hardly anything less than what can be called 'force' in law. Requisite intention that she may be compelled to marry is present in such a case. [Para 6]

Anno. Penal Code, S. 366 N. 3.

(b) Penal Code (1860), Ss. 340, 342 — Wrongful confinement — What amounts to — Escape open to person confined — Confinement is not wrongful — Confiner being able bodied, robust and strong man as against lean and thin person confined—Escape cannot be said to be open. [Para 7]

Anno. Penal Code, S. 340 N. 1.

P. V. B. Rao—for Appellant; Government Advocate —for the King.

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* *Reported in* A. I. R. (30) 1943 Pat. 245—*Ed.*

Ray C. J.—The appellant has been convicted under Ss. 366 and 342, Penal Code, and has been sentenced to undergo rigorous imprisonment for three years and pay a fine of Rs. 100/- for the first offence and six months rigorous imprisonment for the second.

[2] The prosecution case is that the appellant abducted the girl (P. W. 1) while she was on her way back after purchase of paddy in Nuapali village in company with about 9 or 10 others each of whom had a bag load of paddy on the head. The accused happened to be by the side of the road when Chandramma and party were proceeding to the aforesaid village for purchase of paddy. He also was found loitering on the road near a tank while they were returning. He came with a stick from behind the girl and pushed down the bag load of paddy from her head and forcibly carried her away in his arms—lifting her body by putting one hand under the knees and another around the neck. In this condition, he took her to some distance and then dragged her to his house through the back door and bolted the same. First of all, he took her to the house by back door then to the middle house which was then closed. Certain outsiders, being informed of the occurrence by P. Ws. 3 and 4, wanted to intercede on her behalf and presuade the appellant to let her go but to no effect. Later, the village Karji was informed, who also came on the scene and repeated the same request but in vain. He then submitted his report to the Police on which the First Information Report was recorded. Before the Karji sent his report, the father of the girl had also come to the place on getting information from somebody whom he could not name. The girl was brought into the room at about 10.30 A.M. and was kept confined till 5 P.M. of the day when, only on the appearance of the Sub-Inspector on the spot, the door was opened and she had to come away. At the time when she was released, she was found to be perspiring, weeping and almost run down; for sometime she fainted, but her mother took her up into a relation's house where she was given some food. Later, she conducted the Sub-Inspector to the place from where she was forcibly carried away, and the paddy bag, that she had been carrying at the time, was identified, out of several other such bags belonging to her companions and was seized. The Sub-Inspector made an investigation and submitted charge-sheet. Ultimately, the appellant was put on trial and has been convicted and sentenced as above.

[3] The evidence consists of that of the girl and her two companions, P. Ws. 3 and 4. These are the eye-witnesses. P. W. 2 is the father who came to the scene after hearing about abduction. The only inmate in the house of the accused on the date of the occurrence was his mother who has not been examined either by the prosecution or by the defence nor is it known under what circumstances she was left out. The learned Sessions Judge has believed the evidence of P. Ws. 1, 3 and 4 on the point of actual occurrence, namely, carrying and dragging the girl inside the house and putting her in confinement. He has believed P. W. 1 with regard to her story that this confinement and abduction was with the object of compelling her to marry. The evidence of witnesses, other than those mentioned above, is more or less corroborative proving the antecedent and subsequent facts which strongly probabilise the prosecution story. Mr. P. V. Rao, the learned counsel for the appellant, except raising certain points, does not seriously dispute the story in its broad outlines nor has he indulged, and that I think rightly, in dealing with immaterial discrepancies in the statements of the different witnesses deposing on an identical point. The points of dispute are: (i) that the girl had come to the accused's house voluntarily; (ii) assuming that she was dragged, it does not amount to an offence under S. 366, as the prosecution has failed to establish from the facts and circumstances proved that the abduction was with the intent that she may be compelled to marry the appellant against her will; it is not the prosecution case that the intention of the appellant in abducting her (P. W. 1) was that she may be forced or induced to have illicit connexion; (iii) assuming her story—her being lodged in a room which was bolted—to be true, it does not amount to an offence of wrongful confinement.

[4] I shall deal with these points seriatim in the order in which I have referred to them.

[5] That the girl came of her own accord to the accused's house is urged on the basis of a few statements on record, namely, that she was in the habit of coming to the accused's house now and then, both during when her eldest sister, the lawful married wife of the appellant, was in the place and also when she was absent. It is urged that had she been forcibly dragged in the manner alleged by the prosecution, she must have sustained certain injuries, in view of the fact that she was dragged for some distance over the field on which there were shrubs, and bushes here and there; and, further, that it would be impossible to believe that she, when carried against her will, would not struggle and would inflict injury on the body of the appellant. As to her coming of her own accord to the house of the accused, there is no evidence in support of it except the statement of the accused. The circumstances are militant against the theory as

according to the evidence of P. W. 2 and P.W 1 herself the appellant was not on good terms with his first wife (Chandramma's eldest sister) and the latter had left her husband's place and come to reside with her father. The difference between them was due to the fact that all her children so far born, about five in number, died premature deaths and the appellant wanted to marry afresh. There is some difference of version as to whether she gave her consent to such marriage. But from the statement of the accused in his examination under S. 342, Criminal P. C., it appears that she gave up taking her meals for three days when her husband (the appellant) had gone out to Ganjam to seek for a marriageable girl and that she had to be sent away to her father's place. Chandramma is a girl of 17 and it is inconceivable that she should take this difference between her sister and her husband in lighter spirit. Under the circumstances, after her eldest sister came over to live in her father's house, the younger should (not?) like to go there of her own accord. With regard to the absence of the injuries likely to be caused by the forcible dragging there is no evidence either way. Unfortunately, the Sub-Inspector did not send up the girl for medical examination for that purpose. According to his statement, he had sent up the girl to the doctor for examination of her age. There is no dispute that she has reached 17. Therefore, non-examination of the doctor leads to no point in favour of the defence. Under the circumstance in the absence of any evidence as to presence or absence of injuries, it is difficult to speculate. Even if such injuries are to be expected, they should be merely slight scratches. In view of the fact that the girl belongs to a labour class and is accustomed to walk on such rugged and bushy grounds, it is likely she may not incur any such injuries by such forcible dragging. Lastly, with regard to whether she would struggle and, in course of that, would inflict injuries on the body of the appellant, there is no likelihood, because as the learned Judge observed "the appellant is a strong and a robust man of 30 while the girl though 17 is lean and thin."Besides, they were previously known to each other, being very near relations. Under the circumstances, it is difficult to believe that the girl would struggle and that seriously. Under the circumstances, I would accept the finding recorded by the trial Court that the girl was, in fact, forcibly carried. The two eye-witnesses, P. Ws. 3 and 4, have given their evidence without any serious contradiction, nor is there anything to suggest that they had been tutored. There was suggestion to P. W. 3 in cross-examination whether she was a servant under P. W. 2, the appellant's father-in law. She repelled that suggestion as untrue. Mr. Rao relies upon this suggestion with great emphasis. That this suggestion was an after-thought is clear from the fact that it was never made to P. W. 2 while it was known P.W. 3 was going to be examined as a prosecution witness. With regard to P.W. 4. it is contended that her name was not mentioned as one of the members of the party that proceeded in company with Chandramma for purchase of paddy and in this connexion he further argues that on her own statement she was not examined by the Sub-Inspector during the investigation. In the First Information Report, it is written that "ten *Mailpila* had accompanied Chandramma for purchasing paddy." It is urged that they should not exclude P. W. 4 who was a boy. In the list of ten persons appended to the report, the name of the 4th man is Pirinti Ramayya which is admittedly a male name. P. W. 4 was in fact, examined by the Police on the very first day. Therefore, I would read the word "*Maipila*" to mean "to both women and children". So there is no substance in this point. The evidence of P. Ws. 3 and 4 is, therefore, quite convincing and there is no reason to disbelieve any one of them. The next contention of Mr. Rao is that at any rate the requisite intention for the offence has not been established. He argues this on the strength of statement made by P. W. 1, which reads: "the accused was all along requesting me to marry him." His submission is that mere request and keeping her sometime in his house in order to get an opportunity to request repeatedly and in an impressive manner will not make out an intention that she may be compelled to marry. This statement, however, carries a different meaning from what it is sought to attribute to it in view of the context in which it stands. The passage, of which the expression referred to is the last sentence, reads:

"It is not a fact that I used to go to the house of the accused very often. Nor is it a fact that he and I are friends. I never went to his house with my sister. During my childhood, I might have gone there once or twice with my mother. I was not afraid of the Police on seeing the Police on that day. The accused was all along requesting me to marry him."

It is admitted that the appellant had been requesting his father-in-law, P. W. 2 (who is also his maternal uncle) to give Chandramma in marriage to him on account of failure of issue by his first wife and that P. W. 2 used always to refuse. It is also admitted that the appellant was on frequently visiting terms to Chandramma's house. The meaning of this passage is, therefore, clear that while requesting the father to give his daughter in marriage, the daughter was also being requested from time to time to agree. This statement is in reference to what happened inside the room where she was confined.

As to what happened there is deposed to by Chandramma as follows:

"Some outsiders asked the accused to open the doors, but he refused to open it. The accused asked me to stay there as he would marry me. I refused to stay there and marry him, as he had turned out my sister. Inside the room, I was standing and crying."

[6] This is the evidence from which the intention has to be judged. If this evidence is believed, as it is believed, it is clear that the accused's intention was not only to persuade her to change her mind to accept him as her groom but also to marry her, her refusal notwithstanding, that he kept her confined from 10 30 A. M. to 5 P. M. while the girl was standing and crying and refused to stay and marry and gave out her reasons which were very convincing. There can be no other conclusion than that his intention was to compel her to marry or, if opportunity permitted, to marry her forcibly. Even repeated requests to one who knew her limitations, namely, that she was completely within the grip of the requester where she was imprisoned and was given no food and drink, certainly amounted to forcing her to consent. Even if consent in such circumstances would have been given, that would not amount to consent in law. This is hardly anything less than what can be called 'force' in law. I have, therefore, no hesitation in concluding that the requisite intention was there, and the offence under S 366 as charged, has been committed and the appellant has been rightly found guilty under the section.

[7] With regard to the finding of wrongful confinement, Mr. Rao controverts whether the middle room in which she was lodged was chained from outside or bolted from inside. His submission that if it was bolted from inside, it was quite open to her to open the door and come out. As she did not do so, there seems to be no desire in her to go out. The evidence on this point consists only that of the statement of P. W. 1 (Chandramma). The evidence of P. Ws. 3 and 4 must, from its very nature, be confined to bolting of the back door of the house. They do not say that they passed through back door or front door of the appellant's house and came near the middle room. Confining ourselves to the evidence of P. W. 1 on this point, she says that she was taken to the middle room and it was closed. Then follows her statement that in that room she was all along standing and crying and the appellant was asking her to marry. Mr. Rao is willing to take it as a fact that on the evidence, the appellant was in the same room as the girl. If that be so, the fact that the girl did not make an attempt to open the door would make no difference. She knew that she was hardly a match for a robust man like the appellant and that any attempt either to open the door or to run away would be completely fruitless. Let us take it to be a fact that he was not all the while in the room but the room was closed. In that case, it would mean closing it from outside. On that hypothesis, Mr. Rao is agreeable to accept that wrongful confinement is complete. Let us further assume that the middle room was not closed at all but the back door and the front door of the house were closed and admittedly the accused was inside. The result will be same. Absence of a desire to move on the part of the person confined no doubt, detracts from it being an offence under S. 342; but mere omission of an attempt to run away when there is a watch, does not mean absence of a desire. Mr. Rao has referred to us a passage from the Mayne's Commentary on Criminal Law to the effect that, *if escape is open to a person and if he wished to avail himself of it, his confinement will not mean wrongful confinement.* The question, therefore, is whether an escape was open to Chandramma. That an escape is open will not depend upon whether she could open the door herself if she wished, but upon whether she would be feeling confident that she should be able to extricate herself from the confinement notwithstanding the presence of the confiner, who was able-bodied, robust and strong man, as against a lean and thin girl who was confined. In this case it cannot be said that an escape was open to her. I should quote a passage from Ratnalal's Law of Crimes which seems to be based upon a decision of the Bombay High Court with which, with great respect, I agree. The passage is at p. 839 :

"Proof of actual physical obstruction is not essential to support a charge of wrongful confinement. It must in each case, be proved that there was at least such an *impression produced in the mind of the person detained as to lead him reasonably to believe that he was not free to depart and that he would be forthwith restrained if attempted to do so.* The mere threat of some future harm in case of departure would not suffice if he knew that it was open to him to go away and refrained from doing so lest he should suffer such harm. But if the circumstances were such as to justify and to create the belief that he could not depart without being seized immediately, then it would be proper to hold that he was obstructed and confined."

[8] In this case, I have already demonstrated from the circumstances proved and admitted, that Chandramma would have no other belief than that she could not depart without being seized immediately. In this view of the matter, I cannot accept the contention and shall hold, agreeing with the learned Sessions Judge, that the offence of wrongful confinement has also been established. In the result, the appellant's conviction under this section must stand.

[9] Mr. Rao has appealed to us in the circumstances of the present case as to severity of the sentence. The circumstances are as follows.

[10] The appellant's first wife is the eldest sister of Chandramma. The appellant was brought up in her father's family, the latter being his maternal uncle. That on account of failure of issues, as already referred to, he was intent upon and had expressed his desire to marry Chandramma. He had been bold enough to advance his proposals to Chandramma directly. There is nothing to show that if her father agreed to the marriage she would be an unwilling agent. The circumstances were different, however, when she was abducted, wrongfully confined and then asked to agree to the marriage. All the while, there are reasons for the appellant to believe that if he could have the girl in his house, the latter would agree and the father-in-law would reconcile himself to the position. As a matter of fact, he has used no voilence to the girl nor has made any effort to outrage her modesty. Under the circumstances, rigorous imprisonment for one year would meet the ends of justice. According to the judgment of the Court below, both the sentences should run concurrently. It will be so in this Court also. The sentence of fine does not seem to be severe and must stand.

[11] In this result, the sentence of three years rigorous imprisonment under S. 366, Penal Code, shall be reduced to one year. Subject to this modification in the sentence, the appeal is dismissed.

[12] **Panigrahi J.**—I agree.

D.H. *Appeal dismissed.*

A. I. R. (38) 1951 ORISSA 146 (C. N. 38)

PANIGRAHI J.

Baji Mahapatra and others — Accused. — Petitioners v. Indian Dominion — Opposite Party.

Criminal Revn. No. 404 of 1949, D/- 13-1-1950,

Orissa Temple Entry Act (1946), S. 6 — Refusal on part of pujari to open temple doors after puja and after Deity has been sent to sleep — If offence under S. 6.

The right to have the door of the temple opened and offer BHOG at an odd hour is not one of the general rights of worship belonging to the Hindu community nor can a member of the "Excluded Classes" acquire any such right under the Act. (Para 2)

The Marfatdars or the shebaits who are in actual management of the temple and its rituals are the persons entitled to prescribe the hours for the purpose of the rituals. (Para 2)

Refusal on the part of the pujari to open the doors of a temple after the puja has been performed, the bhog offered and the deity has been sent to sleep is therefore not an offence. (Para 2)

Shri R. K. Das for Petitioners, — Government Advocate, for Opposite Party.

ORDER: The petitioners four in number are the marfatdars of Sri Kasi Baijunath Mahadev Temple at Majhika in Angul and have been convicted under section 6 of the Orissa Temple Entry Act of 1946 and sentenced each to a fine of Rs. 50/-. The case against them is that on 8-9-48 they obstructed certain worshippers belonging to the "Excluded Classes" from entering into the temple. Previous to the date of the occurrence there had been some meetings to consider whether "Excluded Classes" would be permitted to enter into the temple. But it does not appear from the evidence if any definite decision was arrived at. On the day of occurrence certain members of the "Excluded Classes" tried to get admission into the temple and being frustrated in their attempt complained to the Sub-Divisional Magistrate who deputed P. W. 1 to see that no breach of the peace occurred and that the members of the "Excluded Classes" gained entrance into the temple. P. W. 1 on arrival at the spot asked Budhia Mahapatra, one of the Petitioners to hand over the key as the temple had been locked up at the time P. W. 1 arrived. Persuasions having failed, a formal complaint was lodged to the police at about 1 p.m. against the Petitioners and the complaint is that the Petitioners refused to open the temple to the 'Harijans'.

(2) A number of points were raised in the trial court as well as here. But those questions such as the public or private character of the temple, whether the Petitioners were observing pollution and for the time being were not acting as worshippers, whether the members who wanted admission into the temple do satisfy the definition of the "Excluded Classes" were not pressed. The substantial point on which argument has been addressed to me is whether on the facts deposed to by the P. W.s any offence under section 6 had been committed at all. The case does not relate to the incident prior to the arrival of P. W. 1 at the spot. The offence charged against the petitioners is that they refused to open the doors of the temple after P. W. 1 arrived. It must be admitted that the Marfatdars or the Shebaits who are in actual management of the temple and its rituals are the persons entitled to prescribe the hours for the purpose of the rituals. If therefore on the day of occurrence the Pujari, for the time being, performed the bhog at an hour earlier than usual it was perfectly within his power to do so. It may be and I have no doubt that it probably was so done with the intention of averting an unpleasant incident. But whatever may be the motive of the Pujaris their rights to regulate the hours of Puja cannot be questioned. If therefore by 10 a.m. the Puja had been performed, the bhog had been offered and the deity had been sent to sleep, it would not be open to any member of the general public whether belonging to the "Excluded Classes" or the "Highest Classes" to insist upon the doors being opened and the 'pahar' of the God being disturbed. Section 3 (i) of the Act lays down that persons belonging to the "Excluded Classes" shall be entitled to enter any temple and to offer worship therein "in the same manner and to the same extent as Hindus in general." The right to have the door opened and offer bhog at an odd hour is not one of the general rights of worship belonging to the Hindu Community nor can a member of the "Excluded Classes" acquire any such right under the Act. I am, therefore, of the opinion that the prosecution was misconceived and that no offence has been committed under section 6 of the Orissa Temple Entry Act. The Rule is made absolute. The convictions are set aside and the fines, if paid, shall be refunded.

V.B.B. *Conviction set aside.*

A. I. R. (38) 1951 ORISSA 147 (C. N. 39)

PANIGRAHI J.

***Narendra Bhoi** and others, Appellants v. Bhagaban Das, Respondent.*

Second Appeal No 456 of 1948 D/- 20-12-1949.

***Debt-Laws** — Orissa Money Lenders Act "III '3' of 1939" S. 17 — Usufructuary mortgage — What amounts to — Transfer of Property Act '1882' Ss. 58, 98.*

Where the mortgagee is put in possession of the mortgaged property in lieu of interest and besides, there is a personal covenant by the mortgagor to pay the mortgage amount through the sale of his other properties and further the mortgagor holds himself primarily liable for the mortgage debt, the mortgage is an anomalous mortgage and as such is outside the purview of S. 17 which does not govern all kinds of mortgage with possession. *'Para 4'*

***Anno:** T. P. Act S. 58 N. 35, 40 S. 98 N. 5.*

M. S. Rao For Appellants, — M. M. Das For Respondent.

JUDGMENT: The plaintiff raised the suit for the recovery of mortgage moneys advanced under two mortgage deeds, viz. Ex. 2 dated 12-5-23 and Ex. 1 dated 1-4-30 executed by the defendant, for Rs. 25/- and Rs. 100/- respectively. The lands mortgaged were plot No. 230 and plots Nos. 1016 to 1018. The documents describe themselves as Dakhal Bandak and recite that the properties are put in possession of the mortgagee in lieu of interest and that the mortgagor shall not claim an account of the rents and profits issuing out of the lands, nor shall the mortgagee demand any interest for the sum lent. They further recite that if the principal amount is paid within the period fixed for redemption, the mortgaged properties shall stand redeemed. Under the first document the period fixed for redemption was nine years, while under the other document it was one year. The recital on which there has been controversy between the parties is as follows:

"If you are dispossessed you can file a suit for the principal amount, together with interest at Rs. 3-2-0 per cent per month and in execution of the decree, bring the mortgage properties to sale. If that is insufficient you will realize the same by attachment and sale of my other immoveable and moveable properties".

(2) It is admitted that the mortgagee was in possession under these two deeds till he was dispossessed by the defendants in 1946. This suit was, therefore, filed for recovery of the principal amount, together with interest.

(3) The learned Munsif granted a simple money decree to the plaintiff for Rs. 122/- with proportionate costs. On appeal the learned Subordinate Judge, while upholding the findings of the Munsif reduced the amount which the plaintiff was entitled to, to Rs. 91-6-6. In the view of the Courts below the plaintiff was not entitled to a mortgage decree.

(4) In second appeal, the point that has very strenuously been urged before me by Mr. Rao, on behalf of the appellant, is that the documents (Exs. 1 and 2) are usufructuary mortgage bonds and are statutorily discharged under S. 17, Orissa Moneylenders Act. This section provides:

"Notwithstanding anything to the contrary contained in any other law or anything having the force of law or in any contract, an usufructuary mortgage executed before or after the commencement of this Act shall, unless discharged previously, be deemed to stand discharged after the expiration of 15 years from the date of the mortgage".

In this case the mortgagee has admittedly been in possession for more than 15 years. If therefore, on a proper interpretation of the contents, the documents are held to be usufructuary mortgages, there can be no doubt that the mortage debt shall be deemed to have been discharged by reason of the plaintiff's possession for 15 years. The learned Subordinate Judge, however, held that the documents were anomalous mortgages and not usufructuary mortgages pure and simple. In both the documents there is a personal covenant to pay the mortgage amount by which the mortgagors undertook to pay the amount through the sale of their other properties. In both the documents, again, the mortgagor says that the mortgagor shall be primarily liable for the mortgage debt. In a usufructuary mortgage, as defined in S. 58(d) T.P. Act, all that the mortgagor does is to authorize the mortgagee to take possession of the mortgaged properties until the entire amount of mortgage is paid off and to receive the rents and profits accruing from the land either in lieu of interest or in payment of the mortgage money. The expression 'usufructuary mortgage' used in S. 17 is to be understood in the light of the definition of that expression occurring in S. 58 (d), T. P. Act. There can be no doubt that the deeds in question contain something more than what is required to create a usufructuary mortgage. Mr. Rao, however, contends that the documents are substantially usufructuary mortgages though they contain some additional provisions and that the insertion of these additional provisions does not detract from the character of the documents as usufructuary mortgages. This argument, however attractive, is not tenable in view of the classification of the various kinds of mortgages made in S. 58. A simple mortgage, for instance, is defined as a mortgage in which the mortgagor binds himself personally to pay the mortgage money and agrees to have the mortgaged property sold for realisation of the mortgage amount. If the provision relating to the delivery of possession of the properties were absent from these two documents, it may well be that they will satisfy all the requirements of a simple mortgage. The Act further defines 'anomalous mortgage' as a mortgage which is neither a simple mortgage nor a usufructuary mortgage. In the case before me I find that the documents are a combination of the requirements of a simple mortgage as well as an usufructuary mortgage and, in these circumstances, they must be held to be composite documents, that is to say, they are neither simple mortgages nor usufructuary mortgages pure and simple. The learned Subordinate Judge was therefore right in holding that Exs. 1 and 2 can only be described as anomalous mortgages and, as such they are outside the purview of S. 17, Orissa Moneylenders Act. In using the expression "usufructuary mortgage" in S. 17 the Legislature must be taken to have intended that other kinds of possession of a mortgagee were not going to be affected. If mere possession were to be the test then a mortgage by conditional sale or even an English mortgage would equally be affected by S. 17, Orissa Moneylenders' Act. It does not, in my opinion, stand to reason that the Legislature should use an expression to denote a particular kind of mortgage with possession, when the meaning of that very expression is well understood as covering other kinds of mortgages with possession. Nothing would have been simpler for the Legisature than to say that a mortgage with possession would be discharged after fifteen years of continuous possession by the mortgagee. As at present advised, I am unable to accede to the contention of Mr. Rao that all kinds of mortgages with possession are governed by S. 17, Orissa Moneylenders Act.

(5) The judgment under appeal is therefore confirmed and the appeal dismissed. There shall be no order as to costs.

D. H. *Appeal dismissed.*

A. I. R. (38) 1951 ORISSA 148 (C. N. 40)

PANIGRAHI AND NARASIMHAM JJ.

Biswakesan Ramanuj Das — Judgment-debtor, Petitioner v. Krushna Chandra — Auction Purchaser, and another, decree-holder, opposite party.

Civil Revn. No. 24 of 1949, D/- 3-1-1950.

(a) Civil P. C. (1908) S. 144 — Property sold in execution of 'ex-parte' decree — Restitution against stranger auction-purchaser.

Where property is sold in execution of an 'ex-parte' decree and purchased 'bona fide' by a third party for value and the 'ex parte' decree is subsequently set aside, restitution will not ordinarily be granted against such stranger auction-purchaser, who is not bound to make any enquiry into the correctness of the order for execution. But this rule is not an inflexible rule and even against 'bona fide' purchasers for value restitution can be allowed in exceptional circumstances such as where the sale itself was without jurisdiction. (Paras 5 and 6)

Anno: C. P. C. S. 144 N. 13, Pts 2, 4, 9.

(b) Civil P. C. (1908), Ss. 144 and 151 — Reversal of decree by same Court — Inherent power to grant restitution.

Where restitution is asked for on the basis of the reversal of the decree by the very same Court and not by any superior Court, even if S. 144 Civil P. C., may not in terms apply, the Court has inherent powers under S. 151, Civil P. C., to grant restitution. (Para 7)

Anno: C. P. C. S. 144, N. 34.

B. K. Pal, for Petitioner; — L. K. Dasgupta, for Opposite Party.

NARASIMHAM J: This revision petition is against the appellate order of the Additional District Magistrate of Cuttack exercising the powers of a Collector under the Orissa Tenancy Act dismissing an appeal filed by the petitioner against the order of the Rent-Suit Deputy Collector, Jaipur, rejecting his petition for restitution.

(2) The material facts are as follows: The petitioner was a tenure-holder (Madhyasatwadhikari) in respect of 12 acres 50 decimals of rent-free 'Lakhraj Bahel' lands in mouza, Barunia, khata No. 12 appertaining to touzi No. 18. Only cess was payable in respect of the property amounting to Rs. 6-3-0 per annum to the zamindar Pandit Shyamsundar Nath Satho (opposite party 2). The zamindar obtained an ex-parte decree for arrear cess against the petitioner on 22-2-43 and in execution of the same put the property to sale. On 4-6-43 the entire property was purchased by opposite party 1 for a paltry sum of Rs .45/- and the sale was confirmed on 12-7-43 and delivery of possession was also effected on or before 26-11-43.

(3) In the meantime as early as 15-3-43 the petitioner had applied for setting aside the ex-parte decree and on 2-4-43 deposited a portion of the claim in Court. On 25-7-45 the 'ex-parte' decree was set aside and after revival of the rent suit it was dismissed on full satisfaction. In the execution proceeding the petitioner-judgment-debtor on 10-1-44 filed an objection under O. 21, R. 90, Civil P. C. for setting aside the sale on the gronud of fraud and material irregularity. The auction-purchaser (opposite party 1) filed an objection. The execution Court on 23-6-47 passed the following order.

"Suit has been dismissed as is seen from the certified copy of the order. Order 21, R. 90 application has been stayed. It is dismissed as the whole proceedings in the execution proceeding are null and void".

The aforesaid order of the rent-suit Deputy Collector is clearly wrong. If the entire execution proceeding became null and void in consequence of the setting aside of the 'ex-parte decree and the original suit after revival was dismissed on full satisfaction the executing Court should not have dismissed the application under O. 21, R. 90, Civil P. C. but may have recorded a note to the effect that it had become infructuous. Perhaps this is what the Court meant though the use of the expression "dismissed" has led to some argument at the Bar before us.

(4) The petitioner then applied for restitution of the entire property basing his claim mainly on the fact that as the whole suit had been dismissed on full satisfaction the sale in execution of the 'ex-parte' decree should not stand. In that restitution he specifically alleged that opposite party 1 was not a stranger but a creature of the 'zamindar' (opposite party 2) and that valuable property had been sold for a paltry sum. Thus his clear case was that opposite party 1 was not a 'bona fide' purchaser for value but was a creature of the decree-holder himself. On this allegation the executing Court ought to have allowed the parties to lead evidence and then come to a clear decision as to whether the acution-purchaser (opposite party 1) was or was not a 'bona fide' purchaser for value. Instead of determining this question the Court rejected the restitution petition on the ground that it was not maintainable. On appeal the learned Additional District Magistrate maintained the order chiefly on the ground that opposite party 1 was a stranger auction-purchaser and that restitution cannot be ordered against him.

(5) Both the Courts have completely misconceived the law on the subject and have failed to exercise their jurisdiction properly. The law on the subject is clear. Where property is sold in execution of an 'ex-parte' decree and purchased 'bona fide' by a third party for value and the 'ex-parte' decree is subsequently set aside, restitution will not ordinarily be granted against such stranger auction-purchaser. This principle was laid down by Privy Council as early as 1886 in the well-known case of 'Rewa Mahton v. Ram Krishen 13 I. A. 106: (14 Cal 18 P. C.)'. Their Lordships particularly emphasised that a person purchasing 'bona fide', and for a fair value, property exposed for sale under an execution issued by a Court of competent jurisdiction was not bound to make any enquiry into the correctness of the order for execution. The same principle was reiterated in 'Zainul-Abdin Khan v. Muhammad Asghar Ali Khan', 15 I. A. 12: (10 All 166 P. C.) where restitution was refused as against third party auction-purchasers. Similarly in 'Janukdhari Lal v. Gossain Lal, 11 C. L. J. 254: (37 Cal 107)' the Calcutta High Court relying on the aforesaid decisions of the Privy Council pointed out that a 'bona fide' purchaser for value without notice in execution of an 'ex-parte' decree could not be put on the same category as the decree-holder auction-purchaser and that restitution may not be available as against him. Again in 'Parsh Nath v. Haricharan', 38 Cal 622: (10 I C 361) it was held that the purchase made by an innocent purchaser for value" in execution of an 'ex-parte' decree should not be disturbed even though the 'ex-parte' decree might have been subsequently set aside. To a similar effect are the observations of the Allahabad High Court in 'Peary Lal v. Hanifunnissa Bibi', A I R (3) 1916 All 159: (38 All 240) and the observations of the Patna High Court in 'Chota Nagpur Banking Association v. C. T. M.Smith', A I R (30) 1943 Pat 325: 22 Pat 315).

(6) The reason for thus making an exception in favour of a 'bona fide' purchaser for value is clear. Ordinarily when the decree on which the execution sale takes place is set aside the Court should restore the parties to the position which they originally held so that the action of the Court may not prejudice either party. But on some occasions this equitable principle may conflict with another rule of equity to the effect that a 'bona fide' purchaser for value should not be

allowed to suffer for the mistake of the Court. To quote Jenkins, C. J. (Paresh Nath v. Haricharan, 38 Cal 622 at P 627: (10 I C 361).

"At the same time it is the policy of the Court and a very wise policy to protect its purchasers, for although in an individual case there may be some hardship, it would be far more prejudicial to the general body of judgment-debtors that any doubt should be thrown upon titles acquired by purchasers in execution under decrees which are to all appearances in order and free from objection".

But this rule is not an inflexible rule and even against 'bona fide' purchasers for value restitution has been allowed in exceptional circumstances such as where the sale itself was without jurisdiction (see 'Janukdharilal v. Gossain Lal', 11 C. L. J. p. 254: (37 Cal 107) or there has been a mistake or material irregularity of the Court) (Radha Bai v. Jagannadha Naidu, A I R (24) 1937 Mad 694: (169 I C 783).).

(7) In the present case it is unnecessary to consider whether S. 144 Civil P. C. will in terms apply where restitution is asked for on the basis of the reversal of the decree by the very same Court and not by any superior Court. There is doubtless some conflict of judicial decisions on this question. But it is now well-settled since the decision of the Privy Council in 'Jai Berham v. Kedar Nath, 49 I A 351: (A I R (9) 1922 P C 269) that:

"It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved".

Thus even if S. 144, Civil P. C. may not in terms apply the Court has inherent powers under S. 151 Civil P. C. to grant restitution.

(8) It is thus clear that restitution in favour of the petitioner can be refused only if opposite party 1 can show that he is a 'bona fide' purchaser for value. If the allegations made by the petitioner in his restitution petition are believed it is clear that opposite party 1 being a creature of the decree-holder was not a 'bona fide' purchaser at all. The property has been sold for a grossly inadequate price of Rs. 45/-. Valuable rent-free property of 12 acres 50 decimals would surely have fetched several thousands of rupees as fair price. In fact I notice that the record contains a mortgage bond dated 29-1-20 from which it appears that the previous owner of the property mortgaged 5 acres 19 decimals of the property with the petitioner for Rs. 300/- in 1920. It will be idle to contend that when the entire property was purchased in 1943 for Rs. 45/- the "purchase was for fair value". For some reason or other, evidence was not taken by trial court on the question of 'bona fide' of opposite party 1 and the fair value of the property. This is perhaps because the lower court was in some confusion as to the principle underlying restitution petitions and thought that it had no jurisdiction to grant restitution in cases of this type. I am however unable to dispose of this revision petition in the absence of a clear finding as to whether opposite party 1 is really a 'bona fide' purchaser for value or not.

(9) The petition is allowed, the orders of the lower courts are set aside and the trial court is directed to give both parties an opportunity to lead evidence on the limited question as to whether opposite party 1 is a 'bona fide' purchaser for fair value and then dispose of the restitution petition in accordance with law bearing in mind the legal position explained above.

Costs will abide the result.

(10) PANIGRAHI J: I agree.

V.E.B. *Petition allowed.*

A. I. R. (38) 1951 ORISSA 149 (C. N. 41)

PANIGRAHI J.

Babaji Krishna Chandra Das, Petitioner v. Dasarathi Das and others, Opposite Party.

Civil Revn. No. 251 of 1949, D/- 24-3-1950.

Civil P. C. (1908), O. 21 R. 90 — Irregularity in conducting sale — Fraud — Limitation Act (1908), S. 18.

Where there have been gross irregularities in the service of processes and the judgment-debtor did not know of the existence of the decree against him or of the subsequent stages of execution but there is no reliable evidence to attribute any specific act to the decree-holder designed to keep the judgment-debtor from knowledge of the proceedings, still if the price fetched at the Court sale is a gross undervaluation this must be attributed to the irregularity in the service of notices. In such a case the sale must be set aside. The judgment-debtor must also be given the benefit of S. 18, Limitation Act. (Para 2)

Anno: C. P. C., O. 21, R. 90, N. 11, 14; Lim. Act, S. 18, N. 10.

B. K. Pal for Petitioner; — J. Kar and D. Mohanty for Opposite Party.

ORDER: The petitioner is the transferee from the auction-purchaser at a rent sale held on 15-7-43 of lands measuring 2.8 acres in holding No. 402 in Mouza Gopalpur. The petitioner purchased the property from the auction-purchaser on 17-5-46 and took delivery through Court on 19-11-46. The judgment-debtor opposite party filed an application under O. 21, R. 90, Civil P. C., read with S. 18, Limitation Act, for setting aside the sale. This application was made on 13-12-46. The Deputy Collector who had seisin of the case found that there were several irregularities in the service of the sale proclamation and attachment order; that the sale notice was not properly proclaimed; and that the sale proclamation and attachment order were not served in the presence of either the president or the Tahsil punchayat. In his opinion these irregularities "kept the door wide open for fraud in this respect" and his ultimate finding is that there were gross irregularities in serving processes. Having regard to the fact that the suit property measured over 2½ acres and had been knocked down at the sale for a sum of Rs. 30/- and that the transferee purchased it later from the auction-purchaser for Rs. 200/-, the Trial Court was justified in holding that in order to secure the suit lands for a low price, the decree-holder:

"fraudulently manoeuvred with regard to the service of the necessary sale proclamation and attachment notices".

The Trial Court has further observed that he would have set aside the sale if the application had been filed within 30 days of the sale. The decree had been passed 'ex-parte' and so far as the judgment-debtor's knowledge is concerned, none of the execution notices appears to have been served upon him. In view of his finding that there were irregularities in the service of processes and that the sale-price was very low, the Trial Court was justified in inferring that the decree-holder (who was the sole bidder at the auction sale) was himself responsible for manoeuvring the sale and that he was guilty of fraud.

(2) The Trial Court, however, refused to set aside the sale as, in his view, the decree-holder was not responsible for the ignorance of the judgment-debtor with regard to the attachment and he was not actively responsible for any act which might have kept the judgment-debtor out of knowledge. The Appellate Court held that in view of the finding with regard to the conduct of the sale it was upon the decree-holder to prove that the judgment-debtor knew of the sale. It is urged in revision that this view of the appellate

court is erroneous, and Mr. Pal appearing for the transferee from the auction-purchaser rightly points out the distinction between fraud arising from irregularities in the conduct of the sale and fraud as contemplated under S. 18, Limitation Act. Section 18 says that if a person had been kept from his knowledge of the rights by means of fraud limitation will run from the date of knowledge. The question therefore is: is there any material on the record to impute any act to the decree-holder which would amount to keeping the judgment-debtor from the necessary knowledge? It appears to me that the fraud envisaged in S. 18, Limitation Act, contemplates some definite act committed by the decree-holder. But it may well be that a concealment of facts which would otherwise amount to notice or bring the same to the knowledge of the judgment-debtor would equally be an act of fraud. If, for instance, the decree-holder takes steps not only to see that the requisite notices do not reach the judgment-debtor but also to see that the sale is made to take place in circumstances which do not attract sufficient number of bidders, so that the property may fetch a reasonable price, then I would be inclined to hold that there had been a concealment of facts or circumstances amounting to fraud which has kept the judgment-debtor out of the knowledge of his right. Where a person gets property by committing fraud of this sort, it is for him to show that the person injured by his act and suing to recover the property, has had clear and definite knowledge of those facts which constitute fraud at a time which is too remote to allow him to bring the suit. This was the dictum of Lord Hobhouse in (Rahimbhoy v. Turner), 17 Bom 341: 20 I.A 1 (PC) The true position then is, as Mookerji J points out in (Biman Chandra v. Promothonath Ghose), 49 Cal 886 at p. 891: (A I R (9) 1922 Cal 157), that where a suit is, on the face of it, barred, it is for the plaintiff to prove, in the first instance, the circumstances which would prevent the statute from having its ordinary effect. A person, who, in such circumstances, desires to invoke the aid of S. 18, Limitation Act, must establish that there had been fraud and that by means of such fraud he has been kept from his knowledge of his right to sue or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. In cases where the property has changed hands on account of any act committed by the party accused of fraud, or if there be circumstances which would reasonably lead to the inference that the opposite party had been deprived of knowledge, the Courts are more astute in applying the test. In a recent case, brought to my notice, reported in (Marudanayagam v. Manickavasagam), 49 CWN 292: (AIR (32) 1945 P. C. 67) — the Privy Council laid down that where a sale takes place at a serious under-valuation occasioned by failure on the part of the Court and of the decree-holder to carry out the obligations laid down under the Civil Procedure Code, the case falls within the language of O. 21, R. 90 and the sale must be set aside when the judgment-debtor has suffered injury thereby, although the decree-holder may not have been guilty of fraud, and however dilatory the judgment debtor may have been provided there has been nothing on his part to constitute a waiver. Applying this rule of law to the facts of the case before me, I find that there have been gross irregularities in the service of processes, that the judgment-debtor did not know of the existence of the decree against him or of the subsequent stages of the execution, though there is no reliable evidence to attribute any specific act to the decree-holder, designed to keep the judgment-debtor from knowledge of the proceedings. Even in such a case, if the price fetched at the sale is a gross under-valuation, this must be attributed to the irregularity in the service of the notices In such cases, the decree-holder cannot escape the charge of fraud, nor can the judgment-debtor be deprived of the benefit of the provisions of S. 18, Limitation Act.

(3) The sale has, therefore, to be set aside as the judgment-debtor has suffered injury on account of the circumstances created by the decree-holder in irregularly publishing and conducting the sale. I am satisfied that the order of the lower appellate court in this case is correct, though his reasoning is somewhat defective. I see no reason to interfere in revision. This revision is dismissed.

D. H. *Revision Dismissed.*

A. I. R. (38) 1951 ORISSA 150 (C. N. 42)

JAGANNADHADAS J.

Haribansha Singh Deo, Appellant v. Sudhanshu Sekhar Singh Deo and others, Respondents.

First Appeals Nos. 45 to 48 of 1948. D/- 25-4-1950.

(a) Court-fees Act (1870), S. 28 — Insufficiently stamped appeal accepted — Power of Registrar to collect proper court-fee.

The Registrar as the Head of the High Court Office by virtue of S. 28, has the power to collect the proper court-fee in respect of an appeal memorandum which, through mistake or inadvertence, has been filed already and accepted as having been sufficiently stamped. (Para 4)

Anno: Court-fees Act, S. 28 N. 1.

(b) Court-fees Act (1870), S. 5 — "When any difference arises".

The Taxing Officer has power to fix a valuation over and above what the Stamp Reporter reports to be the correct valuation. (Para 5)

Anno: Court-fees Act S. 5 N. 4.

(c) Court-fees Act (1870), S. 5 — Power of Taxing Officer to reopen question of valuation.

The Taxing Officer has the power to reopen the question of valuation determined by the lower Court if it is necessary for the determination of the proper court-fee payable on the appeal memorandum to the High Court. (Para 6)

Anno: Court-fees Act S. 5, N. 20.

(d) Court-fees Act (1870), S. 5 — Power of Taxing Officer to call for additional evidence.

In exercising the power to reopen the question of valuation the Taxing Officer is not confined to material already on record and available to the Court below. It is permissible to call for additional evidence. (Para 7)

Anno: Court-fees Act S. 5, N. 20.

(e) Court-fees Act (1870), S. 7 (iv) (c) — Zamindari descending to single heir and not transferable — Valuation.

Where the subject-matter of the suit is held under a special kind of tenure under which the Zamindari descends to a single heir and is not transferable, ten times the 'Takoli' payable on the estate would be the fair estimate of the value of the subject-matter of suit in the absence of any other satisfactory material. (Para 8)

Anno: Court-fees Act, S. 7 (iv) (c) N. 21, 23, 25.

(f) Court-fees Act (1870), S. 7 (iv) (c), Sch. 1, Art. 1 — Relief of possession being surplusage — Valuation for appeal.

Where the relief by way of possession was a surplusage in the plaint but the relief of possession has been given in favour of the plaintiff and the question of maintainability of appeal without asking for relief to get rid of the relief of possession is arguable the court-fee may be collected on the footing of declaratory relief in respect of the appeal. (Para 9)

Anno: Court-fees Act S. 7 (iv) (c) N. 1, 25; Sch. 1, Art. 1, N. 6.

P. Misra (in Nos. 45 and 46) and L. K. Das Gupta (in Nos. 47 and 48) for Appellants — S. N. Sen Gupta for Respondents (in both).

JUDGMENT: These matters come up before me as the Taxing Judge as a result of the decision of the Bench in these appeals that it has no jurisdiction to deal with the matter. Acting on the suggestion made in the order of the Bench and with a view to avoid any further delay in this long pending matter, I propose to treat the reference by the Registrar as a reference by the Taxing Officer to me, the Registrar himself being under the rules of this Court, also the Taxing Officer. These four appeals arise out of three suits which along with four other suits were filed in the Court of the Subordinate Judge of Sambalpur by various rival claimants to the Barpalli Zamindary which were all tried analogously and were disposed of by a common judgment of the Subordinate Judge. Appeal No. 45 is by the plaintiff in T. S. No. 11/49. Appeal No. 48 is by the plaintiff in T. S. No. 8/39. Both these suits were filed as mere declaratory suits and court-fee on the two appeals therefrom was filed on the footing of mere declaration. Appeals Nos. 46 and 47 are against the decree in T. S. No. 10/39 by two of the defendants therein who are respectively the plaintiffs in T. S. Nos. 11 and 8 of 1939. T. S. No. 10 of 39 was filed as a suit for declaration and possession and treating this as a prayer for declaration and consequential relief, 'ad valorem' court-fee was paid in the trial Court on the plaint in that suit. When it came to a question of appeal against it in this Court, the appellant in F. A. No. 46 paid the 'ad valorem' court-fee while the appellant in F. A. No. 47, treating the prayer for possession in the Plaint in O. S. 10 of 39 as mere surplusage, in the circumstances to be set out later, paid on his appeal memorandum only the declaratory Court-fee.

(2) The court-fee originally paid on the appeal memoranda in F. A. Nos. 45, 46 and 48 was considered as sufficient by the Stamp Reporter and on his reports the three appeals were admitted by the Registrar by his order dated 8-3-49. In Appeal No. 47 however, the Stamp Reporter noticing the fact that on the plaint in the suit out of which that appeal arose 'ad valorem' court-fee was paid, was of the opinion that in the appeal also 'ad valorem court-fee was payable and not merely a declaratory court-fee, which was all that was paid by the appellant. He accordingly placed the matter before the Registrar for orders. When the matter came up before the Registrar on 9-5-49, he directed that it should be posted before him along with F. A. Nos. 45, 46 and 48 relating to the matter of court-fees (though he had already admitted those three by his prior order dated 8-3-49). As appears from his subsequent orders he adopted this course presumably because he had the impression that the valuation of the suit-property given in all these four appeals was abnormally low. It may be mentioned that in the trial Court, the valuation of the suit-property for purposes of jurisdiction and court-fee was fixed at Rs. 25,000/- by the learned Subordinate Judge by his order in T. S. No. 19 of '39 which is one of the batch of suits. That valuation has been adopted for all the suits. The appellants in these four appeals have also adopted that valuation for their appeal memoranda. It may also be noticed that in the trial Court, the actual valuation did not matter so far as the suits in which only a declaratory relief was prayed for, but even in the appeals against those suits, the correct valuation is of some consequence since by virtue of the Orissa Court-fees Act, V (5) of 1939 which came into force subsequent to the institution of the suits, a court-fee is payable in respect of declaratory relief, dependant on valuation and based on the slab system. In view of the fresh importance which the valuation of the suit-property has thus acquired, the Taxing Officer called upon the appellants in the four appeals by his order dated 10-9-1949 to furnish statements showing (a) market value of the property in dispute; (b) annual net profits thereof in the year next preceding the institution of the suit. These statements not having been filed within the time granted by the Registrar, all the four appeals were placed before the Bench for orders. The statements were filed on 23-11-49 and a Bench of this Court by its order dated 28-11-49, in all these four appeals, remitted the matter back to the office directing the office to ascertain the market value on the basis of those statements. The appeals thereupon went back to the Stamp Reporter who on 29-11-1949 made a report that the value of the suit property is Rs. 48,000/-, calculating the same at eight times the net annual profits of Rs. 6,000/- as shown by the statements filed on 23-11-49 and that court-fee in all the appeals was payable on the basis of the revised valuation. The matter came up again before the Registrar, who while accepting the statements filed, relating to the net annual profits did not accept the valuation reported by the Stamp Reporter. He was of the view that both the valuation of Rs. 25,000/- as originally fixed by the trial Court as also the valuation of Rs. 48,000/- reported by the Stamp Reporter were low. He therefore fixed the valuation at Rs. 1,20,000/- being twenty times the net profits. He was of the opinion that the court-fee in all the four appeals has had to be paid on the basis of that valuation. He was further of the opinion that in respect of Appeal No. 47, the appellant was not entitled to treat the appeal as involving only a declaratory relief but should ask both declaration and possession and pay 'ad valorem' court-fee on the value as fixed by him. It is in these circumstances that the matter comes to me for a decision on the question of the court-fee payable.

(3) Questions of some importance relating to the practice in such matters have been raised: (1) It is said that so far as the Apps. Nos. 45, 46 and 48 are concerned, the court-fee originally paid thereon having been accepted as sufficient and the appeals having been filed and admitted, the Registrar as the Taxing Officer had no power to reopen the same. It has been pointed out that under the terms of S. 5, Court-fees Act, the Taxing Officer has the power to deal with such a matter only if any difference arises between the party concerned and the Stamp Reporter and not when the Stamp Reporter has accepted the court-fee paid as sufficient; (2) The second point that is raised is that the valuation of the suit-property having been fixed by the trial Court, the Taxing Officer cannot reopen the same and determine the value afresh, and thereby constitute himself into an appellate Court against the decision of the lower Court. (3) It is also urged that the Taxing Officer has no power to call for any fresh evidence for the ascertainment of the value, and (4) that in any case, the Taxing Officer has no power to fix the value over and above what the Stamp Reporter has fixed.

(4) It would appear from R. 14, Chap. VII of the Rules of this High Court that the Stamp Reporter is an officer charged with the duty of examining whether the court-fee on the appeal memorandum is sufficient, and it appears to be arguable that the Taxing Officer's jurisdiction arises only when there is a difference between the Stamp Reporter and the party concerned as to the proper court-fee payable. In 'Bhubaneswar Trigunait, In the goods of, AIR (12) 1925 Cal 1201: (52 Cal 871), Rankin J. seems to have been of the view that such a difference between the Stamp Reporter and the litigant is not necessary in order to give jurisdiction to the Taxing Officer. His Lordship was of the opinion that

"the jurisdiction of the Taxing Officer does not arise like the jurisdiction of an arbitrator upon

the difference between a Court clerk and a suitor and on some sort of formal reference to decide that dispute and that the intention of S. 5 is merely to ensure that the question should be raised before the Taxing Officer and that he should bring his mind to bear on it and decide it." See contra per Jwala Prasad J., 'Krishna Mohan v. Raghunandan Pandey, A I R (12) 1925 Pat, 392 at 402: (4 Pat 336 F B).

It is unnecessary for me to express any final opinion on this matter because the Taxing Officer in this case is the Registrar of the Court and there can be no doubt that the Registrar as the Head of the High Court Office by virtue of S. 28, Court-fees Act has the power to collect the proper court-fee in respect of an appeal memorandum which through mistake or inadvertence has been filed already and accepted as having been sufficiently stamped. Once the matter has been reopened by the Registrar under S. 28, the question very properly goes back to the Stamp Reporter and comes up again to him as the Taxing Officer and thence to the Taxing Judge on a proper reference. Further in the present case, it is the Stamp Reporter that has in fact reopened the valuation under orders of Court dated 28-11-49. The Stamp Reporter has been vested with the power to reopen the valuation under R. 18 of Chap. VII of the High Court Rules which apparently is auxiliary to the power vested in the Court under S. 28, Court-fees Act.

(5) I am satisfied also that there is no substance in the contention that the Taxing Officer has no power to fix a valuation over and above what the Stamp Reporter reports to be the correct valuation. Under the terms of S. 5, the Taxing Officer is not in the nature of an appellate Court against the decision of the Stamp Reporter so as to give room for any possible argument that his decision cannot go beyond what the Stamp Reporter has decided. Indeed it is to be noticed that under S. 5, the Stamp Reporter is not even called upon to give a decision but his duty is to refer the matter to the Taxing Officer when any difference arises between him and the party. Of course he may indicate his views for the guidance of the Taxing Officer, but that in no sense is a decision.

(6) As regards the argument that the Taxing Officer cannot constitute himself into a Court of appeal against the decision of the trial Court on the question of valuation and that he cannot call for any fresh evidence on that matter, I am unable to agree with the same. The power of the Taxing Officer under S. 5, Court-fees Act or of the Registrar as the Head of the High Court Office under S. 28, are vested in him for the purpose of the protection of the proper stamp-revenue payable to the Government and no limitations are indicated in the exercise of those powers. Section 12 (2), Court-fees Act indicates that though the decision of the lower Court on the question of court-fee is final as regards that Court, it is also liable to be corrected by the superior Court without there being a specific appeal against the decision on the particular issue. Though it may be, that the Taxing Officer in reopening the question of valuation already settled by the trial Court, pronounces indirectly against the correctness of the decision of the lower Court, he is not in any sense sitting in appeal against it because his decision is not for the purpose of collecting the deficit Court-fee of the lower Court, but only for the collection of the proper court-fee in the High Court itself which is exclusively within his jurisdiction. I have therefore no doubt that the Taxing Officer has the power to reopen the question of valuation determined by the lower Court if it is necessary for the determination of the proper court-fee payable on the appeal memorandum to the High Court. This view is supported by the decision of the Full Bench in 'Krishna Mohan v. Raghunandan Pandey, A I R (12) 1925 Pat p. 392: (4 Pat 336 F B)'. While upholding the power of the Taxing Officer in this behalf, I would only add by way of caution that the decision of the lower Courts regarding valuation should receive due weight and respect and should not be lightly departed from excepting where the lower Court appears to have committed a gross error and the interests of the Government in the matter of court-fees have seriously suffered thereby.

(7) It cannot also be maintained that in exercising the power to reopen the question of valuation the Taxing Officer is confined to material already on record and available to the Court below. There is nothing in S. 5 or S. 28, Court-fees Act to limit the power in any such way. I think that it is permissible to call for additional evidence . I find support also for this view in the judgment of the Full Bench in 'Krishna Mohan v. Raghunandan Pandey,' A I R (12) 1925 Pat p. 392 at p. 396: (4 Pat 336 F B), where it has been stated by the learned Chief Justice as follows:

"Once it is determined that the power of the High Courts to decide the amount of the fee payable on the memorandum of appeal presented in those Courts is delegated to the Taxing Officer and to the Taxing Judge under S. 5, those officers should always, if need be, require evidence to be produced before them and to hold an investigation as to the value of the subject-matter for they would have all the powers incidental to the discharge of those duties which the High Court itself possesses."

Das J. who expressed the minority view held that the Taxing Officer had no such power. Of course, this power of the Taxing Officer to reopen the valuation and call for fresh evidence is one that ought to be exercised with moderation and caution, and should be used so as not to become a source of harrassment to the litigant. While undoubtedly the Court and its officers are charged with the duty of safeguarding the legitimate interests of the Government for the realisation of proper court-fees, the litigant is also reasonably entitled to expect that the decision of the Courts below on the question of valuation and court-fees would not be lightly ignored and reopened every time that a matter goes up to the higher Court. In this connection it must also be remembered that in cases falling under S. 7, Sub-S. (4) Cl. (C), Court-fees Act, the Legislature gives the litigant choice to put his value on the relief. The ascertainment of the market value by the Court is only to prevent gross undervaluation and not to substitute its own valuation for that by the party. The normal principle should be that the party's valuation should not be interfered with unless it appears to be grossly low.

(8) I, therefore, overrule all the above contentions raised on behalf of the appellants and now proceed to determine what is the correct court-fee payable in all the appeals. The proper court-fee depends in the present cases, on the valuation of the suit-property. The trial court in fixing the valuation at Rs. 25,000/- was largely influenced by the fact that the Barpalli Zamindary is held under a special kind of tenure under which the Zamindary descends to a single heir and is not alienable. The property not being heritable and alienable, the trial Court was of the view that its market value cannot be computed in the ordinary way and therefore fixed the value at Rs. 25,000/-. This however works out at only about four times the net annual profits, of Rs. 6,000/-. I agree therefore with the Taxing Officer that this is grossly inadequate. I am not however prepared to agree with the estimate of the Taxing Officer either when he fixes the valuation at 20 times the net profits. This would be a fair standard only if

the estate was ordinary heritable and transferable property, which, as pointed out by the trial Court, it is not, on account of its special tenure. In the absence of any other satisfactory material, I would, in this case, adopt ten times the 'Takoli' payable on the estate as a fair estimate of the value of the subject-matter of the suit. That is the standard adopted by the Court-fees Act itself with reference to cases that fall under S. 7, Cl 5, Court-fees Act in respect of temporarily settled Zamindaries, which I understand Barapalli Zamindary to be. No doubt the cases before me fall not under Cl. 5 of S. 7, but under Cl. 4 of the said section and it very often happens that the statutory valuation in Cl. 5 differs substantially from the market value in respect of ordinary property. But in view of the special circumstances and in the absence of any other material for guidance I consider that this would be only a fair method of disposing of this matter. I may also add that whenever there is any reasonable doubt or difficulty in ascertaining the valuation of immovable property, it is legitimate to apply the statutory valuation in S. 7, Cl 5 by way of analogy if it is applicable. See 'Venkata Narasimha Raju v. Chandrayya, AIR (14) 1927 Mad 825: (105 I C 171) and P. K. Nainar Rowther v. Kuppai Pichai Rowther, AIR (16) 1929 Mad 609 at p. 611 : (120 I C 889). It appears from the finding of the trial Court on the question of valuation that the 'Tokali' payable in respect of this estate is slightly less than Rs. 6,900/-. I would accordingly fix the value of the subject-matter of the appeal at Rs. 69,000/- for purposes of court-fees. Declaratory fee with reference to this valuation has to be paid in App. Nos. 45 and 48 and the deficit court-fee payable on that footing will have to be paid by the appellants in these two appeals.

(9) As regards Apps. Nos. 46 and 47, a further point raised by the respective appellants therein has to be noticed. It may be recalled that these two appeals are against the decree against the appellants therein passed in T. S. No. 10 of 39 in which the plaint was for declaration and recovery of possession and a decree also was given in favour of the plaintiff in the suit for both the reliefs. The Taxing Officer is of the opinion that 'ad valorem' court-fee is payable by the appellants in these appeals on the footing of declaration and consequential reliefs. Counsel for appellants do not dispute that according to the Patna practice, the court-fee payable would be 'ad valorem' if they are driven to include the relief by way of possession in the appeal memorandum. But they contend that the plaintiff in T. S. No. 10 of 39 in asking for relief by way of possession has asked for an unnecessary relief and that therefore they could ignore it. It is admitted that when T. S. No. 10/39 and the other connected suits were filed the estate was in charge of the Court of Wards who were in possession of the same during the lifetime of the previous female owner and who happened to have continued in charge under S. 33, Central Provinces Court of Wards Act. That section provides that the Court of Wards can retain its superintendence "until one of the claimants (to the succession) has established his claim in a competent civil Court". In view of this provision, I agree with the contention of the appellants in these two appeals that the plaintiff in T. S. No. 10/39 need not have asked for relief by way of recovery of possession and that relief so far as the plaint therein is concerned is a surplusage. The position however may conceivably be different at the appellate stage since a relief for possession has been given in favour of the plaintiff therein. These appellants may have to get rid of it. It may be that if the appeal does not comprise that relief also the matter may become 'res judicata' so far as that relief is concerned. The appeals if confined only to the declaratory reliefs may not be maintainable. See 'Narendra Nath v. Ganesh Prasad', AIR (33) 1946 Pat 408: (227 I C 172). This however is an objection to the maintainability of the appeals and is not a matter which determines the court-fee payable. The court-fee payable depends on the appeal memorandum as it is framed. The Court has no doubt power to insist on a plaint or an appeal memorandum being framed in a proper manner so as not to give room for any device to escape payment of proper court-fee. But in view of the fact that the relief by way of possession was a surplusage in the appeal without asking for relief to get rid of that relief in the appeal memorandum may be arguable, I see no objection to the court-fee being collected in respect of both these appeals (that is, Nos. 46 and 47 of 1948), on the footing of declaratory relief only if the respective appellants therein are prepared to take their risk at the final hearing as regards the maintainability of these appeals. They are therefore directed to pay D. C. F., if any, on the basis of the revised valuation on the footing of the declaratory relief. Appellant in F. A. No. 48 will have to amend his appeal memorandum accordingly.

(10) The deficit court-fees in all these appeals will be payable by the appellants within two weeks of the reopening of the High Court after the summer recess.

(11) The office will intimate to the appellants' counsel the actual deficit court-fee payable in pursuance of the above order before the Court closes for summer recess. If the appellants in F. A. Nos. 46 and 47 do not want to take the risk and want to pay court-fee on the footing of relief for possession also, they will be permitted to do so, but within the time above fixed after necessary amendments.

(12) After the deficit court-fees in Apps. 46 and 47 are paid and the appeals are admitted, the question as to whether the respondent therein who is the plaintiff in T. S. No. 10/39 is to be called upon to pay deficit court-fee on his plaint and given an opportunity to prove the valuation will be considered by the Registrar in due course.

D. H. *Order accordingly.*

A. I. R. (38) 1951 ORISSA 153 (C. N. 43)

SPECIAL BENCH

JAGANNADHADAS, PANIGRAHI AND NARASIMHAM JJ.

Abdul Hamid, Appellant v. Bora Tataya and others, Respondents.

Second Appeal No 105 of 1948, D/- 3-11-1950.

(a) Tenancy Laws — Orissa Tenancy Act II (2) of 1913, S. 236 — Dar-Chandnadari right — Transferability.

(Per Das and Narasimham JJ, Panigrahi J. Contra) — Apart from proof of custom in any particular case a 'Dar-Chandnadari' right is not transferable and there is no general and well-recognised custom in this behalf. *(Para 3)*

(b) Interpretation of Statutes — Retrospective operation.

Per Das J. — Every Act is 'prima facie' prospective in its operation, and unless the language used by the Legislature is clear and unequivocal, retrospective operation is not to be inferred. *(Para 8)*

Anno: C. P. C., Pre. N. 3.

(c) Interpretation of Statutes — Retrospective operation — Remedial Statute.

Per Das J. — The principle that a remedial Statute must be construed so as to advance the

purpose of the Act and to suppress the mischief intended to be prevented thereby can be invoked for retrospective operation only when the language is reasonably susceptible of the same. (Para 9)

Anno: C. P. C., Pre. N. 3.

(d) Tenancy Laws — Orissa Tenancy (Amendment) Act X (10) of 1946, S. 3.

(Per Das and Narsimham JJ, Panigrahi J. Contra) — Section 3 has no retrospective operation. (Para 9)

(e) Tenancy Laws — Orissa Tenancy (Amendment) Act X (10) of 1946, S. 4 — Scope of — Retrospective operation.

(Per Das and Narasimham JJ., Panigrahi J. Contra) — The effect of S. 4 is to give retrospective operation only from the moment of the institution of the suit as regards pending suits for ejectment against tenants, and not to attach all the incidents of an occupancy right to such a tenant from any prior point of time.

Where a Dar-Chandnadar transfers his homestead land with the superstructure before the coming into force of the Amendment Act, the transfer itself not being valid and binding against the Chandnadar the transferee cannot be said to be a 'tenant' within the meaning of S. 4 on the date of the institution of the suit. (Para 10)

(f) Tenancy Laws — Orissa Tenancy (Amendment) Act X (10) of 1946, S. 4 — Scope of.

Per Das, J. — There is no warrant for reading S. 4 as though it said not that the Act was to be taken to be in force from the time of the institution of the suit, but that the issues in suit were to be disposed of on the footing that the tenant always had all the incidents of an occupancy raiyat (Para 10)

(g) Tenancy Laws — Orissa Tenancy (Amendment) Act X (10) of 1946, S. 3 — Scope of — Retrospective operation.

(Per Das, J. and Narasimham JJ, Panigrahi J. Contra) — Even in a case where the intention of the Legislature may have been to explain the pre-existing law, that intention, to make it retrospective, must be expressed in clear and apt language to bring about that result. In S. 3 not only is there no such language, but there was no scope for any ambiguity as to what the previous law was which required to be cleared up by a declaratory Act. (Para 8)

(h) Tenancy Laws — Orissa Tenancy (Amendment) Act X (10) of 1946, Ss. 3, 4 — Applicability of Act to Dar-Chandna lease — T. P. Act (1882), S. 117.

(Obiter — Per Das and Narasimham JJ; Panigrahi J. Contra); If a tenancy including a Dar-Chandna lease is for a residential purpose, it cannot attract the applicability of the Amending Act X (10) of 1946, but must be regulated by the T. P. Act.

Even if the Legislature in amending S. 236, Orissa Tenancy Act purported to include leases of non-agricultural lands the Amending Acts X (10) of 1946 and XXXII (32) of 1947 cannot prevail over the provisions of Chap. V, T. P. Act so far as leases for non-agricultural purposes are concerned since the Amending Acts did not receive the assent of the Governor-General. (Para 13)

Anno: T. P. Act, S. 117 N. 2, 3.

P. Sen and L. K. Dasgupta, for Appellant — N. Mukherji, for Respondents.

DAS, J: Defendant 1 is the applt in this 2nd appeal. The appeal arises out of a suit for ejectment filed by the pltf against defts 1 and 2 in respect of a homestead land, .015 acre in extent and appertaining to plot 236 in Cuttack town. Plot 236 out of which the suit-plot has been carved out is a homestead plot in respect of which the pltfs have been recorded in the settlement records as Chandnadars. Deft 2 obtained a lease of the suit-plot from the pltfs and has been in possession thereof for a considerable period of time, for over 20 years according to the pltf, but according to deft for over 40 years. Deft 2 had admittedly erected a house on it & has been recorded in the current settlement record-of-rights as a Dar-Chandnadar. On 30-6-45, deft 2 sold the land with the superstructure thereon to deft 1. Pltf accordingly filed the suit for ejectment against both defts 1 & 2 on 5-9-45. It is the pltf's case that deft 2 was a mere tenant-at-will under him, & that he had no right to make any transfer without his consent. Such consent for the transfer in favour of deft 2 not having been obtained, he was entitled to evict the defts & re-enter on the land. Deft 2 was 'ex parte'. Deft 1 alleged that deft 2 was not a mere tenant-at-will under the pltf, but that he was a permanent tenant or acquired permanency rights. He denied that deft 2's rights were not transferable without the consent of the pltf. The Cts below have concurrently held that the pltf is entitled to a decree for ejectment. Hence the 2nd appeal by deft 1.

(2) In the trial Ct, the contesting deft set up that deft 2 was admitted to the tenancy under a document giving him a permanent right of occupancy & also alleged that the ejectment suit was not maintainable as there was no proper notice to quit. The alleged written lease was found against & the notice to quit has been found to be sufficient in law. These questions have not been reagitated before us, but it is necessary to note that the deft has not set up the existence of any custom by which deft 2 had permanency rights in his tenancy or a right to transfer his interest in the land without the consent of the pltf. The lower appellate Ct in confirming the decree granted by the trial Ct, stated as follows:

"A Dar-Chandnadar is a mere tenant-at-will and it is the settled principle of law that a Dar-Chandnadari right is not either transferable or heritable".

& based its decision on this view of the law. The point raised in this appeal is that this assumption of the learned Judge is erroneous & that in any case the Orissa Tenancy Amendment Act of 1946, i.e., Act X (10) of 1946 which came into force when that appeal was pending taken with the Orissa Act XXXII (32) of 1947 has made a change of the Law in this respect & that the lower appellate Ct has not noticed this change.

(3) In 'Dulai Dei v. Chema Das', S. A. 156/37 (8 Cut. L. Notes 6), his Lordship Fazl Ali J. stated as follows:

"It is now well-settled that a Chandnadar himself has only a non-transferable interest & it follows that a Dar-Chandnadar also cannot transfer his right".

This appears to justify fully the assumption made by the learned Judge of the lower appellate Ct in the passage above extracted from his judgment. It is true that there is no discussion of this question in the judgment of Fazl Ali, J., but this was so presumably because the legal position was considered so well established that it could not admit of a contrary argument. It has no doubt been held in 'Johabaj Khan v. Sri Krishna De', A I R (23) 1936 Pat, 29: (15 Pat 187 F B) that the burden lies upon the landlord to prove usage or custom in proof of his right to eject a Chandnadari tenant if he wants to maintain ejectment against him. But so far as transferability of the Chandnadari right or the Dar-Chandnadari right is concerned, no case has been brought to my notice which conflicts with the view above stated by his Lordship as being the settled law. On the other hand, cases in 'Chintamani Raut v. Sri Ram Chandrakar', A I R (21) 1934 Pat 422: (149 I C 805); 'Mt Haliman Bibi v. Mohd. Tajamul Hussain', A I R (26) 1939 Pat 504: (185 I C 250) and 'Safiruddin v. Tarak Nath', A I R (36) 1949 Pat 180: (14 Cut L T 12) establish the correctness of the proposition so far as the Chandnadars are concerned, & it would follow 'prima facie' that the same is the law as regards Dar-Chandnadars who are merely under-tenants of Chandnadars. In fact, & in fairness to Mr. Das Gupta, learned counsel for the applt, it must be said that he did not seriously maintain that, apart from proof of custom in any particular case, there are any reported decisions showing that a Chandnadari or Dar-Chandnadari right is transferable or that there is any general & well-recognised custom in this behalf.

(4) What however is maintained seriously is that the two Acts above mentioned have made a change. There can be no doubt that so far as the Chandnadar is concerned, the law has made a change. There appears to have been some doubt as to the effect of Orissa Act X (10) of 1946 in relation to its application to the case of a Chandnadar. In 'Safiuddin v. Tarak Nath', A I R (36) 1949 Pat 180: (14 Cut L T 12). Iyer J. appears to have held that Act X (10) of 1946 did not make any change as regards the transferability of the holding by a Chandnadar which in his opinion, still continued to be regulated by local custom & usage under S. 236, Orissa Tenancy Act. It is in view of this decision, that Act XXXII (32) of 1947 appears to have been passed making the 1946 amendment specifically applicable to Chandnadars with retrospective operation from the commencement of 1946 Act.

(5) Appellant's counsel contends that amending Act of 1946 renders the Dar-Chandnadari right in the homestead also transferable & that the effect of the 1946 Act is to confer the transferability retrospectively both in respect of the Chandnadars & Dar-Chandnadars. It has to be noticed that 1946 Act itself came into operation on 20-11-1946, that is, after the disposal of the present suit by the trial Ct and also that the transfer in favour of deft 2 was more than 2 months, prior to the institution of the suit itself. The two questions that arise for consideration are (1) whether the Orissa Act X (10) of 1946 is retrospective in operation & if so to what extent; (2) whether the Act applies to a Dar-Chandnadar.

(6) It is contended that S. 3, Orissa Tenancy Amendment Act of 1946, which is the operative section, applies to every person who is a "tenant" falling within the definition thereof of the Orissa Tenancy Act & that a Dar-Chandnadar falls within the definition & gets the benefit of the Amendment Act. This is the question raised in point 2 above which I shall deal with later.

(7) For the purpose of consideration of point 1, I shall assume, without deciding, that a Dar-Chandnadar is a tenant within the meaning of the Orissa Tenancy Act. It is contended that deft 2 who is recorded as a Dar-Chandnadar is entitled to the benefits of the Act & that therefore the transfer by him in favour of deft 1 is a valid transfer & makes him also a Dar-Chandnadar entitled to the benefits of the Act. In view of the fact that the transfer by deft 2 to deft 1 was as stated above, prior to the coming into force of the amendment Act of 1946, it is clear that deft 1 cannot get the benefit of the Act in any case, unless it is retrospective in operation. The argument about retrospectivity, therefore, is pressed & is put in two ways. (a) It is said that S. 3 is declaratory in character & therefore retrospective; (b) It is said that since S. 4 applies to all pending proceedings, deft 2, & therefore deft 1, come within the purview of the same.

(8) Section 3, Orissa Act X (10) of 1946 is in the following terms:

"For sub-s. (1) of S. 236, Orissa Tenancy Act, 1913 the following sub-section shall be substituted, namely: Notwithstanding anything in this Act the incidents of tenancy of any tenant, including the holder of a service tenure, in respect of the homestead in which such tenant ordinarily resides, shall be regulated by the provisions of this Act, applicable to land held by an occupancy raiyat".

Section 236 (1) as it previously stood was:

"When a raiyat holds his homestead otherwise than as a part of his holding as a raiyat, the incidents of his tenancy of his homestead shall be regulated by local custom, or usage & subject to local custom or usage, by the provisions of this Act applicable to lands held by a raiyat".

The argument is that since the section comes in by way of substitution for a pre-existing section of the Orissa Tenancy Act of 1913, it must be taken as though it was part of the Orissa Tenancy Act of 1913, from its commencement & was meant to be declaratory of the law in this behalf from the outset. To enforce this argument, stress is laid upon the use of the phrase "incidents of tenancy.....shall be regulated by the provisions of this Act", etc, which, it is said, means that it shall be taken as though those incidents had always attached to it. It appears to me that this argument is untenable. The Act itself purports to be an amending Act as recited in the preamble: "Where as it is expedient to amend the Orissa Tenancy Act, 1913, in the manner hereinafter appearing". Further S. 3 says "shall be substituted" & does not say "shall be deemed to have been always substituted". For instance, when this Amending Act of 1946 was further amended by Act XXXII (32) of 1947, & was

intended to give retrospective operation from the date of the prior Act of 1946, the wording used is:

"for sub-s. (2), the following sub-section shall be substituted & shall be deemed always to have been substituted".

Clearly the Orissa Legislature was using an appropriate & unambiguous set of words when it meant to convey the idea of retrospective operation. The inference is implicit that when those or similar words were not used, no retrospective operation was meant. It is a well-established canon of construction that every Act is 'prima facie' prospective in its operation, & that unless the language used by the Legislature is clear & unequivocal, retrospective operation is not to be inferred. This proposition has been clearly laid down by the House of Lords in 'James Gardner v. Edward A Lucas', (1878) 3 A C 582. It has been urged that the section is & was intended to be declaratory & that therefore it must be taken to be retrospective in operation. It appears to me that there is absolutely no foundation for this suggestion. It does sometimes happen that if the Legislature meant to convey a particular meaning by the use of particular language & the Cts have construed it differently or a conflict has arisen with reference to the interpretation thereof, the Legislature intervenes by a subsequent enactment to explain or declare what it meant to be the law. There may be room for contention in such cases that the fresh enactment is declaratory & is meant to be retrospective. But even in such cases the retrospective operation is not a matter of course, but is one to be gathered from the clear wording of the amending Act. For instance, the P. C. in 'Shamu Patter v. Abdul Kadir', 35 Mad 607: (39 I A 218 P C) (reiterated in 'Mt. Hirabibi v. Ram Harilal', 5 Pat 58: (A I R (12) 1925 P C 203) construed the word "attestor" in T. P. Act to be a person who was present at the time of the execution & saw the executant signing. The Legislature amended the T. P. Act by introducing a definition of the word "attest" into it, by Act XXVII (27) of 1926 which purported to be 'explanatory' of the meaning of the word "attest" & defined the word "attest" as meaning something different from what the P. C. laid down. This was held by the Cts not to be enough to give retrospective operation to the meaning of the word "attest" (See 'Netra v. Sajer Pramanik', A I R (14) 1927 Cal 763: (55 Cal 67) & the Legislature consequently once again came up with a further amendment by Act X (10) of 1927 whereby it said that the word "attest" means & "shall be deemed always to have meant" in the particular way. It is therefore clear that even in a case where the intention of the Legislature may have been to explain the pre-existing law, that intention, to make it retrospective, must be expressed in clear & apt language to bring about that result. In the present case, however, not only is there no such language, but there was no scope for any ambiguity as to what the previous law was which required to be cleared up by a declaratory Act. The previous law under S. 236 (1) as it stood was very clear, without ambiguity & applied only to raiyats, but the substituted sub-section applies to tenants, a wholly different and enlarged category. There was no previous recognition of any customary law in this behalf applicable to all classes of tenants, & indeed the law appears to have been clear the other way.

(9) It has been strenuously argued that the Amending Act is of a remedial nature, that the Legislature was anxious to protect the position of all agricultural tenants in relation to their homestead & that being a remedial statute, full effect must be given to it by giving retrospective operation. I am unable, with respect, to follow this argument. It may be perfectly true that the Legislature wanted to protect the tenants with respect to their homestead by giving them larger rights, but it does not follow that it intended to change the situation retrospectively. The principle that a remedial statute must be construed as to advance the purpose of the Act & to suppress the mischief intended to be prevented thereby, is a well-known principle, but can be invoked for retrospective operation only when the language is reasonably susceptible of the same. I am not aware of any principle laying down that merely because a statute is remedial, it must 'prima facie' be presumed to be retrospective irrespective of the language used. For instance, as pointed out at p. 196 of "Maxwell on Interpretation of Statutes" 8th Edn. the Wine & Beer House Amendment Act of 1817 which enacted that

"every person convicted of felony should for ever be disqualified from selling spirits by retail & that if any such person should take or has taken out a licence for that purpose, it should be void",

was held to include a man who had been convicted of felony before & had obtained a licence after the Act was passed, relying on the principle of construction in favour of advancing the remedy & suppressing the mischief. But this construction was possible only because the phrase "convicted of felony" might equally apply to a future conviction as well to a past conviction. It is, therefore, clear to my mind that since there is nothing in the language of S. 3, Amending Act, which is ambiguous or comprehensive enough to bring about the past operativeness of the benefits of the Act to all classes of tenants there can be no justification for construing S. 3 as having retrospective operation. This conclusion to my mind is strengthened by the fact that the Amending Act itself has in terms prescribed & provided for a limited retrospective operation as regards pending proceedings by S. 4.

(10) The question has therefore next to be considered as to what is the effect of S. 4 & whether that can be evoked in aid of deft 1 in this case to protect him from ejectment. Section 4, Orissa Act X (10) of 1946 runs as follows:

"Any suit for the ejectment of any tenant, including the holder of a service tenure, instituted before the commencement of this Act, or any execution proceeding arising therefrom, shall be disposed of as if S. 236, Orissa Tenancy Act, 1913 as amended, by this Act, had been in force at the time of the institution of the said suit in the Ct of the first instance".

The argument was that in respect of pending suits, the benefit of the Act is given to the tenant, though the Act was not in force by the date of the institution of the suit. It is argued

therefore that as a result of it deft 2 is to be treated as an occupancy raiyat & that it follows that deft 1 who derives title by a transfer under him must also be treated as an occupancy raiyat not liable to ejectment. It may be conceded at once that if the ejectment suit were only against deft 2 & if it appeared on the facts that deft 2 was ordinarily a resident in the suit homestead by the date of the institution of the suit, S 4 would clearly protect him from ejectment. But that question does not require consideration now, since the trial Ct passed a decree for ejectment against both the defts & there has been no appeal therefrom by deft 2 either in the lower appellate Ct or here. The decree for ejectment having become final as against him, the question as to whether that decree is correct, does not call for any consideration or for fresh investigation of facts so far as he is concerned . So far however as deft 1 is concerned, the flaw in the applt's argument is the untenable assumption that because deft 2 would not have been liable for ejectment by virtue of S. 4, deft 1 who purports to derive title from him would also not be liable for ejectment. This however, depends upon whether deft 1 can also be said to be a "tenant" within the meaning of S. 4 by the date of the institution of the suit. That would be so only if the transfer, under which he claims, of the date 30-6-45 long prior to the coming into force of the Amending Act of 1946 & some months prior to the institution of the present suit, can be said to be valid so as to have vested legally the Dar-Chandna right in him as against the pltf-Chandnadar. It appears to me to be clear that S. 4 cannot have that effect. The effect of S. 4 is to give retrospective operation only from the moment of the institution of the suit as regards pending suits for ejectment against tenants, & not to attach all the incidents of an occupancy right to such a tenant from any prior point of time. Learned counsel for the applt points out and stresses that the section says:

"the suit shall be disposed of as if S. 236 as amended had been in force at the time of the institution of the suit."

He points out that by the use of the phrase "had been in force" the retrospective operation is not intended to commence from the point of time when the suit was instituted, but from such earlier point of time as may be necessary for the disposal of any relevant issue arising in the case. He urges that so taken, since one of the issues arising in the case is whether the transfer by deft 1 to deft 2 is valid the retrospective operation is available for the decision of that issue also. It appears to me that this argument, though ingenious, cannot be upheld. The use of the past perfect "had been" instead of the past tense "was" is easily explicable in view of the fact that in relation to the disposal of the suit, the section contemplates past events namely, the coming into force of the Act & the institution of the suit. It may also have been thought necessary to provide for the difficulties of construction that might arise if both the past events were stated to be simultaneous occurrences giving rise to difficult questions as to whether, if the operation of the Act was simultaneous with the institution of the suit, it could be said that the Act was ineffective prior to operation so as to govern the suit. It appears to me therefore that there is no warrant for reading S. 4 as though it said not that the Act was to be taken to be in force from the time of the institution of the suit, but that the issues in the suit were to be disposed of on the footing that the tenant always had all the incidents of an occupancy raiyat. The anomaly of such a construction would be patent if a case is assumed, where, as in this very case, a transfer had been made prior to the coming into force of the Act, but no suit had been filed at all for ejectment until after 1947. It is obvious that S. 4 could not possibly be made to apply to such a subsequent suit and accordingly the transferee in that hypothetical case cannot be protected from ejectment. There can absolutely be no reason for this distinction. It would mean that if the landlord was diligent he is to suffer, but that if he was lax, he was to get an advantage. It is, therefore, clear to my mind that S. 4 cannot bear the interpretation that the learned counsel sought to put on it, neither can it be said that deft 1 can by any stretch of imagination be said to fill the category connoted by the word "tenant" in S. 4 on the date of the institution of the suit, since the transfer itself when made, cannot be said to be valid & binding as against the pltf landlord.

(11) It is next argued for the applt that whatever the anomaly of the above construction the effect of S. 4 in respect of pending suits would be to validate a prior transfer in another view of the matter. It is pointed out that under the section

"pending suits should be disposed of as if the amended S. 236 had been in force at the time of the institution of the suit".

Even conceding that this indicates a point of time almost simultaneous with the institution of the suit, it would follow from S. 3, Orissa Act X (10) of 1946 that the "incidents of tenancy" attach to the holding in the hands of deft 2. It has been suggested that the reference in the section by use of the phrase "incidents of the tenancy" must have been to the group of Ss. 27 to 31 (B), Orissa Tenancy Act, all of which appear under the heading "Incidents Of Occupancy Right". It is therefore urged that S. 31 (B), Orissa Tenancy Act which relates to pre-amendment transfers is thereby attracted. This again, is an ingenious argument, but without any susbtance. Apart from the very doubtful question whether "the incidents of tenancy" which are to be regulated by the provisions applicable to an occupancy raiyat connote the whole group of Ss. 27 to 31 (B), it is clear that the phrase "shall be regulated" shows that only such of them as can be made applicable shall apply. A bare reading of S. 31 (B) shows clearly that it cannot be made to apply, because it applies in terms to a transfer of an occupancy holding made before the commencement of the Orissa Tenancy Amendment Act of 1938 which is not the present case. I have therefore no hesitation in coming to the conclusion that no provision of the Orissa Tenancy Amendment Act of 1946 can be invoked for the benefit of deft applt in this case.

(12) This is enough to dispose of the appeal & to entail its dismissal. It is, therefore, not necessary to express any final opinion on the larger question that has been raised before us,

namely, whether the word "tenant" in the Amendment Act of 1946 includes a Dar-Chandnadar and whether the benefits of the Act can be extended to him.

(13) Since, however, that question has been mooted before us, I shall very briefly deal with the matter. The word "tenant" has been defined in the Orissa Tenancy Act as meaning

"a person who holds land under another person & is or but for a special contract would be liable to pay rent for that land to that person".

A Dar-Chandnadar who holds homestead land under a Chandnadar on condition of paying rent to him for the same, appears to be comprehended by this definition. No doubt, the various classes of tenants for the purposes of the Act have been specified in S. 4. But it has been held with reference to the corresponding section of the Bengal Tenancy Act that this classification is not exhaustive & that there may be classes of tenants governed by the Tenancy Act and outside these categories, for instance, a tenant of a private land (See 'Janki Singh v. Jagannath Das', AIR (4) 1917 Pat 305: (42 IC 177 FB). But the question still is whether having regard to the scope of the Orissa Tenancy Act, it was meant to apply to a Dar-Chandnadar who is a mere under-tenant of a Chandnadar of a homestead land essentially meant for residential purposes. It has been argued, on the side of the applt, that once a Chandnadar has been given the status of an occupancy raiyat in respect of the homestead, it follows that the under-tenure created by him is regulated by the same incidents & is not in any way affected by the purpose for which the under-tenancy lease is created. In support of this, cases in 'Babu Ram v. Hemendra Nath', 8 CWN 454, & 'Krishna Kanta Ghose v. Jadukasya', 21 CLJ 475: (AIR (3) 1916 Cal 32) have been relied upon. On the other hand it has been urged that those are cases which are specifically covered by S. 182, Bengal Tenancy Act corresponding to S. 236, Orissa Tenancy Act as it stood before the 1946 Amendment. It is urged that the Orissa Tenancy Act applies only to tenancies for agricultural purposes & that where the tenancy is not for agricultural purposes, it is the T. P. Act which must govern the rights of the parties & that therefore such an under-tenant cannot be held to fall within the definition of the word "tenant" in the Orissa Tenancy Act. In support of this position, cases in 'Radhamohan v. Kasinath Das', 1 Cut LT 28 & 'Hadumaharana v. Ram Dulal", 9 Cut LT 27: (AIR (31) 1944 Pat 35) & 'Syed Husain Ali v. Gobinda Lal', 9 Cal WN 141 have been relied upon. See also 'Rakhal Das v. Danomoyi Debi', 16 Cal 652. It appears to me that the question is not altogether free from difficulty. The proposition that the Orissa Tenancy Act applies only to agricultural leases, relying on the decisions under the Bengal Act, is one that can only be accepted with some reservation, because the Orissa Tenancy Act has specifically included Chandnadars within the class of tenants. Though there is no clear definition of the word "Chandnadar" in the Orissa Tenancy Act excepting that it means "persons holding land recorded, as Chandnadar in the course of the settlement",. it would appear from the settlement report of Maddox at p. 222, para 327 that:

"Shopkeepers, artisans & labouring classes having no arable lands in the village but holding only homestead lands and paying rent therefor are called Chandnadars".

Hence Chandnadari tenancy appears to be residential tenancy of the homestead & it may be argued that the Orissa Tenancy Act is not confined to agricultural tenancies. It is possible however that the inclusion of such tenants within the scope of the Orissa Tenancy Act which no doubt is mainly concerned with cultivating tenancies, as appears from the definition of words "tenure-holders & raiyats" may have been justified on the ground that such persons were an essential & component part of the agricultural economy of the village. It may be therefore debatable whether the somewhat wide definition of the word "tenant" in the Tenancy Act should be held also to include merely residential under-tenancies of homestead lands unless the Act definitely says so. In this context, it would be relevant to notice that by virtue of S. 117, T. P. Act, leases for agricultural purposes are exempted from the operation of the said Act implying thereby that unless the lease is for agricultural purposes, T. P. Act would govern. While it may be that a Chandna lease may be held not to be governed by the T. P. Act, by virtue of the specific inclusion of it under the Orissa Tenancy Act the validity of which has not been challenged, it may be questioned whether a Dar-Chandna lease is to be held to fall outside the T. P. Act as a matter of course. Whether the Dar-Chandnadari-under-tenancy is to be regulated by the T. P. Act or the Orissa Tenancy Act may be a question of fact to be determined in each case having regard to the essential purpose of the particular underlease. The fact that a settlement officer has recorded a particular holding as Dar-Chandna holding in a settlement may, if at all, be some evidence in this connection that it was meant to be agricultural. It would not probably be entitled, however, to any statutory weight since under S. 113, Orissa Tenancy Act, a Dar-Chandnadari right is not one of the items to be recorded by a settlement officer. The use of the terms "Dar-Chandnadari" appears to have come into vogue during the current settlement operations (1922-32), see 'Dalziel Report', P 44, & the difficulty of dealing with non-agricultural residential leases or underleases as within the purview of settlement operations appears from a perusal of the said report, p. 159 & Pp 22, 23. It appears to me, however, that if a tenancy including a Dar-Chandna lease is clearly for a residential purpose, it cannot attract the applicability of the Amending Act X (10) of 1946, but must be regulated by the T. P. Act, since the Amending Act has not received the assent of the Governor-General & in a conflict between the two Acts, the Central Act must prevail, in the absence of the assent of the Governor-General. (See S. 107, Govt of India Act, 1935). But in view of the opinion that I have come to on the question of the retrospective operation of the Amending Act of 1946, it is, as already stated, unnecessary for me to express any final opinion on this matter.

(14) In the result, therefore ,the appeal must be dismissed with costs.

(15) PANIGRAHI J : This appeal arises out of a suit in ejectment filed by resps 1 to 3 against the applt & resp 4 who were respectively defts 1 & 2 in the suit.

(16) The pltfs are the chandnadars of a holding measuring .015 of an acre in plot 236 of Bakhrabad in Cuttack town, appertaining to touzi 2498 of which the proprietor is one Ganeshlal Pandit. The pltfs were recorded at the last settlement as raiyat in respect of three plots belonging to this touzi & as 'Madhyasatvadhikaris' in respect of 10 plots — the suit plot being one of them which were actually in the occupation of other raiyats. The first 3 plots were recorded in the name of the pltfs as 'Nijdakhal' & the other 10 were recorded as 'Praja Dakhal' — Ex. 5. The status of deft 2 was recorded in khatian 1098 as 'Dar-Chandnadar' while that of the pltfs was recorded as 'Madhyasatvadhikari'. The annual rent for the holding in the occupation of deft 2 was Re. 1/- before the settlement, but it was enhanced at the settlement to Rs. 1-8-0, the rent being payable on the 30th of Aswin every year — Ex. B. The status of deft 2, as 'Dar-Chandnadari' is also recorded in the khewat of the holder of the touzi in respect of this holding — Ex. 5/a. Defendant 2 was in possession of the plot & had put up a dwelling house thereon for at least 20 yrs according to the pltfs, & for over 40 yrs according to the defts. Deft 2 sold the house on 30-6-45 by a registered sale deed (Ex. A) to deft 1. The pltfs thereupon immediately issued a notice to quit on 10-7-45, & filed the suit out of which this appeal arises, on 5-9-45. The 3rd Additional Munsiff granted a decree in favour of the pltfs on 11-9-46 holding that deft 2 had no permanent right in the land & could not, therefore, transfer it to deft 1. Against this decision deft 1 preferred an appeal in the Ct of Dist J, in Munsifi App. No. 207 of 1946, & the learned Judge agreed with the finding of the Munsif and dismissed the appeal on 10-12-47. Hence this 2nd appeal by deft 1.

(17) Both the Cts below have found that the lease in favour of deft 2 being subsequent to the passing of the T. P. Act, was void as there was no registered document creating the lease & that the status of deft 2 was therefore that of a tenant-at-will who was liable to be evicted on a mere notice to quit. The appellate Ct also assumed that it is a settled principle of law that a darchandnadari right is neither transferable nor heritable.

(18) During the pendency of the appeal in the Ct of the Dist J the law relating to homesteads underwent a change. The Orissa Tenancy (Amendment) Act 1946 X (10) of 1946 was passed on 20-11-46 &. was later amended by .the Orissa Tenancy Second (Amendment) Act, XXXII (32) of 1947 on 10-12-47. The decision of the appeal depends upon the effect to be given to the Amending Acts passed by Orissa Legislature. It is contended for the applt that (1) a dar-chandnadar is not a mere tenant-at-will & that he has an interest in the property, the other incidents of his tenure being similar to those of a chandnadar himself; & (2) irrespective of the fact whether the interest of a dar-chandnadar was transferable or not before 1946, the Amendment Act X (10) of 1946 confers that right of transferability retrospectively upon the tenant of a homestead such as a dar-chandnadar. It is on the other hand contended for the resps that (i) the Amendment Act X (10) of 1946 in so far as it affects non-agricultural holdings is 'ultra vires' the Provincial Legislature; (ii) the Orissa Tenancy Act does not govern leases of homesteads not connected with agriculture; & (iii) the Amendment Act X (10) of 1946 is not retrospective.

(19) The law relating to the homestead of a raiyat holding it otherwise than as a part of his agricultural holding is laid down in S. 256 (1) (sic), Orissa Tenancy Act. The incidents of such tenancy are declared to be regulated by custom or usage, & where no such custom or usage is established, by the provisions of the Act applicable to lands held by a raiyat. Sub-section (2) of S. 236 similarly declares the law applicable to the class of tenants known as chandnadars who were in occupation of homestead lands & had put up dwelling houses thereon. This class of tenants had nothing to do with agriculture & consisted mostly of shop-keepers, artisans, tradesmen, & the like. The Orissa Tenancy Act treated them as tenants & put them on the same footing as agricultural tenants in 1913 as, it is said, they formed an integral part of the agricultural economy of the village.

(20) In order to appreciate the merits of the rival contentions it is necessary to ascertain the existing law which was sought to be 'amended' & to see how the Legislature did it. Chandna holdings had been in existence long prior to the first Provincial Settlement of the Province & their status is to be determined by the land laws then in force in the Province. Regulation 44 of 1793 which applied to a few parganas in the Orissa Division, exempted from its operation the grant of leases of pattas for periods exceeding 10 years for the erection of dwelling houses or buildings though, in respect of leases of other lands, the proprietor was prohibited. Bengal Act X (10) of 1859 which conferred the right of occupancy on every raiyat who held land for a period of 12 yrs, did not define the word 'raiyat'. Bengal Act XI (11) of 1856 (Sale of Land for Arrears of Land Revenue Act) exempted the vesting of leases of lands, whereon dwelling house had been erected, in the purchaser of an estate, whether permanently settled or not, by Ss 37 & 52 of that Act. Section 52 says that the purchaser of an estate not permanently settled & sold for recovery of arrears of rent due on account of the same, shall

"acquire the estate free of all encumbrances except leases of lands whereon gardens, plantations, tanks, wells, cannals, places of worship, or burying grounds have been made, or wherein mines have been sunk, which leases shall, so long as the land is duly appropriated to such purpose & the stipulated rent paid, continue in force & effect".

When the Bengal Tenancy Act of 1885 was passed tenants were classified as 'tenureholders', 'raiyats' and 'under-raiyats'. The word 'raiyat' was, for the first time, defined as denoting

"primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself or by members of his family etc. etc."

In determining whether a tenant is a raiyat the Ct is to have regard to the local custom & the purpose for which the right of tenancy had been originally acquired. Section 160 (c) protects a lease of land whereon dwelling houses have been erected by declaring it to be a 'protected interest' & the purchaser of the holding sold in execution of a decree for arrears due in respect thereof, acquires the holding subject to the interest defined as "protected interest". Chapter XIV in which S. 160 occurs was extended to Orissa by a Govt. Notn. It would thus appear that leases of land for building houses thereon were one of the 'protected interests' & treated as leases for agricultural purposes. All such lessees were treated as agricultural tenants till the passing of the Orissa Tenancy Act in 1913. But Chap. XV, Bengal Tenancy Act of 1885, dealing with Contract & Custom, had not been extended to Orissa; & Ss 181, 182 & 183 relating to service-tenures ,homesteads & customs were not in force in Orissa till the passing of the Orissa Tenancy Act in 1913.

(21) In the earliest settlement of the Orissa Province between the yrs 1834 & 1843 mention was made of the existence of Chandna holdings. At that settlement, known as the Bhauria settlement, a rent roll for each estate or a portion of the estate was made out, showing in detail the lands held & the rents payable by what were known as thani or resident-raiyats, chandnadars, & all tenure-holders & owners of resumed lands, but giving any a lump sum assessment on lands in occupation of the proprietors or of pahi-raiyats. At the Provincial Settlement an investigation into the existence of all the tenures then prevailing in Orissa was undertaken by Govt & the characteristics of a chandna tenure are described by Maddox in para 327 of his Report, Vol I, at p. 222.

"Shopkeepers, artisans, & labouring classes who, having no arable land in the village pay rent for homesteads only, are called chandinadars and their tenure chandina. Pahi-raiyats also, who having their home in one village, hold also a house or homestead in the other, are sometimes known as 'chandinadars' of the latter village.....The word 'chandina' has come to be used for all homestead land paying rent separately from arable land. At the last settlement chandinadars were given leases securing to them fixity of rent for the term of the settlement, & the incidents of the tenure do not materially differ from those of thani raiyats except that they are governed by the Contract Act & not by Act X (10) of 1859. Chandina tenures have, to a great extent, merged in pahi, &, on the other hand, new chandina tenancies have been recognised, especially in patnas or villages consisting solely of homestead, & in the suburbs of towns".

It will be noticed that no distinction is made between pahi-raiyats and chandnadars or between agricultural holdings & homesteads. The word was used for all kinds of chandnadari tenures & new chandnas consisting solely of homesteads were being created in the suburbs of towns. It may also be noted that the incidents of this tenure were very similar to those of thani raiyats. One of the incidents of thani tenure was that it was not transferable by sale or gift, but in practice it was found that thani was being freely sold both by voluntary & involuntary transfers. There were many cases of thani holdings having been sold by Civil Cts in execution of decrees & the new tenant having been recognised by the zamindar. In case of voluntary sale the zamindar usually demanded rusum. After discussing the rights of thani raiyats Mr. Maddox remarks at p. 218 of his Report as follows:

"In conclusion we may say that thani is now-a-days transferred, but that the zamindar does not record the transferee in his sherista as a thani raiyat without a fee".

Thani raiyats were those who had homes in the village &, from the earliest times, had been conferred protection against ejectment. All those who could prove that they had held thani lands by inheritance or purchase from the holders at the last settlement, were recorded as thani, so that thani lands were sometimes in the possession of non-resident raiyats. In places thani rights had been recognised by the zamindars by allowing their raiyats their homestead free of rent, the rest of their holding being assessed to rent or revenue. The homesteads which were not assessed to rent were known as 'minha' or 'deducted' from the assessed lands. These minha lands were being freely bought & sold by custom; & sometimes the minhas were found in possession of a person possessing no other lands in the village — See p. (sic) of Maddox's Report. The under-tenants of such raiyats & the under-tenants of those under-tenants were all styled under-tenants, with all the rights attaching to that status, by the extension of the application of Chap VII, Bengal Tenancy Act to Orissa. Not only raiyats but the proprietors & the sub-proprietors used to hold their houses free of rent & revenue & their houses & homesteads were known as 'khanabari'. The Orissa Tenancy Act recognised the holders of all these homestead tenancies as a class of tenants governed by the provisions of the Act & defined Chandnadar as

"any person holding land which had been recorded as chandna in the course of a settlement & for which a rent has been fixed for the term of that settlement".

(22) At the settlement of 1922 by Mr. Dalziel homesteads of agriculturists were recorded as stitiban & those of non-agriculturists as chandna if they had been so recorded at the previous settlement or if they were not on lease for a fixed period, or had been described as chandnadar either in a lease or in the landlord's papers. If no such evidence was available they were recorded as pattadars. The homestead of a non-agricluturist in a permanently settled estate was recorded as 'ghar-bari' as the status of chandna could not be given to a tenant in the permanently settled area even when so recorded at the previous settlement, in view of the definition in the Tenancy Act.

"Some chandna holdings were recorded as 'Isthamarari' chandna but the mere fact that the word 'isthamarari' is not found in the entry of a chadnadar's status, should not be taken to imply that he is a mere tenant at will". P. 23 of Mr. Dalziel's Report.) "In recording tenants in the town of Cuttack care was taken to distinguish mere renters of houses from parties who held an interest in the land. The for-

mer who are known as 'bharadars' have not been recorded at all as the record prepared under the Tenancy Act is only concerned with rights in land."

Enquiry during the settlement disclosed that most of the urban tenants were really chandnadars.

"A few tenants, even in the urban area, were found with the status of 'stitiban' & under-tenants in various degrees were recorded as dar-pattadars, dar-dar-pattadars, dar-chandnadars — P. 44 of Dalziel's Report".

Even in the case of leases of town Khasmahal lands transfer of which without the permission of the Collector is expressly prohibited, it was found that transfers were as a matter of fact taking place in evasion of the prohibition. The position of non-agricultural holdings is discussed at para 451 of the Report at p. 156. The Report says:

"It is both (sic) clear that in any area which has not been excluded from the Act, all occupants of land who are 'tenants' under the Act are liable to have their rents settled by the revenue officers. Some tenants in Cuttack town tried to impugn the validity of the settlement of rents of chandnadars and bajiaftidars in the urban area, & referred to H. C. rulings on the point. These rulings, however were under the Bengal Tenancy Act, whereas chandnadars & bajiaftidars are peculiar to Orissa & are specifically recognised by the Orissa Tenancy Act. Moreover, the area in question is temporarily settled. Section 119, Tenancy Act, requires that the rents of all tenants who should be re-settled at the time of re-settlement of revenue & the expression 'all tenants' must include chandnadars & bajiaftidars. Chandnadars are, of course, essentially non-agricultural tenants & bajiaftidars also, by their definition under the Act, are not precluded from being non-agricultural. It is clearly desirable that in temporarily settled areas the revenue authorities at the time of revenue settlement should have power to re-settle rents under their proprietors & some inconvenience is caused by the fact that many tenants in urban areas are pattadars, whose rents cannot be touched by the revenue authorities. From this point of view, it would be convenient if chandna status could be given to all non-agricultural tenants in temporarily settled estates & their rents fixed at the time of revenue settlement.....I think that some sort of chandna status should be open to non-agricultural tenants in the permanently settled estates, as to their counterparts in the temporarily-settled estates ,not of course as implying that the rents should be settled at the time of the revenue settlement, but that they should be recognised as tenants under the Act, & their rents be liable to be dealt with under S. 123".

(23) I have quoted these extracts from Settlement Reports in order to show that lease of homestead lands, both in urban & rural areas was a fairly common practice & that the tenants of homestead lands were a special class, treated as agricultural tenants by the Orissa Tenancy Act, irrespective of whether such tenants held their homesteads as raiyats or otherwise. These tenants in their turn, created under-tenants by sub-leasing their homesteads or otherwise parting with a part of their leasehold. It was necessary, as, in fact, it was recommended by the settlement officer, that some sort of chandna status should be given to those tenants so that they may be protected from arbitrary eviction, and their rights in respect of their holdings may be more precisely defined.

(24) On the other hand, there were decisions of the highest Cts regarding the nature of these tenancies which were neither uniform nor consistent. In 'Chintamoni v. Sriram Chandrakar', AIR (21) 1934 Pat 422: (149 IC 805), it was held that a chandna right is not transferable except on proof of local custom or usage. The suit was filed for ejecting a purchaser from a chandnadar & the ground for ejectment was that the chandnadar had abandoned his tenancy. But it was laid down that if the person who has acquired by purchase is described in the Record-of-Rights as a chandnadar, the onus is cast on the person who attempts to eject him, of proving local usage which rebuts the entry in the Record-of-Rights. It would appear therefore that if the Settlement Record registered a transferee from a chandnadar as a chandnadar, the onus would be on the pltf seeking to eject him to rebut the correctness of that entry. In S. A No 156 of 1937 it was assumed that a darchandna is not transferable as a chandna is not. This case has not been reported but a short note of the decision appears in 'Dulai Dei v. Chema Das', the Notes portion of 8 Cut L. T. 6. In 'Surya Mal v. Sriram Naidu', AIR (26) 1939 Pat 158: (180 IC 298), it was held that a darchandnadar is not an under-raiyat within the meaning of the Orissa Tenancy Act. In 'Sarat Chandra v. Jamuna Prasad', AIR (32) 1945 Pat 289: (24 Pat 263), it was held that a suit for rent against a chandnadar would lie in the Revenue Ct only. It would therefore appear that while Govt regarded all persons in occupation of homesteads as 'tenants' within the meaning of the Orissa Tenancy Act & settled their rents accordingly, the course of judicial decisions indicates that the incidents of chandna tenancy were indefinite & precarious. In none of the reported cases was custom or usage proved. The time was ripe for the Legislature to step in in order to define the law applicable to homesteads, and rescue those tenures from the obscurities of custom & usage.

(25) The Legislature therefore amended S. 236 so as to secure all tenants in occupation of homesteads & declared that the incidents of their tenancy shall be 'regulated by the provisions of the Act applicable to occupancy raiyats'. The Legislature thereby engrafted upon existing leases an enactment the object of which was to confer occupancy status on all tenants of homestead & do away with proof of custom. It has to be remembered that in 1938 occupancy holdings had been made transferable by legislation. In Bengal the law had been amended in 1928 by enacting that

"an under-raiyat is not liable to be ejected if he is in possession of his land for a continuous period of 12 yrs, or had a homestead thereon. "See proviso to S. 48 C."

The object of the Orissa Legislature was also to achieve the same result, viz., to prohibit the ejectment of a tenant from a homestead. It is the function of the interpreter to ascertain the legislative intent & see whether the language employed is sufficiently expressive

of it. Sub-section (1) of S. 236 as amended by Act X (10) of 1946 reads as follows:

"(1) Notwithstanding anything in this Act the incidents of tenancy of any tenant, including the holder of a service tenure, in respect of the homestead in which such tenant ordinarily resides, shall be regulated by the provisions of this Act applicable to land held by an occupancy raiyat. Provided that if his homestead is held as a service tenure or part thereof & the holder of such tenure ceases to perform the service, he shall be liable to pay such rent for the occupation of the homestead as may be determined by the Collector on an application filed either by the landlord or by the holder of such tenure".

Explanation: A chandnadar is also a 'tenant within the meaning of this section". Orissa Act XXXII (32) of 1947."

The difference between a 'tenant' & a 'raiyat' is that the former holds lands while the latter holds lands for cultivation. A person who holds land for building houses thereon is therefore a 'tenant' under the Act. The expression 'any tenant' quoted above is a catch-all phrase & takes in all tenants of homestead lands. The incidents of tenancy of such tenants are declared to be regulated by the provisions of the Act applicable to land held by an occupancy raiyat. A phrase may be known by the company it keeps. The expression 'incidents of tenancy' is to be found in the previous Tenancy Acts & in the Settlement Reports. The same expression is used in Chap III dealing with tenures & in Chap V dealing with occupancy-raiyats which is divided into several parts with distinct headings such as 'General' Incidents of Occupancy Right', 'Enhancement of Rent', Reduction of Rent' & 'Commutation'. The fascicule of Ss 27 to 31 B appear under the heading 'Incidents of Occupancy Right' which may be regarded as a preamble to these Sections. Section 30 A which deals with transfer of Occupancy holdings was in force at the time of the amendment of S. 236. On a plain reading of S. 236, therefore, I am of opinion that one of the incidents of tenancy of any tenant in respect of the homestead in which such tenant ordinarily resides, is the incident of transferability conferred by S. 30 A. This right of transfer was, however, expressly negatived in the case of a service tenureholder as S. 235 was amended by the same Amending Act, & the restriction on the right to transfer or bequeath was retained, as before, though the protection against ejectment was conferred by S. 236 (1) by the use of the words "including the holder of a service tenure". The resultant effect of the amendment of these two sections is that any tenant, including the holder of a service tenure, is immune from ejectment from his homestead, & the incidents of his tenancy shall be regulated by the law applicable to an occupancy raiyat. Sections 29 & 57 lay down the grounds on which an occupancy raiyat & an underraiyat respectively may be ejected. A tenant other than a chandnadar or an occupancy raiyat, & some other classes of tenants mentioned in S. 75 could be ejected by a suit for arrears of rent. It was argued that all the provisions applicable to an occupancy raiyat such as enhancement of rent, reduction of rent, communication etc. cannot apply to the tenant of a homestead, & consequently the right of transfer cannot attach to a homestead tenure. That is precisely the reason why the Legislature has deliberately used the expression "Notwithstanding anything in this Act" in the opening portion of the amended S. 236 (1) & also the word "regulate" in delimiting the extent of the applicability of the provisions. To regulate is to adjust; to direct by rule or restriction; to subject to governing principles or laws — (Bouvier). In other words, the tenant & undertenant of a homestead can be ejected hereafter only on grounds on which raiyats & underraiyats could be ejected before the amendment. I am, therefore, unable to accede to this contention & regard the amendment as unworkable.

(26) It was next argued that as a dar-chandnadari right is not transferable, deft 1 cannot be regarded as a tenant, & that as deft 2 had transferred his right to deft 1 before the amendment of S. 236, he ceased to be a tenant, & that therefore both are no better than trespassers. This argument involves a doubtful assumption & a wrong conception.

(27) The assumption that a darchandnadari whether it is so or not would depend upon whether the chandna right itself is transferable or not. It is well settled that the incidents of such subtenancy would depend upon the nature of the original tenancy — See 'Abdul Karim v. Abdul Rahman', 15 C L J 672: (13 I C 364); 'Babu Rama Roy v. Mohendranath', 8 C W N 454; Ramapada v. Atore Dome', A I R (12) 1925 Cal 202: (84 I C 743); 'Krishnakanta v. Jadu Kasya', 28 I C 839: (A I R (3) 1916 Cal 32). An under-tenant of the homestead of a raiyat has therefore been held not liable to be evicted & is protected by S. 236 — 'Kandhuri v. Arjun', 1 Pat 161: (A I R (9) 1922 Pat 416). As early as 1869 Sir Barnes Peacock C. J. held that a tenure granted for building purposes is transferable in the absence of any evidence to the contrary . The learned C. J. observed:

"I know of no law which prohibits a man who gets land for the purpose of building from assigning his interest in it to another. By assigning his interest he does not necessarily get (sic) of his liability to pay rent. The tenant who assigns his interest does not in my opinion commit such forfeiture of his rights as to entitle the lessor to treat such rights as altogether non-existent & to turn him out of possession" — Banee Madhub v. Joykishen, 12 W R 495".

A lease is normally assignable, in the absence of a custom or usage to the contrary. The fact that in ordinary leases of agricultural land the right of occupancy or non-occupancy right is not transferable by law, leads people to believe that leases of homesteads are also non-transferable. Though a chandna holding is treated as a lease for agricultural purposes, the right of a chandnadar to transfer was not specifically provided for by the Orissa Tenancy Act. A chandnadar is defined as including also the successor in interest of such a person. Succession to a person is not the same thing as the successor in interest of that person. The latter expression would include an heir as well as a transferee. I am therefore inclined to think that a chandna right is transferable & a darchandna right is equally so in the absence of proof of a custom or usage or contract to

the contrary. Deft 1 became a tenant by virtue of the assignment in his favour by deft 2. The word 'tenant' is to be understood in its generic sense as including any person who is liable to pay rent & who holds land under another person. This in fact is the definition of the word 'tenant' as given in the Act.

(28) The answer to this argument is also to be found in S. 4 of the Amendment Act X (10) of 1946 which is headed "Application to pending suits & proceedings" & which reads as follows:

"Any suit for the ejectment of any tenant, including the holder of a service-tenure, instituted before the commencement of this Act, or any execution proceeding arising therefrom, shall be disposed of as if S. 236, Orissa Tenancy Act, 1913, as amended by this Act, had been in force at the time of the institution of the said suit in the Ct of the first instance".

This section is retrospective in its operation & affects all pending suits & proceedings in execution. The suit, in the present case, was laid for the ejectment of deft 2 on the ground that he had transferred the holding without the consent of the landlord. Although he had transferred the holding, it cannot be said that he ceased to be a tenant from that very moment, until he was actually evicted in execution of a decree in ejectment his tenancy continues. As a result of the transfer, the privity of estate between him & the landlord is assigned. The transferee becomes liable for the rent by reason of his getting possession of the estate. Section 100, Tenancy Act says that "no tenant shall be ejected from his tenure or holding except in execution of a decree". To regard a tenant who has transferred his holding — assuming it to be non-transferable — as a trespasser from the date of his transfer would be to put restrained construction & the reverse of a liebral one. All that can be said in such a case is that he incurs forfeiture for breach of a condition of the tenancy but if the breach is capable of being remedied the forfeiture can be relieved against. I can find no support either in the T. P. Act or in the Tenancy Act itself for the proposition that the moment the lessee violates a provision of the lease he becomes a trespasser & ceases to be a tenant. I cannot conceive of any suit for ejectment of a tenant unless he has violated some condition of the tenancy. To read the clause "any suit for the ejectment of a tenant" occurring in S. 4 as being applicable only to a person who was a tenant complying with all the conditions of the tenancy would be to confine to the letter of the enactment and not to the spirit, & would be sacrificing good sense to technicality.

(29) The Act, as a whole, is declaratory & remedial. It declares the law applicable to homesteads in S. 3 as the law that was then applicable to occupancy raiyats . It is remedial in the sense that it removes uncertainties in the tenure of homestead tenants & declares the law that has to be applied in future. It does not purport to reopen proceedings that had already been closed but has been specifically made applicable to pending proceedings. It undoubtedly affects the existing rights of persons & is retroactive in its scope. The Act should therefore, be so construed as to extend the provisions to all cases within the reason of the rule. The repeated use of the words 'any tenant' in both S. 3 (sic) leads me to think that the words are large enough to embrace such cases as the present & are within the mischief intended to be dealt with in the Act. It is by no means unusual, in construing a remedial statute, to extend enacting words beyond their natural import & effect in order to include cases within the mischief — See 'Dean and Chapter of York v. Middleborough', (1827) 148 E R 888: (2 Y & J 196). In 'Wright v. Person', (1869) 4 Q B 582: (38 L J Q B 312), a case under the Dogs Act of 1869, the word 'cattle' was interpreted to include horses, pigs & mares as they could also be bitten by dogs. The Act, in my opinion, embraces not only tenants but also their assignees & protects them from eviction provided ejectment has not been carried out & a suit or execution proceeding for such eviction is still pending on the day the Act came into force. Such a provision was necessary to quiet titles which had been made insecure, as a result of diversities in judicial decisions & the changes in law relating to homesteads that were taking place with the growth of the community & its concerns. There is no rule that when a person has commenced an action he has a vested right in the then state of the law — 'Hurst v. Hurst', (1882) 21 Ch D 278: (51 L J C H 729) & 'A. G. v. Thobald', (1890) 24 Q B D 557 at p. 560: (62 L T 768). In 'Quilter v. Mapleson', (1882) 9 Q B D 672: (52 L J Q B 44), relief against forfeiture in an action in ejectment was sanctioned by the Ct of Appeal although, when the action was before the Ct of the first instance ,the new statute had not come into operation. Great weight is to be attached to the fact that the Act was designed to protect the public interest & was remedial in its object. As was observed in 'Pardo v. Bingham', (1869) 4 Ch 735: (20 L T 464), we must look to the general scope and purview of the statute & the remedy sought to be applied, & consider what was the former state of the law & what it was that the Legislature contemplated. But quite apart from interpretation the language of S. 4 clearly affects the existing rights of landlords. It necessarily follows that the existing breaches of covenants & existing obligations incurred thereby are also affected by the Act. If the landlord had the right to eject he cannot enforce it. If deft 1 had committed a breach of any of the covenants of the lease, he does not incur the liability of forfeiture or eviction. The Act applies to leases made before the Act. Can it be said that it does not apply to breaches committed before the Act? It applies to all breaches so long as the landlord has not obtained possession. The Legislature did not want to discriminate between tenants whose rights were under challenge at the time the Act was passed & those whose rights may thereafter be challenged. I see no reason why the interpretation of the Act should be confined to breaches committed after the Act — See 'Raghu Raj Singh v. Harikishen', A I R (31) 1944 P C 35: (I L R (1944) Kar P C 199) and 'Syamakanta v. Ram Bhajan', A I R (26) 1939 F C 74: (I L R (1939) Kar 165). Supposing deft 2 had transferred his interest one day after the Act. He or his assignee would clearly be protected against eviction. If he had done it a day before the Act, could it be said that the Legislature intended to exclude him from the protection? If, again, deft 2 had transferred only a portion

of his interest he would nonetheless continue to be tenant, but according to the argument of the resp if he had transferred the whole of his interest he becomes a trespasser. Section 4 means that all the proceedings which were pending on the day the Act came into operation are to be treated as having been commenced after the Act came into force. That is the only meaning that can be attached to the expression

"as if it had been in force at the time of the institution of the suit in the Ct of the first instance".

The Legislature intended to remove difficulties of proof, no less than to introduce a law intrinsically better. If the pltf had filed his suit one day after the Act, he would be clearly hit by the Act: if he had filed it one day before the Act, S. 4 would apply & he would be equally hit by the Act. The same view has been adopted by D.B. of the Patna H. C. in 'Brajsundar Deb v. Giridhari Behera', 13 Cut L T 66.

(30) It was argued, however, that the Orissa Tenancy Act itself does not apply to a lease like the one which is the subject-matter of the present suit. As I have already pointed out, leases of homestead lands have been a peculiar feature of the tenancy law of Orissa, & the interest created in land on which dwelling houses stand, known as the chandna right, has been the subject-matter of tenancy legislation. Leases of such land are, in my opinion, excluded from the operation of the T. P. Act being leases for an agricultural purpose. Agriculture should not be confounded with cultivation. Land, though not cultivated, may yet be the subject-matter of agriculture when held by a tenant. Such leases may be made orally & in the absence of proof of custom or usage to the contrary, the English rule based on natural justice, equity and good conscience, that every lease is assignable, will apply. I am, therefore, unable to accede to the argument of Mr. Mukherji, learned counsel for the resp, that the Amendment Act X (10) of 1946 is 'ultra vires' the Provincial Legislature as it affects transfer of non-agricultural lands. Learned counsel had ultimately to concede that, having regard to item 21 in the Provincial List of the Government of India Act, the Provincial Legislature was competent to regulate the relations between landlord and tenant and S. 236 did not affect transfer of land as such.

(31) Even if the majority view in this case were to prevail the pltf cannot succeed in the absence of proof of custom or usage that he is entitled to evict. It is the admitted case of both parties that deft 2 could transfer with the consent of the landlord. Whether a violation of this covenant would entail eviction is a matter for proof. The pltfs have adduced no evidence to show that by the mere act of transfer by deft 2, they acquired the right to evict. Irrespective of the provisions of the Amendment Act X (10 of 1946, I am therefore, of the view that the pltf's suit should be dismissed. I would accordingly allow the appeal with costs.

(32) NARASIMHAM J: I have read with great care the judgments of my learned brothers Das J. and Panigrahi J. & I am of the opinion that the appeal must be dismissed with costs.

(33) The dispute here is between the transferee of the Darchandnadar on the one hand & the Chandnadar on the other. The Darchandnadar was also impleaded as deft 2; but he allowed the suit to proceed 'ex parte' & did not contest the judgment of the trial Ct either before the lower appellate Ct or before this Ct in second appeal. Consequently so far as the Darchandnadar is concerned, the decree of the two subordinate Cts is final. It is necessary to emphasise this aspect of the case in dealing with the various questions of law that were argued at great length before us.

(34) The transfer by the Darchandnadar in favour of the applt took place on 30-6-45. As the law then stood, even a Chandnadar had no transferable interest in his chandna holding except by custom (See 'Chintamoni v. Sri Ram Chandra Kar', A I R (21) 1934 Pat 422: (149 I C 805) and 'Mt Haliman Bibi v. Mohd. Tajamul Hussain', A I R (26) 1939 Pat 504: (185 I C 250). The position of a Darchandnadar was no better and in 'Dulai Dei v. Chema Das', S. A. 155/37 (8 Cut L. T., notes 6) Fazl Ali J. (as he then was) pointed out that a Darchandnadar cannot transfer his right. The lower appellate Ct, therefore observed "it is a settled principle of law that a Darchandnadari right is neither transferable nor heritable". In the grounds of appeal before this H. C. this view of the law of the lower appellate Ct was not expressly challenged & the main ground taken was that whatever might have been the law formerly, a Darchandnadar or his transferee could not be evicted from his homestead where he ordinarily resides by virtue of the amendments made to S. 236, Orissa Tenancy Act by Orissa Acts X (10) of 1946 & XXXII (32) of 1947. It may therefore be taken as well established that on 30-6-45 when the Darchandnadar (deft 2) transferred his right to the applt he had no transferable interest in the land & consequently such a transfer would not bind the landlord, namely, the resp Chandnadar who was entitled to treat the transferee as a trespasser & the tenancy land as having been abandoned.

(35) Therefore the sole point for consideration is whether by the two amendments made to S. 236, O. T. Act the applt can claim occupancy rights including the right of non-evictability. For the purpose of the present discussion it may be assumed that the applt ordinarily resides in the disputed land which is admittedly a homestead containing a residential house. The texts of the two amendments made to the O. T. Act in 1946 & 1947 have been quoted in the judgment of my learned brother Das J. & I need not therefore quote them once again. By those amendments the Legislature conferred on any tenant the same rights in that portion of his homestead in which he ordinarily resides as are conferred by the O. T. Act on an occupancy raiyat in his holding. The expression 'tenant' has been defined in S. 3 (23) as below:

" 'tenant' means a person who holds land under another person & is or but for a special contract would be liable to pay rent for that land to that person."

The word 'holds' occurring in that section is very important. Every person whether a trespasser or not in possession of the land belonging to a landlord would not necessarily become his tenant merely because he is willing to pay rent on his part, conveys an idea that there must be either a contract of tenancy, express or implied or relationship of landlord &

tenant brought about by the operation of law. I have already shown that a Darchandnadar had no transferable interest in 1945 in his land & consequently any transfer made by him would not be binding on the landlord who was entitled to treat him as a trespasser. In the present case it is not alleged that the resp landlord gave his consent to the transfer nor is there any material on record for holding that there was any such implied consent by the resp to the applt becoming his tenant. Consequently the transferee of a non-transferable interest cannot by any stretch of imagination be said to 'hold' land under the landlord of the transferor. Therefore the applt not being a 'tenant' within the meaning of the O. T. Act cannot claim the benefit of S. 3, Orissa Tenancy (Amendment) Act, X (10) of 1946.

(36) The next question is regarding the precise extent of the retrospective effect given to the Amending Act X (10) of 1946 by S. 4 of that Act. My learned brother Panigrahi J. seems to have taken the view that that Act is declaratory & remedial in nature & that it should be given full retrospective effect so as to apply to a transfer made by a Darchandnadar prior to the commencement of that Act. He has relied on certain observations contained in Maddox settlement Report at pp 222, 218 & 311 & also on the observations of Mr. Dalziel in his Settlement Report at pp 23, 44 & 159. From these observations he seems to have drawn the inference that all lessees or underlessees of homestead lands whether in urban or rural areas were treated as tenants & that the Settlement authorities recommended that they should be given some sort of chandna status so that they may be protected from arbitrary eviction (para 9 of his judgment). (Para 23 of this report). He had then referred to the various decisions of the Patna H. C. reported in 'Suryamal v. Sriram Naidu', A I R (26) 1939 Pat 158: (180 I C 298) and 'Sarat Chandra v. Jamuna Prasad', A I R (32) 1945 Pat 289: (24 Pat 263) dealing with nature of chandna tenancies & drawn the inference that those decisions were neither uniform nor consistent. He then concludes:

"It would therefore appear that while Govt regarded all persons in occupation of homesteads as 'tenants' within the meaning of the O. T. Act & settled their rents accordingly, the course of judicial decisions indicates that the incidents of chandna tenancy were indefinite & precarious." (Para 10). (Para 24 of this report).

With great respect I must point out that a close scrutiny of the extracts from the two Settlement Reports would not support the view that the Govt regarded all persons in occupation of homesteads as 'tenants' within the meaning of the O. T. Act. In Dalziel's Settlement Report the position of homestead tenants in urban areas was fully discussed in para 451 at p. 159 & it was recommended that the O. T. Act may be applied to them & chandna status conferred on such tenants. But he was obviously considering the case of tenants under proprietors as will be clear from the following passage:

"It is clearly desirable that in temporarily-settled areas the revenue authorities at the time of revenue settlement should have power to resettle the rents of the 'tenants under the proprietors' & some inconvenience is caused by the fact that many tenants in urban areas are pattadars, whose rents cannot be touched by the revenue authorities."

The words underlined (here in inverted commas) are very significant. The settlement authorities were considering the status of lessees under proprietors in urban areas & they were not at all concerned with under-lessees in general or the limited question which arises in this case, namely, lessees under Chandnadars. The position of a lessee under a Chandnadar was not discussed in any of the Settlement Reports & apart from a mere statement to the effect (at p. 44 of Dalziel's Settlement Report) that they were recorded as Darchandnadar & Dar-darchandnadar there is absolutely no observation about their status or their incidents of tenancy. The observations of Mr. Dalziel at p. 159 have therefore absolutely no bearing on the present case. He was concerned with the position of some homestead tenants in urban areas who were recognised as Chandnadars on the one hand & some other lessees from the proprietors who were recorded as pattadars & who were governed by the T. P. Act. He clearly recognised that even in urban areas the T. P. Act would apply in respect of some homestead leases & he pointed out the confusion that arose by the application of two different Acts to two different types of homestead leases in urban areas.

"By the application of the Act to Cuttack town the statuses in the urban area are somewhat confused. Some tenants are pattadars or lease-holders, governed by the T. P. Act, while others have various statuses under the Tenancy Act — chandnadars, bajiaftidars or settled raiyats".

The report of Mr. Dalziel was submitted to his superior, namely, the Govt & his recommendation about conferment of chandna status to all non-agricultural tenants in temporarily settled estates was based on the fact that the definition of the word 'chandnadar' as given in S. 3 (3) practically left it entirely to the discretion of the Settlement Officer to confer chandna status on any such tenant. Therefore whatever might be the origin of the tenancy, if a Settlement Officer in the course of settlement of revenue, records a person as a chandnadar he gets the chandna status & the Settlement Officer was anxious to justify his action before his superior so that it may not be criticised as being purely arbitrary. But his report has nothing to do with the status of sub-lessees under chandnadars & the Tenancy Act did not confer on a Settlement Officer any discretion to confer chandna status on such sub-lessees.

(37) Similarly the various Patna decisions cited in the judgment of my learned brother Panigrahi J. if carefully scrutinised will show that there was nothing indefinite or precarious as regards the incidents of chandna tenancy. It is true that in 'Chintamoni v. Sriramachandra Kar' A I R (21) 1934 Pat 422: (149 I C 805) & 'Mt. Haliman Bibi v. Mohd. Tajamul Hussain', A I R (26) 1939 Pat 504: (185 I C 250), it was held that a chandna tenancy is not transferable except by custom. But in 'Johabaj v. Sri Krishna', 1936 Pat 29: (15 Pat 187 F B), a Full Bench made it absolutely clear that a chandna tenant was not a mere tenant-

at-will & that if his landlord claimed the right to eject him the burden of proving such right by local usage or custom rested on the landlord & not on the chandna tenant. Thus these decisions recognised some sort of permanent right in a chandnadar and shifted on his landlord the burden of proving the customary right to evict him. Doubtless all the decisions assumed that a chandna tenancy was not transferable except by custom. But this view does not in any way make the incidents of chandna tenancy indefinite or precarious because even occupancy raiyats prior to 1939 had no unrestricted right of transfer. I am therefore unable to understand how it can be held that there was, as it were, a conflict between revenue authorities who wanted to confer permanent status on all tenants of homestead lands & the decisions of the Patna H. C. which made such tenancies indefinite or precarious. The law was well-settled & clear.

(38) When the Legislature passed the Amending Act of 1946 it deliberately changed the law & conferred occupancy rights in the homestead of all tenants under the O. T. Act by S. 3 of that Act. There was no question of passing any declaratory Act with a view to remove any ambiguity as regards the incidents of chandna tenancy as has been thought by my learned brother Panigrahi J. The Legislature fully knew the existing law regarding the rights of a chandna tenant & deliberately made a change affecting vested rights in their future operation & conferring occupancy rights in the homestead of all tenants. This was done in pursuance of a well declared policy & I fail to see how S. 3 of the Amending Act of 1946 can ever be said to be of a declaratory nature so as to have retrospective effect by its own force. On the other hand, as it affects vested rights prima facie, it would be prospective in nature. Doubtless some limited retrospective effect was given to that Act by S. 4 in respect of pending proceedings but the opening words of that section are "in a suit for the ejectment of any 'tenant'.....instituted before the commencement of this Act". The word underlined (here in inverted commas) shows that the limited retrospective effect given by that section was restricted only to those persons who were 'tenants' within the meaning of the O. T. Act at the time of the institution of suits for their ejectment. In the present case the suit was brought on 5-9-45. Deft 1 was then a mere trespasser in the eye of the landlord (pltf) because he was a transferee of a non-transferable holding. It is true that deft 2 was also impleaded as a party in that suit & he being the Darchandnadar of the pltf may under some circumstances claim to be a 'tenant' within the meaning of the O. T. Act. But no relief was claimed against him & in fact he allowed the suit to proceed 'ex parte'. Consequently so far as deft 1 is concerned the suit was against a trespasser & it is difficult to see how S. 4 of Act X (10) of 1946 could help him. In the judgment of my learned brother Panigrahi J. (if I may say so with great respect) the fundamental distinction between a suit brought by a Chandnadar against a Darchandnadar on the one hand & a suit brought by a Chandnadar against a transferee of a Darchandnadar (the transfer having taken place prior to the commencement of Orissa Act X (10) of 1946) has been overlooked.

(39) There is no doubt, as pointed out by my learned brother Das J., that the expression 'tenant' as defined in S. 3 (23), O. T. Act is more comprehensive than the expression 'classes of tenants' which classes have been enumerated in S. 4, O. T. Act. For instance, it may include a 'bhagchasi' of the 'nijchas' or 'nijjot' lands of a proprietor & if such a tenant has his residential house in a small plot of homestead he may get the benefit of the Amending Act of 1946. But a prior transferee of a non-transferable right was & continues to be merely a trespasser. Doubtless after the coming into force of the 1946 Act there can be no question of any non-transferable right so far as the homesteads of the tenants under the O. T. Act are concerned & any transfer made after that date might give the transferee also the same occupancy rights as the transferor was given by that Act. My learned brother Panigrahi J. seems to consider this to be an anomaly (see the last part of para 15 of his judgment, Para 29 of this report). But it is difficult to conceive of any anomaly when an Amending remedial Act confers new rights as respects transfers made after the coming into force of that Act & does not confer such right on transfers which took place prior to its commencement. But in giving retrospective effect to that Act Ct cannot go beyond the limits prescribed by S. 4.

(40) For the purpose of deciding this appeal it is unnecessary to consider whether a Darchandnadar is also a 'tenant' within the meaning of the O. T. Act. But as this question has been argued at great length I think it advisable to give my views. Chandna holdings are undoubtedly non-agricultural holdings as will be clear from a scrutiny of the relevant passages of Maddox's Settlement Report & Dalziel's Settlement Report which have been quoted at some length in the judgment of my learned brother Panigrahi J. But a Chandnadar may sub-let his chandna holding either for agricultural or horticultural purposes or for building purposes. In the former case the Darchandnadar may become a 'tenant' within the meaning of the O. T. Act. But if the Chandnadar sublets his chandna holding or a portion thereof for purely non-agricultural purposes such a Darchandnadar cannot be a 'tenant' within the meaning of the O. T. Act. The reason is obvious. Prior to 1913 most of the provisions of the Bengal Tenancy Act were in force in Orissa & the provisions of the T. P. Act were also in force. Chapter V, T. P. Act while dealing with the law relating to landlord & tenant expressly excluded leases for agricultural purposes from the provisions of that chapter (See S. 117). So far as the Bengal Tenancy Act is concerned, it is now well settled that it does not apply to lands let out for non-agricultural purposes (See 'Judoonath v. Schoene Kilburn & Co', 9 Cal 671: (12 C L R 343); 'Umarao Bibi v. Mohd Rojabi', 27 Cal 205: (4 C W N 76). The O. T. Act which was passed in 1913 is merely a re-enactment of most of the provisions of the Bengal Tenancy Act with slight modifications here & there to suit the peculiar conditions prevailing in Orissa. New classes of tenants such as Chandnadar & Bajiaftidar were undoubtedly included in the O. T. Act & to the limited extent of such inclusion the Orissa Act expressly embraces within its scope purely non-agri-

cultural tenancies. The O. T. Act received the sanction of the Governor-General in Council under S. 5, Indian Councils Act of 1892 & consequently to the extent of the express provisions contained therein it would override the provisions of Chap V, T. P. Act. But there seems to be absolutely no basis for further extending the O. T. Act to leases for non-agricultural purposes. If a Chandnadar sublets his holding for a non-agricultural purpose to a Darchandnadar the relationship between him & the Darchandnadar must be regulated by the T. P. Act in view of S. 117 of that Act. It is true that after the passing of the Government of India Act, 1935 even the Provincial Legislature has the power to make laws regulating leases of non-agricultural lands. This is a subject in the concurrent Legislative List (Item 8 of Part I of List III). But if such a law is inconsistent with any provision of the T. P. Act then unless it is assented to by the Governor-General under S. 107 (2), Government of India Act 1935, it would be void to that extent. In the present case neither the Orissa Act X (10) of 1946 nor the subsequent Amending Act XXXII (32) of 1947 received the assent of the Governor-General. This indicates unmistakably that when the Legislature made the amendments to S. 236, O. T. Act it was confining itself to leases of agricultural land. Even if it purported to include leases of non-agricultural lands the Amending Act cannot prevail over the provisions of Chap. V, T. P. Act so far as leases for non-agricultural purposes are concerned.

(41) Therefore, I would take the view that if a Darchandnadar lease was made for agricultural purposes such a Darchandnadar may be a tenant within the meaning of the O. T. Act but if such lease is purely for non-agricultural purposes the Darchandnadar will not be a tenant under the O. T. Act & consequently will not be entitled to the special protection conferred by the two Amending Acts of 1946 & 1947.

(42) I have already referred to some passages in the judgment of my learned brother Panigrahi J. with which with great respect, I am unable to agree. There are also some other passages with which I am constrained to express dissent though with great respect. In para 14 (Para 28 of this report) he has observed:

"I can find no support either in the T. P. Act or in the Tenancy Act itself for the proposition that the moment the lessee violates a provision of the lease he becomes a trespasser and ceases to be a tenant".

So far as the tenants under the O. T .Act were concerned, there was no doubt about the proposition that if a tenant of a non-transferable holding transfers his holding without the consent of the landlord the transferee is a mere trespasser & the landlord could proceed to take possession of the holding as if it had been abandoned. This proposition was well established by the various decisions under the old Bengal Tenancy Act & the O. T. Act & it is too late to doubt it. It would only quote the observations in 'Chintamoni v. Sriramchandra Kar', AIR (21) 1934 Pat 422: (149 IC 805).

"But in this suit the landlord is not ejecting the chandnadar, but the purchasers who are trespassers. The ground of the suit is that the chandnadar has abandoned his tenancy, & that since his tenancy was not transferable no tenancy now intervenes to prevent the landlord from re-entering into direct occupation of the land".

That the Legislature was fully aware of this right of the landlord to evict the transferee of a non-transferable holding will be clear from a scrutiny of S. 31 B (1), O. T. Act as Amending Act of 1938. Prior to that amendment even occupancy holdings were not freely transferable unless the landlord's consent was obtained by payment of mutation-fee. That Act doubtless abolished the payment of mutation-fee & dispensed with the consent of the landlord. By S. 31 B the Legislature gave retrospective effect to that amendment in respect of unrecognised transfers that had taken place prior to the coming into force of that Act. In sub-s. (1) of S. 31 B the Legislature took away the right of the landlord to eject the pre-1938 transferee on the ground that he had not given his consent to the transfer. The implication of this section is obvious. But for the express provision contained therein the landlord could have successfully instituted a suit for ejecting a pre-1938 transferee on the ground that he had not given his consent to such transfer. Thus apart from judicial decisions, there is a clear statutory recognition of the position that in the eye of a landlord the transferee of a non-transferable tenancy under the O. T. Act is a mere trespasser & the landlord could successfully bring a suit for his eviction unless of course it is barred by express satutory provisions or by custom.

(43) At the end of para 13 (Para 27 of this report) of the judgment of my learned brother Panigrahi J. he has observed:

"A Chandnadar is defined as including also the successor-in-interest of such a person. Succession to a person is not the same thing as the successor-in-interest of that person. The latter expression would include an heir as well as a transferee. I am therefore inclined to think that a chandna right is transferable & a darchandna right is equally so in the absence of proof of a custom or usage or contract to the contrary".

Even if it be assumed that the expression 'successor-in-interest' would include a transferee, the mere definition of a Chandnadar in S. 3 (3) as including his successor-in-interest does not necessarily make such a tenancy transferable. The transferability must depend on the other provisions of the O. T. Act & so far as a Chandnadar is concerned the only other relevant provision is sub-s. (2) of S. 236 which expressly says that incidents of tenancy of a Chandnadar shall be regulated by local custom & usage. My learned brother Panigrahi J. has himself recognised transferability to be an incident of tenancy (Para 11, Para 25 of this report) & consequently the right of a Chandnadar to transfer his holding can arise only by proof of local custom or usage & it cannot be inferred from the definition contained in S. 3 (3). The danger of inferring transferability from the mere fact that the definition of a particular class of tenants is inclusive of his successor-in-interest will be apparent if the definition of the expression 'raiyat' in S. 5 (2), O. T. Act is scrutinised. In that sub-section a raiyat has been defined as including his successor-in-in-

terest. But merely because of this definition it was never contended at any time that a raiyati interest was necessarily transferable. Such transferability was conferred only by the other sections of the Act such as Ss. 30 A & 31. The Legislature found it necessary to insert those sections by the Amending Act of 1938 (Orissa Act VIII (8) of 1938) because prior to the passing of that Act a raiyati interest was not freely transferable notwithstanding the definition given in S. 5 (2). A similar definition of the word 'raiyat' was given in the Bengal Tenancy Act when it was enacted in 1885. But it was never disputed that till the passing of the Amending Act of 1928 & the insertion of new sections (Ss. 26 to 26 J.) to that Act a raiyati interest was not transferable except on proof of custom. I must therefore with great respect, dissent from the view that merely because the definition of a Chandnadar includes his successor-in-interest a chandna tenancy must be held to be transferable.

(44) In para 17 (Para 31 of this report) of his judgment, my learned brother Panigrahi J. seems to have cast on the pltf the burden of proving custom or usage entitling him to evict the applt. There is however no authority for such a proposition. The pltf is the Chandnadar landlord & it is well settled that in any suit brought by a landlord for eviction the burden, in the first instance rests on the landlord to prove his title as landlord but once this is either proved or admitted the burden shifts on the deft to show that his tenancy is not precarious but that it entitles him to continue in occupation. This principle is based on several English decisions & also on 'Nainapillai v. Ramanathan', 47 Mad 337: (A I R (11) 1924 P C 65) which have been referred to in the F. B. decision of the Patna H. C. reported in 'Johabaj Khan v. Sri Krishna De', A I R (23) 1936 Pat 29: (15 Pat 187 F B). In the present case the pltf's position as Chandnadar is unchallenged. The plea taken by deft 1 was that the Darchandnadar (deft 2) had a permanent right by virtue of long possession of over 40 yrs. No question of any transferable right of a Darchandnadar by custom or usage was even alleged. The trial Ct disbelieved the deft's story of possession for more than 40 yrs. The burden of proving non-evictability either on the ground of acquisition of permanent tenancy through possession over a long period or on the ground of custom or usage must obviously lie on the deft. It is true that in 'Johab v. Sri Krishna', 1936 Pat 29: (15 Pat 187 F B), the Full Bench held that so far as chandna tenancy was concerned the burden of proof of custom of evictability would shift on the landlord by virtue of the special implications arising out of S. 74, O. T. Act. But there is absolutely no justification or authority for extending this principle to a Darchandnadar much less to the lessee of a Darchandnadar.

(By the Court): In accordance with the majority view the order of the Ct is that the 2nd appeal is dismissed with costs.

D. H. *Appeal dismissed.*

A. I. R. (38) 1951 ORISSA 168 (C. N. 44)

FULL BENCH

RAY C. J., JAGANNADHADAS AND NARASIMHAM JJ.

Bala Majhi, Appellant v. The State of Orissa, Respondent.

Criminal Appeal No. 26 of 1950, D/- 22-1-1951.

(a) Criminal P. C. (1898), S. 164 — Non-compliance with requirements laid down in I. L. R. 1 Cuttack p. 207 at p. 218 — Effect.

Per Full Bench. — The requirements of I. L. R. 1 Cuttack, p. 207 at p. 218 are not intended to be mandatory statutory requirements the non-observance of which would by itself without more, vitiate the admissibility of a confession. The said requirements are wholesome and valuable principles to be observed by a Mag recording a confession under S. 164, Cr. P. C. and a trial Ct which is called upon to decide whether the confession has been voluntarily made in order that it may be admissible, may consider the omission to put any of the questions indicated in that decision as relevant either on the admissibility of the confession or the weight to be attached to it. Moreover, the model questions suggested in that decision are only illustrative and by no means exhaustive and it is always open to a Mag to put such further questions as the circumstances of each case may require so as to satisfy himself about the voluntariness of the confession. **(Paras 1, 19, 32)**

Anno: Cr. P. C., S. 164, N. 13.

(b) Criminal P. C. (1898), Ss. 164 and 533 — Confession — Mode of recording — Failure to record questions and answers — Effect.

Per Full Bench. — The Mag recording a confession is bound to record every question put by him to the accused and every answer given by the accused to the same in order to satisfy himself that the confession to be made is voluntary. If the questions have been put and answered but no record of it has been made, evidence can be given both of the factum of the questions and answers and of the contents of the same under S. 533, Cr. P. C. If the substance of the actual questions and answers can be supplied by such evidence, that cures the defect completely. **(Paras 1, 21, 22, 32)**

Anno: Cr. P. C., S. 164, N. 11; S. 533, N. 2 and 9.

(c) Criminal P. C. (1898), S. 164 (3) — Substantial non-compliance of — Effect — Evidence Act, (1872), S. 26.

Per Full Bench. — Where the requirements of S. 164 (3) have not been substantially complied with, what purports to be the confessional statement, cannot be treated as a validly recorded confession under S. 164 which could be brought in under S. 26, Evidence Act, and it must, therefore, be disregarded. **(Para 24)**

Where in fact there has been no adequate explanation or questioning by the Mag of the nature prescribed in S. 164 (3) before he starts recording the confession, his record of the confession cannot be said to be in substantial compliance with the requirements of S. 164 (3) and no evidence 'aliunde' that the confession was in fact voluntarily made would be admissible. Such a confession vitiated by substantial non-compliance, with the provisions of S. 164 (3)

is not a valid record of the confession and cannot, therefore, be made use of under S. 26, Evidence Act. There is thus no scope for invoking the aid either of S. 29, Evidence Act or S. 533, Cri. P. C. to cure such defect.

(Paras 1, 26, 32)

Anno: Cr. P. C., S. 164, N. 13, 14 and 15.

(d) Criminal P. C. (1898) Ss. 164 and 533 — Confession — Admissibility — Test — Evidence Act (1872) S. 24.

Dicta (per Ray C. J.). — In considering the admissibility of a confession, there is a simple test which can always be employed. The Ct will address itself to the question "Is it proved affirmatively by the prosecution that the confession was free and voluntary?" that it was not preceded by any inducement, threat, or promise held out by a person in authority; if so, whether the effect of such inducement, threat, or promise had clearly been removed before the statement was made. In that case and that case alone, the evidence of that statement is admissible. The burden of proof always lies upon the prosecution. It is a mistaken notion to hold that confessions are received in evidence or rejected as inadmissible upon consideration whether they are or are not entitled to credit. A free and voluntary confession deserves the highest credit, because it is presumed to flow from the strongest sense of guut. It is, therefore, that a confession forced from the mind by flattery of hope, or torture of fear comes in so questionable shape, when it is to be considered as an evidence of guilt, that no credit ought to be given to it; and, therefore, it is rejected. (Paras 6 and 7)

..Dicta (Per Das J.). — Section 164, Cr. P. C. cannot, be read as though the Magistrate's jurisdiction to record a confession depends on positive proof before him of its voluntary character. The Mag, in the circumstances in which he would at the time be placed, can only make a reasonable enquiry, but must come to a well-grounded belief judicially and on a judicial approach. The Legislature has provided that and alone as sufficient for initial admissibility of a judicial confession trusting to experienced Mag to whom alone the function is by law entrusted to discharge their prescribed duty in this behalf properly and responsibly. But this is not to say that the trial Ct is relieved of its duty under S. 24, Evidence Act to exclude the confession if it finds it irrelevant even after it is allowed to go in under S. 164, Cr P. C.

(Para 35)

Anno: Cr. P. C., S. 533, N. 2; Evi. Act, S. 24, N. 1.

(e) Criminal P. C. (1898) S. 164 — Scope and object.

Dicta (Per Ray C. J.). — The language of S. 164 leaves it optional to the Mag to record the confession or not as he thinks fit; but if he proceeds to record, he is bound to do so in the manner laid down in the section in as faithful a manner as possible so as to guarantee the result aimed at by such record, viz. (i) fidelity of faithful reproduction of the statement, (ii) spontaneity of the making thereof; (iii) awareness in the accused's mind of the risk that he has to incur in case he makes a confessional statement in relation to the charge in which he has been arraigned and lastly, (iv) a sense of safety from the risk, physical or mental, if any, consequent upon his refusal to make one. The intendment of the requirement under S. 164, Cr. P. C. is clearly for the removal of the impressions referred to in S. 24, Evidence Act. (Para 9)

Anno: Cr. P. C., S. 164, N. 2.

(f) Criminal P. C. (1898), S. 533 — "Notwithstanding anything contained in S. 91, Evidence Act."

Dicta (Per Ray C. J.). — Section 533, Cr. P. C. furnishes an exception to S. 91, Evidence Act, in allowing oral evidence to prove that the accused person duly made the statement recorded. The words "duly made" correlates to "duly taken" in the latter part of S. 80, Evidence Act. A confession is presumed under S. 80, to have been duly taken when it appears from the document produced in proof that it was taken in accordance with law. The statement therefore is said to be duly made or duly taken provided the state of things insisted upon in S. 164, Cr. P. C. as conditions precedent and subsequent to its recording was brought into existence; or, in other words, the fit state of the accused's mind was either produced or assured by the questioning. The oral evidence that is permissible in S. 533 is exclusively confined to the proof thereof.

Hence any evidence other than the evidence of strict and substantial compliance with the provisions of S. 164 shall not make the recorded statement admissible in evidence.

(Paras 11 and 12)

Anno: Cr. P. C., S. 533, N. 7.

U. C. Misra, for Applt — Govt Advocate, for Resp; M. S. Mohanty as amicus curide.

RAY, C. J: I have had the opportunity & privilege of reading the judgment prepared by my learned brother Narasimham, J. I am in entire agreement with him as to the answers proposed therein & associate myself with all the reasons adduced in support thereof. I also agree with the order of conviction & sentence proposed.

(2) In view, however, of the practical importance of the question posed to standardisation & stabilisation of this branch of law in this State, I propose to add, as given below, some further reasons for my agreement with him. I have, since, seen the judgment proposed by my learned brother Das, J. He agrees with answers proposed. He, however, has added some further reasons not for the purpose of reinforcing the correctness of the answers but for a different purpose. It seems he should approach the question with a leaning towards admissibility of a confession as a rule leaving it to the accused to be bound thereby to establish the exception by proof of circumstances that would impair its testimonial trustworthiness. This approach, if correct, (with which I do not agree) will seldom make any difference in the practical application thereof, provided the legal safeguards are not disregarded. In criminal law, the accused is entitled to keep mum casting the entire burden on the prosecution to prove his guilt, & that by legally admissible mode of proof. The further reasons that I wish to add will appear from the following paras:

(3) Before grappling with the problem, in its direct bearing on the section, I should like to treat the following as the background in which

the proposition has to be considered. "Judicial confession" have been authoritatively defined to mean "pleas of guilt on arraignment if made freely by a person in a fit state to plead". The emphasis is on the words underlined (here in inverted commas). These epithets refer to the state of mind of the accused.

(4) "Extra-judicial confessions" have also similarly been defined to mean

"a free & voluntary confession of guilt made by a person accused of a crime, in the course of conversation with persons other than a Judge or Mag seised of the charge against him".

"The testimonial trustworthiness of the confession" in one case, or, the other, is based upon the presumption that, as a free agent, no man would make a confession against himself if the facts confessed were not true. The law, in all ages, & all times, makes a discrimination in favour of judicial confessions as against extra-judicial ones. With regard to extra-judiical confessions, Blackstone, J. observed:

"Even in cases of felony at common law, they are the weakest & most suspicious of all testimony, very liable to be obtained by artifice, false hopes, promises of favour, or menaces, seldom remembered accurately, or reported with precision, & incapable in their nature of being disproved by other negative evidence".

In this view of the matter, more reliance has always been placed upon a confession reduced into writing either by the prisoner or by someone else & read over to him if it be clearly shown that the confession was a spontaneous & voluntary act of the prisoner. Such a record of confession is always entitled to great weight & consideration. When a confession is proved by a witness, it rests upon his capability of understanding what was said by the prisoner, his competency to remember the very words used, & his fidelity & accuracy in relating them to Ct, & should all be received with very great caution; because, besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, & the infirmity of memory, it should be borne in mind that the mind of the accused is oppressed by the calamity of his situation & that he is often influenced by motives of hope, or fear to make an untrue confession. It should always be borne in mind that the zeal, which generally prevails to detect offenders, & the strong disposition in the person engaged in the pursuit of evidence to rely on slight grounds of suspicion, all tend to impair the value of such confessions.

(5) Baron Parke said:

"Too great a weight ought not to be attached to evidence of what a party has been supposed to have said; as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say".

The emphasis is upon the words underlined (here in inverted commas).

(6) In considering the admissibility of a confession, there is a simple test which can always be employed. The Ct will address itself to the question "Is it proved affirmatively by the prosecution that the confession was free & voluntary?", that it was not preceded by any inducement, threat ,or promise held out by a person in authority: if so, whether the effect of such inducement, threat, or promise had clearly been removed before the settlement was made. In that case & that case alone, the evidence of that statement is admissible. The burden of proof always lies upon the prosecution.

(7) It is a mistaken notion to hold that confessions are received in evidence or rejected as inadmissible upon consideration whether they are or are not entitled to credit. A free & voluntary confession deserves the highest credit, because it is presumed to flow from the strongest sense of guilt. It is, therefore, that a confession forced from the mind by flattery of hope, or torture of fear comes in so questionable shape, when it is to be considered as an evidence of guilt, that no credit ought to be given to it; &, therefore, it is, rejected. — ('R. V. Warickshall', (1783) I Leach 263: (168 E R (234).

(8) Spontaneity & faithful reproduction are the two vital needs in determination of admissibility of confession, & they have been sufficiently well-impressed upon the statutory provisions in relation to them. Section 24, Evidence Act, rules out confessions caused by inducement, threat, or promise as irrelevant in a Cri proceeding. Section 25 rules it out on the simple ground that it is made to a police officer by a person accused of any offence. The police officer is a person in authority within the meaning of S. 24 & he is the person to whom is attributed the greatest zeal to detect the offence, & who is likely to exaggerate every ground of suspicion into proof. It is not so much from consideration of credit as from consideration of public policy that law declares a confession made to a police officer as irrelevant. Section 26 deals with confession made not to police officer but to any other person including a Mag when made while the person making it is in the custody of a police officer. This provision is based upon a consideration of abundant caution. Its enactment proceeds from a well conjectured suspicion that a confession made in those circumstances if not made in the immediate presence of a Mag, have flowed either from the flattery of hope, or torture of any fear. In such cases, the presumption that a free & voluntary confession flows from the strongest sense of guilt is ruled out. The exceptional factor of the presence of a Mag, while a person confessing is in police custody ,is insisted upon for the reason that it may dispel the extraneous influence that might be otherwise conjectured to haye overcome his mind. This section, at any rate, is clear that it may cover a case of confessional statement being made to a Mag or any other person in the immediate presence of Mag. We are here concerned with a confession made to Mag. Section 26, standing by itself, would not require the Mag referred to therein being one specially authorised in that behalf nor that he should record it. But this section, however, cannot be stripped off from the context of S. 28, which insists upon the freedom of the accused's mind from the impressions caused by any such inducement, threat, or promise, as are referred

to in S. 24. Suppose there is a case in which, a man in police custody making a confession in the immediate presence of a Mag & to the Mag is considered to have been still under the impressions that invalidate a confession within the purview of S. 24; it cannot be held relevant notwithstanding the provisions of S. 28. In Cri P. C., therefore, a machinery has been provided for the recording of such confession by a Mag in a particular manner. To a keen observer, it will be clear that all the requirements, the performance whereof, or the compliance wherewith have been provided for in the matter of recording, are intended to secure (i) spontaneous & voluntary character of the statement, that is, freedom from impressions supposed to have been caused in the prisoner's mind due to inducement, threat, or promise; (ii) faithful recording of the statement actually made by him — in this connection, I should advert to the caution given by some eminent Judges that any unintentional alteration of the words used by the prisoner may make the statement mean variantly from what was actually said; & (iii) that, besides the impressions caused by threat, inducement, or promise from a person in authority, the prisoner should not also be overcome with any influence on his mind flowing from a consideration that he can with immunity make a statement in order to escape from the irksome custody or from the constant annoyance of interrogators or from any other similar cause. Hence the requirement of cautioning the accused before he is asked to make a statement. This cautioning may, be & probably is, a matter of public policy when a man in authority is responsible for taking the confession for the purpose of recording. Section 29 provides that a confession does not become irrelevant merely because, 'inter alia', he was not warned that he was not bound to make such confession & that evidence of it might be given against him. Even if S. 29, Evidence Act & S. 164 Cr. P. C. are deemed to be covering the selfsame field, there is no direct impact of one against the other in relation to this point; but however, the Legislature intends, & that in the plainest possible expression, that when a Mag proceeds to record a confession he must observe this mandatory provision for the purpose of having a valid record.

(9) I consider it a tragic ingenuity that it should at all be advanced seriously as a contention that in view of S. 29, Evidence Act, a Mag can deliberately infract the caution provision in S. 164 & the questioning provision in the selfsame section & leave a bare & nude record for the purpose of being used against the accused as a binding proof of a character deserving the highest credit. A case may happen when an accused is produced before a Mag who may ask him to make his statement & listen to what he says & omit to make a record. It appears from S. 164 (1) that a Mag has a discretion to record the statement. He may exercise his discretion at his option. The language of the section leaves it optional to the Mag to record the confession or not as he thinks fit; but if he proceeds to record, he is bound to do so in the manner laid down in the section. It is clear, therefore, that in the situation envisaged in the section, that is, when a confession is made to him in the course of an investigation under Chap. XIV, Cr. P. C., or at any time before the commencement of an enquiry, or trial, he is bound to observe the provisions of the section in as faithful a manner as possible so as to guarantee the result aimed at by such record, viz., (i) fidelity of faithful reproduction of the statement, (ii) spontaneity of the making thereof; (iii) awareness in the accused's mind of the risk that he has to incur in case he makes a confessional statement in relation to the charge in which he has been arraigned, & lastly, (iv) a sense of safety from the risk, physical or mental, if any, consequent upon his refusal to make one. The law requires the duties cast upon a Mag to be performed in a judicial manner, & that is why it picks & chooses particular classes of Mags for the task. The strictness or the laxity with which the provisions of the section should be observed must be commensurate with the achievement of the result aimed at. The intendment of the requirement under S. 164, Cr. P. C. is clearly for the removal of the impressions referred to in S. 24, Evidence Act. I would quote a passage from Woodroffe's Law of Evidence (commentary to S. 28). The learned author says:

"This section forms an exception to the law provided by the twenty-fourth section, & as a qualification of that section should be read together with it. The impression caused by the inducement may have been removed by mere lapse of time, or by an intervening act, such as, a caution given by some person of superior authority, to the person holding out the inducement. An inducement may continue to operate on a man's mind for a considerable time after it was uttered; but, on the other hand ,it may be altogether removed by subsequent statements which precede the confession, & which clearly inform the deft that he must expect no temporal advantage from making one. Thus where a Mag had told a prisoner that if the latter would confess he would use his influence to obtain a pardon for him, & had afterwards received a letter from the Secretary of State refusing the pardon, which letter the Mag communicated to the prisoner; a confession subsequently made was held to be admissible. It is for the Ct to decide under all the circumstances of the particular case whether the improper influence was totally done away with before the confession was made".

From this follows the necessity of giving the prisoner sufficient time for reflection & guarding against his being influenced by the police so as to ensure that no police was present at the time of taking the confession though according to S. 26, the Mag's immediate presence is enough to destroy the polluting effect of the presence of a police officer.

(10) Section 533, Cr. P. C., on its very face, bears the impress that the defects, that are cured by compliance with its provisions, are not matters of substance but of form. If the matters of substance were to be cured, S. 164 will be reduced to nothingness. The section, broadly speaking, may be divided into two material parts — one defines its field of operation, that is, in what circumstances it comes into play, & the other prescribes what is the achievement it aims at.

(11) It comes into operation or application when a confession recorded or purported to be

recorded under S. 164 read with S. 364 is tendered or has been received in evidence. The result intended for is that the recorded statement or confession shall be admitted into evidence notwithstanding anything contained in the Evidence Act, 1872, (S. 91), but always subject to the consideration that the error, if any, has not injured the accused in his defence on the merits. "Notwithstanding anything contained in S. 91, Evidence Act" is the key to its interpretation. According to S. 91, in all cases in which any matter is required by law to be reduced to the form of document, no evidence shall be given in proof of such matter except the document itself or the 'secondary evidence' of its contents. The law that requires that the matter, namely, confession or other statement of an accused made in specified circumstances shall be reduced to the form of a document is contained in Ss. 164 & 364, Cr. P. C. Reading the two sections together, it is clear that whatever is to precede & to succeed the actual recording of the confessional statement are also to be incorporated in the document. According to S. 364, whenever the accused is examined by any Mag,....the whole of such examination including every question put to him & every answer given by him shall be recorded in full in the language in which he is examined. According to S. 164, the accused's confessions shall be recorded & signed in the manner provided for in S. 364. Before the confession is recorded the Mag shall caution him & shall question him in order to satisfy himself that the confessions were made voluntarily. The questioning amounts to examining the accused. This examination too shall be recorded in the form of questions & answers in the language in which they are put & given. With regard to cautioning, the Mag has to say in his memorandum, that he has complied with it. Addressing oneself to S. 91, it would be plain that the record should be received as the sole evidence in proof of the confession. The requirements that would make the confession trustworthy & receivable are of as much importance as the actual confessional statement itself. Both are required to be proved & must be proved by production of the record. Section 533, as to its bearing, has to be understood in this setting. That section furnishes an exception to S. 91 in allowing oral evidence to prove that the accused person duly made the statement recorded. The words "duly made" correlates to "duly taken" in the latter part of S. 80, Evidence Act. A confession is presumed under S. 80, to have been duly taken when it appears from the document produced in proof that it was taken in accordance with law. The statement therefore is said to be duly made or duly taken provided the state of things insisted upon in S. 164 as conditions precedent & subsequent to its recording was brought into existence; or, in other words, the fit state of the accused's mind was either produced or assured by the questioning. The oral evidence that is permissible in S. 533 is exclusively confined to the proof thereof. The section provides:

"....it (the Court before which the confession recorded or purported to be recorded under S. 164 or S. 364 is tendered in evidence or has been received in evidence) shall take evidence that such person 'duly made' the statement recorded.....".

The evidence, therefore, will be, by way of supplementing the deficient record, that all the mandatory provisions of S. 164, such as, cautioning, questioning, making of the statement in the Mag's immediate presence, & its having been read out or explained to him & his acknowledging the same to be the faithful record of the statement made, have in fact, been complied with though there may be some lacuna in their incorporation into the document. This leaves no manner of doubt that the oral evidence should be addressed to prove what should otherwise have been proved by the record had the provisions of either of the Ss. 164 & 364 been fully complied with. This could never be a matter of substance, but must be a matter of form, viz., that there has been actual compliance with the provisions in the Mag's performance of his duty, but there are deficiencies or non-observance in relation to reducing the same into writing.

(12) It is sought to be contended that S. 533 will permit production of oral evidence in proof of voluntary making of the statement independently of or otherwise than by compliance with the provisions of S. 164. This contention tantamounts to say that suppose a Mag has not cautioned nor questioned nor taken any steps to see that the impression of undue influences on the accused's mind have fully been removed at the time the accused made the statement, the recorded confession shall still be admitted into evidence if the Ct, before whom it is tendered, is otherwise satisfied by evidence adduced before it that the accused made the statement voluntarily. This sort of satisfaction, to my mind, appears to be physically incapable of production. The law requires that at the particular moment when the accused made the statement he should be free from the bias of any undue influence & inducement on his mind by extraneous agencies, such as, inducement, threat, or promise from a person in authority. How could any evidence as to his previous state of mind replace the evidence as to his state of mind at the time he made the statement ? Such evidence should be simply irrelevant for the purpose. Hence it is my conclusion that any evidence other than the evidence of strict & substantial compliance with the provisions of S. 164 shall not make the recorded statement admissible in evidence. Of the confession made to a Mag in the course of investigation or thereafter before the commencement of enquiry or trial, the record by the Mag under S. 164 is the sole evidence. The question 3, in my judgment, has to be answered accordingly. This view is sufficiently borne out by the 'dicta' in the decision in 'Nazir Ahmed v. King Emperor', A I R (23) 1936 P C 253: (37 Cr L J 897) being pushed to its logical deductions. Section 29 contains a residuary provision of negative character. It is codification of English law instances of what do not amount to inducement, threat, or promise though they appear to be on its border land. It does not touch the fringe of the question what polluted a confession. It is dangerous to admit into evidence confessions about which you are not sure of their freedom from such pollution as affects their spontaneity I would here quote a passage from Greenleaf on Evidence P. 256 (borrowed from Russel on Crime, p. 1999):

"The difficulty experienced in this matter seems to have arisen from the endeavour to define & settle, as a rule of law, the facts & circumstances which shall be deemed in all cases to have influenced the mind of the prisoner in making the confession. In regard to persons in authority there is not much room to doubt public policy, also, requires the exclusion of confession obtained by means of inducements held out by such persons. Yet even here the age, experience, intelligence & constitution, both physical & mental of prisoners are so various, & the power of performance so different in the different persons promising, and under different circumstances of the prosecution, that the rule will necessarily sometimes fail of meeting the truth of the case. But as it is thought to succeed in a large majority of cases, it is wisely adopted, as a rule of law applicable to them all. Promises & threats by private persons, however, not being found so uniform in their operation, perhaps may, with more propriety, be treated as mixed questions of law & fact; the principle of law that the confession must be voluntary being strictly adhered to, & the question whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left in the discretion of the Judge under the circumstances of the case".

This passage would, I think, go a great length to bring into relief & help clear visualisation of the meaning of S. 29. It can have no reference to the act or omission of a person in authority in the matter of extracting admission of guilt from a person arraigned in a criminal charge. Accused's pleading in a trial stands on a different footing, viz., his statement under S. 342 examination. It is the pleading of a party, & distinct from his previous statement tendered in evidence against him & his plea of innocence if taken, during trial.

(13) Section 29, Evidence Act does not, in its practical application, come in conflict with the operation of S. 164, Cr. P. C. In this connection, I would invite attention to two very recent judgments of the Madras & Bombay H. Cs. viz., 'Karunathambi Subramania Goundar v. State', (1950 1 M L J 659 at p. 662: (A I R (37) 1950 Mad 579: 51 Cr L J 1047) & 'Bhimappa Saibanna v. Emperor', A I R (32) 1945 Bom 484: (47 Cr L J 252) respectively. With great respect, I am in perfect agreement with them.

(14) Mr. M. S. Mohanty, a learned counsel of this Bar, took leave of the Ct to make some submissions in view of the public importance of the question. In his illuminating arguments, he traced the genesis of the principle governing the admissibility & user of confessions or confessional statements of an accused. He invited our attention to the former Criminal Procedure Codes of 1872 & 1882 for the purpose of comparing or contrasting the language employed in the corresponding sections thereof, viz., Ss. 122 & 164 respectively with that of S. 164 of the present Code. He also invited our attention to the dispatch of the Govt of India to the Secretary of State, dated, 24-7-1913, reproduced in the Gazette of India, dated, 7-2-1914, for the purpose of emphasising that the basic requirement of the voluntary character of the confession had international importance & had reference to the fundamental human right — that an accused should be tried in an atmosphere free from prejudice & should not be put under compulsion of any form whatsoever to make statements incriminating himself. He also referred to Stephen's Digest-Arts. 24 & 27; Taylor's Evidence, Wigmore on Evidence Vol. III, Arts. 816, 822, 825, 826, 842 & 843; Willis on Constitutional Law pp. 515 & 521; Stone's Province & Function of Law, p. 510 dealing with immunity of will & function of mind; & Cooley's Constitutional Limitations Vol. I. I have carefully considered all these references, & I am fully satisfied that even the slightest stress of compulsion, exercised in any of the remotest possible manner continuing working upon the mind of the prisoner would vitiate the testimonial trustworthiness of his confession, & that in every civilised country freedom from compulsion on the accused's mind has always been insisted upon as the basic requirement, before it could be thought of as evidence to implicate the accused. I would rest content with referring to a few passages cited by him from Cooley's Constitutional Limitations, 8th Edn., Vol. I., Chap X, "Protection to Personal Liberty", P. 651 et seq.,

"It is the law in same States (United States of America), when a person is charged with crime & is brought before an examining Mag .....he may also make a statement concerning the transaction charged against him, & that this may be used against him on the trial if supposed to have a tendency to establish guilt. But the prisoner is to be first cautioned that he is under no obligation to answer any question put to him unless he chooses & that whatever he says & does must be entirely voluntary. 'He is also to be allowed the presence & advice of counsel & if that privilege is denied to him it may be sufficient reason for discrediting any damaging statement he may have made' — (652). The portions underlined (here in inverted commas) have no counterpart in the law of this country.....But to make it admissible in any case it ought to appear that it was made voluntarily, & that no motives of hope or fear were employed to induce the accused to confess — (652)..... Under the excitement of a charge of crime, coolness & self-possession are to be looked for in very few persons; & however strongly we may reason with ourselves that no one will confess a heinous offence of which he is not guilty, the records of Cr Cts bear abundant testimony to the contrary — (653)".

He also referred to Arts 20 & 21, Const Ind. These Articles cannot be ruled out as wholly irrelevant to the question, at issue. As at present advised, I would refrain from expressing any opinion whatsoever in relation thereto. In my individual judgment, the Ct's time has been very usefully employed in listening to his arguments. To me personally, it has been reassuring as to such of my views on the subject as have been elaborately exposed in my judgment, as a Judge of the Patna H. C., reported in Emperor v. Jamuna Singh', A I R (34) 1947 Pat 305: (25 Pat 612).

(15) The learned Govt Advocate, unaffected by any consideration of sponsoring one view or the contrary placed all the authorities of the Indian H. Cts bearing upon the subject upto-date. The cases of particular importance,

with reference to the question before us, the difficulty wherein arose from the apparently conflicting provisions of S. 29, Evidence Act, & S. 164, Cr. P. C., were the very recent decisions of both Madras & Bombay H. Cts, already referred to.

(16) I will close, after observing a few words, with regard to what 'substantial compliance with the provisions of' S. 164, Cr. P. C., as is insisted upon in the judgment of my learned brother Narasimham, J., means. By citing an illustration as to how, without any direct efforts of tampering, proceeding from the investigating police officer, or any other person in authority, sufficient affectation can be caused, proceeding as it were from inducement, threat, or promise. In the case of 'Amons v. State', (80 Miss 592) S. C. of Mississippi, 1902 (vide Wigmore on Select Cases on Evidence, p. 392), the Chief of police testified that the accused made to him a free & voluntary statement (for the purpose of receiving or recording a confessional statement — the police of that country enjoys the same privileges as a Mag does under the Indian Evidence Act or Cri. P. C.). The circumstances under which he made it were these:

"There was what was known as a 'sweat-box' in the place of confinement. This was an apartment about five or six feet one way & about eight feet another.....The prisoner was allowed no communication whatever with human beings. Occasionally the officer, who had put him there, would appear, & interrogate him about the crime charged against him. To the credit of our advanced civilisation & humanity it must be said that neither the thumbscrew nor the wooden boot was used to extort a confession. The efficacy of the sweat-box was the sole reliance.....This circumstance, even after several days of obstinate denial, makes the prisoner make a confession. The officer, to his credit, says he did not threaten his prisoner, that he held out no reward to him, & did not coerce him. Everything was 'free & voluntary. He was perfectly honest & frank in his testimony, (sic) this officer was. He was intelligent, & well up in the law as applied to such cases, & nothing would have tempted him, we assume, to violate any technical requirement of a valid confession on threats, no hope of reward, no assurance that it would be better for the prisoner to confess. He did tell him, however, 'that it would be best for him to do what was right', & that it 'would be better for him to tell the truth'. In fact, this was the general custom in the moral treatment of these sweat-box patients, since this officer says, 'I always tell them it would be better for them to tell the truth, but never hold out any inducement to them'. He says, in regard to the patient, Ammons, "went to see this boy every day, & talked to him about the case, & told him it would be better for him to tell the truth; tell everything he knew about the case."

Per Calhoon, J. — held:

"The confession was not competent to be received as evidence. Defendant, unless demented, understood that the statement wanted was confession, & that this only meant release from this 'black hole of Calcutta'. Such proceedings as this record discloses, cannot be too strongly denounced. They violate every principle of law, reason, humanity, & personal right. They restore the barbarity of ancient and medieval methods. They obstruct, instead of advance, the proper ascertainment of truth. It is far from the duty of an officer to extort confession by punishment. On the contrary, he should warn his prisoner that every statement he may choose to make may be used against him on his trial."

(17) Though we have not sweat-boxes literally for the use of the police, but the practice of hand-cuffing, roping, & chaining them, making them walk from place to place, confining them in the police lock-ups, & interrogating them from time to time without either threatening, or inducing, or promising any favour for extraction of confession would amount to imposition of sufficient pressure to impair the mental equilibrium of the prisoner. Instances are ample that the prisoner, anticipating what was wanted of him, would make a confession in order to escape from the torture. The Mag who has the judicial task of recording the confession should keep this in mind & see that he, by his questioning, cautioning, & otherwise fulfilling the conditions prerequisite to such recording under the law, has assured himself that he has been able to obliterate the effects thereof from the prisoner's mind so that the statement made by him can deserve the name of 'a free & voluntary confessional statement'.

(18) **NARASIMHAM J:** The three questions of law referred for the decision of the Full Bench are:

(1) Is the confession of an accused taken under S. 164, Cr. P. C. to be ruled out as not being voluntary & therefore inadmissible merely for non-compliance with any of the requirements laid down in (iv) & (v) at p. 218 of I L R (1949) 1 Cut 207: (A I R (36) 1949 Orissa 67: 51 Cr L J 72, Guru Baru Praja v. The King).

(2) Is the Mag recording a confessional statement under S. 164, Cr. P. C. bound to record all the questions put by him to the accused & the answers given, to satisfy himself that the confession to be made is voluntary &, if so, what is the effect of the non-recording of the same?

(3) Does non-compliance with the provisions of S. 164 (3), Cr. P. C. by the Mag when recording a confessional statement render the same a nullity or inadmissible, if there is satisfactory evidence, 'aliunde', before the Ct that the confessional statement was voluntarily made?

(19) As regards question (1), there can be no doubt that the requirements of 'Guru Baru Praja v. The King', I L R (1949) 1 Cut 207 at p. 218: (A I R (36) 1949 Orissa 67: 51 Cr L J 72) are not intended to be mandatory statutory requirements the non-observance of which would by itself without more vitiate the admissibility of a confession. The said requirements are wholesome & valuable principles to be observed by a Mag recording a confession under S. 164, Cr. P. C. & a trial Ct which is called upon to decide whether the confession has been voluntarily made in order that it may be admissible may consider the omission to put any of the questions indicated in that decision as relevant either on the admissibility of the confession or the weight to be attached to it.

Moreover, the model questions suggested in that decision are only illustrative & by no means exhaustive & it is always open to a Mag to put such further questions as the circumstances of each case may require so as to satisfy himself about the voluntariness of the confession.

(20) As regards question (2), S. 164 (2), Cr. P. C. says that a confession shall be recorded & signed in the manner provided in S. 364, Cr. P. C. Section 364 says:

"Whenever the accused is examined by any Magistrate, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full."

Section 164 (3) says that:

"No Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily".

It is certainly arguable that the word 'confession' occurring in sub-ss (2) & (3) of S. 164 should be restricted to that portion of the Mag's record which contains the statement of the accused relating to the offence under investigation & not the preliminary questioning of the Mag for the purpose of satisfying himself about the voluntary character of the confession. On that footing, it is arguable that the statutory obligation to record every question & every answer, imposed under S. 364 does not attach to the preliminary questioning. It appears to me however that this could not be a reasonable construction of the relevant provision. The idea underlying S. 364 clearly appears to be that whenever an accused is examined by a Mag all the questions & answers should be on the record in order that every Mag who records it or any trial or appellate Ct that will be called upon to deal with the matter may have the whole of what the accused says in his own words in the setting in which he gave the answers. When therefore the requirements of S. 364 for the recording were extended to the confessions to be recorded under S. 164, the statutory requirement under S. 364 may reasonably be taken to refer not merely to what the accused states relating to the offence, which alone, strictly speaking, is the confession but also to everything stated by him in that connection. Ordinarily, there may not be any substantial questioning so far as the strict confessional portion is concerned & therefore if the statutory obligation under S. 364 to record every question & answer is to apply to the recording of a confession, it must apply mainly to the preliminary questioning. I am therefore of the opinion that the Mag recording a confession is bound to record every question put by him to the accused & every answer given by the accused to the same in order to satisfy himself that the confession to be made is voluntary.

(22) The further question that has been raised under this heading is what is the effect of non-recording of the questions & answers. Section 533, Cr. P. C. provides as follows:

"If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded."

It would therefore follow from this section that if the questions have been put & answered but no record of it has been made, evidence can be given both of the factum of the questions & answers & of the contents of the same. If the substance of the actual questions & answers can be supplied by such evidence, that cures the defect completely. As has been repeatedly pointed out in several decisions, S. 533, Cr. P. C. can cure errors of form & not of substance.

(23) As regards question (3), it is necessary to point out that the question itself related to non-compliance with the requisites of S. 164 (3). Those requisites are the following: (1) The Mag should explain to the accused — (a) that he is not bound to make a confession; (b) that if he makes a confession, it may be used as evidence against him. (2) The Mag should question the accused with a view to ascertain whether the accused is making the confession voluntarily & on such questioning should have reason to believe that the confession is being made voluntarily. (3) He must append a certificate to the following effect:

"I have explained to.....that he is not bound to make a confession & that, if he does so, any confession he may make may be used as evidence against him & I believe that this confession was voluntarily made. It was taken in my presence & hearing, & was read over to the person making it & admitted by him to be correct, & it contains a full & true account of the statement made by him".

It may be noticed in this context that the Cr. Rules of Practice, Vol I, R. 11 requires that to the certificate under S. 164 the Mag should add a statement in his own hand of the grounds on which he believes that the confession is genuine.

(24) There can be no doubt that the above three requirements which are statutory, must be substantially complied with by every Mag who records a confession, under S. 164, Cr. P. C. A confession to a Mag under S. 164 is one that is generally made while accused is in police custody during the investigation or thereafter before the trial, & would therefore be available as evidence at the trial only under S. 26, Evidence Act. It has been authoritatively held by P. C. in 'Nazir Ahmed v. King Emperor', AIR (23) 1936 P. C. 253: (37 Cr L J 897) that where a confession made to the Mag in the course of the investigation is sought to be brought in under S. 26, Evidence Act, it cannot be admitted if it is one which is wholly outside the requirements of S. 164, Cr. P. C. Though the actual decision in 'Nazir Ahmed's case, (AIR (23) 1936 P C 253: 37 Cr L J 897) related to a confession which did not purport to be under S. 164 the reasoning of the decision equally applies to a case where the confession purports to be taken under S. 164, but is not in substantial compliance with it, for it can equally be said that where the provisions of S. 164 have not been complied with in substance & in spirit, it is legally as bad as a confession outside S. 164. My answer therefore to the question would be that where the requirements of S. 164 (3) have not been substantially complied with, what purports to be the confessional statement, cannot

be treated as a validly recorded confession under S. 164 which could be brought in under S. 26, Evidence Act & that it must therefore be disregarded.

(25) The difficulty, however, consists in deciding what amounts to such a substantial non-compliance as to render the record of a confession totally invalid. Of the three requirements specified above as arising under S. 164 (3) the requirement as to the certificate is essentially one of form & the non-compliance with it is obviously one that can be cured under S. 533, Cr. P. C. if as a fact the other two requisites have been substantially complied with, though of course the absence of such a certificate may raise serious doubts as to whether the other two requirements have been intelligently & consciously complied with at all.

(26) As regards (1) & (2), if the requisite explanation & questioning have in fact been done, the non-compliance with the recording thereof, is again a defect of form that can be remedied under S. 533. It would also follow from S. 80, Evidence Act, that where any document is produced before a Ct purporting to be a statement made by a prisoner or accused person, in accordance with law & purporting to be signed by the Mag the Ct shall presume that any statement as to circumstances under which it was taken purporting to be made by the person signing it is true & that the confession was duly taken. From this it would follow that if the certificate contemplated by S. 164 (3) is found in a confessional statement as recorded & if by evidence taken under S. 533 the factum of the explanation & of the questioning as required under S. 164 (3) is satisfactorily made out, a presumption would arise that the confession was duly taken, that is to say, after such sufficient explanation & such sufficient questioning as satisfied the recording Mag that the confession was being voluntarily made. If therefore a trial Ct finds no material which would conflict with that presumption the statement would be admissible & the weight to be attached must depend on circumstances. The essence of the requirements of sub-s (3) of S. 164 is that before the Mag records the confession he must have reasons to believe that confession to be made is voluntary. That emphatic language which the sub-section uses, namely, "no Magistrate shall record any such confession unless he has reason to believe that it was made voluntarily" is itself sufficient to show that his power to record the confession is conditional upon the pre-existence of his belief. It is also clear from that sub-section that belief in this behalf must be based upon his questioning the accused after a prior explanation to him that he is not bound to make a confession & that if he does so it will be used as evidence against him. In entertaining the belief under this sub-section, the Mag is acting judicially & therefore the belief itself must be based upon the materials indicated in the section. It follows therefore that where in fact there has been no adequate explanation or questioning by the Mag of the nature prescribed before he starts recording the confession, his record of the confession cannot be said to be in substantial compliance with the requirements of sub-s (3) of S. 164 & no evidence 'aliunde' that the confession was in fact voluntarily made would be admissible. This is in accord with the cardinal principle laid down by P. C. in 'Nazir Ahmed's case' AIR (23) 1936 P. C., 253: (37 Cr L J 897) that when power is given to a certain thing in a certain way, the thing must be done in that way or not at all. Such a confession vitiated by substantial non-compliance, as indicated above, with the provisions of sub-s (3) of S. 164 is not a valid record of the confession & cannot, therefore, be made use of under S. 26, Evidence Act. There is thus no scope for invoking the aid either of S. 29, Evidence Act or S. 533, Cr. P. C. to cure such defect. It is therefore unnecessary in this reference to discuss elaborately the various decisions cited at the Bar regarding the construction & applicability of the aforesaid two sections.

(27) Now I take up the facts of the case. The applt was charged with the murder of one Sana Nimulia who along with several other villagers had accompanied him to the weekly Hat at Majhiguda & who on the return journey had slept along with the applt & other companions in a room in the liquor shop at Ghantidare. There was ample evidence on the record to show that in the liquor shop the applt quarrelled with his brother Arjun Majhi (P. W. 2) (who was also one of the companions who accompanied the party to the Hat & on the return journey) because the latter refused to give him two annas for purchasing some more liquor. The other companions pacified the two brothers & they all went to sleep thinking that nothing serious would happen. In the middle of the night however they all awoke when Sana Nimulia while struggling at the point of death kicked Khaga Dandsana (P. W. 1) who was sleeping by his side. They all found Sana Nimulia lying dead with a bleeding out injury on the left side of his head. Appellant Bala Majhi was sitting in the same room & when questioned by the companions admitted having killed Sana Nimulia mistaking him for his own brother Arjun Majhi whom he wanted to kill because of the quarrel over the giving of two annas for purchasing more liquor. The liquor vendor named Sagar Sahu (P. W. 11) came there soon afterwards & the applt was said to have admitted before him also that he killed Sana Nimulia mistaking him for his brother. A bloodstained tangia was found close-by & the stains on it have been certified by the Imperial Serologist to be caused by human blood. The applt also made a judicial confession before a Mag named Mohini Mohan Mukherji (P. W. 4) on 21-6-1949. The learned lower Ct rejected the judicial confession chiefly because: (i) the applt was not warned by the Mag that even if he retracted his confession subsequently it would still be evidence against him; & (ii) the applt was not assured of protection from any apprehended torture or pressure from police if he declined to make any confession. Apparently the learned Ses J. relied on certain observations in 'Guru Baru Praja v. The King', I L R (1949) 1 Cut 207: (A I R (36) 1949 Orissa 67: 51 Cr L J 72). I have already observed that the model questions suggested in the aforesaid decision are meant to be illustrative & should not be taken as mandatory statutory requirements. The learned lower Ct should therefore have carefully considered the other circumstances under which the confession was taken before coming to a

conclusion as to whether it was voluntary or not. The applt was arrested by the police on 18-6-1949. He was produced before the Mag for the first time on 20-6-1949 for recording the confession. The latter gave him the necessary warning & remanded him to jail custody for full 24 hours. Again on 21-6-1949 he gave him the usual caution to the effect that he was not bound to make a confession & that his confession would be used as evidence against him. He also cautioned him against making a confession on the threat of the police or any other person & that he should not confess out of fear or coercion. In fact the applt's reply to the Mag's warning was that no one threatened to assault him. The Mag further put a searching question to the effect as to why the applt was making a confession & thereupon the latter replied that he was confessing because he really committed the offence. On 21-6-1949 the Mag gave him 30 minutes time for reflection. I have carefully scrutinised the evidence of the Mag (P. W. 4) & I am inclined to accept his statement to the effect that the confession was voluntary. There was ample time for reflection & though every one of the model questions suggested in 'Guru Baru Praja v. The King', I L R (1949) 1 Cut 207: (A I R (36) 1949 Orissa 67: 51 Cr L J 72) was not put, most of the questions were put & there was substantial compliance with the requirements of S. 164, Cr. P. C.

(28) Apart from the judicial confession; there is the extra-judicial confession which is of great value in the present case. It is true that ordinarily too much importance is not attached to extra-judicial confessions. But the circumstances are quite different in this case. The applt is an aboriginal & his companions were also aboriginals who had accompanied him to the Hat & who slept with him in a room of the liquor shop on the return journey. When they awoke on being disturbed by the death struggle of the victim the applt immediately told them that he killed Sana Nimulia mistaking him for his brother Arjun. The witnesses who have spoken about this are all simple aboriginals (P. W.s 1, 7, 8, 9 & 10) & there is absolutely nothing on record to show that they could have any possible motive either to implicate the applt on a false charge or else that they misunderstood what he told them then & there. The previous quarrel between the applt & his brother Arjun is well-proved & as all of them were sleeping in a row his explanation to the effect that he killed Sana Nimulia mistaking him for his brother in the darkness of the night seems very probable. The applt repeated the extra-judicial confession before the liquor vendor Sagar Sahu (P. W. 11) against whom also nothing could be urged. This is not a case of any interested party coming forward with a story of extra-judicial confession with a view to implicate an innocent man on a false charge.

(29) Moreover, the presence of human blood stains on the tangia is another important corroborative piece of evidence against the applt. Doubtless the tangia was not found in his hand when his companions awoke soon after the commission of the crime. But it was found lying at a distance of 5 or 6 cubits away from him & P. Ws. 1, 7, 8, 9 & 10 have all stated that the applt was the only member of the party who was armed with a tangia when they left the village for the Hat. Therefore there was no difficulty in identifying the tangia. The presence of human blood-stains on his shirt is also another incriminating circumstance against him.

(30) I would accordingly hold that though there is no eye-witness to the commission of the crime, the judicial confession of the applt, his extra-judicial confession to his companions & the presence of human blood stains on his tangia & his shirt, leave no room for doubt that the crime was committed by him & by none else. He was rightly convicted under S. 302, I. P. C. & the lesser sentence was also rightly imposed in view of his being a young aboriginal who had some kind of provocation from his brother in the evening of the date of the commission of the crime.

(31) The conviction & sentence are upheld & the appeal is dismissed.

(32) DAS, J: I agree with the answers given by Narasimham J. & with the reasons therefor given by him.

(33) I should have been content to leave the matter at that, since we are all agreed about the answers to the reference. But, out of respect for the different views expressed in the order of reference & somewhat different approach elaborated in the answer to the reference given by my Lord the Chief Justice & out of regard for the very strenuous arguments advanced at the bar, I consider it desirable to place briefly on record my point of view on the matters discussed, though they do not call for any final decision in this case.

(34) In the Evidence Act, confessions are treated as a species of admission. Any admission by an accused of an incriminating fact falls within the scope of Ss. 18 to 21, Evidence Act & is relevant. (See 'Ghulam Hussain v. The King', 77 I A 65: (51 Cr L J 1552).) A confession is an admission, in terms of the offence itself, or at any rate, substantially, of all the facts which constitute the offence. (See 'Pakala Narayanaswami v. Emperor', A I R (26) 1939 P C, 47 at p. 52, Col. II: (40 Cr L J 364).) Sections 24, 25 & 26 provide the circumstances under which a confession is not relevant or cannot be proved. Thus the scheme of the Evidence Act is to treat confessions 'prima facie' as relevant or provable under the category of admissions & to provide under Ss. 24, 25 & 26 the circumstances in which they are not relevant or provable. Sections 27, 28 & 29 are provisions indicating the limitations in the operation of Ss. 24, 25 & 26. This method of dealing with confessions adopted by the Indian Legislature shows a marked departure from the approach of the English law to the admissibility of confessions. The English law in this respect has been authoritatively pointed out by P. C. in 'Ibrahim v. The King', 1914 A C, 599 at p. 609: (A I R (1) 1914 P C 155) in the following terms:

"It has long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority".

The terms in which S. 24, Evidence Act, is couched seem to indicate that in the case of an ordinary confession, there is no initial burden on the prosecution to make out the negative, viz., that the confession sought to be proved or admitted is not vitiated by the circumstances stated in the section. It is the right of the accused to have the confession excluded & equally the duty of the Ct to exclude it even 'suo motu', if the vitiating circumstances "appear". While this is the general rule, Ss .25 & 26 are special rules relating to a confession made to a police officer & a confession made in the immediate presence of a Mag by an accused in the custody of the police officer. The former is completely excluded, thereby indicating a total distrust, (unlike in the Englisn Law) of the police machinery, in so far as it brings out a confession by the accused. But inspite of this distrust a confession made in the immediate presence of the Mag is made provable under S. 26, though the accused is at the time in the custody of the police. The position therefore as emerges, is that confessions other than what may be called police-confessions are admissible subject to their being excluded by the "appearance" of vitiating circumstances mentioned in S. 24. The Evidence Act does not deal with how magisterial confessions are to be recorded. That is specifically dealt with in S. 164, Cr. P. C. The effect of that section, as interpreted by P. C. in 'Nazir Ahmed's case', (A I R (23) 1936 P C 253 : 37 Cr L J 897), is that if a magisterial confession is sought to be admitted under the Evidence Act, it can be proved only if it is a valid record of the confession under S. 164, Cr. P. C. It is to be noticed that S. 26 is in negative terms. It does not say that every confession made in the immediate presence of a Mag can be proved as against the accused. Therefore, it would follow that if there is a special statute prescribing how a Mag is to record the confession, it is only a confession so taken that can be proved & received & admitted in evidence.

(35) A consideration of S. 164 however would show that what is aimed at in that section is not in the nature of an absolute guarantee that the confession is voluntary in the sense of freedom from inducement, threat, or promise, proceeding from a person in authority. What that section prescribes is not that the recording Mag should have positive proof before him about the absence of those vitiating circumstances but that he should, before recording, have "reason to believe" that the confession is voluntary, i.e., not prompted by inducement, threat, or promise, proceeding from a person in authority. It is to be noticed that the use of the phrase "he has reason to believe that it was made voluntarily" indicates that it is not the function of a trial Ct to sit in judgment over the recording Mag to the extent of substituting its belief on the material, but to see whether he has exercised his jurisdiction in this behalf judicially & with a judicial approach. What gives the Mag jurisdiction to record is his own subjective belief based on objective reasons. This clearly shows that it is not the intent of the Legislature by S. 164, Cr. P. C. to restore in respect of magisterial confessions the English Law requisite of positive proof of the absolute voluntariness of the confession as a 'sine qua non' for its admissibility a test which it seems to have discarded for non-magisterial confessions (other than police confessions which alone it has totally prohibited). The position, therefore as I conceive it, is that a magisterial confession can be proved only by the record of that confession & that the record cannot go in against the accused at the trial, unless it is one that is made in substantial compliance with the provisions of S. 164, Cr. P. C. including the fair belief of the recording Mag as to the voluntary character of the confession, arrived at on a judicial approach. But once the record goes in, it is for the accused to make out or for the Ct to find the appearance of vitiating circumstances mentioned in S. 24 in order to exclude it. It is also to be noticed that even in the matter of finding whether or not there has been substantial compliance with the terms of S. 164, the prosecution has the initial advantage of relying on the presumption in S. 80, Evidence Act & of the remedying provision of S. 533, Cr. P. C. What I wish to point out is that the Legislature has indicated two different standards for "proof" & "reason to believe" as appears from S. 3, Evidence Act & S. 26, I. P. C., that this distinction is not academic. Section 164, Cr. P. C. cannot, therefore, be read as though the Mag's jurisdiction to record a confession depends on positive proof before him of its voluntary character. The Mag in the circumstances in which he would at the time be placed, can only make a reasonable enquiry, but must come to a well-grounded belief judicially & on a judicial approach. The Legislature has provided that & alone as sufficient for initial admissibility of a judicial confession trusting to experienced Mag to whom alone the function is by law entrusted to discharge their prescribed duty in this behalf properly & responsibly. But this is not to say that the trial Ct is relieved of its duty under S. 24, Evidence Act to exclude the confession if it finds it irrelevant even after it is allowed to go in under S. 164, Cr. P. C.

(36) It appears to me therefore with greatest respect that to approach the subject of confessions & particularly of judicial confessions, as though every record or evidence of confession is to be treated as 'prima facie' suspect & as being liable to be thrown out as inadmissible in the absence of evidence that the recording Mag had clear & positive proof before him of its voluntary character, would be to contravene the provisions of the Statute in this behalf which are delicately balanced & which provide for a self-proving & admissible record of a judicial confession if duly taken. It would also equally be contrary to the express provisions of the Statute to allow a judicial confession to go in against the accused without substantial & adequate compliance with the provisions of S. 164 or to treat such substantial non-compliance as one affecting merely the weight of the confession or as liable to be cured under S. 533, Cr. P. C. in all cases. As has been laid down by so eminent a Judge as Sir Barnes Peacock as early as in 'Queen v. Nabadwip Chandra', 1 Beng L R O. Cr 15 at p. 22: (15 W R Cr 71 N),

"The object of the Criminal law is to punish the guilty for the purpose of deterring them & others from committing offences. The object

of the law of procedure, including the Law of Evidence, is or ought to be that the innocent shall be protected & the guilty punished."

Any view, therefore, as regards judicial confessions which proceeds on a feeling that a magisterial confession is only a few degrees less open to suspicion than a police-confession, & that therefore it is necessary to impose further exacting tests by judicial legislation than what the Statute in terms has provided, or any view that would relieve the recording Mag from the rigour of the safeguards in terms imposed by the Legislature & treat all magisterial confessions as 'prima facie' valid, however recorded, leaving the defects in the recording & in founding his belief as going into the weight of the same, would with very great respect not be in harmony with the letter or the spirit of the statutory provisions in this behalf. It has been pointed out by reputed text-writers & by eminent Judges on the subject that the whole subject of confessions, in its treatment under the English Law, has been deflected from its rational course by a lot of unreasonable & illogical sentiment. (See per Baron Parke in 'R. v. Baldry', 5, Cox's Cr. Cas 523 at p. 531). This appears to have been due to not keeping separate in their consideration two matters, which are really independent, namely, (1) The confessions as a proved fact; (2) The process of proof of an alleged confession. The great likelihood of infirmities in the latter has been allowed to affect the weight due to the former & considerations germane to the latter have sometimes got crystallised by authority as affecting the weight of the former. See Wigmore, Vol. III, para 866 at p. 356. As late as in 'Ibrahim v. The King', 1914 A C 599: (A I R (1) 1914 P C 155) the judicial committee was obliged to remark that the rule of English Law on the matter before them must still be taken as unsettled. A perusal of the judgment of their Lordships in that case indicates how difficult & sometimes futile it is to lay down general rules on a branch of the law where the circumstances so greatly vary. In India, the Legislature has adopted a middle course in this respect & has laid down a few well-defined rules & has left other matters to be judged according to circumstances, I think it would be hazardous for Cts to try to enunciate further rules or weaken the application of the statutory requirements by importing other considerations, I wish, therefore, to say nothing which will in any way weaken the application of the safeguards provided by the Legislature in S. 164, Cr. P. C. & thereby load against an accused person ill-scrutinised confessions, irresponsibly taken, nor say anything which will unduly hamper the functions of the recording Mag by insisting on his having before him what virtually amounts to preliminary & positive proof of voluntariness, before proceeding to recording a confession which may, well nigh, be impossible in the situation in which he would then be placed, & thereby bring about likelihood of the initial exclusion of almost all judicial confessions to the detriment of the administration of criminal justice. I feel therefore bound to add that, with great respect, I am not in agreement with my Lord about the proposition enunciated in para 6 of his judgment or with his approach to the question based on English Law, but I am not to be supposed as being in total disagreement with my Lord's exposition of the subject in general. While I acknowledge, with respect, the learning thereof, I must own to a feeling of doubt whether it will help or hamper the subordinate magistracy for which it is intended.

(37) In arguments before us, a very wide range of discussions & citations have been covered. It is enough to say that I have considered all of them very carefully. I refrain from noticing them because it is unnecessary to burden this judgment with the same when all of us are in the main agreed about the answers to be given to the reference. I am also conscious of the fact that no amount of elaboration in a judgment where there are differing views on matters not directly arising for decision can afford guidance except as material for further discussion when such matters actually arise later for decision. There has also been some argument that Art. 20, sub-cl. (3), Const. Ind. recently adopted, makes a change in the legal position. All that I need say is that I do not think it does, if the law is as indicated in the answers to this reference.

(38) On the merits of the appeal before us also I agree with the judgment & conclusions of my learned brother Narasimham J.

K. S. *Appeal dismissed.*

A. I. R. (38) 1951 ORISSA 179 (C. N. 45)

RAY C. J. AND NARASIMHAM J.

Chamra Meher and another, Petitioners v. State of Orissa, Opposite Party.

Criminal Revn No. 58 of 1950, D/- 21-8-1950.

Criminal P. C. (1898), Ss. 499 and 514 — Bond by surety only — Enforceability.

A bond executed only by the sureties and not by the accused also is not a bond as contemplated by S. 499 (1) and therefore the summary procedure for forfeiture of the bond provided in S. 514 will not apply: A I R (38) 1951 Orissa 18 Foll. (Para 2)

Anno: Cr. P. C., S. 499 N. 4 Pt 1.

G. G. Das, for Petnrs — Advocate-General, for Opposite Party.

NARASIMHAM J: This petn is against the appellate order of the Dist Mag of Boudh-Phulbani dismissing an appeal filed by the petnrs against the order of a 1st class Mag, Boudh, forfeiting their bond executed in a case under S. 420/471, I. P. C. in the Ct, of the said Mag. Two persons named Nrusing Meher & Hrusikesh Meher were accused persons in that case. On 11-11-48 when they appeared before the S. D. M. they were directed to be released on bail of Rs. 1,000/- each & then the case was transferred to the file of a 1st class Mag named Sri S. B. Mohapatra for disposal. Then the two petnrs acting as sureties for the accused persons executed a bond undertaking to produce them before the Ct on such dates as may be fixed. Strangely enough the accused persons themselves were not required to execute bonds for their appearance before the Ct on several successive dates. Whether this omission was due to oversight or not it is difficult to say. But whatever that may be the fact remains that there is on record no bond signed by the ac-

cused persons for their appearance on successive dates.

(2) The main point of law urged by Mr. Das in support of this petn is that a bond executed only by the sureties & not by the accused persons also will not be a proper bond as contemplated by S. 499 (1), Cr. P. C. & that consequently the Mag had no jurisdiction to forfeit the bond while purporting to act under S. 514, Cr. P. C. In support of this contention he relied on a recent decision of my lord the Chief Justice in 'Gobindachandra v. State', Cri. Revn. No. 168 of 1950, (A I R (38) 1951 Orissa 18: 52 Cr L J 97) in which the entire case law on the subject has been exhaustively discussed. With respect I would agree with the reasonings given in that judgment & hold that a bond executed only by the sureties is not a bond as contemplated by S. 499 (1), Cr. P. C. & that consequently the summary procedure for forfeiture of a bond provided in S. 514, Cr. P. C. will not be applicable to such a case.

(3) I would accordingly allow the revision petn & set aside the order of the appellate Ct.

(4) RAY, C. J: I agree.

K. S. *Revision allowed.*

A. I. R. (38) 1951 ORISSA 180 (C. N. 46)

PANIGRAHI J.

Banchhanidhi, Petitioner v. Balaram and others, Opposite Parties.

Civil Revn. No. 273 of 1948, D/- 24-3-1950.

Partition Act (1893), S. 4 (1) — Defendant, if can avail of provisions of section.

The language of S. 4 does not preclude a defendant from availing himself of the provisions of that section if the stranger transferee happens to be arrayed as a party defendant and should not be strictly limited only to those cases where the transferee figures as the pltf.

(Para 3)

Anno: Partition Act, S. 4, N. 1.

S. N. Das Gupta, for Petitioner — R. N. Sinha, for the Opposite Parties.

ORDER: This revision is directed against an order of the Second Munsif, Cuttack refusing to apply Section 4 of the Indian Partition Act to the proceedings before him.

(2) The facts are briefly these. The property in question is a dwelling house belonging to four branches of a family: one-fourth share belongs to defendant No. 1, a stranger; one-fourth share belongs to defendant No. 5 in his own right; one-fourth to defendants 2, 3 and 4, and the remaining one-fourth was purchased by the wife of defendant No. 5, who filed the suit for partition in order to buy off the share of defendant No. 1. A preliminary decree was granted and before the final decree was drawn up defendant No. 5, applied under Section 4 of the Partition Act to buy up the share of defendant No. 1, who was a stranger to the family. The learned Munsif rejected the petition on the ground that as the suit was not instituted by the stranger-transferee, section 4 of the Act did not, in terms, apply. Hence this revision.

(3) It is contended by Mr. Das Gupta appearing for the petitioner that Section 4 of the Partition Act can be applied in a case where the stranger-transferee is arrayed as a party-defendant as in this case and that the strict interpretation put upon it by the learned Munsif would result in frustrating the object of the Act. The Act was designed to prevent the intrusion of strangers into the dwelling-house of an undivided family and enable the Court to make a valuation if any shareholder undertook to buy the transferred share; and the shareholder offering to buy it shall be offered such valuation as the court may fix. This was certainly a beneficient provision intended to allow members of an undivided family to enjoy their property uninterrupted by strangers. But the language of the Section easily lends itself to the strict interpretation put upon it by the learned Munsif. The words "and such transferee sues for partition" are however capable of the wider meaning sought to be put upon them by Mr. Das Gupta. The word "sues" is applicable not only to a suitor who figures as plaintiff, but is equally applicable to a defendant who carries on his defence as a suitor. The words "to sue" not only signify "to prosecute" but also "to defend" or "to do something which the law requires for the better prosecution or defence of the cause" — See Stroud's Judicial Dictionary. I am therefore inclined to accept the argument of Mr. Das Gupta that the language of S. 4 does not preclude a defendant from availing himself of the provisions of that Section if the stranger-transferee happens to be arrayed as a party-defendant and should not be strictly limited only to those cases where the transferee figures as the plaintiff.

(4) Secondly, in a suit for partition every one of the parties is in the nature of a plaintiff in so far as each one of them wants his share to be partitioned off; and it is only by accident that one of them figures as a defendant and it is open to him to be substituted as the plaintiff; and even as defendant it is open to him to press his claim and have his share divided and allotted to him. Mr. Das Gupta has invited my attention to a case reported in 'Sheodhar Prasad v. Kishun Prasad', A I R (28) 1941 Pat 4: (190 I C 117) where Dhavle, J., took the same view. The latest case which is very much in favour of Mr. Das Gupta's contention is the one reported in 'Abu Isa v. Dinabandhu', A I R (34) 1947 Cal 426: (51 C W N 639). Mr. Sinha appearing for the opposite party relies upon 'Subbamma v. Veerayya', A I R (19) 1932 Mad 15: (136 I C 203), but I am satisfied that is no authority for the point raised by the petitioner here. I am of opinion that Section 4 of the Partition Act is equally applicable to all cases where a partition suit is brought and where a stranger-transferee is a party thereto. There does not appear to be any justification for confining the operation of Section 4 only to cases of partition suits filed by a stranger transferee alone.

(5) Mr. Sinha, however, points out that this point had once been taken by one of the parties and had been decided against. All that I am able to gather from the representations made at the Bar is that on a prior occasion, before the preliminary decree was passed, defendants 2, 3 and 4 contended that the plaintiff was not a stranger-transferee being the wife of defendant No. 5 and that, therefore, Section 4 of the Partition Act would not be available to her. The court upheld this contention and held that the plaintiff, being a member of the family, could not invoke the provisions of that Section. Mr.

Sinha relies upon this circumstance and urges that the point which has been once concluded cannot be agitated over again at the instance of defendant No. 5 the present petitioner. Unfortunately, this argument was not specifically raised before the Munsif on the ground of 'res judicata' nor does the Munsif base his order on that ground. In any event, the question whether the decree could be passed against a stranger-transferee when he is a defendant, was not specifically raised or decided. Furthermore, as at present advised, I am not prepared to say that the finding against the plaintiff would operate as 'res judicata' as between two co-defendants, viz. defendants 1 and 5 unless defendant 5 also raised the point.

(6) I have, therefore, arrived at the conclusion that the petitioner must succeed on both the contentions and direct the court to make a valuation of the share of defendant 1 and sell his share to such of the shareholders as may be willing to purchase it.

(7) The order of the Munsif is set aside and this revision is allowed. The petitioner shall have the costs of this revision. Counsel's fee one gold mohur.

V.R.B. *Revision allowed.*

A. I. R. (38) 1951 ORISSA 181 (C. N. 47)

PANIGRAHI J.

Raghunath Patnaik and others, Defendants-Appellants v. Dullabha Behera, Plaintiff. Respondent.

Second Appeal No. 155 of 1950, D/- 5-12-1950.

Easements Act (1882), S. 18 — Trees growing on boundary line — Ownership.

Where the trees have sprung up on the plaintiff's land from roots of trees planted by the defendant on his own land, penetrating into the plaintiff's soil, the defendant cannot claim any right either by the statute of limitation or under the law of prescription although the roots of the trees have spread into the plaintiff's land for over twenty years. If the trees on the plaintiff's land derive nourishment from the soils of both the parties, they are the common property of both. If the defendant goes on the land of the plaintiff and cuts the trees there, he is liable to the plaintiff for half the value of the trees cut. (*Paras 5, 7*)

Anno: Easements Act, S. 18 N. 6.

P. C. Chatterji, for Appellants — Pitambar Misra and C. S. Misra, for Respondent.

JUDGMENT: The defendants are the appellants in this second appeal. The suit was for a perpetual injunction against the defendants from interfering with the plaintiff's peaceful enjoyment of the suit lands and for the recovery of a sum of Rs. 30 being the cost of bamboos alleged to have been cut and removed by the defendants from the suit lands.

(2) The dispute between the parties is about the ownership of certain bamboo clumps growing on a common ridge between the lands of the plaintiffs and those of the defendants. Survey Nos. 220/I and 220/2 admittedly belong to the plaintiff and adjoining it immediately to the north is Survey No. 210 belonging to the defendants. There are certain bamboo clumps all along the northern and northeastern portion of the ridge. The roots of these clumps have grown into the soil on either side of the boundary line and trees have sprung up on both sides. The question is whether or not the trees growing on the southern side of the ridge belong to the plaintiff. A commissioner was appointed to localise the boundary-line and he found that the bamboo clumps extended on either side of the boundary line and that the defendants cut and carried away some of the trees growing on the side of the plaintiff's lands.

(3) The learned Munsif who tried the suit in the first instance held that the defendants' father had actually planted the bamboo clumps on his side of the ridge and that the roots of those trees had, in course of time, burrowed into the plaintiff's lands on the south and that as a result new trees sprang up on his side and that, as such, the plaintiff had no right to the trees. He also placed reliance on the evidence adduced on the side of the defendants that they had been cutting bamboos from that part of the ridge for over twenty years and that consequently the plaintiff's title, if any, had been barred. The learned Munsif further held that the ridge itself was put up by the defendants and that therefore the trees growing on either side of the boundary line along the ridge belonged to the defendants. The plaintiff's case that the defendants went upon his lands and cut sixty bamboos was admitted . On appeal the learned Subordinate Judge held that the defendants were not entitled to trespass on the plaintiff's land for the purpose of removing the bamboos even though the trees might have been a part of the clump planted by the defendants on their side of the ridge. In this view of the matter, he set aside the order of the learned Munsif and decreed the plaintiff's suit for injunction as well as for damages as claimed in the plaint.

(4) In second appeal the learned counsel for the defendant-appellants urges that the lower appellate court was wrong in giving the plaintiff a decree for damages for trespass whereas the basis of the plaintiff's claim in the suit was for compensation for the removal of trees by the defendants on the ground that they were the plaintiff's property. The suit was not conceived in tort for trespass on the plaintiff's land and consequently the judgment of the lower appellate court was erroneous. This argument is met by learned counsel for the respondent plaintiff by the contention that although the suit was not for damages for trespass on the land the trees having grown on the plaintiff's land must be deemed to have belonged to him and that, accordingly, the decree granted to the plaintiff by the learned Subordinate Judge must be upheld.

(5) There is no common law, as such, relating to ownership of boundary trees in this country except that two Rules of Hindu Jurisprudence are quoted in Vyavahara Mayukha Chap. XV, Cl. 12 from Katyayana which is in the following terms:

"The fruit and flowers of trees produced upon a boundary between two fields are declared to be joint property pertaining in common to the masters of the two fields".

In Mandlik's Hindu Law there is a passage which throws some light on the ownership of the branches of a tree overhanging a neighbour's land. The rule is stated thus: Where the branches of trees growing in one man's field

are spread over that of another then he shall be considered as the owner, in whose fields the the trees stand. This also appears to be the law in England and in other countries. The man who planted the tree is the owner not only of the trunk but also of the branches although the branches overhang his neighbour's land. He is also the owner of the roots although the roots penetrate into the neighbour's soil. The owner, however, cannot acquire a prescriptive right for his trees to overhang or for the roots of his trees to grow into his neighbour's land, apparently because there is a perpetual change in the quantity of inconvenience caused thereby. The leading case on the subject is the decision of the House of Lords in 'Lemmon v. Webb', (1895) A C 1: (64 L J Ch 205). Lord Herschell, L. C. observed:

"I think it is impossible to say that he has either ever acquired the right to the land over which they hang or to their overhanging under the statute of limitations. The trees, of course, grow from time to time and their state each year is different from what it was a year before. The same remark applies to the suggestion that a prescriptive right has been obtained. The tree of today is not in the condition in which it was 20 years ago. It would be idle to suggest that the right gained at any time was the right to have the tree there in the condition in which it was 20 years before and that it was only open to the adjoining owner to put back the tree into the condition in which it then was.....It seems to me impossible to say in a case of this description that a right is gained either by the statute of limitation or under the ordinary law of prescription".

It is clear, therefore, that the defendants cannot claim any right either by the statute of limitation or under the law of prescription, although the roots of the trees have spread into the plaintiff's land for over twenty years. The imperceptible penetration of the roots over a long period cannot amount to trespass as conceived in law. Trespass is a direct entry into the land of another. In this case the entry of the roots into the plaintiff's soil is consequential and is to be regarded as no more than a nuisance. It has been held that where the branches of a tree growing on the land of one man overhang his neighbour's land or where the roots burrow into his land and damage his buildings etc., it would amount to nuisance and not to trespass. See 'Butler v. Standard Telephones & Cable Co., Ltd.', (1940 K B 399: (109 L J K B 238). The person whose property has suffered from the roots of a tree belonging to his neighbour has the right to cut the roots of the offending tree and is also entitled to recover damages if damage has been suffered by his owing to the action of the roots. Authorities on this point were summed up by Kay, L. J. in 'Lemmon v. Webb', (1894) 3 Ch 1 at p. 24 in these words:

"The encroachment of the boghs and roots over and within the land of the adjoining owner is not trespass of occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this, an action on the case would lie. Also the person whose land is so affected may abate the nuisance if the owner of the tree, after notice, neglects to do so".

The House of Lords ruled that no notice was necessary to the owner of the tree and that the person who complained of the nuisance might abate it by lopping off the branches which overhang his land. It is also clear that the right of lopping does not carry with it the right to appropriate the severed branches or the fruit growing on them — See 'Mills v. Brooker', (1919) 1 K B 555: (88 L J K B 950) where it was held that the right to lop off branches does not carry with it the right to pick and appropriate the fruit and if he does so he is guilty of conversion and liable to the owner for its value; 'Mahabali v. Manu', A I R (11) 1924 Pat 416: (74 I C 828) and 'Hakim ullal v. Saminullal', A I R (22) 1935 All 750: (156 I C 42). It has been laid down that not only has he the right to cut off the overhanging branches but he can also obtain an injunction for removing the overhanging portion without proof of damage — 'Vishnu Jagannath v. Vasudev Raghunath', 43 Bom 164: (A I R (5) 1918 Bom 68) and 'Bhoodev Mukerji v. Kalachand', 34 C L J 315: (A I R (8) 1921 Cal 129).

(6) In the present case however the question is whether the trees which have sprung up on the plaintiff's lands from roots which were planted by the defendants on their own lands and have subsequently burrowed into the plaintiff's soil remain the property of the defendants. The rule of Hindu Jurisprudence cited above appears to be the law in France, as would appear from Article 173 of the Code Napolean which runs as follows:

"Trees growing in a party hedge are party like the hedge and each of the two owners has the right of requiring that they be cut down".

In Houn's Law of Boundaries a passage is quoted from the Digest of Civil Law which reads as follows:

"If a tree planted near a boundary extends its roots into the lands of a neighbour it becomes common" — (Dig. XL — 1, 7, S. 13)."

Hay, L. J. quoted a passage from an anonymous case reported in '2 Rolls, 225', where the following note appears:

"But if it grows in a hedge which divides the lands of A and B and the roots take nourishment on both the lands it was adjudged that they were tenants in common of it".

In 'Holder v. Coates', (1827) M & M 112: (173 E R 1099), it was held that where the tree is on a boundary line so that the trunk is partly in the land of each of the adjoining owners they become joint owners of the tree.

(7) The principle, therefore, seems to be well established that where the ownership is unestablished that where the ownership is uncertain a tree on a boundary line is the common property of the owners on either side of the boundary; and secondly where the tree draws its nourishment from the soils of both owners it becomes the common property of the owners though it may actually be situated on the land of one of them. It is difficult to find for either party as to the proportion of nourishment derived by the tree from the plaintiff and defendant respectively. The law therefore appears to be well settled that where the roots of a tree extend into the lands of the two parties and derive nourishment from both, it should be held to be the common property of both. The findings of fact in this case being

that the defendants originally planted the trees, the roots of which have penetrated into the plaintiff's land and fresh trees have sprung up on the latter as a result thereof, it must be held that the trees which were removed by the defendants drew their nourishment from the plaintiff's soil as well and were the common properties of both the parties. The plaintiff shall accordingly be entitled to a decree for half the value of the trees cut and removed by the defendants, viz., Rs. 15/-. In view however of his assertion that he had planted the tree originally — a claim which has been found to be false by both the Courts below — I would disallow the costs incurred by him.

(8) In the result the appeal is allowed in part. The judgment of the learned Subordinate Judge is modified viz., that the plaintiff shall get a decree for Rs. 15/- instead of Rs. 30/- as claimed by him. There will be no order as to costs in view of the fact that the law relating to the ownership of the trees, in a case of this kind, is obscure.

D. H. *Appeal partly allowed.*

A. I. R. (38) 1951 ORISSA 183 (1) (C. N. 48)

RAY, C. J., AND PANIGRAHI, J.

Madano Mohano Naiko, Plaintiff — Petitioner v. Arjun Naiko and others, Defendants — Opposite Party.

Civil Revn. No. 121 of 1946, D/- 27-3-1950.

Court-fee Act (1870), S. 7 (V), Sch. II, Art. 17 (VI), Art. 17 A (Orissa Amendment) — Suit for possession — Property inalienable.

Where a pltf sues for possession he is liable to value the suit under S. 7. Mere fact that the property is declared inalienable by S. 5 of the Madras Hereditary Village Offices Act III (3) of 1895 does not render it incapable of valuation. (Para 1)

Anno: Court-fees Act, S. 7 (V) N. 1, Sch. II Art. 17 (VI) N. 1.

D. V. Narasing Rao, for Petnr — K. Patnaik Govt Advocate, for Opposite Party.

PANIGRAHI J: This revision is directed against the order of the Subordinate Judge, Berhampur, calling upon the pltf to pay 'ad valorem' Court-fee on his plaint. The pltf filed a suit for possession of certain lands alleged to be his Sardar Inam lands. The Revenue Ct in a suit brought under the Madras Hereditary Village Offices Act (Madras Act III (3) of 1895) proceeded on the assumption that the inam consisted of the emoluments arising from the lands & left it open to the pltf to establish his right to the land itself in a civil Ct. The pltf, thereafter raised this suit for establishing his right to the land as constituting a part of his emoluments in lieu of the Sardar service & prayed for possession of the land, & in the alternative prayed for partition of the same & possession of one-sixth share. The pltf's case primarily is that the land itself constituted the inam. If however the Ct should hold that it is not so, he wants to avail himself of the alternative remedy on the basis that the land would form a part of joint family property & would be available for partition. The pltf valued the occupancy right at Rs. 20,000/- but, for purposes of Court-fee, valued it according to Sch II Art. 17 A. His contention is that the nature of the right is such that it is incapable of valuation & has no market value, the sole basis for this argument being that the property is declared inalienable by S. 5 of the Madras Act III (3) of 1895. Despite the fact that the lands are inalienable it cannot be said that they are excommercium or that they are incapable of valuation: it may well be that on that very ground the property may have a larger value than otherwise. The pltf having sued for possession is liable to value it under S. 7, Court-fees Act. The pltf himself has assessed the value at Rs. 20,000/- & I fail to see how the argument that it is incapable of valuation can be reconciled with the pltf's valuation of the occupancy right at Rs. 20,000/-. After hearing Mr. Rao, Counsel for the petnr, we are satisfied that this is not a case which can be brought under Art. 17 A & we are of opinion that the order of the learned Subordinate Judge is correct & must be upheld, & would hold that the pltf is liable to pay 'ad valorem' Court-fee on the valuation he puts upon the relief of possession claimed by him.

(2) Mr. Rao, however, submits that he should be given permission to amend his plaint so as to reduce the valuation which he erroneously put at Rs. 20,000/-. That is a course which he may adopt in the lower Ct if he so chooses. But it is not for us to pronounce any opinion on the step he proposes to take. It will be for the lower Ct to adjudicate upon such a petn properly filed in due course by the pltf & to dispose it of on merits. So far as the principle on which Court-fee is to be paid is concerned, we hold that the order of the learned Subordinate Judge is correct & should be upheld.

This revision fails & is dismissed with costs. Hearing fee — two Gold Mohurs.

(3) RAY C. J: I agree.

D. H. *Revision dismissed.*

A. I. R. (38) 1951 Orissa 183 (2) *[C. N. 49.]*

PANIGRAHI AND NARASIMHAM JJ.

Rangulal Ram — Plaintiff — Appellant v. Makhan Lal and others—Defendants — Respondents.

A. F. A. D. No. 214 of 1946, D/- 16-11-1949.

(a) Limitation Act (1908), Art. 142 — Possession — What is.

Possession must be distinguished from mere occupation or detention. Possession in the eye of the law consists of the fact of physical occupation and the mental act of holding the subject of possession to the exclusion of others. The physical element is not necessarily connected with any bodily contact with the subject of possession. It implies the physical power or possibility of dealing with the subject immediately. Legal possession is occupation with the intention of exercising the right of ownership in respect of it. Mere acts of user which do not interfere and are consistent with the owner's title are not sufficient to consistute dispossession of the owner or start adverse possession in favour of the occupant. Whether, in particular circumstances, the acts of the occupant amount to possession and whether such possession is on behalf of the legal owner or in opposition to his title are matters of inference to be drawn from proved facts. [Para 6]

Anno. Lim. Act, Arts. 142 and 144, N. 11 Pts. 5 and 7.

(b) Limitation Act (1908), Art. 144 — Adverse possession — Possession is not adverse if it can be referred to lawful title. [Para 6]

Anno. Lim. Act, Arts. 142 and 144, N. 18 Pt. 2.

(c) Limitation Act (1908), Art. 142 — Dispossession—Meaning of.

Dispossession involves some element of force or fraud and implies the coming in of a person and his driving out another person from his possession. There can, therefore, be no dispossession unless there is a termination of the possession of the rightful owner, followed by actual possession of another. [Para 7]

Anno. Lim. Act, Arts. 142 & 144, N. 9 Pts. 5 and 6.

(d) Limitation Act (1908), Arts. 142 and 144 — Discontinuance Meaning of Adverse possession —Hostile intention —Payment of house tax.

There can be no 'discontinuance' within the meaning of Art. 142 merely because of absence of physical possession. A mere repudiation of the plaintiff's title behind his back is not enough to dispossess him unless it is followed by some overt act. The payment of house tax is not such an unequivocal act as would constitute an assertion of hostile intention so as to amount to adverse possession in law. If the plaintiff knew that the defendant was asserting his own title and yet omitted to enforce the remedies open to him, there would be discontinuance. But without a voluntary abandonment of possession there can be no such discontinuance. Merely remaining quiescent cannot amount to discontinuance. [Para 8]

Anno. Lim. Act, Arts. 142 and 144, N. 9.

H. Mohapatra — for Appellant; A. N. Purohit — for Respondents.

Panigrahi J. — This is a second appeal by the unsuccessful plaintiff whose suit for recovery of possession of a house has been dismissed.

[2] The plaintiff is the son of one Jainarain who had a brother Rup Ram and mother named Achchunari Bewa. The plaintiff, his uncle Rup Ram and his grand-mother Achchunari were living joint. They own some homestead lands in Khurda and paddy lands in the adjoining villages. The plaintiff's case is that in or about the year 1924 there was an oral partition of the joint family properties between him and his uncle and that plot No. 533 consisting of 5.379 acres of land and the suit house and plot No. 534 which is the adjoining *bari*, were allotted to his share. The plaintiff further alleges that he was in possession of these plots, allotted to him, but that the properties stood jointly recorded in the settlement khatian in the names of the plaintiff, Rup Ram and Achchunari. On 13-8-1928 Rup Ram and Achchunari executed a '*nadabi* deed (Ex. 2) in favour of the plaintiff acknowledging his title to the suit properties and the lands allotted to his share. In 1938 Rup Ram and Achchunari executed an agreement to sell the disputed house in favour of defendant 3 and his sons defendants 1 and 2. The defendants brought a suit against Rup Ram and his mother Achchunari in O. S. 586 of 1938 in the Munsif's Court for specific performance of the contract to sell. That suit ended in a compromise decree in execution of which the defendants took delivery of possession of the disputed property on 11-1-1942 thereby and dispossessed the plaintiff. The plaintiff, therefore, filed this suit for recovery of possession of the house on 17-10-1944. The only defence put up by the defendants is that the suit is barred by limitation by reason of their vendors having enjoyed the property openly and adversely to the plaintiff for longer than the statutory period of twelve years. The plaintiff led evidence to show that he was in enjoyment of the property, through tenants, but this was rejected by both the Courts below as unreliable. The evidence on behalf of the defendants was that Rup Ram was always in possession of the suit property for 15 to 20 years. The Courts below, therefore, held that the plaintiff had failed to prove dispossession within 12 years of the suit and accordingly dismissed the plaintiff's suit.

[3] The only point to be considered is whether the plaintiff's right to eject has been established. The '*nadabi*' deed, dated 13.8-1928 (Ex. 2) recites :

"Having partitioned our properties each one of us has been paying rents on the lands and for the house separately, but we have sold some of the lands and the house allotted to us. The properties mentioned in this deed having fallen to your share you have been paying the rents thereon as being in possession. Although the said properties are recorded in our name we are not entitled to them, nor are we paying rents. You having apprehended that we might in future claim these properties, we execute this '*nadabi*' deed."

At the time of the execution of this deed, the plaintiff was living at Ittamatti in Nayagarh State, running a grocery shop, and Rup Ram was living at Khurda and—according to the defence evidence—in the disputed house itself. This '*Nadabi*' deed amounts to nothing more than an acknowledgment of the plaintiff's title and his right to the exclusive possession of the house. It does not appear that the plaintiff was living in the house or that Rup Ram and his mother Achchunari surrendered possession of the house on the day the *Nadabi* deed was executed. The effect of this document was that the plaintiff and Rup Ram regarded themselves as co-tenants by reason of the oral partition of the year 1924 and Rup Ram besides acknowledging the plaintiff's title to the suit house undertook not to claim any title thereto. The question that has now to be considered is whether if, notwithstanding this acknowledgment, Rup Ram continued in occupation of the house, such occupation would amount to exclusive occupation by Rup Ram or dispossession of the plaintiff.

[4] Exhibit 5 is the certified copy of a registered sale deed dated 2-1-1937 executed by the plaintiff and his uncle Rup Ram and his grandmother, Achchunari, jointly in favour of one

Ramkumar Ram. This document recites that the plaintiff, his uncle and grandmother jointly executed an usufructuary mortgage deed in favour of the vendee on 4-12-1931 and borrowed Rs. 400. It further recites that the plots sold thereby, together with the house standing thereon, were in joint enjoyment of the vendors. The description of the boundaries also shows that the vendors had some joint lands in plot NO. 537. Exhibits 6 and 7 series show that the Settlement Record is still in the joint names of the plaintiff, his uncle and his grandmother. It would, therefore, appear that in spite of the admission that there was an oral partition—according to the *Nadabi* deed of the year 1928—the properties were in fact never divided by metes and bounds. In 1931 the joint family borrowed some money and later, in 1937, executed EX. 5 in order to discharge that debt.

[5] Strong reliance was placed on certain house tax receipts produced by the defendants to prove that Rup Ram was in exclusive possession of the suit house. Exhibit F series show that Rup Ram was paying tax for the house to the Union Board of Khurda from the year 1930-31. it is accordingly contended that the possession of Rup Ram became adverse to the plaintiff at least from 1930—the year from which he was paying house tax.

[6] Possession must be distinguished from mere occupation or detention. Possession in the eye of the law consists of the fact of physical occupation and the mental act of holding the subject of possession to the exclusion of others. The unity of these two elements, namely, occupation and *animus possidendi* is recognized as constituting 'possession' in the eye of the law. The physical element is not necessarily connected with any bodily contact with the subject of possession. It implies the physical power or possibility of dealing with the subject immediately. Legal possession includes cases of constructive possession, permissive possession and other kinds of possession where the owner is not in direct physical contact. There is perhaps no legal conception more open to a variety of opinion than 'possession' (*See Lyall* v. *Kennedy* (1887) 18-Q-B. D. 796.) Possession is a flexible term and is not restricted to mere occupation. Legal possession is occupation with the intention of exercising the right of ownership in respect of it. Mere acts of user which do not interfere and are consistent with the owner's title are not sufficient to constitute dispossession of the owner or start adverse possession in favour of the occupant. Another principle which is well settled is that possession is never considered adverse if it can be referred to a lawful title. Whether, in particular circumstances, the acts of the occupant amount to possession and whether such possession is on behalf of the legal owner or in opposition to his title are matters of inference to be drawn from proved facts.

[7] A great deal of argument was directed by Mr. Purohit, counsel for the respondents to the question whether the case was governed by ART. 142 or ART. 144, Limitation Act. But as we find the evidence sufficient to establish a clear conclusion of fact, it is unnecessary to discuss whether the onus lay on the plaintiff to prove that he was dispossessed within the statutory period or whether it was on the defendants to prove that their predecessor-in-title (Rup Ram) had acquired title by adverse possession. If the appellant's contention is right, the question is whether Rup Ram had adverse possession of the disputed property before 17-10-1932. If the respondents' contention is to be accepted the question is whether the plaintiff had not been dispossessed before that date. Article 142, Limitation Act, prescribes a period of twelve years from the date of dispossession or discontinuance of possession. The expression "dispossession' has nowhere been defined but there can be no doubt about its meaning. Dispossession involves some element of force or fraud and implies the coming in of a person and his driving out another person from his possession. There can, therefore, be no dispossession unless there is a termination of the possession of the rightful owner, followed by actual possession of another. The test, in such cases, has been laid down by Bramwell L. J. in *Ley* v. *Jack* (5 EX. Division p. 273):

"To defeat a title by dispossessing the former owner acts must be done which are inconsistent with the enjoyment of the soil for the purpose for which he intended it. It is, therefore, necessary to look at the position in which the former owner stands towards the property as well as to the acts done by the alleged dispossessor. Acts which *prima facie* are acts of dispossession may, under particular circumstances, fall short of evidencing any kind of ouster."

As was observed by Lord Sumner

"they may be susceptible of another explanation, bear some other character or have some other object." (44 Ind. App. 104.)

[8] Having regard to the recognition of the plaintiff's title by Rup Ram in 1937 (EX. 5) and the joint loan contracted by them in 1931 it appears to me that the possession of Rup Ram never went beyond mere occupation of the suit house either as a co-tenant with the plaintiff or as his representative. It should be noted that the parties were closely related. The plaintiff was doing business at Ittamatti and had to be absent from Khurda where the property lies. Rup Ram and his mother had no house to live in as the only house allotted to them was—according to the evidence—in a state of disrepair and had been usufructuarily mortgaged. In

these circumstances, what could be more natural than that the plaintiff allowed his uncle and grandmother to reside in the house, keep it in good repair and pay the taxes to the Union Board? Conversely, there is no single act done by Rup Ram which is inconsistent with the plaintiff's possession. He never asserted any title hostile to that of the plaintiff. He never dealt with the property till 1938 in exercise of any right in himself, real or fancied, when he purported to execute the agreement to sell the property to the defendants. Even this act cannot be held to be adverse as it is not proved that the plaintiff had any knowledge of this transaction. The plaintiff's allegation of dispossession by the defendants in the year 1942 has, therefore, been established and it has not been proved that dispossession occurred earlier than that date. In the circumstances since dispossession occurred within twelve years of the suit Art. 142, Limitation Act, will not apply and the only article that would be applicable is the residuary Art. 144. It is nobody's case that there was discontinuance of possession by the plaintiff. There can be no 'discontinuance' within the meaning of the statute merely because of absence of physical possession. Rup Ram's occupation of the suit house having been found to be no better than that of a representative or a co-tenant or licensee from the plaintiff, the latter's possession continues until the denial of his title is brought to his knowledge. A mere repudiation of the plaintiff's title behind his back is not enough to dipossess him unless it is followed by some overt act. The payment of house tax is not such an unequivocal act as would be sufficient to attribute hostile intention to Rup Ram. Every occupier of a house is bound to pay tax and as Ex. F series show the payment was made by the occupier or owner, I am, therefore, unable to accede to the contention of Mr. Purohit that these constitute an assertion of hostile intention so as to amount to adverse possession in law. If the plaintiff knew that Rup Ram was asserting his own title and yet omitted to enforce the remedies open to him, there would be discontinuance. But without a voluntary abandonment of possesssion there can be no such discontinuance. Merely remaining quiescent cannot amount to discontinuance. On the proved facts, therefore, the fair presumption that would arise is that the continued residence of Rup Ram was with the permission of the plaintiff. That Rup Ram never asserted a title in himself is an obvious inference from the facts proved in the case.

[9] The Courts below fell into an error in interpreting physical occupation of Rup Ram and payment of house tax by him as constituting possession adverse to the plaintiff. This appeal accordingly succeeds. The judgments of the Courts below are reversed and the plaintiff's suit is decreed with costs throughout. The plaintiff shall also be entitled to recover the sum claimed by him as "*wasilat.*"

[10] **Narasimham J.**—I agree.

V.R.B. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 186 *[C. N. 50.]*

SPECIEL BENCH

JAGANNADHADAS, PANIGRAHI AND NARASIMHAM JJ.

Keshab Chandra Choudhary—*Plaintiff*—*Appellant* v. *Lokenath Jena and others* —*Defendants*—*Respondents.*

Second Appeal No. 130 of 1944, D/- 3-11-1950.

(a) Tenancy Laws — Orissa Tenancy Act (II [2] of 1913), S. 31 — As amended in 1938 — Transfer of occupancy holding — Service of notice of transfer on landlord if essential for validity — Subsequent rent sale behind back of transferee — Effect.

(Per *Panigrahi and Jagannadhadas JJ.*; *Narsimham J.* dissenting.) — The transfer of an occupancy holding must be deemed to be complete as soon as the requisite fee is paid and the notice contemplated in S 31 is filed into Court. The provision that the Collector shall serve the notice is directory in nature and therefore the failure of the Collector to serve the notice on the landlord cannot in any way affect the title of the transferee to hold lands purchased as a tenant. It would not therefore be reasonable to import into S. 31, service of notice of transfer on the landlord or the landlord's knowledge of the transfer as a condition precedent to the vesting of the title in the transferee and to the binding character of the transfer as against the landlord. Once the transfer becomes complete the transferee becomes liable to the landlord for rent chargeable on the holding and the holding cannot be put up for sale in execution of a rent decree behind his back. If the holding is sold in execution of a rent decree to which the transferee is not a party, all that the auction purchaser acquires at the rent sale is only the right, title and interest of the judgment-debtor and not the holding itself. [Paras 17, 51]

Per *Narsimham J.*— The necessity of impleading a transferee of an occupancy holding or a portion thereof in a rent execution proceeding so as to have the full effect of a rent decree and rent sale, arises only if the landlord receives notice of the transfer through the machinery provided in S. 31 or becomes aware of it by other means. Doubtless there may be a presumption that he did receive notice of the transfer if the transferee had deposited the processes and necessary fees either before the registering officer or before the Court as required by sub-ss. (2), (5) and (6) of that section. But this is only a rebuttable presumption and if the evidence in a particular case shows that the processes were not actually served and the landlord has no knowledge through other sources it will not be correct to hold that rent decree and rent sale in execution thereof obtained by the landlord against the recorded tenants would have the effect of a money-decree. [Para 43]

(b) Tenancy Laws —Orissa Tenancy Act (II [2] of 1913), S. 31 (5)—As amended in 1938—Mortgage sale of occupancy holding — Non-service of notice

under S. 31 (5) — Effect — Subsequent rent sale behind back of prior auction purchaser — Title of prior purchaser if affected.

A in execution of his mortgage decree against the recorded tenant of an occupancy holding purchased a portion of it. Though the necessary processes for service of notice on the landlords as required by S. 31 (5) were filed by A, the notices were not actually served on all the co-sharer landlords. The landlords subsequently obtained a rent decree against the recorded tenant in respect of arrears prior to the transfer without impleading A and the holding was then purchased by B in the rent sale:

Held **(Per *Jagannadhadas and Panigrahi JJ.*; *Narsimham J.* dissenting), that the non-service of notice on the landlords had no bearing on the completion of transfer of title to *A* under the mortgage sale and the subsequent rent decree obtained behind the back of *A* was not binding on him. Consequently, *A's* title to the holding by virtue of his prior purchase was not affected by *B's* subsequent purchase at the rent sale and must prevail over the latter. [Paras 18, 43, 44, 45]**

(c) Tenancy Laws — Orissa Tenancy Act (II [2] of 1913), S. 31 — As amended in 1938 — Object of notice.

The provision for notice in S. 31 is intended only to keep the landlord informed of all transfers taking place within his estate so that his lack of knowledge of such transfers may not lead to unnecessary litigation. It is a provision primarily for the benefit of the landlord and should not be construed as restricting the right of the tenant to transfer his holding. [Para 6]

(d) Tenancy Laws — Orissa Tenancy Act (II [2] of 1913), S. 83 — Section emphasises absolute character of transfer of an occupancy holding by a raiyat by declaring the transferee jointly and severally liable to landlord for arrears of rent prior to transfer — Landlord is bound to implead transferee in his suit for recovery of arrears of rent — S. 83 thus effectively safeguards landlord's interest whether notice of transfer is served on him or not. [Para 7]

(e) Tenancy Laws — Orissa Tenancy Act (II [2] of 1913), Ss. 31-A and 83 — Sections if redundant.

There is no redundancy or inconsistency between S. 31-A and S. 83. Section 31-A (1) recognises the status of a transferee of an undefined portion of the holding as a joint tenant with the transferor for the unsold portion as well, while S. 83 makes him jointly and severally liable for arrears of past rent on the entire holding. In the case of transfer of a defined portion of a holding, on the other hand, the transferee becomes a tenant in his own right of that portion under S. 31-A (2) and not a joint tenant as under S. 31-A (1); while his liability for arrears of rent due on the entire holding before the transfer is declared by S. 83. There was no need to declare his status as a joint tenant in the case of transfer of a defined portion, as indeed it would be inconsistent with the transfer, and therefore S. 31-A (2) merely gives the landlord the right to object to the distribution of rent and not to the transfer. [Para 8]

(f) Tenancy Laws — Orissa Tenancy Act (II [2] of 1913), S. 197 — Scope.

Section 197 does not suggest that the landlord could ignore all transfers made subsequent to the publication of the Record of Rights. If he does not bring the transferee on his rent roll, he shall do so at his own risk. [Para 10]

(g) Tenancy Laws — Orissa Tenancy Act (II [2] of 1913), S. 31-B Explanation — Scope — Words of explanation are wide enough to apply to all transfers whether made prior to amendment of 1938 or after it — It should not be restricted to pre-1938 transfers merely because it appears as explanation to S. 31-B: A I R (38) 1951 Orissa 41, *Rel. on.* (Per *Narasimham J.*) [Para 32]

S. N. Sen Gupta, L. K. Das Gupta and S. K. Ray — for Appellant; R. N. Singh — for Respondents.

Panigrahi J. — The point raised in this appeal relates to the correct interpretation of S. 31 (5), Orissa Tenancy Act (Bihar and Orissa Act II [2] of 1913, as amended by Orissa Act VIII [8] of 1938).

[2] The plaintiff purchased .60½ of an acre of land out of a holding measuring 1.45 acres, in execution of a mortgage decree against defendant 2 who was the occupancy raiyat of the holding No. 189 in Touzi No. 2484 belonging to defendants 3, 4 and 5 who are co-sharer landlords, in village Tiran. The plaintiff purchased four complete plots and an undivided half share in plot No. 580 on 15-5-40 Defendants 3 and 4 filed a rent suit against defendant 2 and put up the holding to sale in execution of the decree obtained in that rent suit. Defendant 1 purchased it at court auction on 15-5-41. The plaintiff thereafter on 17-9-41, filed the suit, out of which this appeal arises, praying for a declaration of his right and confirmation of possession and, in the alternative, for delivery of possession after ejecting defendant 1.

[3] The plaintiff-appellant's case is that on the confirmation of the sale by the Civil Court he acquired an absolute right to the land, and any rent decree passed behind his back thereafter would not affect his title to the holding. The landlord-defendants 3, 4 and 5 remained *ex parte* and the suit was contested by defendant 1 alone. The contention of defendant 1 is that the sale in favour of the plaintiff on 15-5-40, in execution of his mortgage decree against defendant 2, may be ever so good, but would not be operative against the landlords until they receive notice of that sale, and that as they had not received any such notice of sale, contemplated in S. 31 (5) of the Act they were not bound to implead the plaintiff as a party-defendant in the rent suit and that, accordingly, the title acquired by defendant 1 by reason of his purchase at the rent sale would prevail over that of the plaintiff.

[4] In 1938, the Orissa Legislature by Orissa Act VIII [8] of 1938, introduced some radical changes in the status of tenants of occupancy holdings by enacting Ss. 30-A, 31, 31-A and 31-B. Prior to the introduction of these sections, an occupancy holding was not transferable except with the consent of the landlord, this consent being purchased by the pament of what is known as the mutation fee. The object of the Legislature was to remove this fetter on the

right of the occupancy raiyat to transfer his holding, and, by S. 30-A, it expressly declared such holdings, or portions thereof, to be transferable by sale, exchange, gift or bequest, without the landlord's consent, and without the payment of any fee to him; and it was also declared that such transfer would carry with it occupancy right in the holding as well as all other rights appertaining thereto. Section 31 is a machinery section and is entitled : "Manner of transfer and notice to the landlord" Sub-section (1) of S. 31 enacts that every voluntary transfer of an occupancy holding, or a portion thereof, shall be made by a registered instrument. Sub-section (2) of the section says that a registering officer shall not accept for registration any such instrument unless it is accompanied by a notice signed by the transferor and the transferee, giving particulars of the transfer and the fee prescribed for the service of such notice on the landlord. Sub-section (3) says that after the instrument is registered the registering officer shall transmit the notice to the Collector who shall cause it to be served upon the landlord, named in the notice, in the prescribed manner. Sub-section (4) similarly lays down the procedure to be adopted in the case of transfer of a holding by bequest and says that the Court shall, before granting a probate or letters of administration, require an applicant to file a notice giving particulars of the transfer, accompanied by the prescribed fee for the service of the notice on the landlord. When probate is granted, the Court shall transmit the notice to the Collector who shall cause it to be served on the landlord in the prescribed manner. Next comes sub-s. (5) which is in the following terms :

"When the holding of an occupancy raiyat or a portion or share thereof is sold in execution of a decree or of a certificate signed under the Bihar and Orissa Public Demands Recovery Act, 1914, other than a decree or certificate for arrears of rent due in respect of the holding or dues recoverable as such, and neither the purchaser nor the decree-holder is the sole landlord, the Court or the Revenue Officer, as the case may be, shall, before confirming the sale, require the purchaser to file a notice giving particulars of the transfer in the prescribed form, and to deposit a fee of the prescribed amount for the service of it. When the sale has been confirmed, the Court or the Revenue Officer shall transmit the notice to the Collector who shall cause it to be served on the landlord in the prescribed manner."

In the case of an execution sale, the purchaser is required to file a notice giving particulars of the transfer in the prescribed form and to deposit the requisite fee for the service of such notice on the landlord. The actual service on the landlord is left to the Collector. The confirmation of the sale, however, does not await the service of notice on the landlord by the Collector. All that sub-s. (5) requires is that the purchaser is to file the notice and deposit the fee required for the service of it. As soon as these requirements are fulfilled, confirmation of sale should follow, as a matter of course, and the transfer of title to the purchaser becomes absolute. If the transfer relates to a portion or share of the occupancy holding, and the portion transferred is not divided by metes and bounds, S. 31-A (1) lays down that the transferee and the persons possessing interest in the remainder of the holding shall be considered as joint tenants by the landlord. The object of this provision is to enable the landlord to collect his rent from the entire holding by treating the transferee as a joint tenant with the transferor who still possesses an interest in the remainder of the holding. If the portion transferred is divided by metes and bounds, S. 31-A (2) lays down that the landlord shall be deemed to agree to the division as also to the distribution of the rent made by the parties unless, within six months of the date of service of notice, he applies to the Collector for a just and equitable apportionment of the rent so distributed. These two sections, viz., S. 31 and S 31-A, apply to transfers made after the passing of the amending Act (ACT VIII [8] of 1938). In respect of past transfers the Legislature made a provision in S. 31-B enacting that the transferee shall be liable to pay mutation fee within the time-limit fixed by the section, and that such transferee shall not be liable to be ejected on the ground that the landlord had not given his consent to the transfer. In order that the holding may not be put to sale in execution of a decree for arrears of rent, sub-s. (2) of S. 31-B provides that the transferee is to give notice of his transfer by registered post to the landlord and thereupon the landlord shall be bound to implead him as a party in the execution proceedings. Lest this provision should appear to be in conflict with the other provisions of the Act and the Civil Procedure Code, the Legislature provided, by way of explanation, that the transferee may be brought on the record in the execution proceedings either in substitution of, or in addition to, the judgment-debtor, and such transferee shall, when so substituted or added, be treated as a judgment-debtor. The scheme of the amending Act is that, in the first place, it declares occupancy holdings to be transferable; it then provided how the transfer is to be effected in different cases; thereafter it preserves the right of the landlord to object to unfair apportionment of rent if there be any such unfair apportionment, in cases of transfers of a portion or portions of holdings divided by metes and bounds; and lastly it makes provision to the effect that all past transfers could be validated by giving notice to the landlord,

and ensures that the holding would not be exposed to sale without the transferee being made a party to the execution proceedings. The need for the landlord's consent to the transfer is expressly done away with and the provision for giving notice to the landlord through the Collector is not to be regarded as equivalent to taking the consent, as such, of the landlord for such transfer. The transfer can by no means be regarded as being dependent on the notice, which is to follow in due course after the completion of the transfer. The section does not expressly stipulate that the transfer of the holding will depend upon the consent or knowledge, or notice to the landlord; nor does it follow, by necessary implication, that it should be so. Having regard to the scheme and object of the amending Act, viz., that it was designed to remove a long standing grievance of the tenantry, the provisions should be so construed as to advance the remedy provided by the Legislature and suppress the mischief which was intended to be removed. We cannot get away from the remedial operation of the statute while complying with the language of the statute.

[5] Let me now examine the facts and the contentions advanced on either side. The proved facts are that plaintiff filed into Court the requisite notices and the process fee, as is evidenced by Ex. 7 (certified copy of the Order of the Court). Whether the Court actually transmitted the notices to the Collector and whether the Collector, on his part, served the notice on any of the landlords, has not been satisfactorily established one way or the other. The learned Subordinate Judge who was directed to record additional evidence and submit a finding on this point held that there was no material for concluding that the landlords, viz., defendants 3 and 4 had actually received any notice of tranfer, either through the machinery provided in S. 31 of the Act or otherwise. It was proved, however, that defendant 5, one of the cosharer-landlords, did receive the notice of transfer on 18.11.41. The agent of defendant 5 was examined and he produced Ex. 8, a copy of the notice under S. 31 (5) as having been served upon him. But his evidence that it was also served on the agents of defendants 3 and 4 on the day was not accepted. Neither defendant 3 nor defendant 4 nor their agent went into the box, to contradict it. The position thus would appear to be that two out of the three landlords have not been served with the notices by the Collector and it is, therefore, contended by Mr. Sinha, appearing for defendant 1, that the sale in favour of the plaintiff must be inoperative inasmuch as the co-sharer landlords, defendants 3 and 4, were not bound to implead the transferee in their rent suit. The competition is between two purchasers of an occupancy holding which was at one time non-transferable. The issue about non-transferability is raised not by the landlord but by one who has purchased the ryoti interest after the transfer in favour of the plaintiff. In such cases it has been held that it is not open to the subsequent transferee to question the validity of the first transfer *(See Ayenuddin* v. *Srish Chandra*, 11 C W N 76). In cases between rival claimants, neither of whom is the landlord or tenant, the question of transferability does not arise; and the one would have the best title if the holding were transferable is entitled to succeed—[*Samiruddin* v. *Benga*, 13 C W N 630 : (1 I.C. 114) and *Tulsi* v. *Dayal*, 15 I. C. 718 (Cal.).] None the less the respondent has been allowed to raise the point and his learned counsel was heard at length as if the subsequent purchaser were the representative-in-interest of the landlords.

[6] Mr. Singha's argument proceeds on the assumption that either notice or knowledge of transfer is an essential requisite for validating the transfer and that the landlord—who is expressly precluded by S. 30-A from withholding his consent to a transfer—must nevertheless receive the notice of such transfer *before* the transfer becomes operative. In other words, according to this contention the law as contained in the Amending Act VIII [8] of 1938 has brought about no such radical change as to make an occupancy holding absolutely transferable regardless of the interest of the landlord, and that the notice contemplated under S. 31 must be taken to have been substituted for impliedly obtaining the consent of the landlord. This contention, if I may say so with respect, completely ignores the antecedent history of the legislation, the object of the legislation, and the language employed by the Legislature in carrying out that object. Prior to 1938, the purchaser of a holding was required to apply to the landlord for registration of his transfer and no such transfer would be valid until the landlord consented to it. He could not deposite his rent until such registration (see S. 70 (3)). The raiyat could not sub let or mortgage except with the landlord's consent — (see Ss. 95 and 96). All these disabilities have been removed by the Amending Act of 1938. Section 30-A of the Amending Act is affirmative, explicit and peremptory when it says that a holding shall be transferable without the landlord's consent; and registration in his books is done away with. I am not inclined to restrict the operation of this section by introducing words which are not to

be found there. Section 30-A does not say that the holding shall be transferable without the landlord's consent but that the transfer shall be operative only after notice has been served upon him. There is no such restrictive clause either in that section or in any of the succeeding sections. The duty of serving the notice is cast upon the Collector—a stranger to the transaction between the parties. The provision for notice, therefore, is in my opinion intended only to keep the landlord informed of all transfers taking place within his estate so that his lack of knowledge of such transfers may not lead to unnecessary litigation. It is a provision primarily for the benefit of the landlord and should not be construed as restricting the right of the tenant to transfer his holding It represents a delicate balancing of two conflicting interests: on the one hand the right of the tenant to transfer is unrestricted and on the other the hardship that may result if the landlord is kept ignorant of it is sought to be removed.

[7] It was then argued that since the transferee and the transferor are made jointly and severally liable for past rent under S. 83, the transferee does not acquire a perfect title until he is registered in the books of the landlord. Section 83, as it stood before 1938, applied to transfers in permanently settled areas where transfers could be effected without the landlord's consent—See old S. 31 (5). The transferee was declared liable for arrears of rent after the transfer along with the transferor. The Amending Act of 1938 has removed this distinction and placed transferees in permanently settled as well as in temporarily settled areas on the same footing. Furthermore the amendment makes him liable for arrears of rent even prior to the date of transfer. The landlord cannot, therefore, ignore the transfer having regard to the fact that under S. 83 the transferee is jointly and severally liable to the landlord for payment of arrears of rent accrued due prior to the date of transfer. Since S. 83 imposes a liability on the transferee for arrears of rent, any construction which would relieve him of that liability on the ground that the landlord had no notice of the transfer and thus impose the entire liability on the person remaining with the transferor would be unsound. If the transferee is liable to the landlord for arrears of rent, it stands to reason that the landlord is bound to implead the transferee in his suit for realising the arrears if the holding is sought to be proceeded against. Section 83, therefore, far from lending support to Mr. Singha's contention, emphasises the absolute character of the transfer of an occupancy holding by a raiyat by declaring the transferee jointly and severally liable to the landlord for arrears of rent accruing due prior to the date of transfer. The interest of the landlord is thus effectively safeguarded—notice or no notice.

[8] It was next contended that S. 31-A provides a clue as to the manner in which S. 31 is to be read. As I read S. 31-A it only emphasised the absolute right of transfer that was conferred on the raiyat when it lays down that if the transfer is of an undefined portion the transferee shall be considered as a joint tenant by the landlord. Here, again, the language is mandatory and leaves no option for the landlord to ignore the transfer. In the case of transfer of a defined portion, on the other hand, the only option left to the landlord is to object to the distribution of rent which is inextricably bound up with the division of the holding. This section is a corollary to S. 31 (2) and had to be inserted. Under the old S. 31, the landlord had the right to object to a transfer on the ground that it would result in the creation of unreasonably small holdings. The new S. 31 (2) requires that the deed of transfer should state the rent of each holding or a portion or share transferred and thus recognises the right of the raiyat to divide his holding and distribute the rent. Section 31-A makes it obligatory of the landlord to recognise this division. The transferee of an undefined portion 'shall be considered as a joint tenant by the landlord' under S. 31-A (1) and where the transfer is of a defined portion "the landlord shall be deemed to agree" to the division and distribution as set forth in the notice referred to in S. 31 unless he applies to the Collector for a fair and equitable distribution of rent within six months. The effect of this section is that the security of the holding for the rent due to the landlord is kept unimpaired. It says no more than that and cannot be regarded as by any means whittling down the operation of S. 31. It is noteworthy that when the transfer relates to an entire holding there is no provision entitling the landlord to object on any ground; such a case would be clearly covered by S. 83. It was suggested that S. 83 would be redundant in view of the provision in S. 31-A (1) of the Act, but I am unable to see any such redundancy or inconsistency between the two sections. Section 31-A (1) recognises the status of a transferee of an undefined portion of the holding as a joint tenant with the transferor for the unsold portion as well, while S. 83 makes him jointly and severally liable for arrears of past rent on the entire holding. In the case of transfer of a defined portion of a holding, on the other hand, the transferee becomes a tenant in his own right of that portion under S. 31-A(2) and not a joint tenant as under S. 31-A (1);

while his liability for arrears of rent due on the entire holding before the transfer is declared by S. 88. There was no need to declare his status as a joint tenant in the case of transfer of a defined portion, as indeed it would be inconsistent with the transfer, and therefore S. 31-A (2) merely gives the landlord the right to object to the distribution of rent and not to the transfer. A reference to S. 99 which deals with sub-division of tenures would show that sub-divisions effected by transfers are expressly saved. A division of tenure of holding except as provided in Ss. 31 and 31-A is not binding upon the landlord unless it is made with his express consent under old S. 99, which has since been amended in 1947 (Act XV [15] of 1947).

[9] This also appears to emphasise the position that a tenant can, by transfer of his holding, effect a sub-division of the same between himself and the transferee without reference to the landlord and subject to the distribution of rent. Mr. Sinha's contention is that if the transfer were to be regarded as complete on registration, why does S. 31-A (1) declare that the transferee shall be regarded as a joint tenant by the landlord? The reason is obvious. Under the old Ss. 31 and 31-A, the transferee was obliged to apply to the landlord for recognition of his transfer and the transfer of the holding could be validated only after registration of the transfer in the landlord's books on payment of the mutation fee. Excepting in the cases specifically provided in old Ss. 31 and 31-A, all other cases of sub-division of a tenancy were prohibited without the landlord's consent in writing as laid down in S. 99. When these two sections were replaced by the new Ss. 31 and 31-A in 1938 and the landlord's consent was dispensed with, it was necessary to declare that the transfer of a holding or a portion thereof would be binding upon the landlord even when made without his consent, and the status of the transferee would be that of a joint tenant along with the transferor. The present position, therefore, is that while a division of tenure can be effected by sale, exchange, gift, or bequest, subject only to the right of the landlord to object to the distribution of rent any other form of division would be governed by the provisions of S. 99.

[10] Reliance was placed on S. 197 of the Act for the contention that the landlord is bound to look to the Record of Rights for realisation of his rent, and that tenant alone whose name is recorded in the Record of Rights shall be liable to pay the rent due to him. A reference to this section shows that all that it lays down is that a revenue Court shall have due regard to the entries made in the Record of Rights. There is nothing in the language of the section to suggest that the landlord could ignore all transfers made subsequent to the publication of the Record of Rights. If he does not bring the transferee on his rent roll, he shall do so at his own risk.

[11] Mr. L. K. Das Gupta, learned counsel appearing for the plaintiff-appellant advanced the following propositions: (1) that the transfer of a holding is complete, the moment registration of such transfer is made by the registering officer or the moment a sale certificate is granted by the Court; (2) that the transferor of an occupancy holding ceases to be liable to the landlord for payment of rent once he transfers his interest in the holding to another party; (3) that in order that the holding may pass to the auction-purchaser at a court sale there should be the relationship of landlord and tenant subsisting on the date of the rent sale. If the matter were res integra, I should have had no difficulty in holding, on a mere interpretation of the relevant sections, that these contentions are well-founded. But every one of these propositions has been well established by a long course of decisions of the Calcutta High Court which have been approved by the Judicial Committee of the Privy Council.

[12] The language employed in S. 13, Bengal Tenancy Act, 1885 (VIII [8] of 1885) is identical with that used in S. 31, amended Orissa Tenancy Act. Section 13 of the Bengal Act says that when a permanent tenure is sold in execution of a decree the Court shall, before confirming the sale, require the purchaser to pay into Court the landlord's fee required by S. 12 together with the prescribed cost of transmission thereof to the landlord and such further fee for service of the notice of sale on the landlord as may be prescribed; and that when the sale has been confirmed the Court shall send to the Collector the landlord's fee, the prescribed cost of transmission of the same, and a notice of the sale, and the Collector shall cause the fee to be transmitted to, and notice to be served upon, the landlord named in the notice and in the prescribed manner. A comparison of the above provisions in S. 13 of the Bengal Act with those contained in S. 31 (5) of the Orissa Act would clearly show that the object of the Legislature in both cases was to provide a machinery for the transfer of a permanent tenure in the former case and of an occupancy holding in the latter case. The agency employed for service of notice of transfer is the Collector in both the cases.

[13] It has been held, uniformly, by the Calcutta High Court that the transfer of a tenure under the Bengal Act becomes complete on payment of the requisite fee to the landlord and

the cost of transmission thereof. As early as 1889 it was held by Petheram C. J. in *Kristo Bulluv* v. *Kristolal Singh*, 16 Cal. 642 that a transfer becomes complete as soon as the document was registered and that the liability of the transferor to the landlord for payment of rent ceases when the estate is so transferred, and the Act does not say that his liability subsists until notice has been served upon the landlord. This case has been followed in a number of cases decided by that High Court. In *Chintamoni Dutt* v. *Rashbehari*, 19 Cal. 17 it was observed:

"Though it might seem a case involving hardship to the landlord that he has not received notice on account of some neglect on the part of the Registrar, or the Collector, his suit is still liable to be dismissed if brought against the wrong person."

The argument that the landlord is entitled to look to his recorded tenant until he receives due notice of the transfer was negatived on the authority of *Kristo Bulluv's case*, 16 Cal. 642. In *Mohesh Chunder Ghose* v. *Saroda Prasad*, 21 Cal. 433, the argument put forward was that the recognition of the transferee of a share of the holding would conflict with S. 88, Bengal Tenancy Act, which corresponds to S. 99 of the Orissa Act—an argument that was repeated before us by Mr. Sinha. This argument was rejected on the ground that the transferee of a portion of a holding can always claim to be a joint tenant with the transferor and there was nothing inconsistent in S. 88 which would militate against that position of the transferee. It was held in that case that the decree obtained by the landlord and the rent sale in execution thereof without impleading the transferee, did not affect the rights of the transferee plaintiff. In *Hemendra Nath* v. *Kumar Nath*, 12 C. W. N. 478, neither the landlord's fee was paid nor notice of transfer served on the landlord. It was held that once the document was registered the fact that the landlord's fee was not paid did not render the transfer invalid. A transfer in favour of the purchaser must be deemed to have been completed upon payment of fee into the Court, irrespective of its acceptance by the landlord: See *Girish Chandra* v. *Khagendranath*, 13 C. L. J. 613 : (9 I. C. 1001). The unrecorded transferee of a transferable tenure is a tenant though his name is not on the books of the landlord: See *Azgar Ali* v. *Asaboddin*, 9 C. W. N. 134. Similar cases which recognised transfers, in spite of the fact that the landlord's fee had not been paid may be found reported in *Fazal Ali* v. *Amir Baksh*, 47 I. C. 334 : (A.I.R. (6) 1919 Cal. 1000) and *Joy Gobind* v. *Monmotha Nath*, 33 Cal. 580.

[14] The exposition of the law in *Kristo Bulluv's case*, 16 Cal. 642 and in *Hemendra Nath* v. *Kumar Nath*, 12 C. W. N. 478 was referred to, with approval, by the Judicial Committee in *Surapati Roy* v. *Ramnarain*, 50 I. A. 155 : (A. I. R. (10) 1923 P. C. 88). In *Jitendranath Ghose* v. *Manmohan Ghose*, 57 I. A. 214 at p. 221 : (A. I. R. (17) 1930 P. C. 193) the Judicial Committee had again occasion to consider the requirements of notice as prescribed in Ss. 12 and 13, Bengal Tenancy Act, 1885. The arguments addressed before their Lordships in this case are reported in *Jitendra Nath* v. *Manmohan*, 34 C. W. N. 821 : (A. I. R. (17) 1930 P. C. 193). Lord Tomlin pointed out, during the discussion, that before the Bengal Act of 1885 there was a statutory duty on the tenant to give notice to the zamindar but no such duty was imposed on the tenant or the transferee under the Act of 1885 and that it was for the Court or the Collector to give that notice. At p. 832 of the Report the same learned Lord made this observation :

"Once you have a valid transfer by a registered instrument, what has notice got to do with it?"

Sir George Lowndes, who delivered the judgment of the Board, pointed out that before the Act of 1885 the duty was laid specifically upon the transferee to see that his name was recorded in the landlord's sherista, but after the coming into force of the Act of 1885, instead of the transferee being required to go to the landlord to get his name recorded, the landlord had to find out his tenant. The landlord could not ignore a transfer of the tenure and rely upon decrees obtained by him against persons whom he chose, for his own purposes, still to regard them as his tenants, though he knows or must be taken to know—that their interest in the tenure has ceased. It was further observed that, apart from the knowledge of the landlord, their Lordships had no hesitation in presuming, in the absence of evidence to the contrary, that the procedure laid down in Ss. 12 and 13 of the Act was duly followed and that proper statutory notice was given. It was accordingly held that the tenure being statutorily transferable, the original tenure-holders would no longer be liable for rent and that an effective decree could only be obtained against the transferee.

[15] Nor can the failure to serve the notice have the effect of invalidating the sale of the tenure : *See Barada* v. *Tarakanath Prasad*, A.I.R. (13) 1926 Cal. 844 : (94 I. C. 147) and *Amtika Charan* v. *Harkishoree*, A. I. R. (14) 1927 Cal. 825 : (103 I. C. 707).

[16] These cases were sought to be distinguished on the ground that they related to transfer of tenures. But I can find nothing on principle to distinguish these cases from the present case. The language used by the Legislature being the same in both the cases the

interpretation given to that language by the Calcutta High Court should be adopted. The Bengal Tenancy Act of 1885 was amended in 1928 and the right of transfer was conferred upon occupancy tenants by Ss. 26B and 26C. *Maharaj Bahadur Singh* v. *Nari Mollani*, 63 Cal. 1117:(A. I. R. (23) 1936 Cal. 279) was a case which arose under S. 26C, Bengal Tenancy Act of 1928. In that case the landlord's transfer fee did not reach the landlord before the decree in the rent suit was passed, and Mitter J. held that as soon as the document was registered title to the holding passed from the transferor to the transferee with retrospective effect from the date of execution of the conveyance. The question whether the landlord was served with the notice of transfer by the Collector was not material and it could not be said that the transfer would be complete as against the landlord only when he received the notice of transfer. In another case, relied on by the learned counsel for the respondent, viz., *Nagendranath* v. *Niranjan*, A. I. R. (24) 1937 Cal. 655:(I.L.R. (1938) 1 Cal. 164) the immediate point for decision was whether the transferee was represented by the transferor in an execution proceeding and the decision of the question turned upon the correct interpretation of S. 146A, Bengal Tenancy Act ,introduced in the year 1928. There is no corresponding provision in the Orissa Tenancy Act and I am unable to see how this case can support the respondent's argument.

[17] My conclusion, therefore, on a review of all these decisions, is that the transfer of an occupancy holding must be deemed to be complete as soon as the requisite fee is paid and the notice contemplated in S. 31 is filed into Court. The section refers to the immediate act of parties to give validity to the transfer and does not extend to the acts or omissions of third parties. The provision that the Collector shall serve the notice is a direction to that officer, it is directory in nature as it is introduced after the transfer is completed (Craies on Statute Law, p. 238). A provision in a statute is often directory in the sense that it is not a condition precedent, but a condition subsequent, as to which responsible persons may be blamable and punishable if they do not observe it (*see* Halsbury, Vol. 27, p. 172). The failure of the Collector to serve the notice on the landlord cannot in any way affect the title of the transferee to hold lands purchased as a tenant. Once the transfer of title becomes complete it follows, as a consequence, that the transferee becomes liable to the landlord for rent chargeable on the holding and the holding cannot be put up for sale in execution of a rent decree behind his back. It may be that the transferor is also liable but as there is no privity of estate between him and the landlord in respect of the transferred portion and as the relationship between the landlord and the transferor ceases to be that of a landlord and tenant from the date of sale the transferor's liability to pay rent also ceases. In such a case all that the auction purchaser acquires at the rent sale is only the right, title and interest of the judgment-debtor and not the holding itself: See *A. H. Forbes* v. *Maharaj Bahadur Singh*, 41 I. A. 91 : (A. I. R. (1) 1914 P. C. 111) and *Krishnapada* v. *Mannada Sundari*, 59 Cal. 1202 : (A. I. R. (19) 1932 Cal. 321 S. B.). It has been observed that

"any proceedings for rent after the completion of the transfer must be against the transferee and any decree for rent obtained against the transferor after the transfer cannot affect the interest of the transferee."

See *Prabhavati* v. *Lalji Mahto*, 23 Pat. 356 : (A. I. R. (31) 1944 Pat. 252), following *Kristo Bulluv* v. *Kristolal*, 16 Cal. 642. In *Chandra Sekhar* v. *Jagannath*, 24 Pat. 148 : (A. I. R. (32) 1945 Pat. 313), it was found, as a fact, that the landlord's fee was not paid and no notice of transfer was served upon the landlord as required by S. 13, Bihar Tenancy Act, which corresponds to S. 12, Bengal Tenancy Act. It was held that the mere fact that the Registrar or the Collector did not carry out the directions contained in Ss. 12 and 13 cannot affect the title of the transferee. It may be noted that, in that case, even the requisite fee for serving the notice had not been deposited.

[18] I am satisfied that the non-service of notice on the landlord has no bearing on the completion of transfer of title and that the decree for arrears of rent obtained by the landlords in this case does not bind the plaintiff. The plaintiff's title to the suit holding by virtue of his purchase on 15-4-40 is not affected by the later purchase of the same by defendant 1 at court auction in execution of a rent decree, on 15-5-41, and must prevail over the latter.

[19] In the result I allow this appeal with costs throughout.

[20] **Narasimham J.**—This appeal is by the plaintiff against the appellate judgment of the Additional District Judge of Cuttack modifying the judgment of the 2nd Additional Munsif of Cuttack in a suit brought by the appellant for declaration of his title and confirmation of possession in respect of 60½ decimals of land which forms part of an occupancy holding comprising 1·45 acres recorded in Khata No. 189 of village Adankur, P. S. Tirtol. During the last settlement the said Khata comprised 6·63 acres of land. But since then the holding was split up into two separate holdings consisting of 1.45 acres and 5.18 acres with the consent of the

landlords and defendant 2 and his co-sharers were recorded as raiyats in respect of 1.45 acres of the said khata. The plaintiff's father took a mortgage of 60½ decimals of that separate holding from defendant 2 and in execution of the mortgage decree the plaintiff purchased that property through the civil Court on 15-5-40. Soon after the purchase he filed the necessary fees and processes for service of notice on the landlords as required by sub s. (5) of S. 31, Orissa Tenancy Act, as amended by Orissa Act VIII [8] of 1938. But it appears that the processes were not actually served on all the co-sharer landlords. Defendants 3, 4 and 5 are the three co sharer landlords of the khata. For arrears of rent due on this holding defendants 3 and 4 filed a rent suit on 12-4-40 (more than a month before the mortgage sale in favour of the plaintiffs and impleaded in that rent suit the recorded tenant (defendant 2) and his co-sharer Sadai Rout making the other co-sharer landlord (defendant 5) a *pro forma* defendant in that suit. In due course they obtained the rent-decree in November 1940 and in execution of that decree the holding was purchased on 15-5-41 by defendant 1 who obtained delivery of possession through the civil Court. It was conceded before us (though this point was challenged in the lower Courts) that in that rent suit and the subsequent rent sale the requirements of Ss. 199 and 212, Orissa Tenancy Act, were complied with. Consequently, the decree would have the effect of a rent decree and the entire holding would pass by the sale unless it be held that the plaintiff is a necessary party to the execution proceeding.

[21] The plaintiff's main contention is that by virtue of the mortgage sale dated 15-5-40 he became a co-sharer raiyat of the holding and that as he was not impleaded as a party in the rent suit and the subsequent execution proceedings, the rent-decree had the effect only of a money-decree and that consequently his title in respect of 60½ decimals of the holding remained unaffected by the rent-sale. Several other points were taken up both in the trial Court and in the lower appellate Court and also before this Court when it sat as a Division Bench and heard the appeal. At that time Mr. Dasgupta on behalf of the appellant asked for a remand of the appeal for a finding of the lower Court as to whether the mortgage sale in favour of the appellant was duly notified to the landlords in the manner provided in S. 31 (5) or else they were otherwise aware of the transfer. He felt so sure of his ability to prove by evidence that the transfer in favour of the plaintiff was brought to the knowledge of the landlords and that they actually made the necessary corrections in their rent-roll and entered the transferee plaintiff as a tenant that he did not rely on the presumption of due service of notices by the Collector under S. 31 (5), Orissa Tenancy Act. This Court then remanded the appeal to the lower Court for a finding on this question of fact but unfortunately for Mr. Dasgupta the finding of the Subordinate Judge is to the effect that two of the landlords (defendants 3 and 4) did not have notice of the transfer either through the machinery provided in S. 31, Orissa Tenancy Act, or otherwise. Mr. Dasgupta, however, contended that even if it be held that those landlords did not know about the transfer yet the decree obtained by them in a rent suit (otherwise properly constituted against the recorded tenants) would still have the effect of a money-decree inasmuch as the title of the plaintiff to his portion of the holding become complete as soon as the mortgage sale was confirmed on 15-5-40. Consequently, on the date of the rent-sale (15-5-41) one of the parties interested in the holding was not a party before the execution Court and his right, title and interest cannot, in any way, be affected by the sale. Mr. Sinha on behalf of respondent 1, however, urged that in view of the clear finding to the effect that the transfer was not brought to the knowledge of all the landlords either through the machinery provided in S. 31 (5), Orissa Tenancy Act or otherwise such transfer though valid as between the transferor and the transferee (defendant 2 and the plaintiff) could not have a binding effect on the landlords so as to render a rent-decree obtained by them in a suit properly constituted in other respects against the recorded tenants into a mere money-decree. In view of the importance of this question and its repercussion on the security of the holding for arrears of rent in north Orissa it was considered necessary to decide this question in a Special Bench. There is a Division Bench decision of this Court in *Giridhari Mohanty* v. *Abdul Khan*, I.L.R. 1950 Cut. 195:(A.I.R. (38) 1951 Orissa 41) in which my Lord the Chief Justice (Panigrahi J. concurring) while discussing another case, which on facts is distinguishable from the present one, made some general observations to the effect that the various amendments to S. 31, Orissa Tenancy Act, by the amending Act of 1938 had as their object the conferments of an unrestricted right of transfer either in whole or in part to the raiyat but at the same time making it incumbent on the transferee to give notice of such transfer to the landlord in the manner provided in that section so as to make it binding on the latter. The correctness of some of those observations was also challenged before this Special Bench.

[22] Prior to the amending Act of 1938, the landlord's consent was necessary to make any transfer of an occupancy holding or a portion thereof binding on him and such consent was deemed to be given when he accepted the prescribed transfer fee tendered by a tenant or else when that fee was received by the Collector and a declaration was given by him to the effect that the transter was registered (see old S. 31). Unless a transfer was so effected the landlord could proceed to sue the recorded tenant for arrears of rent and any decree obtained by him would have the effect of a rent-decree provided that all the co-sharer landlords and co-sharer recorded tenants were made parties. Section 212, Orissa Tenancy Act, expressly stated that in such a case the entire holding would pass to the purchaser. The landlord was not bound to implead any transferee either of a whole or a portion of the holding whose transfer had not been recognised by him in the manner described above and the omission to so implead such a transferee would not in any way reduce the rent-decree to a money-decree. But there were also some occupancy holdings which were transferable without the consent of the landlord in accordance with custom or usage prevalent in particular localities. The law relating to the transfer of these classes of holdings will be discussed later.

[23] In 1938, the Orissa Legislature made radical changes in the Tenancy law mainly with the object of conferring on all classes of occupancy raiyats freedom as regards transfer. In place of old S. 31, four new sections (30A, 31, 31A and 31B) were substituted. Section 30A expressly declared that the occupancy holding of a raiyat or a portion or a share thereof was transferable without the landlord's consent and without the payment of any fee to him. Section 31 contained elaborate provisions regulating the mode of transfer and service of notice on the landlord. As regards voluntary transfers, registration was made compulsory irrespective of the value of the property and the registering officer was prohibited from accepting for registration any instrument of transfer unless it was accompanied by a notice signed by the transferor and the transferee giving particulars of the transfer and also the prescribed fee for service of the notice on the landlord. The registering officer was required to transmit the notice to the Collector who was also required to serve it on the landlord in the prescribed manner. As regards involuntary transfers sub-s. (5) of that section required that the Court, before confirming the sale, should direct the purchaser to file a notice giving particulars of the transfer in the prescribed form and to deposit the necessary process fee. After the confirmation of the sale the Court was required to transmit the notice to the Collector who was directed to cause it to be served on the landlord in the prescribed manner. I shall discuss Ss 31A and 31B later. As a consequential amendment, S. 83 was also recast and the transferor and the transferee were made both jointly and severally liable for arrears of rent that accrued due prior to the date of the transfer and such arrear rent was made a first charge on the holding. The contention of Mr. Dasgupta is that by virtue of S. 30A an occupancy raiyat was given the unrestricted right of transfer either of the whole or a portion of the holding and as soon as such a transfer was duly registered under sub-s. (2) of S. 31 (in case of voluntary transfers) or the sale of the holding was duly confirmed (in case of involuntary transfers) by a Court under the provisions of sub-s. (5) of S. 31 the title of the transferor completely passed to the transferee and that the other provisions regarding service of notice on the landlord though intended to inform the landlord about the transfer do not affect the transfer of title. Therefore, even if the notices prescribed in that section are not served on the landlord the transfer was binding on him and if notwithstanding such transfer, he continues his suit against the transferor he runs the risk of having his rent-decree declared to be a money-decree. Mr. Sinha, however, contended that the elaborate provisions made in S. 31 for service of notice on the landlord through the Collector made it clear that the object of the Legislature was to make such transfer binding on the landlord only after he became aware of it. Ordinarily in view of the presumption in favour of regularity of performance of official acts a Court may presume that the notices were duly served on the landlords if it could be shown that the transferee filed the necessary processes and the fee before the registering officer or the Court as the case may be. But where, on the evidence adduced in a case, it is actually found that the notices were not served on the landlords, such a presumption cannot arise and though title might have passed from the transferor to the transferee by the confirmation of the sale such a transfer will not be binding on the landlord until he is made aware of the transfer.

[24] The whole question turns on the construction of sub-s. (5) of S. 31, but for that purpose that section has to be construed along with Ss. 30A, 31A and 31B which were all contemporaneously inserted in the parent Act by the amending Act of 1938 and which along with S. 31 consolidate the law relating to transfers of occupancy holdings. Any necessary implication arising out of the construction of those sections will have a direct bearing on the effect

of non-compliance with any of the provisions of S. 31 dealing with the mode of transfer. Moreover, the previous law embodied in old S. 31 should be the background against which the provisions of the aforesaid four amended sections should be viewed. As pointed out by the Privy Council in *Abdur Rahim* v. *Abu Mahomed Barkat Ali*, 55 I. A. 96 at p. 103 : (A. I. R. (15) 1928 P. C. 16) :

"When it is contended that the Legislature intended by any particular amendment to make substantial changes in the pre-existing law, it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended."

[25] It is, therefore, necessary to closely scrutinise the law on the subject prior to the amending Act of 1938. As early as 1884, a Division Bench of the Calcutta High Court in *Panye Chunder* v. *Hurchunder*, 10 Cal. 496, had pointed out that

"According to the common law, quite apart from any statutory provisions, when a tenant transfers his interest to a third person, in order to discharge himself from future liability for rent, and in order that the transferee may have the advantages of the tenancy, one or both of them must give notice to the landlord."

This common law right of a landlord to receive notice was emphasised by Dr. Rash Behari Ghose in his arguments in *Sasi Bhusan* v. *Tara Lal Singh*, 22 Cal. 494. In that case, however, the Judges did not express their views definitely on the question because they were dealing with a non-agricultural tenancy which was governed by S. 108 (j), T. P. Act. But in a later Madras decision reported in *Ranga Ramanujachariar* v. *Srinivasa*, A. I. R. (2) 1915 Mad. 34 : (25 I. C. 804), Sadasiva Aiyar J., concurred in the view that

"it is the common law of India that on transfer of a tenure *with notice* the lessee ceases to be liable for rent."

This common law right received statutory recognition in S. 73 of the old Bengal Tenancy Act, 1885 which ran as follows :

"When an occupancy-raiyat transfers his holding without the consent of the landlord, the transferor and transferee shall be jointly and severally liable to the landlord for arrears of rent accruing due after the transfer, unless and until notice of the transfer is given to the landlord in the prescribed manner."

Prior to 1913 most of the provisions of the Bengal Tenancy Act were in force in Orissa and at the time occupancy holdings were broadly divided into two classes : (1) those holdings which were transferable without the consent of the landlord in accordance with the custom or usage prevalent in a particular locality and (2) those holdings which were not transferable without the consent of the landlord. Section 73 of the old Bengal Tenancy Act dealt with the former class of occupancy holdings only. Therefore, apart from the common law which existed prior to the passing of Bengal Tenancy Act of 1885, it seems well established that from the passing of the Orissa Tenancy Act in 1913, those occupancy holdings which were transferable without the consent of the landlord were controlled by S. 73, Bengal Tenancy Act, in accordance with which the landlord was entitled to receive notice of the transfer before the transferor-occupancy-raiyat could be absolved from his liability for rent that may accrue even after the date of the transfer. Therefore the claim of the landlord to receive notice before transfers are made binding on him even in respect of holdings which were transferable without his consent is not a new claim put forward now but is based not only on the common law of India existing prior to 1885 but also on the express provisions of S. 73 of the old Bengal Tenancy Act. In Maddox Settlement Report at p. 226 it was pointed out that S. 73, Bengal Tenancy Act, did not appear to alter the then existing law in Orissa.

[26] The Orissa Tenancy Act came into force in 1913 and S. 31 of that Act dealt with the law regulating the transfers of occupancy holdings in temporarily settled estates. Section 73, old Bengal Tenancy Act, was similar to S. 83, Orissa Tenancy Act, but as the latter section was restricted to holdings in permanently settled estates it may be left out of the present discussions. Old S. 31, Orissa Tenancy Act, recognised distinctly two steps in the transfer of an occupancy holding so as to make it binding on the landlord. Firstly, there should be an application by the transferee for registration of the transfer. Such an application gave notice of the transfer to the landlord as required by the common law as well as by old S. 73, Bengal Tenancy Act. The next step was the payment of mutation-fee which was fixed at a *maximum* of 25 per cent of the consideration money. The word 'maximum' has great importance. Prior to 1913, the exact amount of mutation-fee realised for recognition of transfers by the landlords varied from place to place and in many estates such as a Khasmahal no mutation-fee was charged at all. In fact in Maddox Settlement Report at p. 218 he mentions that in some estates the zamindars recognised the transfers on payment of arrear rent and nominal sums such as Rs. 2 as Dakhil Kharaj Salami without insisting on full payment of 25 per cent. of the consideration money. Therefore, on receipt of the application from the transferee for registration of the transfer and the payment of the prescribed mutation fee or a nominal fee or no fee at all according to the custom or usage prevalent in the estate (which was expressly saved by S. 237) the landlord was

bound to recognise the transfer and if he omitted to do so a special provision was made in sub-s. (3) of old S. 31 for such recognition through the medium of the Collector. Therefore under the law in force from 1913 to 1938 the previous law which required notice of the transfer to be given to the landlord even in respect of those holdings which were transferable without his consent was maintained by insisting on the transferee applying to the landlord for registration of the transfer and the two steps in the transfer were distinctly recognised.

[27] When the Legislature passed the amending Act of 1938 the change in the law was expressed in sub-s. (1) of S. 30A as follows:

"The occupancy holding of a raiyat, or a portion or share thereof, shall be transferable by sale, exchange, gift or bequest without the landlord's consent and without payment of any fee to him."

By this amendment, the necessity of obtaining the consent of the landlord and the payment of fee to him were dispensed with, but his right to receive notice of the transfer which was always existing even before the passing of the Bengal Tenancy Act of 1885 was not expressly taken away. Therefore applying the dictum of the Privy Council mentioned above, the residue of the old law which required knowledge of the transfer on the part of the landlord still continues to exist. When an amending Act changes the old law it is not necessary that the amending Act itself should expressly say what is the residue of the old law that still continues to exist. Doubtless the Court should give full effect to the amendment; but after giving such effect and excising from the old law all elements which were expressly dispensed with by the amendments the residue must continue to remain in force. As pointed out by Maxwell in his Interpretation of Statutes, 8th Edn., p. 73

"the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed."

Thus when the Legislature knowing fully well that under the old law the landlord was entitled to get notice of the transfer and was also entitled to give his consent on receipt of the customary mutation fee not exceeding 25 per cent. of the consideration money expressly dispensed with the consent and the payment of mutation fee in the amending Act of 1938 and kept completely silent as regards the right of the landlord to receive notice, the reasonable inference is that that right continues to exist.

[28] In Expln. (1) to old S. 183, Bengal Tenancy Act, the usage under which a raiyat was entitled to sell his holding without the consent of the landlord was expressly saved. Some of the case law under that Explanation is instructive. In *Jagun Prosad* v. *Posun Sahoo*, 8 C. W. N. 172, itw as pointed out that

"The essence of a usage of transferability is that tranfers made *to the knowledge* of but without the consent of the landlord are valid and must be recognised by him."

This view was reiterated in *Peary Mohan* v. *Joti Kumar*, 11 C.W.N. 83. As already pointed out there were always certain classes of occupancy holdings which were transferable without the consent of the landlord according to local custom or usage. But in respect of those classes of occupancy holdings neither under the old common law nor under the provisions of the Bengal Tenancy Act nor under the provisions of the O. T. Act up to 1938 could it ever be validly contended that the transfer was binding on the landlord even if he was not aware of the same On the other hand, the aforesaid discussions make it clear that he was entitled to notice. The amending Act of 1938 dispensed with the necessity of proving custom or usage in every case and unified the incident of transferability of all classes of occupancy holdings by bringing it to the same level as that of those holdings which were always transferable without the consent of the landlord.

[29] This was perhaps the reason why in new S. 31 elaborate provisions were made for *effective* service of notice of the transfer through the medium of the Collector instead of leaving it to the choice of the parties. The amending Act of 1938 did not substitute notice of transfer on the landlord *in lieu* of his consent to the transfer as required by the old law. Knowledge of transfer by the landlord was always required as it is of the essence of transferability. But under the old law, on that knowledge was superimposed the obtaining of the landlord's consent either by payment of mutation fee or otherwise and it was this necessity of obtaining consent by payment of mutation fee that was expressly taken away by S. 30A (1). If the Legislature intended that the giving of notice to the landlord itself should be dispensed with the Legislature could easily have adopted the language used in S. 12 as regards the right of transfers of permanent tenures and S. 30 as regards devolution of occupancy rights by inheritance. In both those sections, it was expressly stated that the transfer or devolution of the tenure, or the holding, as the case may be, shall be "in the same manner as other immovable property". The Legislature could easily have said in S. 30A also, as in S. 12, that an occupancy holding was capable of being transferred "in the same manner and to the same extent as other immovable property". If such language had been used

the question of notice to the landlord could not have arisen because ordinarily in transfers of immovable property the giving of notice to a third party is not required to complete the transfer. The elaborate provisions made in S. 31 for the giving of effective notice of transfer to the landlord through the medium of the Collector indicate unmistakably that the Legislature did not change the old law regarding the giving of notice to the landlord but put it on a surer footing.

[30] An indication as to the stage at which the transfer is binding on the landlord seems inferable from a scrutiny of Ss. 31A and 31B. Sub-section (1) of S. 31A says that where a transfer of a portion of a holding is not defined by metes and bounds the transferee and the persons possessing interest in the remainder of the holding shall be *considered* as joint tenants by the londlord. The word 'considered' occurring in this sub-section has been rightly emphasised by Mr. Sinha as implying that as soon as the landlord is made aware of the transfer he is bound to consider the transferee and the persons possessing interest in the remainder of the holding as joint tenants. If the contention of Mr. Dasgupta is correct and the title passes completely as soon as the sale is confirmed sub-s. (1) of S. 31A becomes otiose. The right of free transfer having been declared in S. 30A and the mode of transfer having been declared in S. 31 the transferee and the person possessing interest in the remainder of the holding become joint tenants by virtue of those sections and there would have been no need to make a pious declaration in sub s. (1) of S. 31A. A consideration of sub-s. (2) of S. 31A leads to a similar result. That sub-section authorises the landlord to apply within six months of the date of service of notice of the transfer for a just and equitable distribution of rent in those cases where a transfer is of a portion of a holding and the portion is defined by metes and bounds. If he fails to apply within such time, his consent to the division and distribution of rent shall be deemed to have been given. Thus where a transfer of a portion of a holding is by metes and bounds the landlord is authorised to take further steps on receipt of notice and visits him with a penalty if he omits to take such steps within a stipulated period. Thus the provisions of S. 31A imply that the binding nature of the transfer, where it is a transfer of a portion of a holding as against the landlord, arises only after he is made aware of the transfer. Section 31 deals with all classes of transfers, namely (1) transfer of an entire holding, (2) transfer of a portion of a holding defined by metes and bounds and (3) transfer of a portion of a holding not defined by metes and bounds and makes no distinction as regards the mode of transfer of service of notice on the landlord in respect of those three classes of transfer. If, therefore, in respect of two of those classes, S. 31A, by necessary implication, indicates that there must be actual service of notice on the landlord so as to make it obligatory on him to consider the transferee and other persons as joint tenants or to take further steps for apportionment of rent, it will be illogical to hold that in respect of the transfer of an entire holding no such service of notice is necessary.

[31] A similar result would follow from a consideration of S. 31B which deals with transfers that took place prior to 1938 and which remained unrecognised on the date of the amending Act. Under sub-s. (1) of that section, the right of a landlord to realise transfer fee lawfully payable was recognised but at the same time such transferee was held not liable for ejectment on the ground that the consent of the landlord had not been given. Sub-section (2) and the Explanation thereto being of great importance in the present discussion may be quoted in full.

"(2) The holding or a portion or a share thereof shall not be liable to be sold in satisfaction of the decree for arrears of rent without making the said transferee a party to the proceedings in execution of the decree provided that the transferee has given notice of transfer by registered post to the landlord.

Explanation—Notwithstanding anything contained in this Act or in the Code of Civil Procedure, in the case of a transfer of a holding or a portion of a share thereof, whether before or after the decree, the transferee may be brought on record in the proceedings in execution either in substitution of or in addition to the judgment debtor, and such transferee shall, when so added or substituted, be treated as a judgment-debtor for all purposes of the said proceedings in execution of the decree."

It is here that the Legislature for the first time expressly states that in respect of pre-1938 transfers the holding shall not be liable to sale in execution of a decree for arrears of rent without making the transferee a party *provided that the transferee has given notice of the* transfer by registered post to the landlord. This shows that the Legislature intended that the duty of the landlord to implead the transferee arises only after he is given notice of the transfer. It is true that such notice was required to be given by registered post whereas in the case of transfers made after the amending Act of 1938 such notices were required to be served through the Collector But the difference as regards the medium for the service of notice in respect of these two classes of transfers is unavoidable because as regards pre-1938 transfers whether voluntary or involuntary, there can be no question of filing the processes etc., either before the registering officer

at the time of registration of the transfer or before the Court at the time of the confirmation of the sale because these had terminated long ago. The Legislature had no other option but to require service on the landlord by registered post, but it was very particular that in respect pre-1938 and post-1938 transfers, the machinery for service of notices on the landlord should be very effective. As regards the meaning of the words "giving notice by registered post" S. 29, Orissa General Clauses Act, 1937 is very clear. Though such a notice would be deemed to have been effected by properly posting the notice by registered post the non-receipt of the notice can also be proved. That is to say if by evidence it is proved that the notice is not received by the addressee the presumption under that section would not apply. In my opinion, the main object of S. 31B was to validate all pre-1938 transfers and to place them on the same footing as post-1938 transfers except to the limited extent of retaining the landlord's right of realisation of mutation fee in respect of the former class of transfers. It will be illogical to say that after conferring unrestricted right of transfer on occupancy raiyats in 1938 and after expressly declaring that even in respect of pre-1938 transfers the landlord had no right of eviction and that the obligation of the landlord to implead the pre-1938 transferee in his rent execution proceedings would arise only after service of notice of the transfer the Legislature intended that in respect of post-1938 transfers such obligation would arise irrespective of the service of notice especially in view of the nature of the machinery chosen in both classes of transfers for service of such notices. A question may be asked as to why, when the Legislature took so much precaution to express itself clearly in sub-s. (2) of S. 31B in respect of pre-1938 transfers, no such declaration was made in S. 31. The Legislature could easily have inserted another section in S. 31 very similar to sub-s. (2) of S. 31B and had it done so, the present controversy would perhaps have never arisen. But the absence of such a provision is quite understandable. The rule for the construction of a statute prospectively is not so stringent as the rule for construing it retrospectively. Retrospective effect cannot be given unless it is expressly so provided or else such effect follows by necessary implication. Hence for pre-1938 transfers express provisions had to be made in sub-s. (2) of S. 31B. As regards post-1938 transfers the Legislature perhaps thought that the changes brought about by the amendment when read with the residue of the old law would indicate that service of notice on the landlord was always necessary.

[32] The Explanation to sub-s. (2) of S. 31B is equally helpful. The words in it are wide enough to apply to all transfers, whether made prior to the amendment of 1938 or after the amendment of 1938. It seems just an accident (or perhaps an oversight on the part of the draftsman) that it was inserted as an Explanation to S. 31B and it might for all practical purposes have remained as an independent section. This question has been fully discussed in *Giridhari Mohanty* v. *Abdul Khan*, I.L.R. 1950 Cut. 195 at p. 200: (A.I.R. (38) 1951 Orissa 41) by my Lord the Chief Justice and with respect I would agree with his observations. When the words of this Explanation are in terms wide enough to include all classes of transfers there seems to be no justification for restricting it to pre-1938 transfers merely because it appears as an Explanation to S. 31B

[33] Thus I would hold that on a fair construction of Ss. 31, 31A and 31B and considering the same in the light of the law as it stood prior to 1938 the reasonable inference is that the landlord is not bound to implead the transferee in his rent execution proceedings unless he knows or must be presumed to know such transfer. Where, on the evidence in a case, such presumption is rebutted and it is found as a fact that he is unaware of the transfer he is not bound to implead the transferee at the risk of having his rent-decree reduced to the position of a money-decree.

[34] Mr. Dasgupta, however, contended that if such a view be taken the unrestricted right of transfer conferred by the amending Act of 1938 would, in many cases, be made ineffective by a landlord who could conveniently evade the service of notice and thus bring the holding to a rent-sale by impleading only the recorded raiyats. He urged that so long as the transferee was not guilty of any laches and had filed the necessary processes and the fee either before the registering officer or before the Civil Court under S. 31, he should not be visited with any penalty for non-service of such notice due to any fault either in the office of the Sub-Registrar or Civil Court or of the Collector. This argument, however, overlooks one important fact, namely, that when a person purchases an occupancy holding he knows or, at any rate, is presumed to know, that under S. 83, Orissa Tenancy Act, he is also jointly and severally responsible for the arrear rent and that such rent is a first charge on the holding. It is, therefore, his duty to find out, as soon as the transfer is effected, whether any arrear rent is due on the same and he could easily obtain this information at the office of the landlord in every village. On ascertaining about such arrear there is nothing to prevent him from rushing

to the rent Court depositing the arrear rent and thereby saving the property from sale. Moreover, at the time of attachment in the rent execution proceeding, when the processes are served at the spot he gets another opportunity to know about the existence of arrear rent on the holding and there is nothing to prevent him from appearing before the Rent Court to be made a party. Under S. 228, he could save the property from sale by depositiug the decretal dues within 30 days of the sale. Therefore, the hardship to a *bona fide* transferee that is visualised by Mr. Dasgupta disappears if he exercises even ordinary prudence in the management of his affairs. If he thinks that his duty is completed as soon as the processes are filed in the civil Court (in the case of involuntary transfers) and that he need not bother as to whether any arrear rent is due, he runs the risk of the entire holding being sold after impleading the recorded transferee. In the present case there was an interval of one full year (15-5-40 to 15-5-41) between the date of the plaintiff's purchase from the recorded tenant and the date of the rent sale. During that period the plaintiff took absolutely no steps for payment of the arrear rent. The arrear had accrued prior to the plaintiff's purchase and inasmuch as the plaintiff's purchase was only of a portion of a holding the recorded tenant still continued to be a tenant for a major portion of the holding. From the plaintiff's conduct it can reasonably be held that he acquiesced in the recorded tenant continuing to represent the holding and there is thus no question of any equitable construction in his favour.

[35] Mr. Dasgupta's contention, however, requires omniscience on the part of the landlord and visits him with the penalty of having his rent decree reduced to the position of a money-decree for the sole reason that he was not aware of the transfer, especially when it took place after the institution of his rent suit as in the present case. It is also equally unfair to a *bona fide* purchaser for value in the rent sale. It was then urged that the amending Act of 1938 being a remedial statute should not be so construed as to defeat its main object of conferring complete freedom of transfer on occupancy raiyats. This argument, however, overlooks the fact even if the opposite view be accepted that the transferee is not required to prove in every case that the notice was actually served on the landlord and thus the object of the statute is not frustrated. Once he proves that he deposited the requisite fees and processes before the civil Court, and that Court passes order for the issue of those processes to the Collector, he can rely on the presumption of due performance of further official acts and thus shift the burden of rebutting that presumption on the landlord or on the auction purchaser in the rent sale. In the present case such a presumption was not available to the plaintiff because though Ex. 7 shows that the processes were filed before the civil Court, there is no order of the Court for the issue of those processes to the office of the Collector. This case is, therefore, of an exceptional nature and cannot justify the construction of the provisions of S. 31 dealing with the service of notice on the landlord as merely directory and not mandatory or as having no bearing on the question of the duty of the landlord to implead the transferee in the rent execution proceeding. It is easier for a transferee raiyat to know about the arrear rent due on his holding than for a landlord to know about the transfer effected by any one of his innumerable raiyats. No construction which would penalise a landlord for omitting to implead a transferee, about whose transfer he is unaware, can be justified especially when S. 31 does not expressly declare to that effect and when the opposite construction does not, in any way, cause any hardship to a *bona fide* transferee and is thus not defeating the main object of the amending Act.

[36] Moreover, if Mr. Dasgupta's contention is accepted, the security of the holding for arrears of rent and the special incidents of a rent sale provided in Chap. XVI could in most of the cases be nullified. As soon as a rent decree is obtained by a landlord against a recorded tenant and execution is applied for either orally or under S. 217, the recorded tenant may, if he is unable to pay the decretal amount, transfer the holding in favour of a third party in an out of the way sub-registrar's office prior to attachment at the post. Notice of transfer would in the usual course take three to four months for actual service on the landlord. In the meantime, a landlord acting in good faith without knowledge of the transfer, would have brought the holding to sale and it might be purchased by a third party. Then he may be met with the plea that prior to the date of attachment, the judgment-debtor's entire interest had been validly transferred and that consequently by the rent sale nothing passed. Thus the rent decree would be reduced to a scrap of paper and the landlord would be compelled to bring a fresh suit against the transferees subject to the law of limitation. In ordinary litigations relating to immovable properties such difficulties cannot arise because the law of *lis pendens* (S. 52, T. P. Act) would save the plaintiff-decree-holder. But that provision is not applicable to a rent suit inasmuch as in such a suit no right to immovable property

is directly and specifically in question. Therefore any construction of S. 31 which would nullify the effect of a rent decree and weaken the security of the holding for arrears of rent on which the whole of Chap. XVI, Orissa Tenancy Act, is based, seems not justifiable especially when there is no express provision to that effect in the amending Act.

[37] Whenever any statute refers to the 'giving of notice' to any person, such a notice is generally effective against that person only when it is actually served on him or else when, in the absence of any evidence to the contrary, it may be presumed to have been served on him. The entire Civil Procedure Code is based on this principle and S. 27, General Clauses Act, 1897 and the corresponding S. 29, Orissa General Clauses Act, 1937, merely reproduce this principle. There are several sections in the Orissa Tenancy Act which refer to the giving of notice to a person and in respect of all of them the binding nature of the notice on that person arises only after actual receipt of the notice by him. At this stage I would defer the consideration of the provisions of Ss. 14 to 16, Orissa Tenancy Act, dealing with transfer of tenures which will be dealt with separately. Section 57B refers to the liability of an under-raiyat to be ejected by his landlord at the end of the agricultural year when such notice to quit has been served on him Similarly, S. 82 refers to the liability of a tenant to pay rent to the transferee from the original landlord when notice of such transfer has been given to him. Section 97 deals with the liability of a raiyat who has surrendered his holding to indemnify the landlord for loss of rent due to the surrender unless he gives notice in writing of his intention to surrender. Sub-section (4) of that section authorises the Revenue Court to serve such notices. I do not think it will ever be contended that the liability of the tenant to indemnify the landlord under S. 97 (2) will be removed unless it be shown that the notice was actually served or may be presumed to have been served on the landlord. Section 98 says that when a tenant abandons a holding the landlord may enter on it after filing a notice in the Collector's office. Under sub-s. (3) of that section the limitation for a suit by the tenant for recovery of possession of that land is within two years from the date of the publication of the notice I may also refer to Ss. 104, 207 (1) and 221 (4). There seems to be no reason, in the absence of any provision in S. 31, to hold that the same principle should not apply in construing that section. The landlord is after all not a stranger third party but he is also interested in the holding as his rent is the first charge on it and any transfer made after the institution of his rent suit adversely affects him. In this connection I can do no better than quote the observations of Field J., in *Panye Chunder* v. *Hurchunder*, 10 Cal. 496 :

"When a decree-holder seeks to execute his decree against property, movable or immovable, it is his duty to make sure that the property which he brings to sale in execution is the property of the judgment-debtor, and, if he makes any mistake, he does so at his own peril. The circumstances of the present case are, I think, an exception to this general rule. The landlord, the decree-holder, knew that the person whom he sued was his tenant. No doubt that tenant had by law the right to transfer his tenure, but the same law cast upon the transferee the duty of giving the landlord due notice of the transfer, and unless the transferee discharged the duty so cast upon him, the landlord was not in my opinion bound to look beyond the information contained in any sirishta, and cannot be affected with knowledge of a fact not communicated to him by the person whose duty it was to communicate it."

Though that decision related to tenures governed by Bengal Act VIII [8] of 1869 which has long since been repealed, the soundness of those observations has not been doubted in any subsequent decisions though this case was subsequently considered and distinguished in *Afraz Mollah* v. *Kulsumannessa Bibee*, 10 C. W. N. 176 : (4 C. L. J. 68).

[38] I may now refer to the parallel provisions in the Bengal Tenancy Act on which learned counsel for both sides have relied. In Bengal, prior to 1928, an occupancy raiyat had no right of transfer without the consent of the landlord except by custom and consequently the landlord could obtain a valid rent decree by impleading only those tenants recorded in his rent-roll. But in 1928 such right of transfer was conferred by new Ss. 26A to 26J which made elaborate provisions for payment of landlord's fee. But as regards the proper representation of the tenants in rent suits a new provision (S. 146A) was inserted and sub-s. (3) of that section settled the matter beyond all doubt. It is not necessary for the present discussion to refer to that section. Mr. Das relied on *Maharaj Bahadur Singh* v *Nari Mollani*, A. I. R. (23) 1936 Cal. 279 : 63 Cal. 1117) But that decision was distinguished and explained in *Nagendra Nath* v. *Niranjan*, A I. R. (24) 1937 Cal 665 : (I L. R. (1938) 1 Cal. 164). The Calcutta decisions relating to transfers of occupancy holdings are, therefore, not of much help in view of the express insertion of S. 146A. Bengal Tenancy Act dealing with the vexed question of representation of co-sharer tenants. But there are several decisions under Ss. 12 and 13, Bengal Tenancy Act, dealing with transfers of permanent tenures which might throw some light. Section 11 of that Act says that a permanent tenure is capable of being transferred or bequeathed in the same manner as other immovable properties.

This section thus recognises unrestricted right of transfer. Section 12 describes the procedure for voluntary transfers of permanent tenures and directs that a registering officer shall not accept for registration any instrument of such transfer unless the prescribed fee and processes are filed. Such processes should be served on the landlord in the prescribed manner. Similarly S. 13 contains provisions for involuntary transfers through court sales and directs that before confirming the sale the purchaser shall deposit the landlord's fee and processes which should be served on the landlord in the prescribed manner after confirmation of the sale through the Collector. These two sections undoubtedly bear very close resemblance to S. 31 Orissa Tenancy Act, and in fact the language is, in many respects, identical. It has, however, been held in a series of decisions beginning with *Kristo Bulluv* v. *Kristo Lal*, 16 Cal. 642, *Chintamoni* v. *Rash Behari*, 19 Cal. 17, *Surapati Roy* v. *Ram Narain*, 50 Cal. 680 : (A. I. R. (10) 1923 P. C. 88), *Barada* v. *Tarak Nath*, A. I. R. (13) 1926 Cal. 844 : (94 I. C. 147) and *Jitendra Nath* v. *Monmohan Ghose*, A. I. R. (17) 1930 P. C. 193 : (58 Cal. 301), that a transfer of a permanent tenure is complete soon after registration or confirmation of the sale, as the case may be, and the mere fact that notice of such transfer was not received by the landlord in the manner provided in S. 12 or in S. 13 would not in any way invalidate the transfer or justify the landlord in continuing his rent sale against the transferor. Mr Dasgupta urged that the principle should apply for transfers of occupancy holdings. But in applying the decisions based on Ss. 12 and 13 of the Bengal Act to a transfer under S. 31, Orissa Tenancy Act some of the important distinctions between permanent tenures and occupancy holdings should not be overlooked. Firstly, as regards permanent tenures, S. 11 gives complete unrestricted right of transfer whereas the corresponding S. 30A, Orissa Tenancy Act, merely says that an occupancy holding may be transferable by sale without the landlord's consent and without payment of any fee to him. In other respects the old law remains unaffected. Secondly, even in Bengal it was held in *Babar Ali* v. *Krishnamanini Dassi*, 26 Cal. 603 : (3 C. W. N. 531) that the unfettered freedom of transfer conferred by the Bengal Tenancy Act was intended to be exercised in strict conformity to the conditions of the Act prescribed in Ss. 12 and 13 and unless those conditions were substantially complied with the transfer was invalid and ineffectual. This decision necessitated the passing of an amending Act known as the Bengal Tenancy Validation Act, 1903 (Bengal Act I [1] of 1903) which expressly stated that as soon as transfers of permanent tenures are registered and sales of such tenures are confirmed by the Courts the transfer is complete and it shall not be deemed to be invalid merely on the ground that the landlord's prescribed fee had not been paid. This Act of 1903 thus settled the controversy and made it absolutely clear that the provisions of Ss. 12 and 13, Bengal Tenancy Act, providing for transmitting notice and transfer fee to the landlord cannot affect the transfer of title. Therefore all decisions subsequent to 1903 regarding compliance with the provisions of Ss. 12 and 13, Bengal Tenancy Act being based on those express provisions cannot be of much guide in the present case where there is no provision similar to the provisions of the validating Act. The law in the present case seems to be somewhat similar to what it was prior to the passing of that Act of 1903 in Bengal and the principles laid down in *Babar Ali* v. *Krishnamanini Dassi*, 26 Cal. 603 : (3 C. W. N. 531) would apply. That is to say, there must be substantial compliance with the provisions of S. 31, Orissa Tenancy Act, regarding the mode of transfer before such transfer can be said to be effectual and valid. Thirdly as regards permanent tenures, there was no provision similar to old S. 73, Bengal Tenancy Act, making the transferor also jointly and severally liable for arrears of rent accruing due after the transfer unless and until notice of the transfer is given to the landlord. That section applied only to occupancy holdings. Therefore whatever common law right might have existed prior to the passing of the Bengal Tenancy Act, 1885, in absence of any express provision in that Act and in view of the unambiguous language used in S. 11 to the effect that the transfer of a permanent tenure can be made 'in the same manner and to the same extent as other immovable property, the transferor's liability ceased as soon as title passed to the transferee in the manner provided in S. 12, Bengal Tenancy Act. This was perhaps the main reason why in *Kristo Bulluv* v. *Kristolal*, 16 Cal. 642, Petheram C. J. held that a suit brought against the transferor for rent after he has transferred the tenure is not maintainable. In fact he has made this absolutely clear in the following para of the judgment:

"The liability here is a liability in consequence of the estate and it is admitted that it is an ordinary rule that the liability ceases when the estate is transferred."

Fourthly, the permanent tenures were freely transferable without the consent of the landlord, long before the passing of the Bengal Tenancy Act in 1885. Hence Ss. 11, 12 and 13 of that Act did not make any change in the law dealing with such transfers. But in the Orissa Tenancy Act, Ss. 30A and 31 changed the previ-

ous law and have to be construed against that background for ascertaining the extent of the change so effected.

[39] A closer scrutiny of the various Calcutta and Patna decisions regarding transfers of permanent tenures would show that in almost all those cases it was found as a fact that the landlord had actual knowledge of the transfer and in spite of that knowledge he continued the proceedings against his recorded tenure-holder. For instance in *Giris Chandra Guha* v. *Khagendra Nath*, 13 C. L. J. 613: (9 I. C. 1001), the landlord having noticed that the tenure passed into the hands of the transferee brought the rent suit against the recorded tenant and thereby ran the risk of having his suit declared to be not properly constituted and the decree not being a rent-decree. Similarly, in *Surapati Roy* v. *Ram Narain*, 50 Cal. 680: (A. I. R. (10) 1923 P. C. 88), the landlord was fully aware of the transfer of a portion of the tenure and in fact in a previous suit between the parties the transferors had entered appearance and denied their liability on the ground that they had parted with their interest. In spite of that knowledge the landlord continued a fresh suit against all the recorded tenants. Similarly, in *Jitendra Nath* v. *Manmohan*, A. I. R. (17) 1930 P. C. 193: (34 C. W. N. 821) which is the leading Privy Council case on the subject, their Lordships devoted two paras to the question of the landlord's knowledge of the transfer and held that there was unrebutted evidence of such knowledge. They further held that:

"When the landlord knows or must be taken to know that the recorded tenants' interest in the tenure had ceased he could not ignore such transfers and rely upon decrees obtained by him against the transferors."

Similarly in *Prabhabati* v. *Lalji Mahto*, A.I.R. (31) 1944 Pat 252: (23 Pat. 356), there was a clear finding to the effect that the landlord had full knowledge of the transfer. The only decision in which it was held that even if the landlord had no knowledge of the transfer he was still bound to implead the transferee in his rent suit is *Chandra Sekhar* v. *Jagarnath Singh* A. I. R. (32) 1945 Pat 313: (24 Pat. 148). It is not necessary for me to say how far that decision is correct. But as already pointed out that decision itself is based on the Bengal Tenancy Validation Act, 1903 which confers complete title to the transferee of a permanent tenure irrespective of the service of processes on the landlord. Therefore that decision may not apply to the present case.

[40] In *Sarasvati Charan* v. *Suraj Deo*, A. I. R. (15) 1928 Pat. 867: (7 Pat. 167), there is an interesting discussion about how far there should be compliance with Ss. 12 and 13, Bengal Tenancy Act, but in that case there was a complete failure to comply with the provisions of Ss. 12 and 13 and therefore the question as to what would happen when the transferee has done his part of the duty by depositing the landlord's fee and processes before the Court and when the failure to serve notice on the landlord was due to the laches of the Court or the Collector did not come up for decision. In fact Sir Dawson-Miller C. J. left the question open by the following words:

"It is unnecessary to determine whether if the plaintiffs had done all that was required by them and still the landlord had not received notice they could then have contended that the rent suit was not properly constituted."

A recent Calcutta decision reported in *Menajuddin* v. *Heronuddin Mullick*, 225 I. C. 575: (A. I. R. (34) 1947 Cal. 137) is also helpful in the present discussion. There the superior landlord instituted a rent suit against the recorded tenure holders and obtained his decree and in execution of the same put the tenure to sale. But prior to the rent sale the tenure was purchased in execution of a mortgage decree by a third party. The main question canvassed in that case was whether the rent sale affected the rights of the purchaser in execution of the mortgage decree who was not made a party in that sale. The Court held that the purchaser's right was not affected. But one of the arguments advanced was that the landlord could not make the purchaser in execution of the mortgage decree a party because he was not aware of that purchase. Mukherji J. deals with this question as follows:

"It appears that there is oral evidence on the record which is practically one-sided and which goes to show that the landlords had knowledge. Quite apart from that, as the sale was in execution of a mortgage decree, notice would be served upon the landlords under the provisions of S. 13. Bengal Tenancy Act. The presumption in law would be that such notices were served. *It was certainly open to the landlords to rebut that presumption by showing that no notice was served upon them or even if it was served at all, it was served after the rent sale took place*, but no such evidence was adduced by the defendants to this suit, and consequently, we are unable to say that the landlords had no knowledge of the plaintiff's purchase."

The passage underlined (here italicised) seems to indicate that if the presumption is rebutted by evidence and it is proved that the landlord did not have knowledge of the transfer, the decision in that case might have been otherwise. Though all these cases relate to transfers of permanent tenures and though the Bengal Tenancy Validation Act, 1903 had removed all doubts about the passing of title on transfer, neither the Privy Council in *Jitendra Nath* v. *Manmohan*, A. I. R. (17) 1930 P. C. 193: (34 C. W. N. 821) or in *Surapati Roy* v. *Ram Narain*, 50 Cal 680: (A. I. R. (10) 1923 P. C. 88)

nor the High Courts in the above-mentioned cases, have held that where the landlord had no knowledge of the transfer he was still bound to find out who the transferee was and to implead him in his rent execution proceedings. This indicates that knowledge of the transfer on the part of the landlord is one of the important circumstances in considering how far his rent decree and sale in execution thereof carried on against the recorded tenants without impleading the transferee, would have the effect of a money-decree only. Bearing in mind the important distinguishing features between a permanent tenure and an occupancy holding and the inferences arising from a construction of Ss. 31A and 31B it would appear that in case of transfer of a portion of an occupancy holding governed by S. 31, Orissa Tenancy Act, it will not be reasonable to hold that whether the landlord had knowledge of the transfer or not he was still bound to implead the transferee so as to obtain the full effect of a rent decree.

[41] Even on the question of representation, I do not think Mr. Dasgupta has a good case. This is not a case of a transfer of an entire holding but only of a portion of the holding The recorded tenant was still the owner of a substantial portion (more than two-thirds) of the holding and though the transfer in favour of the plaintiff took place about a year before the rent sale he did not care to enter appearance in the rent execution proceedings for being made a party. When the landlord brought the rent suit the recorded tenants alone had interest in the holding and the suit was thus properly framed in its inception. Under such circumstances and in view of the joint and several liability of the transferor for arrear of rent as provided in S. 83 it may be held that the holding was adequatly represented by the recorded tenants. This principle of representation by acquiescence was recognised as early as 1902 in *Rajani Kant* v *Uzir Bibi*, 7 C. W. N 170 and it was reiterated in *Gagan Sheikh* v. *Abejan Khatun*, 14 C. L. J. 180 : (10 I C. 116).

[42] My learned brother Panigrahi J. (whose judgment I have had the advantage of reading) has relied on *Ayenddin Nasya* v. *Srish Chandra*, 11 C. W. N. 76, *Samiruddin* v. *Benga*, 13 C. W. N. 630 and *Tulsi* v. *Dayal*, 15 I. C. 718 (Cal) in support of the view that the question about the transferability of the holding may be raised by the landlord against the transferee but not by the auction-purchaser after the transfer in favour of the plaintiff and that such a purchaser had no right to question the validity of the first transfer. But with respect I should point out that a closer scrutiny of the aforesaid three decisions would reveal fundamental differences between the facts of those cases and the facts of the present case. In *Ayenddin Nasya* v. *Srish Chandra*, 11 C. W. N. 76 the defendant was a lessee from a co-sharer landlord who had purchased the holding in execution of a decree for his share of the rent only. That decision was given in 1906. At that time there was no provision in the Bengal Tenancy Act enabling a co-sharer landlord to obtain a decree for his share of the rent while at the same time having the effect of a rent-decree so far as the sale of the holding was concerned. It was only in 1907 that a new S. 148-A was inserted in the Bengal Tenancy Act by the amending Act I [1] of 1907 in consequence of which a co-sharer could after complying with the provisions of that section obtain a decree for his share of the rent which would be as effectual as a rent-decree by the sole landlord. Prior to 1907 therefore a rent suit by a co-sharer was always regarded as only a money-suit. In the Orissa Tenancy Act, however, S. 199 was specially inserted corresponding to S 148-A Bengal Tenancy Act, conferring on the co-sharer the special right of realising his share of the rental without in any way reducing his decree from a rent-decree to a money-decree. I have already pointed out that the present suit is of that type and the decree would therefore have the effect of a rent decree unless the plaintiff-appellant can succeed on other points discussed already. *Ayenddin Nasya* v. *Srish Chandra*, 11 C. W. N. 76, is therefore clearly distinguishable. *Samiruddin* v. *Benga*, 13 C. W. N. 630, deals with different set of facts. In *Tulsi* v. *Dayal*, 15 I. C. 718 (Cal.), also the rent sale was in execution of a decree obtained by a co-sharer landlord and there is nothing to show that the special procedure prescribed in S. 148 A, Bengal Tenancy Act was followed. Those decisions are, therefore, not of any help. On the other hand, in *Menajuddin* v. *Heranuddin*, 225 I. C. 575 : (A. I. R. (34) 1947 Cal. 137), this question about the transferability of the tenure was raised not by the landlords or the recorded tenants on the one hand and the transferees on the other but by subordinate tenants of the tenure who challenged the right of the purchaser of the tenure in execution of the mortgage decree on the ground that the entire tenure had been purchased in a rent sale by another party. Their right to challenge the title of the purchaser in the mortgage decree was not disputed. Therefore I do not think that it can be maintained that the defendants are not entitled to raise the question about the passing of the entire holding in the rent sale.

[43] I would, therefore, hold that the necessity of impleading a transferee of an occupancy holding or a portion thereof in a rent execution

proceeding so as to have the full effect of a rent decree and rent sale, arises only if the landlord receives notice of the transfer through the machinery provided in S. 31 or becomes aware of it by other means. Doubtless there may be a presumption that he did receive notice of the transfer if the transferee had deposited the processes and necessary fees either before the registering officer or before the Court as required by sub ss. (2), (5) and (6) of that section. But this is only a rebuttable presumption and if the evidence in a particular case shows that the processes were not actually served and the landlord had no knowledge through other sources it will not be correct to hold that rent decree and rent sale in execution thereof obtained by the landlord against the recorded tenants would have the effect of a money-decree.

[44] I would, therefore, affirm the judgment of the lower Court and dismiss the appeal.

[45] **Jagannadhadas J.** — I have had the advantage of reading the judgments of my learned brothers, Panigrahi and Narasimham JJ. I have also read with care the observations of my Lord the Chief Justice in *Giridhari Mohanty* v. *Abdul Khan*, I. L R. (1950) Cut. 195: (A I.R. (38) 1951 Orissa 41), having a bearing on the questions arising in this case. I am conscious of the fact that having regard to the vast experience of his Lordship the Chief Justice as regards the Tenancy Laws of Orissa, great weight is due to his views. I have accordingly bestowed anxious thought on the questions raised before us, and have come to the conclusion that the non-receipt of notice by the landlord contemplated under S 31 (5), Orissa Tenancy Act, does not by itself, have the effect of rendering the transfer of the occupancy holding or of a portion or share thereof not binding against the landlord.

[46] On the facts found in the case, which I need not repeat, the question that arises for consideration is whether in execution of a decree against defendant 2, the recorded tenant, for arrears of rent which accrued prior to the date of the transfer of a portion of the holding in favour of the plaintiff, the entire holding including the plaintiff's share or interest therein could be validly sold though the plaintiff was not a party to the proceedings. As pointed out by my Lord the Chief Justice in *Giridhari Mohanty* v. *Abdul Khan*, I. L. R. (1950) Cut. 195 at p. 199 : (A. I. R (38) 1951 Orissa 41):

"The position of law is too well settled to be controverted that at the time of sale in execution of a decree for recovery of rent, the entire landlord's interest and also the ryoti interest should be represented respectively by the decree-holder as well as the judgment-debtor. Any one of these parties having ceased to have either the landlord's interest or the ryoti interest, as the case may be, the execution and the sale thereunder should lose the character of being an execution of a rent decree as such with the result that the sale will not pass the holding or the tenancy as the case may be.

....

As a principle, it is fundamental that nobody's property will be sold except in a proceeding to which he is a party."

(See also *A. H. Forbes* v. *Maharaj Bahadur Singh*, A. I. R. (1) 1914 P. C. 111 : (41 Cal. 926) and *Aradhan Mondal* v. *Abhoya Charan*, A. I. R. (10) 1923 Cal. 321 : (68 I. C. 626) These observations apply with equal force whether what is sold is a whole or a part of the rayati holding In considering the question at issue in the case, I must point out at the outset that in the course of the arguments and discussions before us, the distinction between the effect of non-joinder of the plaintiff as the part-owner of the holding, and the liability of the holding to be represented by defendant 2 the recorded tenant in the circumstances, so as to bind the plaintiff's interest in an action by the landlord, has not been kept in view. The whole argument has proceeded on the footing that the decision of the case turns only on whether by virtue of the transfer the title itself to the part transferred has or has not passed to the plaintiff so as to bind the landlord. It is the non-appreciation of these two as distinct legal positions that has caused not a little difficulty in the correct appreciation of the legal question involved. It may also be noticed that the question as to who are necessary parties to proceedings taken by the landlord to bind the tenant's interest in the holding is not in terms prescribed by any provision of the Orissa Tenancy Act. Sections 199, 212 or S. 197 do not provide for this and one must turn only to the general law for the purpose. (*See Rampada Nag* v. *Kanai Rai*, A.I.R. (13) 1926 Cal. 1219 at p. 1220, Col. II : (98 I. C. 206.)) Under that law every person having an interest in the holding must be impleaded as a party if the holding is to pass and this obligation does not depend on notice or knowledge of the transfer.

[47] I shall first take up the question whether or not defendant 2's interest to the extent of what has been transferred, must be taken to vest in the plaintiff so as to bind the landlord also and to render him a necessary party to proceedings by the landlord against the holding. As I have said at the outset, I have no hesitation in coming to the conclusion that it does in agreement with the view of my learned brother Panigrahi J. Even apart from any authority, and on a fair and reasonable consideration of the group of sections that were introduced into the Orissa Tenancy Act of 1938 by Orissa Tenancy Amendment Act, 1938 (Orissa Act VIII [8] of 1938), this result must follow. By S. 6 of

the amending Act, a new S. 30-A was inserted into the parent Act, which categorically states that

"the occupancy holding of a raiyat or portion or a share thereof shall be transferable by sale, exchange, gift or bequest without the landlord's consent and without payment of any fee to him" and that "such a transfer shall carry with it the occupancy right in the holding and all the rights appurtenant thereto."

Section 7 of the amending Act substitutes a new S. 31 for the previous S. 31 and provides for the manner of transfer and notice to the landlord. That section enjoins that every such transfer shall be made by a registered instrument, except in the case of a sale in execution of a decree or a certificate signed under the Bihar and Orissa Public Demands Recovery Act. Sub-sections (2) and (3) enjoin on the registering officer not to accept an instrument for registration, unless notice containing certain particulars in the prescribed form is filed and a prescribed fee for service of notice on the landlord is deposited. It also enjoins on him that after registration, he should transmit the notice to the collector who in turn is enjoined to cause it to be served on the landlord named in the notice. Similarly, where the holding is purchased in execution of a decree, the Court is enjoined to require the purchaser to file a notice with particulars and to deposit fees for service of notice before confirming the sale and to transmit the notice to the Collector for service on the landlord after confirmation. There are similar provisions relating to bequests and foreclosure in mortgage suits. These provisions appear to prove clearly that the point of time at which the transfer becomes effective is registration in the case of a private sale and confirmation in the case of a court-sale in the same manner as under the general law. If that be so, I can see no reason for thinking that the registration or confirmation makes the transfer operative only as between the transferee, but that the title must remain in suspense so far as the landlord is concerned until he receives the actual notice. To have this effect, it would be necessary to construe the provisions relating to the service of notice as a condition precedent for the vesting of the title in the transferee and yet confine such construction to the operativeness of the transfer as against the landlord, but not as against the transferor. Looking merely at the language of the two Ss. 30-A and 31, I am unable to find any justification for any such anomalous construction. The provisions in S. 31 relating to the filing of notices and payment of fees before registration or confirmation and those relating to the service of notice after registration or confirmation may no doubt be mandatory in one sense, that is, in the sense that their violation must have some legal consequences. But it is quite a different thing to say that they are conditions precedent for the vesting of the title in the transferee or that they are enough to bring about the vesting of the title in two different ways at two different stages; one as against the transferor and the other as against the landlord. It is in dealing with the analogous wording of the corresponding section relating to the transfer of tenures and in repelling a similar (though not exactly the same) contention that the Privy Council in *Jitendra Nath* v. *Manmohan*, A. I. R. (17) 1930 P. C. 193 at p. 196 : (34 C. W. N. 821) said that "their Lordships knew no principle of law which justifies such a contention."

[48] It has been urged, however, that the contrary is the proper construction if the collocation of other connected sections is taken and the previous state of law is considered. I have no doubt that reference to previous law is a valuable guide as laid down in *Abdur Rahim* v. *Abu Mahomed Barkat Ali*, 55 I. A. 96 : (A. I. R. (15) 1928 P. C. 16), but it is clear from that decision itself that the ultimate criterion is as to what is the meaning and effect of the language used by the amending legislation. Under the pre existing law, the occupancy holding was not freely transferable (except where there was a custom), but the consent of the landlord was a pre-requisite and that would ordinarily be given on the payment of the mutation fee. Section 31 of the Act as it stood before 1938 intervened by providing a machinery against the arbitrary refusal of the consent by the landlord and as against the demand of exorbitant mutation fees, but left matter untouched so far as permanently settled estates were concerned. All this has been completely changed and the new S. 30 (A) provides that all occupancy holdings shall be transferable carrying with it the occupancy right and other appurtenant rights. It has been pointed out that this section does not say as does the corresponding S. 12 relating to the transfer of permanent tenures that it shall be capable of being transferred "in the same manner and to the same extent as other immovable property", but that it only says that it shall be transferable "without the landlord's consent and without any payment of fee to him." It has been suggested that the difference in this language is indicative of the fact that the transfer was not intended to bring about the same results, but was intended to be subject to certain further limitations which must be gathered from S. 31. It appears to me, with respect, that the use of the phrase "without the landlord's consent and without payment of any fee to him" merely meant to emphasize the fact that the

pre-existing fetter on free transferability were intended to be completely wiped out. It cannot be taken to suggest that any further limitation was intended to be placed. An argument has been strenuously advanced at the bar that while the mutation fees and consent were abolished, a small process fee and service of notice were intended to be substituted and that inasmuch as the transfer was not previously binding in the absence of mutation fee and consent, similarly the transfer is not binding against the landlord in the absence of payment of process fee and service of notice. This, to my mind, is whittling down the effect of the unambiguous language that has been used in the section and to say that while the Legislature intended to wipe out the consent of the landlord, it still meant to leave its trial behind. It is to be noticed that sub-s. (4) of the previous S. 31, in terms, said that

"save as provided in this section and Ss. 95 and 96, no transfer of an occupancy holding or portion of a holding otherwise by succession or by sale in execution of a decree for arrears of rent shall be valid unless and until the landlord has consented thereto."

If the Legislature merely meant to substitute notice for consent, it would similarly have said that the transfer under S. 30-A is not binding until notice has been received. In this context, it appears to me that the provisions of the amendment Act of 1938 relating to pre-amendment transfers, viz., those contained in S. 31 B, are very significant. My learned brother Narasimham J. has been inclined to think that that section supports the conclusion that a transfer under S. 31 also is not binding against the landlord until notice is received. It appears to me, with respect, that it confirms exactly the opposite conclusion. Section 31-B validates pre-amendment transfers to a limited extent. It protects the transferee from liability to ejectment but continues his liability for payment of mutation fee and prescribes a period of limitation for recovery thereof. It recognizes that the effect of validating the transfer even to that limited extent is to render the transferee a necessary party for sale of the holding in satisfaction of the decree for arrears of rent and provides a machinery therefor by the "explanation" to the section and by sub-s. (2) casts upon the transferee the obligation in giving notice of transfer by registered post in order that he may not be affected by proceedings to which he is not a party. To my mind from the absence of such a provision in S. 31 the implication is obvious that in the case of other transfers governed by S. 30 A giving notice of the transfer is not a condition precedent to the operativeness of the normal requirement as to the transferee being a necessary party to the proceedings by which he is to be bound. It has been urged by learned counsel for respondent that the new S. 31-A, sub-ss. (1) and (2) clearly indicate that the knowledge of the landlord is a prerequisite for the working of that section and it would, therefore, follow that service of notice on him is essential. It appears to me that the sub-sections of this section cannot be taken to imply what they do not in terms say that service of notice is a condition precedent for the binding character of such transfers on the landlord. The argument based on the wording of sub ss. (1) and (2) of S. 31-A recognises that they deal only with transfer of a portion or a share and not of the whole of the holding. It would be far-fetched to extend the construction by implication said to arise from the language of S. 31-A to the case of transfer of the entirety of a holding. It appears to me that S. 31-A has only to do with the distribution of the rent; while the right of transfer of a portion or share has been recognised in unrestricted terms carrying with it the right of sub dividing the holding as the tenant may choose. The Legislature was only anxious to protect the interests of the landlord in so far as the distribution of the rent is concerned. In the case of a transfer of an undivided share or portion by metes and bounds, the rent was to remain joint and in the case of transfer of a portion by metes and bounds the transferor and the transferee were given the right to distribute the rent between themselves subject to the right of the landlord to challenge the same by an application before the Collector in time. Knowledge of the landlord is undoubtedly presumed and how S. 31A, sub-s. (2) is to be worked in the absence of such knowledge may be a question for consideration when it arises, but that cannot be a reason for importing such knowledge consequent on the notice as a condition precedent to the binding character of the transfer not merely for the distribution of the rent with which the section deals, but for the operativeness of the transfer itself as against the landlord about which it has nothing to say. Some stress has been laid upon the use of the phrase "shall be considered as joint tenants by the landlord" in S. 31A, sub-s. (1). This appears to me only to emphasize that while the tenant has no right to distribute the rent when he sells an undivided share or portion, the landlord cannot refuse to recognize the transfer of such undivided share, but must treat him as a joint tenant. The phrase "shall be considered" cannot be construed in this context too literally. For instance, nobody would suggest that it is not open to the landlord to agree to the distribution of rent in such a case, but that the landlord is bound to treat them only as joint tenants for

all time and cannot if he chooses agree to the splitting up of the joint tenancy.

[49] My learned brother Narasimham J. is inclined to think that both under the common law of the country as well as under the statutory tenancy law prior to the amendment of 1938, the giving of notice to the landlord was a condition precedent to the binding character of the transfer against the landlord in cases where by custom or otherwise the holding was transferable without his consent, and that the only effect of the 1938 amendment was to take away the requirement of consent where it was previously necessary, but not to touch the requirement as to giving of the notice. I must confess with respect that I have not been persuaded by this argument. The only basis for the view that under the common law the giving of notice was necessary to make the transfer binding on the landlord is the dictum in *Panye Chunder* v. *Hurchunder*, 10 Cal. 496, but that case itself was one relating to the alienation of a tenure and the decision in that case was based on a specific provision of the then Bengal Tenancy Act of 1869, namely, S. 26, which expressly imposed a duty of giving notice to the landlord upon all transferees of tenures to which the section applied. My learned brother has also referred to the recognition of custom of transferability. In *Jagan Prosad* v. *Posun Sahco*, 8 C. W. N. 172, their Lordships were considering whether the evidence of transfers without consent in other pattis can be used as proof of the custom relating to the partti of the particular landlord. In negativing it, their Lordships say :

"The essence of a usage of transferability is that transfers made to the knowledge of but without consent of the landlord are valid and must be recognised by him."

I understand this passage in the context only to mean that instances of transfer to constitute proof of usage must be transfers which have in fact been recognised as a matter of course by the landlord though he did not consent to them. There was no question in the case as to whether or not the landlord was bound to recognize a particular transfer on knowing about it, after the usage itself has been established. I do not understand these cases to lay down that a landlord was not bound to recognize a transfer until he has notice of it, but that the custom of transferability without consent is made out by and validates only transfers known to the landlord. This is clear from the case in *Peary Mohan* v. *Joti Kumar*, 11 C. W. N. 83. That is perfectly intelligible since a custom to be recognised by the Court must be reasonable. But transferability conferred by statute cannot be judged on that footing and must be gathered from the language used. It is also true that certain decisions have held that the principle underlying S. 108, sub-s. (j), T. P. Act is also applicable to agricultural leases. That, however, does not appear to me to help the present discussion. The question that arose in those cases was whether or not the transferor tenant could absolve himself from the liability from future rent by the mere transfer itself, and it was held that he could not, in view of the fact that the transferor was liable to the landlord by privity of contract. Such a line of reasoning is not normally applicable to the case of an occupancy raiyat, who, it seems to me, more often holds by privity of estate and not by privity of contract. It would also appear from the decision in *Saradindu Mukherjee* v. *Kunja Kamini*, A. I. R. (29) 1942 Cal. 514 : (202 I. C. 663) that the principle of S. 108 (j) does not apply to a case where the incidents relating to the assignment or transfer of the tenancy are provided for by the tenancy legislation itself as in the case of transfer of permanent tenures under the Bengal Tenancy Act. In any case, this does not show that so far as the transferee is concerned, his liability to the landlord depends on his giving notice Neither S. 108 (j), T. P. Act, nor S. 73, Bengal Tenancy Act, 1885 which have been referred to in the discussion, show that the transferee's liability does not commence from the date of the transfer or that it arises only when a notice has been given or the landlord has knowledge. Indeed, they clearly seem to imply the contrary. Section 83, Orissa Tenancy Act, prior to the amendment of 1938 was as follows :

"When an occupancy raiyat in a permanently settled estate transfers his holding without the consent of the landlord, the transferor and the transferee shall be jointly and severally liable to the landlord for arrear of rent falling due after the transfer."

It would appear from this section that in respect of transfers falling within its scope at the time, the transferee's liability would commence from the date of the transfer itself and not from the date when the landlord gets notice or has knowledge of the transfer. This implies, if at all, that the reciprocal liability of the landlord *vis s-vis* the transferee, viz., his obligation to recognize him and treat it as binding arose from the date of the transfer itself and did not depend on any independent notice after transfer. It is significant that by the amendment of 1938 this old S. 83 relating to future arrears of transferable holdings in permanently settled estates has been omitted and fresh section dealing only with past arrears, and applicable to all transfers within temporarily or permanently settled estates has been substituted. This substitution seems to me to be an indication of the legislative intention that the

transferor-tenant was not to be liable for future rents at all from the date of the transfer and the transferee was to be liable for past and future arrears—notice or no notice. The position, therefore, as I understand, was this. There probably was some common law principle that a transferee of a tenancy must give notice to the landlord before he could get the benefit of the tenancy as stated in *Panye Chunder* v. *Hurchunder*, I. L. R. 10 Cal. 496 but this became academic when landlords grew sufficiently powerful to obliterate free transferability of tenancy rights and were able to impose their consent as a condition precedent. The matter then rested either with statute or custom. Custom recognized the validity only of transfers to the knowledge of the landlord. See *Jagan Prosad* v. *Posun Sahoo*, 8 Cal. W. N. 172 and for the rest consent was a pre-requisite except when statute purported to regulate the same. That attempt at regulation was first made in Orissa in 1913, which retained the theory that consent was a pre-requisite, but provided for a statutory mode of obtaining that consent from an unreasonable landlord. Thus between 1913 and 1938 the field relating to transfers of tenancy right in Orissa was partly occupied by statute and partly by custom and the particular provisions relating to the validity of such transfers in both the cases were such that notice to the landlord was necessarily implied. Notice was not something in addition to the requisites for validity of the transfer and did not have any separate existence as a pre-requisite to render it binding as against the landlord. All that has now been changed, and the field is in its entirety occupied by statute. The requisites for validity of the transfer have themselves been altered and I do not think it permissible to hold that the implications of the previous law continue unless the same can be reasonably derived from the language of the new statute itself. I am, therefore, not persuaded by the argument that prior to 1938, there was any well-established principle recognised by the Orissa Tenancy Act to the effect that notice was an independent pre-requisite for the binding character of the transfer of a transferable holding and that therefore it could be argued that pre-requisite was left untouched.

[50] My learned brother Narasimham J. has noticed the case in *Babar Ali* v. *Krishnamanini Dassi*, 26 Cal. 603 : (3 C. W. N. 531), where it has been held that:

"As regards court-auction sale of a permanent tenure which was confirmed without the payment of the prescribed landlord's fee and in disregard of the provisions of Ss. 12 and 13, Bengal Tenancy Act, the sale itself was invalid."

It would appear that subsequent to that decision, the legislature intervened by passing the Bengal Tenancy Validation Act, 1903 (Bengal Act (I [1] of 1903) which in terms enacted that the non-payment of the fee should not be held to invalidate the transfer. It has been suggested that since there is no such specific provision in the Orissa Act, the non-compliance with any of the requirements of Sub-ss. (2) to (6) of S. 31 may have the effect of invalidating the transfer in the light of the decision in *Babar Ali* v. *Krishnamanini Dassi*, 26 Cal. 603 : (3 C. W. N. 531). This, however, does not seem to follow. On the very language of sub-ss. (2) to (6) of S. 31, non-payment of process fee or not filing of notices for service appear to stand on a different footing from the non-service of notice. If the requirement as to payment of process-fee and filing of notices are not complied with, the Registrar or the Court are specifically prohibited from completing the title. But the service of notice is a duty cast on the officers after the formal completion of the title and, the disregard of the statutory prohibition before completion of title may well be held as was done in *Babar Ali* v. *Krishnamanini Dassi*, 26 Cal. 603 : (3 C. W. N. 531), to invalidate the title itself while a dereliction of duty cast on the public officers after completion of title cannot by itself be said to invalidate the title. Indeed, even in the former contingency the case in *Chandra Sekhar* v. *Jagannath*, A. I. R. (32) 1945 Pat. 313 : (24 Pat. 148) has held that the title is completed by registration or confirmation, even though it was in disregard of the statutory prohibition. That, however, is a question which does not arise for decision in this case. All that is sufficient to say in this context is that failure to give notice after registration or confirmation cannot be said to stand on the same footing.

[51] It appears to me, therefore, that taking all the amending sections together and having regard to the pre-existing state of law, it would not be reasonable to import into S. 31 service of notice of transfer on the landlord or the landlord's knowledge of the transfer as a condition precedent to the vesting of the title in the transferee and to the binding character of the transfer as against the landlord

[52] As has been pointed out in the judgment of my learned brother Panigrahi J., there is quite a large catena of decisions of high authority starting from *Kristo Bulluv* v. *Kristolal Singh*, 16 Cal. 642 which was approved in *Jitendra Nath* v. *Manmohan*, A. I. R. (17) 1930 P. C. 193 : (34 C. W. N 821) construing the analogous section relating to the transfer of permanent tenures in the manner in which Panigrahi J. and myself are inclined to construe. It has been urged that the law relating to the transferability of permanent tenures has always

been different and that therefore different considerations must apply. It has also been pointed out that almost every one of those decisions while saying that the binding character of the transfer on the landlord is not dependent on the payment of the fee or service of the notice, also mentioned that on the facts of those particular cases, the landlord had knowledge or must be taken to have knowledge. It has, therefore, been urged that those decisions cannot be taken as a guide for the construction of S. 31, Orissa Tenancy Act. It appears to me, however, that when the Legislature adopted almost similar language and machinery in S. 31, Orissa Tenancy Act, relating to occupancy holding as in Ss. 12 and 13, Bengal Tenancy Act relating to permanent tenures the *prima facie* implication is that the Legislature did so with full knowledge of the judicial interpretation that the language of those sections had received and was prepared for the similar language used in S. 31 being construed in the same manner. See *Mersey Docks* v. *Cameron*, (1864-65) 11 H. L. C. 443 : (145 R. R. 255) and *Isan Chandra* v. *Saftulla Sikdar*, A. I. R. (9) 1922 Cal. 331 at p. 333 : (68 I. C. 219). The reference to knowledge in all such cases is easily explicable on the ground that what was intended to be obviated thereby was the likelihood of the applicability of the theory of representation on the facts of a particular matter with which I shall deal presently.

[53] It has been very strenuously argued that this view would result in considerable hardship to the landlords and that it will encourage fraudulent transfers by defaulting tenants almost on the eve of rent sales. It is also said that this view will be contrary to what has been accepted by the Bench and the Bar all along as having been the correct legal position, namely, that a decree in execution sale as against the tenant recorded in the landlord's registry is valid to pass the holding itself when the transferee of whose transfer the landlord was not aware is not made a party. These considerations even if correct are matters for hesitation and more anxious consideration, but cannot ultimately be the prevailing factors for decision if otherwise the construction of the section is reasonably clear on the language. No pre-existing reported decision relating to the construction of S. 31-A, Orissa Tenancy Act, has been brought to our notice excepting, as already stated, *Giridhari Mohanty* v. *Abdul Khan*, I. L. R. 1950 Cut. 195 : (A. I. R. (38) 1951 Orissa 41). In that case the particular question with which we are dealing, was not before the Court. There are no doubt some observations which may be taken to indicate the contrary view, but his Lordship the Chief Justice himself at p. 206 of the report appears to have summarised the position when he stated :

> "So is a transfer by an occupancy tenant to which his landlord's consent is implicit by virtue of the statute as soon as its conditions for giving notice to him are fulfilled."

This seems to imply not that the notice should have been served, but that the pre-requisite for the issue of notice, namely, the filing of notices and the deposit of the fees should have been complied with. Indeed, the scheme of S. 31 as amended seems to me, not that notice has been substituted for consent and knowledge is essential or that it is only on the receipt of notice or on obtaining knowledge that the transfer becomes binding on the landlord, but that the transfer was intended to become absolute on registration or confirmation and that a dependable machinery for issue of notice to the landlord was provided by means of public agencies by insisting on registration in every case of private sale and that the transferor and the transferee were to be penalised only by refusal of the registration or confirmation if they failed to provide facilities for service of notice, and not in any other way. The Legislature apparently contemplated that the public machinery provided would work effectively and promptly and that service on the landlord and his knowledge of the transfer would be a matter of course. It did not, therefore, provide for the consequences of the failure of the machinery. As to the supposed hardship of the landlord or the scope for the commission of frauds by defaulting tenants, I am not satisfied that it is likely to be so serious as has been represented to us to be, especially since a sale in execution of a rent-decree must be preceded by attachment under Ss. 216 and 217 of the Act, and fraudulent transfers prior thereto are not likely to be numerous or common; but if the hardship resulting from what appears to me to follow from a plain reading of the amending sections is really such as is said to be, the remedy rests with the Government in tightening up the statutory machinery which the Legislature provided for the service of notice or by the Legislature itself intervening by a clear provision for the effect of non-service of notice. It is not without some significance that as a fact the proceedings of the Orissa Legislature when the Bill relating to the amendment of 1938 was on the anvil show that a specific non-official amendment providing for the giving of notice and the effect thereof on the lines of the analogous provisions of the Madras Estates Land Act was moved, but not accepted. See Orissa Legislative Assembly Debates 1938, p. 1841 and p. 1866).

[54] The contrary view strenuously urged on the other side appears to me to lead to much greater anomaly and hardship. Such a view would result in keeping the transferor-tenant liable for all future arrears of rent even though his liability for rent was not based on any contract, but only on the holding of the land; while as already pointed out it is clearly implied by the new S. 83 that there was to be no continuing liability of the transferor for future arrears. Any continuing liability of the transfer for future arrears would be in the nature of a fetter on his right of transfer. I cannot imagine that the Legislature ever intended that while as a result of the transfer the transferee's liability for rent should arise at once and also should extend to past arrears, his title to the land should be precarious and liable to be defeated by proceedings to which he was not a party, whether such proceedings be in respect of further or past arrears, and that the transferor-tenant should be hampered in the freedom of his transfer by continuance of such liability dependant on the failure of the machinery for giving notice or the default of the transferee in not punctually paying up his rent are circumstances for which he is not responsible.

[55] It appears to me that the difference in the two views propounded in this case arises from the difference in the approach to the crucial question involved, namely, whether the right of the occupancy raiyat in the land is to be treated as an interest in the land or as being analogous to a contractual right. If it is an interest in the land itself, it is more in consonance with principle that the effectiveness of transfer of such interest can have nothing to do with notice or knowledge though it may be that the landlord who has an interest in the land is in one sense affected by such transfer. If it be permissible to apply terms familiar to Madras Tenancy Law, the tenant has the Kudivaram interest in the land and the landlord has the Melvaram interest and both are in a sense co-owners in different levels of the total ownership of the land. (*See Venkata Narasimha* v. *Kotayya*, 20 Mad. 299 : (7 M L J 251).) Into such a relationship it is hardly right to import notions arising out of a contractual tenancy. In referring to this analogy, I am perfectly well aware that the conditions of the tenancy law here are different from those in Madras; but I refer to the same only for the purpose of elucidating the position that the right of an occupancy raiyat in the land is in the nature of property and that his obligations towards the landlord must be founded, as far as possible, on the terms of the statute which purport to govern the same.

[56] From the above discussion, it follows in my opinion that the transfer of an occupancy right under S. 31 of the amended Orissa Tenancy Act is binding as much against the landlord as against the transferor from the date of its registration or confirmation and that, therefore, he would normally be a necessary party to any proceedings taken to bind his interest in the holding. This, however, does not necessarily conclude the question which arises in such cases, namely, as to what is the effect of proceedings taken as against the original recorded tenant alone without making the transferee a party.

[57] While it is true as pointed out at the outset that no person's title can be affected by proceedings to which he is not a party, that principle itself has been subjected to an important exception, namely, that the interest of a person not a party to the proceeding may be fully bound by the result of the proceedings if on the facts and circumstances of the particular case, the party on record may be held to represent fully the person having the interest and not on the record. The well-known Privy Council cases in *Malkarjun* v. *Narhari*, 27 I. A. 216 : (25 Bom. 337 P. C.) and *Khiarajmal* v. *Daim*, 32 I. A. 23 : (32 Cal 296 P. C.) — clearly recognise both the main rule and the exception by way of principle of representation. I have had occasion to discuss the principal of representation under the general law with reference to the limited question of the binding character, against the true legal representative of proceedings bona fide taken against the wrong representative. (See *Sarat Chandra Deb* v. *Bichitrananda Sahu*, I. L. R. (1950) Cut. 413 at p. 434-445). I find on a close examination of the law on the subject that this principle of representation has been held to apply also to rent-decrees and execution proceedings for realisation of rent. Thus, for instance, in *Nitayi Behari* v. *Hari Gobinda*, 26 Cal. 677, two of the learned Judges, Hill and Banerjee JJ., have extended the principle of representation laid down by their Lordships of the Privy Council in *Bissesur Lall* v. *Luchmessur Singh*, 6 I. A. 233 : (5 C. L. R. 477 P. C.), to the facts of that case and held that a registered tenant represented the transferee who was not a party to the proceedings and that the proceedings against the registered tenant bound the transferee. The case in *Afraz Mollah* v. *Kulsumannessa Bibee*, 10 C.W.N. 176: (4 C. L. J. 68), recognizes the applicability of the principle to rent proceedings and decides on the facts of that case that there was no representation (see the judgment of Mukherjee J.). The case in *Jagat Tara Dassya* v. *Daulati Bewa*, 13 C. W. N. 1110 : (2 I. C. 695), discusses the principle of representation and says that the fact that the party to the proceeding is only the

registered tenant is not everything and the principle was laid down that it is only one of the items of evidence upon which the question is to be decided as to whether he fully represents the holding so as to bind a person not a party to it. The case in *Gagan Sheikh* v. *Abejan*, 14 C. L. J. 180: (10 I. C. 116), also recognises and discusses the rule of representation of the holding by some of the heirs of the original tenant on behalf of all the persons interested and says it is essentially a question of fact. *Profulla Kumar* v *Salimullah*, 23 C. W. N. 590: (A. I. R. (6) 1919 Cal. 62) is another case in which the principle of representation was applied and the sale as against the recorded tenants was held binding as against persons not recorded. In *Faridpur Loan Office Ltd.* v. *Nirode Krishna Ray*, A. I R. (16) 1929 Cal. 452: (56 Cal. 462), it was clearly laid down as follows:

"Now the ordinary law is that where a landlord sues some only of the co-tenants of a tenure obtains a decree, and purchases the tenure in pursuance of the decree, all that he obtains by the purchase is the interest of the defendant judgment-debtors. But the whole tenure will pass under the auction-purchase pursuant to the decree if the facts warrant a finding that the tenants who were impleaded in the circumstances represented the whole estate."

Rameshchandra v. *Dinanath Mestary*, A. I. R. (23) 1936 Cal. 178 : (63 Cal. 846) also appears to adopt this view. In *Girdharimohnty* v. *Abdul Khan*, I. L. R. (1950) Cut. 195 at p. 199: (A. I. R. (38) 1951 Orisa 41), his Lordship the Chief Justice has said:

"At the date of the sale the judgment-debtor in the suit was no longer the raiyat and *was not representing the holding.*"

(The underlining (here italicised) is mine). This clearly shows that in his Lordship's view the principle of repreeentation is available in such a case. That principle, as has been pointed out by me in *Udayanath Mohapatra* v. *Rahas Pandiani*, I. L. R. (1950) Cut. 410 at p. 411: (A I. R. (38) 1951 Orissa 10) is based on the fact that the interests of the person wrongly on the record and of the person really interested, though not a party on the record, are identical in respect of all matters arising on the proceeding in question and that the action of the creditor in failing to implead the person really interested was *bona fide*. These are the necessary criteria though not always sufficient by themselves to bring about the applicability of the principle of representation which must ultimately depend on the applicability of the equitable doctrine to the facts of each particular case. In considering whether the facts of any particular case justify a conclusion as to the binding character of rent proceedings against the holding itself, though every person interested therein is not a party, the corresponding decisions under the Bengal Tenancy Act prior to the enactment of the statutory representation under S. 146A, may be a useful guide. But it is necessary to caution that so far as any such prior decisions relating to non-transferable holdings are concerned, the cases mix up the question of representation with the question of want of title as against the landlord on account of the absence of his consent to the transfer. It is unnecessary, however, to pursue this aspect further to attempt to lay down the conditions or limits for the applicability of the doctrine of representation in the rent proceedings except to say that the non-observance of the statutory requirements of S. 31, Orissa Tenancy Act, which results in the landlord having no notice and the default in non payment of rent which brings about the proceedings for recovery of rent, may on the facts and circumstances of a particular case, afford sufficient protection to the landlord or the auction-purchaser on invoking the principle of representation. The present case has unfortunately not been presented from that aspect and the requisite facts have not been elucidated on that footing. I am also not prepared to embark upon a larger discussion of the limits of this principle of representation without its having been debated at the bar before us in this case. It is enough to state that I am satisfied that the principle is available and can be invoked in proper cases. I may add, however, that in a matter so important as the effect of rent proceedings, it is rather unfortunate that the applicability and the limits of the principle of representation should have been left unprovided for by the Legislature. This has been made up to some extent in Bengal by the enactment of S. 146-A.

[58] In the result, therefore, I agree that the appeal should be allowed with costs throughout.

[59] **By the Court.**—In accordance with the majority view the order of the Court is that the second appeal is allowed with costs throughout

K.S. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 212 *[C. N. 51.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Sarat Chandra Deb and others — *Defts.*— *Applts.* v. *Bichitrananda Sahu and others* — *Pltf* — *Resps.*

F. A. No. 4 of 1945, D/- 1-3-1950.

(a) Debt Laws — Orissa Money-lenders Act (III [3] of 1939), S. 10 (1)—Decree—Meaning of.

Per *Narasimham J.*—The expression 'decree' in S. 10 (1) means a preliminary decree and not a final decree in a mortgage suit and S. 10 (1) does not apply

to a preliminary decree in a mortgage suit passed prior to the coming into force of the Act [Paras 9, 14]

Per *Jagannadhadas J.*—The word "decree" includes all kinds of preliminary decrees and all kinds of final decrees without distinction. [Para 26]

(b) Civil P. C. (1908), Ss. 2 (11), 50, 52 and O. 22, R. 3—Decree against person in possession—Whether binding on real heir.

Where a mortgagee institutes a suit *bona fide* against the person in possession of the estate of the deceased mortgagor, who is in such possession in assertion of a claim to succeed to that estate, and where a person purchases the mortgaged property *bona fide* in execution of that decree, such purchaser gets the full title to the mortgaged property by virtue of such sale and the real heir is bound thereby and his only remedy if at all, in a proper case is to get the sale set aside by appropriate proceedings in time. [Para 45]

Anno : C. P. C., O. 22, R. 3, N. 10, 12.

K. N. Das, P. Misra, M. Mohonty, S. N. Sengupta, G. B. Mohanty and A. C. Gupta—for Applts,. J. G. Das, B. N. Das and P. Mohanty—for Resps.

Narasimham J.—This is judgment debtors' appeal from a final decree dated 24-10-1944 passed by the Subordinate Judge of Cuttack in a mortgage suit. In order to appreciate the points involved in this appeal it is necessary to describe briefly the previous history of this protracted litigation.

[2] Patia estate known as Killa Patia is an impartible estate in Cuttack district whose proprietor was one Raja Raghunath Deb in 1913. On 26-2-1913 he executed a simple mortgage for Rs. 1,07,000 mortgaging the entire estate in favour of one Bhaban Sahu, the predecessor-in-interest of the respondent-decree-holders. Again on 13-8-1913 he executed a second mortgage in favour of the same Bhaban Sahu for Rs. 5,000 in respect of the same property. Raja Raghunath Deb died subsequently and was succeeded by one Madan Mohan Deb who assumed the title of Raja Madhusudan Deb. Some time in 1917 the title of Madan Mohan Deb to Killa Patia was challenged by Achhutananda Deb in O. S. No. 762 of 1917 in the Court of the Subordinate Judge of Cuttack. Achhutananda lost the suit in the lower Court and filed an appeal (F. A. No. 1 of 1920) in the High Court. During the pendency of the appeal, Madan Mohan Deb died and the Secretary of State for India was substituted in his place. On 10-3-1922, however, the Secretary of State for India and Achhutananda compromised the litigation in consequence of which the estate was surrendered to Achhutananda who obtained possession in due course in the same year.

[3] Sometime in 1926 Bhaban instituted a mortgage suit (O. S. No. 51 of 1926) on the basis of the second mortgage bond dated 13-8-1913 and impleaded Achhutananda (as the latter was in possession of the entire estate by virtue of his compromise with the Secretary of State of India) as the principal defendant. The suit was decreed on 23-8-1927. In 1929, however, the title of Achhutananda to Patia estate was challenged by one Krushna Chandra Deb in O. S. No. 24 of 1930 which was decreed in his favour on 25-11-1933. During the pendency of this litigation, however, Killa Patia was sold on 20-5-1931 in execution of the mortgage suit (O. S. No. 51 of 1926) of Bhaban Sahu and purchased by the Raja Bahadur of Kanika subject to the first mortgage dated 26-2-1913. The said Raja Bahadur obtained delivery of possession of Killa Patia (excluding the palace and its appurtenances) on 4-9-32. Consequently when Krushna Chandra Deb succeeded in his litigation against Achhutananda in O. S. No. 24 of 1930 he could not obtain possession of the entire estate but only of Patia palace and its appurtenances amounting to 2.44 acres of land. The said Raja Bahadur, apart from being in the possession of the entire estate as a purchaser of the equity of redemption in mortgage suit O. S. No. 51 of 1926, also acquired further interest in the estate by virtue of two subsequent mortgages taken by him from Madan Mohan Deb as early as 1918 and 1919 and decrees obtained on the basis of those mortgages as early as 1927. In the present litigation, however, it is unnecessary to describe in detail the other interests obtained by the Raja Bahadur of Kanika in Patia estate.

[4] On 6-2-1935 the respondents instituted the mortgage suit under appeal (O. S. No. 9 of 35) on the basis of the first mortgage bond for Rs 107,000 executed by Raja Raghunath Deb on 26-2-1913. They took care to implead as defendants (i) Krushna Chandra Deb who had succeeded in his litigation against Achhutananda in 1933 (O. S. No. 24 of 1930) (ii) the Raja Bahadur of Kanika (iii) the Raja of Madhupur who had obtained some interest in the mortgaged property by virtue of a transfer in his favour of the subsequent mortgage decrees obtained by the Raja Bahadur, and (iv) Achhutananda himself. Achhutananda and Raja of Madhpur did not contest the litigation and a preliminary decree for Rs. 3,71 833-8-0 was passed by the Additional Subordinate Judge of Cuttack on 6-3-37 Against this preliminary decree an appeal was filed before the Patna High Court in F. A. No. 3 of 1938 by the Raja Bahadur of Kanika alone and it was dismissed on 28-11-1941.

[5] In the meantime the decree-holders moved the Court for making the preliminary decree final. In 1941, however, three persons, namely, Nakshyatramalini Debi Chandramani Patamahadei and Sachidananda Narayan Deb claiming to be heirs of Krushna Chandra Deb filed applications before the learned Subordinate Judge for reducing the decretal amount under S. 10 (1),

Orissa Money-lenders Act, 1939 which embodies the well-known rule of Damdupat. They urged that as the original mortgage of 1913 was for Rs. 107,000 the decree holders were not in any case entitled to get more than the same amount as interest in view of S. 10, Orissa Money-lenders Act and consequently the decretal amount should be scaled down to Rs. 2,14,000. This application was rejected by the Subordinate Judge of Cuttack by an order dated 5-2-1942. Appeals were taken against that order to the Patna High Court (Misc. Apps. Nos. 12, 13 and 14 of 1942) but they rejected as not maintainable and a prayer to treat those appeals as appeals against a final decree was rejected. After committing minor errors the Subordinate Judge made the decree final by his order dated 24-10-42 and the present appeal is against that final decree.

[6] It will be noticed that at the time of passing the preliminary decree the only two contesting defendants were (i) Krushna Chandra Deb and (ii) the Raja Babadur of Kanika. The appeal against the preliminary decree was taken up by the Raja Bahadur only. The present appeal against the final decree has, however, been filed by the three rival heirs of Krushna Chandra Deb and the Raja Bahadur of Kanika has receded into the background. The only point for decision in this appeal is whether the appellants are entitled to any relief under S. 10 (1), Orrisa Money-lenders Act. The said Act came into force on the 30th June, nearly two years after the passing of the preliminary mortgage decree. The Raja Bahadur of Kanika could not obviously claim any benefit under the Orrisa Money-lenders Act because the definition of the expression 'loan' in S. 2 (i) (3), expressly excludes any amount that is payable under a mortgage by the purchaser at a sale of the whole of the property subject to a mortgage. The Raja Bahadur's purchase of the mortgaged property in execution of the O. S. No. 51 of 1926 was made on 20-5-1931 and in the sale it was expressly stated that the purchase was subject to the first mortgage of 26-2-1913. Consequently, the amount payable by him to the decree-holders will not be a 'loan' within the meaning of the Orissa Money-lenders Act and he is not entitled to any relief under that Act. This is the main reason why he has chosen to remain in the background in the present litigation.

[7] Though in form this is an appeal against the final decree dated 24-10-1944, in substance it is an appeal against the order of the Subordinate Judge dated 5-2-1942 rejecting the appellant's petition for relief under S. 10 (1), Orissa Money-lenders Act. The learned Subordinate Judge rejected their petitions for two reasons; (i) the appellants have no subsisting interest in the estate known as Killa Patia because the said estate was adequately represented by Achhutananda in mortgage suit No. 51 of 1926 and Achhutanand's interest had been purchased by the Raja Bahadur of Kanika on 20-5-1931. Krushna Chandra's success in O S. No. 24 of 1930 against Achhutananda gave him possession of only 2.44 acres of land containing the Patia palace and its appurtenances but that did not give him any claim to the impartible estate. The present mortgage suit under appeal is confined to the impartible estate of Patia and the appellants have no interest in the same; and (ii) in any case sub-s. (1) of S. 10, Orissa Money-lenders Act, will not be applicable to a preliminary decree passed prior to the coming into force of that Act. For this view he relied on *Chandrawati Debi* v. *Nandkishoreprasad*, A. I. R. (27) 1940 Pat. 376 : (186 I. C. 401).

[8] Both the reasons given by the learned Subordinate Judge were assailed before us very strongly and lengthy arguments were advanced on the question as to whether Krushna Chandra Deb or his heirs had any subsisting interest in the mortgaged property. A decision on this question depends on whether Achhutananda effectively represented the mortgaged property in mortgage suit No. 51 of 1926 so as to bind Krushna Chandra also notwithstanding the fact that the latter was not a party to that litigation. The learned lower Court, however, held against Krushna Chandra relying on *Sanna Govappa* v. *Rodda Sanna Govappa*, A. I. R. (16) 1929 Mad. 482 : (120 I. C. 65) mainly on the ground that from 1922 till 1932 Achhutananda was in possession of Killa Patia and was thus a legal representative of the original mortgagor Raja Raghunath Deb. The learned counsel for the appellants challenged the correctness of *Sanna Govappa* v. *Rodda Sanna Govappa*, A. I. R. (16) 1929 Mad. 482 : (120 I. C. 65) and argued that the general principle to the effect that a person who is not a party to a litigation is not bound by the same should not be relaxed except to the limited extent permissible by virtue of the Privy Council decision in the well-known case *Malkarjan* v. *Narhari*, 27 I. A. 216 : (25 Bom. 337 P. C.). He also relied on a later Privy Council decision reported in *Khiarajmal* v. *Daim*, 32 I. A. 23 : (32 Cal. 296 P. C.) where the previous decision was distinguished. He also relied on *Pukhraj Jeshraj* v. *Jamsetji Rustum*, A. I. R. (14) 1927 Bom. 63 : (50 Bom. 802) which has been followed in a later Madras decision reported in *Manikyanayanim Varu* v. *Lakshminarasimha*, A. I. R. (20) 1933 Mad. 43 : (139 I. C. 465) and *Amarchand* v. *Parmanand*, A. I. R. (21) 1934 ALL. 474 : (150 I. C. 323). Out of respect for the

learned counsel for the appellants I would have liked very much to discuss this interesting question of law. But in the present case this question appears to be of mere academic interest because even if it be held in favour of the appellants that Krushna Chandra was not bound by the decree in O. S. NO. 51 of 1926 against Achhutananda and that their interest in the impartible estate of Patia continued to exist, they cannot, in my opinion, claim any relief under S. 10 (1), Orissa Money-lenders Act.

[9] As already pointed out, the Orissa Money-lenders Act came into force on 30-6 1939, nearly two years after the passing of the preliminary mortgage decree in the present case. Section 10 (1) of the Act runs as follows:

"Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through Court or otherwise, is greater than the amount of the loan originally advanced."

The expression 'decree' has been defined in S. 2 (g) as having the same meaning as in the Civil P. C. and with a view to avoid any ambiguity it is further expressly stated that it includes a preliminary decree and a final decree in the case of secured loans. The learned counsel for the appellants relied very much on this definition and urged that by virtue of that definition, the expression 'decree' occurring in sub-s. (1) of S. 10, Orissa Money-lenders Act, should be construed as referring to a final decree also and that consequently even though the preliminary decree might have been passed prior to the coming into force of that Act, if no final decree had been passed before that date, the Court was bound to comply with the provisions of that sub-section. The whole question, therefore, narrows down to this: Does the expression 'decree' occurring in S. 10 (1), Orissa Money-lenders Act, include a final decree in a mortgage suit or else is it limited to a preliminary decree only because of the context? The definition of the expression 'decree' in S. 2, Orrisa Money-lenders Act, is itself subject to there being nothing repugnant in the subject or context' and notwithstanding the definition, if the context in any of the succeeding provisions of the Act indicates clearly that the Legislature intended only a preliminary decree in a mortgage suit, the definition must necessarily be deemed to have been modified to that extent. It will be noticed that in sub-s. (1) of S. 10 the material words used are "pass a decree for an amount of interest for the period preceding the institution of the suit." Can it be said that in a final decree in a mortgage suit for sale any decree is passed for any amount of interest? The Legislature while enacting the Orrisa Money-lenders Act was fully aware of the various provisions of the Civil P. C. dealing with preliminary decrees and final decrees in mortgage suits. It was fully aware that under O. 34, R. 4 a preliminary decree in a mortgage suit first directs the ascertainment of the interest due and then directs payment of the principal and interest whereas in a final decree under O. 34, R. 5 the only direction by the Court is for sale of the mortgaged property if the amount specified in the preliminary decree is not paid within the stipulated period. Similarly in the forms of the preliminary decree and the final decree (Forms 10 and 11) of Appen. D to Sch. I, Civil P. C., the distinction between the directions contained in the two decrees is clearly borne out. That is to say, the preliminary decree directs the payment of principal plus interest within a stipulated period and describes the consequences of non-payment, whereas the final decree direc's the sale of the mortgaged property or a part thereof. Thus, the Legislature was fully aware of the nature of the directions contained in the two decrees and when in sub-s. (1) of S. 10 expressly referred to a decree for an amount of interest for a period prior to the institution of the suit the reasonable inference seems to be that in the context of that sub-section the Legislature meant only a preliminary decree in a mortgage suit and not a final decree.

[10] Any doubt on this point is, I think, clarified by scrutinising the provisions of sub s. (2) of S. 10 which runs as follows:

"Where in any suit, as is referred to in sub-section (1) it is found that the amount already realised as interest through Court or otherwise for the period preceding the institution of the suit is greater than the amount of the loan originally advanced, so much of the said amount of interest as is in excess of the loan shall be appropriated towards the satisfaction of the loan and the Court shall pass a decree for the payment of the balance of the loan, if any."

It will be noticed that in this sub-section the words used are 'pass a decree for the *payment* of the balance of the loan'. There can be no doubt that this refers only to a preliminary decree because that decree alone, in terms, directs payment of any sum. But it was argued that the provisions of sub s. (1) of S. 10 are not controlled by the provisions of sub-s. (2) of that section and that the expression 'decree' need not necessarily have the same meaning in both the sub-sections. But in my opinion sub-ss. (1) and (2) of S. 10 are closely interlinked and sub-s. (2) is in the nature of a consequential provision to carry into effect the provisions of sub-s. (1) in those cases where excess interest had been paid.

[11] If the other provisions of the Orissa Money-lenders Act are scrutinised this view seems to gain further strength. For instance, in ss. 9 and 12 there can be no doubt that a decree in relation to mortgage suit means only a preliminary decree. But in S. 14 (1) there can be no doubt that a decree means only a final decree because the sub-section refers to a decree for the sale of the judgment-debtor's property.

[12] The authorities on the subject, of the Patna High Court, are I think overwhelming. As early as 1939 in *Muhammad Yunus* v. *Champamani Bibi*, 18 Pat. 141 at p. 152: (A.I.R. (26) 1939 Pat. 49), a Division Bench while construing S. 11, Bihar Money-lenders Act, 1938, (which was similar to S. 10 (1), Orissa Money-lenders Act) held that that section referred to the passing of a fresh decree and not merely to the carrying out of a decree already passed which is what happens when a final decree is drawn up. Again in *Chandrawati Debi* v. *Nandkishore Prasad*, A. I. R. (27) 1940 Pat. 376: (186 I. C. 401) a similar interpretation was given to S. 7, Bihar Money-lenders (Regulations of Transactions) Act, 1939 and it was pointed out:

"The passing of the final decree does not involve the determination of any amount of interest for the period preceding the institution of the suit at all and the preliminary decree in the present case became binding on the parties when it was confirmed on appeal."

An attempt was made to distinguish the two Patna decisions on the ground that in the Bihar Act the expression 'decree' has not been so widely defined as in S. 2 (g), Orissa Money-lenders Act. It is true that in the Bihar Act the expression 'decree' has not been defined expressly so as to include a preliminary decree and a final decree in the case of secured loans; but there is no exhaustive definition of the expression 'decree' in the Bihar Act at all and the definition is merely of an inclusive nature running as follows:

"'decree' includes an award and an order of contribution passed under the Bihar and Orissa Co-operative Societies Act, 1935."

It cannot be seriously contended that the ordinary meaning of the expression 'decree,' namely the definition as given in the Civil P.C. meant to apply throughout the Bihar Act also. The sole object of the inclusive definition provided in S 2 (b), Bihar Act, was to add something more to the definition as given in Civil P C. That is to say, the definition of the expression 'decree' as given in the Civil P. C. includes both a preliminary decree and a final decree, was left untouched. Doubtless in the Orissa Money-lenders Act, S. 2 (g) defines the expression 'decree' more elaborately by way of abundant caution though such caution was unnecessary when it says that the definition given in the Civil P. C. shall apply. Thus there seems to be no doubt that both in the Bihar and the Orissa Acts the Civil Procedure Code definition of the expression 'decree' applies and the Bihar cases cannot be distinguished on this ground.

[13] Apart from this reason, there is a direct case dealing with the construction of S. 11 (2), Orissa Money-lenders Act, reported in *Chakradhar Mahapatra* v. *Sailendra Narayan Bhanj Deo*, 9 Cut. L. T. 54 where the same meaning was given to the expression 'decree' occurring in S. 11 (2), Orissa Money-lenders Act, relying on the aforesaid two previous decisions. It was urged that this view was wrong and we were requested to refer this appeal to a Full Bench for overruling that decision. But with respect I am inclined to agree with the reasons given by the learned Judges in those three Patna decisions.

[14] I am, therefore, of the opinion that the appellants cannot invoke the aid of sub s. (1) of S. 10, Orissa Money-lenders Act, in view of the fact that the preliminary decree was passed long before the Act came into force.

[15] The other points that were argued at great length before us have been fully dealt with in the judgment of my learned brother which I have had the opportunity of reading I am in entire agreement with him on those matters and consequently even if the view taken by me regarding the construction of S. 10 (1), Orissa Money-lenders Act, be held to be incorrect, the appellants cannot succeed in view of their having lost in the mortgaged property in consequence of the decree in O. S. No. 51 of 1926.

[16] The appeal is dismissed with costs.

[17] **Jagannadhadas J.**—The facts have been set out in my learned brother's judgment, and it is unnecessary to recapitulate the same. The question at issue is the right of the appellants to get relief under S. 10, sub-s. (1), Orissa Money lenders Act (Orissa Act III [3] of 1939) in respect of the amount declared due under the preliminary mortgage decree in O. S 9 of 1935, on the file of the Additional Subordinate Judge of Cuttack dated 6-3-1937. There independent applications were made by the appellants for the said relief during the pendency of the decree-holder's application for passing a final decree. These applications were rejected by an order of the learned Subordinate Judge dated 5-2-1942 and the final decree was passed on 24-10-1944. As pointed out by my learned brother, the present appeal, though in form an appeal against the said final decree, is, in substance an appeal against the order of the Subordinate Judge dated 5-2-1942 inasmuch as no other objection to the final decree has been raised before us. It may also be mentioned that the

present appellants had previously filed direct appeals against the order of the Subordinate Judge dated 5-2-1942, but those appeals, namely, Misc. Apps. Nos. 12, 13 and 14 of 1942 were rejected by the High Court on 25-4-1944 on the ground that the appeals were not maintainable, but with the express reservation that the point which the appellants were trying to raise in those appeals could be properly raised in their appeal against the final decree when passed. The decision that the said miscellaneous appeals were not maintainable, may not be correct, in view of the decision of the Privy Council in *Adaikappa Chettiar* v. *Chandra Sekhara*, A. I. R. (35) 1948 P. C. 12 : (I. L. R. (1948) Mad. 505) but no objection on that ground can be taken to the challenging of the correctness of the order of the Subordinate Judge dated 5-2-1942, in this appeal since the same has been expressly reserved.

[18] The learned Subordinate Judge has dismissed the applications of the appellants on the following grounds : (1) The appellants have no subsisting interest in the property which is the subject-matter of the mortgage sued upon; (2) the relief under sub-s. (1) of S. 10, Orissa Money-lenders Act, is not available in respect of the amount declared due under a preliminary mortgage decree passed before the commencement of the Act.

[19] The second of these questions may be taken up first. The question for consideration is whether S. 10, sub s. (1), Orissa Money-lenders Act, is applicable to a final decree to be passed in a mortgage suit wherein the preliminary decree has already been passed prior to the commencement of the Act. The said sub-section runs as follows :

"Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which together with any amount already realised as interest through Court or otherwise, is greater than the amount of the loan originally advanced."

[20] It is not disputed that this section applies as much to a suit instituted after the Act came into force as to a suit pending at the date of the Act, by virtue of S. 16 (1) of the Act. There can also be no doubt that in a mortgage action, the suit is pending notwithstanding that a preliminary decree has already been passed. It is also to be noticed that the word "decree" has been specifically defined in the Orissa Money-lender's Act by S. 2, cl. (g) thereof as including preliminary decrees and final decrees in the case of secured loans. It would appear, therefore, *prima facie*, that S. 10 (1) applies equally to a Court which has yet to pass a final decree in a mortgage suit and that the prohibition against passing a decree for interest in excess of what is provided therein is equally applicable to such a case in view of the absolute and mandatory terms of the sub-section. It is however argued that the said provision is not applicable for the following reasons : (a) What is prohibited is the passing of a decree for interest which is not what purports to be done by a final decree; (b) The extended definition of the word "decree" to include a final decree is only when there is no repugnancy arising out of the context. The context which refers to the passing of a decree for interest shows that the final decree was not meant to be included in the word "decree" in the sub-section. (c) The effect of holding that the sub-section covers a final decree is to permit the preliminary decree itself to be reopened which has already become final between the parties and it therefore operates to give retrospective effect to the said sub-section, which if intended would have been provided for specifically and in clearer language.

[21] In support of the above arguments the cases in *Muhammad Yunus* v. *Champamani Bibi*, A. I. R. (26) 1939 Pat. 49 : (18 Pat. 141); *Chadrawati Debi* v *Nand Kishore Prasad*, A. I. R. (27) 1940 Patna 376 : (186 I. C. 401) and *Chakradhar Mahapatra* v. *Sailendra Naraya Bhanj Deo*, 9 Cut. L. T. 54 have been cited. The broad consideration underlying the decision in these cases is this. A final decree in a mortgage action is passed in terms of O. 34, R. 5, Civil P. C. It does not involve the determination of any fresh right, but merely carries into effect the preliminary decree after making some further arithmetical calculations that may be necessitated on account of any payments meanwhile. The preliminary decree is the decree that regulates the rights of the parties and also the amount of interest which is payable in respect of the loan and thus regulates the final decree. The preliminary decree retains its force even after final decree (see *Mt. Wahidunnissa* v. *Dip Narain*, A. I. R, (3) 1916 Pat. 370: (1 Pat. L J. 406 F B). Hence the Court does not at the stage of final decree pass any fresh decree for interest. Therefore, it is argued, the sub-section does not apply to the passing of a final decree. It cannot be disputed that the above is the normal relation between the preliminary and final decrees as provided in the Civil P. C. But is that any sufficient reason for not giving full effect to S. 10 (1) in the face of the express provision defining the word "decree" as including the final decree in a mortgage-suit? It is to be noticed that S. 10 (1) is applicable "notwith-

standing anything to the contrary contained in any other law." It would therefore follow that the fact that the giving effect to the provision would contravene the ordinary notions of the relation between the preliminary decree and a final decree as gathered from the Civil P. C., cannot be a reason for its inapplicability. To my mind, the real question is whether when passing a final decree in a mortgage suit, the Court is or is not passing a decree "for an amount of interest for the period preceding the institution of the suit."

[22] It appears to me with great respect that it does. A careful examination of the relevant provisions of the Civil P. C. will clearly show that the Court passes a decree for interest not only at the stage of the preliminary decree, but also at the stage of the final decree under O. 34, R. 5, and of a further decree under O. 34, R. 6, where the circumstances admit of the same. This is none the less so though there need not be a fresh determination of the amount of interest at the later stages under O. 34, R. 5 and O. 34, R. 6. Under O. 34, R. 4. the Court undoubtedly determines what is the interest payable and passes a decree for principal and for interest; but the relief granted is only by way of a declaration of the amount due and an option given to the concerned persons to redeem. Under O. 34, R. 5, the Court grants a fresh relief by way of direction for sale to realise the amount still remaining due by way of principal and interest, and in that sense passes a decree for an amount of interest still remaining due. Under O. 34, R. 6, the Court again passes a decree for the amount still remaining due including interest, if any, and grants a relief for realisation of the same from the person of the judgment-debtor or his property other than that covered by the security. The Court thus passes a decree for interest at each and every one of these three stages covered by O. 34, R. 4, O. 34, R. 5, O. 34, R. 6, the actual relief granted however being different. In the normal course, no doubt, the interest payable prior to the institution of the suit is determined at the stage of the preliminary decree and there is no fresh determination of such interest at the subsequent stages but the subsequent stages also result in decree by the express definition of the word "decree" itself in the Civil P. C., obviously because the right to the further reliefs appropriate to each such stage is determined by those decrees. I can see therefore no insuperable difficulty, on principle, in giving full effect to the word "decree" in S. 10 (1) as comprising a final decree also especially when the Legislature by way of abundant caution in specific terms states so in the definition clause and makes S. 10 (1), applicable notwithstanding any law to the contrary.

[23] It has been pointed out that sub-s. (2) of S. 10 which *prima facie* would appear to apply to the same set of facts as contemplated in S. 10 (1) uses the phrase "pass a decree for *payment of the balance* of the amount." Our attention has been drawn to the form of the preliminary decree as given in Sch. 1 Appendix D, Civil P.C., which shows that the defendant is directed to pay the amount determined to be due. A close examination, however, of the forms of the preliminary and final decrees in Forms 5, 5-A and 6 in Sch. (1), Appendix D, Civil P. C. and a reference to the terms of O. 34, R. 4, O. 34, R. 5 and O. 34, R. 6 with reference to their substantive provisions, would clearly show that a preliminary decree is in substance, nothing more than a declaration as to the amount due. A substantive relief by way of realisation which amounts to payment is given only by the final decree and a further decree for personal payment is passed under O. 34, R. 6 in an appropriate case. If anything, therefore, the phrase "pass a decree for payment of the balance of the loan" in S. 10 (2) would apply to the decrees under O. 34, R. 5, O. 34, R. 6 and not to the decrees under O. 34, R. 4. What appears to me to be almost decisive in the construction of the word "decree" as used in S. 10 (1) or S. 10 (2) is that to construe the word "decree" therein as referring only to a preliminary decree would be to ignore that at least so far as the decree under O. 34, R. 6 is concerned, the Court is passing a decree for *payment* of the balance due and thus S. 10 (2) would in any case, apply to that decree. It would be anomalous to hold that the provisions in S. 10 would apply to preliminary decrees under O. 34, R. 4 and to the personal decree under O. 34, R. 6, but not to the intermediary final decrees under O. 34, R. 5. I am also not impressed by the argument that the exercise of the powers under S. 10 (1) at the stage of the passing of the final decree would involve the re-opening of the preliminary decree and cannot therefore, be done. That appears to be in a way begging the question. When the Court is given the specific power to scale down the interest on specific principles, it is not recalculating the interest with reference to the contract between the parties or under the general law which is all that has been done under the preliminary decree and authorised to be done by the Civil P. C. In passing an amended final decree under S. 10 (1), therefore, the Court in terms does not purport to amend or modify the preliminary decree which determines only the contractual interest, but exercises the fresh powers,

dehors the contract conferred on it by Legislature and passes the further decree in exercise of those powers. I am also not impressed by the argument that there is any repugnancy in the context in which the word "decree" in S. 1 0(1) is used which necessarily limits it to a preliminary decree in a mortgage suit. The argument of repugnancy is really one based on the importation of the concept of inter-relation between the preliminary decree and final decree as gathered from the Civil P. C. It appears to me that the fact of any conflict arising out of the implications of the provisions of the Civil P. C., if the word "decree" is to be taken as defined in the Money-lenders Act, is in no sense a repugnancy "arising from the context. The repugnancy must be one which arises from the Money-lenders Act itself and not from anything to be implied from outside it. The Act itself in terms is intended to cut across the provisions of the pre-existing law or the implications thereof and the conflict with such law cannot amount to repugnancy in the context.

[24] A close examination of the other provisions Act leads me to the same conclusion. For instance, by parity of reasoning with reference to which the meaning of the word "decree" in S. 10 (1) and (2) is sought to be understood, the word "decree" in Ss. 11 and 12 also must refer only to a preliminary decree. Under S. 11, after reopening the previous transaction, the Court has to pass fresh decree for interest that may be due. Under S 12, the Court is to exercise the power to grant instalments at the time of passing the decree in a suit, and refers also to payment by judgment-debtor. If the above reasoning relating to the inter-relation between a preliminary decree and a final decree and as to the preliminary decree being the only decree for payment of interest is imported into these sections also, it would result in making these provisions equally inapplicable to final decrees under O. 34, R. 5 and personal decrees under O. 34, R. 6. But there are very clear indications in these sections to the contrary at least so far as their applicability to decrees under O. 34, R. 6, Civil P.C., is concerned. That would mean again the anomalous result that these sections which are applicable to decrees under O. 34, R. 4 & O. 34, R. 6 are not applicable to decrees under O. 34, R. 5. It would also follow that the specific mention in the definition of the word "decree" as including the final decree would become absolutely purposeless and devoid of any application, if in all the four Ss. 10, 11, 12 and 13 the word "decree" is not to include "final decree".

[25] The construction which I am inclined to put on S. 10 (1) of the Act as being applicable also to final decrees in mortgage suits is one that would be in accordance with the scheme of the Act and would promote the purpose of the Act as stated in the preamble, namely, to grant relief to debtors in the province of Orissa. The Act provides for relief, broadly speaking, by enjoining the Courts to exercise certain powers not available to them under the Civil P.C. The powers so conferred on Court when passing decrees are in Ss. 9 to 12, and those in execution stage are in Ss. 13 ,14 & 15 and in Ss. 10 (3) and 11 (2). At the stage of passing the decree, the Court is empowered to scale down interest according to the provisions of Ss. 9, 10 and 11 and to accord the relief by way of instalments under S. 12. At the execution stage there are safeguards under Ss. 14 and 15 for securing that the property is sold at an adequate price and that only a sufficient portion of the property is sold. By S. 13 the executing Court is given the power to modify the decree already passed by granting instalments. Under Ss. 10 (3) and 11 (2) the Act is assiduous to grant relief even in execution by way of scaling down of interest in respect of unsatisfied decrees whose execution remains pending, but limits such relief to decrees passed subsequent to 1.4-1936, and confines the reliefs to those awardable under Ss. 10 (2) and S. 11 (1). It is unecessary to speculate upon the reasons for these limitations or the principle behind the same and it may be difficult to gather any principle for not extending the relief in such cases to that awardable under S. 10 (1) also. But what is to be noticed is that the Legislature has thought fit to extend reliefs by way of scaling down interest to unsatisfied decrees also, though with certain limitations. It would, therefore, be contrary to the whole purpose and policy of the Act not to give the benefit of the provisions of the Act to a judgment-debtor against whom even a final decree has not yet been passed and against whom the suit still remains pending.

[26] Of the three decisions above mentioned and cited in suport of the opposite view the first two namely, *Muhammad Yunus* v. *Champamani Bibi*, A. I. R. (26) 1939 Pat. 49 : (18 Pat. 141) and *Chandrawati Debi* v. *Nandkishore Prasad*, A.I.R. (27) 1940 Pat. 376 : (186 I.C. 401) are decisions under the Bihar and Orissa Money-lenders Act. They may be distinguished on the ground that the definition of the word "decree" therein does not in terms include a final decree, though, of course, "a decree" would include a final decree even under the normal connotation of the word under the Civil P. C. The case, however, in *Chakradhar Mahapatra* v. *Sailendra Narayan Bhanj Deo*, 9 Cut. L. T. 54 is a direct decision under the Orissa Money-

lenders Act, though it is a decision relating to S. 11 (2) and not a decision under S. 10 (1). I can only say with great respect that that decision requires reconsideration. In addition to the criticism offered above relating to the common idea running through all these three decisions about the juridical inter-relation between a preliminary decree and a final decree, there is one portion of the reasoning in *Chakradhar Mahapatra* v. *Sailendra Narayan Bhanj Deo*, 9 Cut. L. T. 54, which I have been unable to follow. The learned Judges refer to the definition of the word "decree" in the Orissa Money-lenders Act as supporting the view taken by them. Probably, it was meant thereby to indicate, that in order to make S. 2 (g) applicable "decree" must be the aggregate of a preliminary and a final decree, since the word "decree" is defined as including "preliminary decree and final decree" and that, therefore the condition of the decree being passed on 1-4-1936 or thereafter, would apply only if *both* preliminary *and* final decrees are passed after 1-4-1936. If so, it appears to me with respect, that this ignores that "the decree" referred to in sub-s. (2) of S. 11 is the decree which is under execution and remains unsatisfied and which can only refer to a final decree and not to a preliminary decree also in any case. The learned Judges have not noticed that the definition of the word "decree" is that it includes "preliminary decrees and final decrees" in cases of secured loans and uses the plural not to indicate the combination of a preliminary decree and a final decree, but to indicate that it includes all kinds of preliminary decrees and (meaning or) all kinds of final decrees without discrimination. In view of the opinion that I have formed on this question, I should have considered it necessary to refer the same for an authoritative decision by a Full Bench, if the result of this appeal depended entirely on this.

[27] I shall now take up for consideration the first point on the basis of which the learned Subordinate Judge has dismissed the applications, *viz.*, that the appellants (applicants) have no subsisting interest in the mortgaged properties and that hence they cannot obtain any relief under the Orissa Money-lenders Act. Before dealing with the question, it would be well to appreciate at the outset how the question of subsisting interest of the appellants arises with reference to their right to relief under the Act. In order that S. 10 (1) may be applicable, it is of course necessary that the question must arise in a suit brought by a money-lender in respect of a "loan advanced." "Loan" is defined by S. 2 (i) of the Money-lenders Act. By the said definition "loan" means (omitting portions unnecessary for this discussion):

"an advance whether of money or in kind on interest made by a money-lender . . . but shall not include . . . the amount or the proportionate amount, as the case may be, payable under a mortgage by the purchaser at a sale in execution of a decree of a Court or otherwise, of the whole or part of the properties subject to a mortgage, the purchase having been made prior to the coming into force of this Act."

There is no dispute that the suit amount would be loan, but for sub-s. (3) above. In this case admittedly the personal remedy in respect of the mortgage sued upon is long ago time-barred. The properties which are the subject-matter of the mortgage are now in possession of defendant 2, Raja Bahadur of Kanika, who has purchased the same in court-auction on 20-5-1931 in execution of the decree in O. S. No. 51 of 1926 specifically subject to the suit mortgage. *Prima facie*, therefore, the amount under the mortgage bond is payable by defendant 2 out of the properties in his possession and it would therefore appear that the money due under the mortgage-bond is not a "loan" for the purposes of the Act. The contention of the appellants however is that the decree in O. S. 51 of 1926 was one obtained against defendant 4 herein who has been ultimately found to have no title to the mortgaged property and that accordingly the said decree and the execution proceedings thereupon do not bind him and that the execution sale is not effective to convey any title or interest to defendant 2. The argument therefore is that defendant 2 cannot be treated as a purchaser of the mortgaged properties since the purchase referred to in cl. (3), sub-s. (i) of S. (2) must refer to a valid purchase on account of which the purchaser would be liable to pay the mortgage amount out of the properties belonging to him by the said purchase. The question, therefore, is not directly whether the appellants have any subsisting interest in the equity of redemption, but whether the equity of redemption has validly passed to defendant 2 and as belonging to him is liable to meet the mortgage-debt. The answer to this question will depend upon whether in the circumstances relating to the suit O. S. No. 51 of 1926 which led up to the execution sale under which defendant 2 made the purchase, the decree and the execution proceedings though taken only against defendant 4 and though the predecessor of the present appellants, namely, Krishna Chandra Deb is not a party to the same, are enough in law to pass the title in the property to the purchaser, defendant 2.

[28] Before dealing with this question on its merits, it is as well to clear certain preliminary arguments advanced on both sides relating to

it. It has been contended on behalf of the respondents that this question is not open to be raised at this stage in these proceedings by the appellants. That argument is based on the following facts: In the suit out of which these proceedings arise, namely, O. S. 9 of 1935, the predecessor of the present appellant in para 10 of the written statement raised the plea that

"the plaintiffs had no right to institute O. S. 51 of 1926 against defendant 4 (13th respondent) on the strength of the alleged mortgage-bond dated 13-8-1939 of Raja Raghunath Deb in favour of Bhaban Sahu, knowing full well that defendant 4 had no right to represent the Patia Estate and as such the execution case No. 6/13 of the Subordinate Judge's Court was infructuous as against the Estate of this defendant for want of proper representation and defendant 2 (11th respondent) acquired no right by sale thereunder."

[29] On this pleading an issue was raised which is covered by issue 7. The last portion of the said issue 7 runs as follows:

"Did defendant 2 or defendant 3 acquire any right under their alleged purchases in execution of a decree against the non-representation of the alleged mortgagor."

The judgment in the suit dated 6-9-1937 shows that issue 7 has not been pressed by the contesting defendants. It would appear that the contesting defendants in the suit were defendants 1 and 2. It is therefore, argued for the respondents before us that the suit was allowed to proceed on the footing that defendant 2 obtained a valid title in the equity of redemption by virtue of his purchase and that in a later stage of the same proceedings, defendant 1 or his representatives cannot be allowed to turn round and say that defendant 2 had no title. On behalf of the appellants, it is urged that that issue was then raised only as between defendant 1 and defendant 2 and did not arise as between the plaintiff and defendant 1 and the fact that defendants 1 and 2 as between themselves gave up the contest for purposes of the pending litigation cannot be taken advantage of by the plaintiff. It is however pointed out on the other side that though the question now raised is one between the plaintiff and defendant 1's representatives, it directly affects defendant 2 also and therefore to allow the question to be raised at this stage is to reopen an issue which has been closed in the course of the trial itself. There is, no doubt, some force in these arguments, but it appears to me that the consideration of the question on its merits cannot be shut out on this technical view of the matter. The question as to whether defendant 1 or defendant 2 had the title to the equity of redemption was one, which at that stage was not directly relevant in the mortgage suit and may well have been thought by all the parties as not requiring a decision and accordingly given up without any necessary implication as to the conflicting title between defendant 1 and defendant 2. The question has now become material on account of the fact that legislation subsequent to the judgment necessitates the consideration of the matter, in further stages of the same suit. In such circumstances, I do not think there is any prohibition based on procedure for the re-opening of the issue during the pendency of that very suit, even as between defendants 2 themselves, if it became necessary, much less as between plaintiff and defendant 1. I would, therefore, overrule this contention raised on behalf of the contesting respondents.

[30] It has been equally urged on behalf of the appellants that by the very frame of the suit and by the preliminary decree therein and also by virtue of the fact that the present appellants have been specifically brought on record as representatives of the deceased defendant 1 during the pendency of the final decree-proceedings the plaintiffs-respondents must be deemed to have admitted that defendant 1 and his representatives had a subsisting interest and that the preliminary decree itself gave them the right to redeem, and that therefore it is not open to the plaintiffs in these proceedings to contend that the appellants have no such subsisting interest which will enable them to obtain relief under the Orissa Money-lenders Act. It appears to me that this argument is equally not tenable. A perusal of the plaint in the suit would clearly show that it is not based on any admission of subsisting interest of defendant 1. It merely narrates all the relevant facts that had transpired and para 20 in the plaint sets out as follows:

"While defendant 4 was in possession of the properties mentioned below, defendant 1 brought O. S. No. 24/30 in the Court of the Subordinate Judge of Cuttack against him (defendant 4) for recovery of possession of the mortgaged properties mentioned below on 29-3-30 and the suit was decreed on 25-11-30."

The plaint contains no statement whether defendants 1 or defendant 2 were entitled to the equity of redemption and it has taken the obviously intelligible course that both defendants 1 and 2 should be made parties to be on the safe side without taking any risk of committing oneself to a decision on a somewhat difficult legal question as to who was the person entitled as between the two. I do not think it fair, in those circumstances, to construe the plaint or the decree following thereon and the proceedings taken to bring the present appellants as legal representatives of the deceased defendant 1, as constituting an admission by the plaintiffs about the subsistence of the interest. It must also be remembered that as pointed out above the question at issue is not so much whether defendant 1

had or his legal representatives have a subsisting interest in the equity of redemption, but whether proceedings in the suit O.S. 51/26 are such as to bind them so as to vest the title to the equity of redemption in defendant 2 by virtue of the execution sale thereunder. As already pointed out this question is completely outside the scope of the mortgage-suit as originally framed and has become material only by virtue of subsequent legislation and it cannot therefore be taken to have been admitted by the previous course of the proceedings. It is said, however, that since the preliminary decree in terms directs defendant 1 along with the other defendants to pay the mortagage amount declared due by the preliminary decree, he has got the right to treat that as a loan payable (by ?) himself and therefore to be relieved against that payment by provisions of the Orissa Money-lenders Act. But there is no personal liability in this case and the only liability arises in respect of the property, title to which is the matter in conflict between defendants 1 and 2.

[31] This argument, therefore, is really the same as the prior one in a different form. I have, therefore, no hesitation in equally overruling the same raised on behalf of the appellants.

[32] It has further been argued that in certain prior proceedings arising out of the same suit the High Court had decided that the present appellants had a subsisting interest and that therefore the question cannot now be reopened. That argument is based on the following facts. After the final decree now under appeal had been passed and the decree-holder applied for execution, the present appellants applied for relief under Ss. 14 and 15, Orissa Money-lenders Act, praying that the Court should estimate the value of the property and direct the sale only of such portion of the property as would be sufficient for the decree-amount. This prayer was rejected by the Subordinate Judge and Misc. Appeal No. 6/47 was filed against it which was dealt with by the High Court by its judgment dated 22-5-1947 and by that judgment the learned Judges directed the Subordinate Court to proceed as prayed for by the appellants. It is argued that that amounts to an adjudication that the appellants had an interest in the property which entitled them to relief under the Orissa Money-lenders Act. A perusal of that judgment, however, clearly shows that the learned Judges directed that course more as a matter of convenience and not as a result of adjudication and have, in express terms, left the matter for adjudication in the present appeal. In fact, they were aware of the fact that the present appeal was then pending and regretted that both the appeals could not be taken up and disposed of together. There is, therefore, no substance in this contention.

[33] A further contention, has, however been raised, namely, that on any view of the facts the appellants are entitled to a portion of the mortgaged property and have therefore got the right of redemption in respect of the entire mortgage by virtue of S. 91, T. P. Act. It is true that in execution of the decree which defendant 1 herein obtained against defendant 4 herein in O. S. 24 of 1930, defendant 1 had obtained delivery of two acres and forty-four decimals of Lakhraj-Baheli land and the building and the homestead of Patia Palace situate on the land lying within the Mouza of Patiagarh, Killa Patia. It would appear that defendant 2 did not obtain possession of this item of property when he obtained delivery on the strength of the purchase made by him in sale in execution of the decree in O. S. No. 51/26. *Prima facie*, therefore, the 2.44 acres and the building thereon were not comprised in the second mortgage which was the subject-matter of the suit O. S. No. 51/26. The question, however, is whether they were comprised in the properties covered by the first mortgage dated 26-2-13 which is the subject-matter of the present suit. A schedule of the properties comprised in the 1st mortgage is attached to the preliminary decree which is a part of the present proceedings. The said schedule sets out the Mouzas which are the subject-matter of the mortgage, and mentions Nizagarh Patia as one of the said Mouzas. The appellants contend that the land of 2.44 acres with the buildings thereon must be taken to be part of Nizagarh-Patia and therefore to be comprised in the mortgage. This, however, does not necessarily follow. It will be seen from the said schedule that what has been mortgaged are the "said villages together with all sorts of proprietary interest therein" and this is also what appears on a reference to the original mortgage-bond dated 26-2-1913, which has been marked as Ext. 1 in the suit and the translation of which appears in the paper-book of F. A. 3 of 1938. When certain villages have been mortgaged "with the proprietary rights therein" it is not to be presumed that the residential house therein of the mortgagor and the land on which those residential houses stand have also been mortgaged without clear and express words to that effect. It is well settled that the execution sale of a land does not necessarily pass the buildings standing thereon unless the same has also been made the subject-matter of the sale *vide* *Narayan Das* v. *Jalindra Nath*, A. I. R. (11) 1927 P. C., 135 : (54 Cal. 669). See also *Mahomad Amanotullah* v. *Elahi Bux*, 2 Cut. L. T. 91.

That the residential buildings and the plot on which they stood were not intended to be mortgaged either by the first mortgage dated 26-2-1913, or by the second mortgage dated 13-8-13 which is in the same terms (and which has also been marked in the present suit as Ex. 1-E and the translation of which appears in the same paper-book in F. A. 3/38) would seem to be probablised by the fact that defendant 2 did not obtain delivery of the same in pursuance of his court-auction-purchase. I, therefore, agree with the Subordinate Judge thinking that the appellants cannot be said to have partial interest in the equity of redemption of the suit-mortgage which gives them the right to relief on that ground. If I had come to the conclusion that the 2.44 acres of land with buildings thereon was part of the mortgaged property that it was all the interest that the appellants had in redeeming the mortgagee, it should have been necessary to consider the question whether by virtue of the definition of "loan" in the Money-lenders Act, only the proportionate portion of the decree-amount which corresponded to this item of property bore to the entire mortgaged property is not all the amount that can be considered as "a loan" in relation to the relief that the appellants may have been entitled to. This would have been an extremely small amount and obviously the appellants are not interested in it. It is however unnecessary to consider the same in view of the relevant facts, which I have taken.

[34] The appellants have raised a further point that the purchase by defendant 2 in court-auction was during the pendency of defendant 1's suit O. S. No. 24/30 against defendant 4. This is no doubt so. I cannot see what advantage the present appellants can derive from that fact so far as the questions now at issue are concerned in these proceedings. That fact cannot be relied upon to show that the purchase by defendant 2 is void and of no effect. That is not the effect of S. 52, T. P. Act, or the analogous principles applicable to execution sales. The principle of *lis pendens* does not invalidate the transfer but only renders the transfer subject to the rights obtained by the decree-holder in the litigation. Defendant 1 could, therefore, have obtained delivery of possession of the entire estate against defendant 2 by virtue of the decree obtained against defendant 4, and in fact it would appear that that is what he attempted to do, but did not succeed in getting, *vide* judgment between the parties reported in *Krishna Chandra* v. *Rajendra Narayan*, 2 Cut. L. T. 49 : (A. I. R. (23) 1936 Pat. 465) (which though not formally marked as an exhibit, has been referred to in the judgment of the Court below and by both the parties before us in the argument) If, however, it is suggested that what the auction purchaser, defendant 2 got, was only the right, title and interest of defendant 4 in the properties which in a suit between him and defendant 1 has been declared to be nil, that argument raises the question whether what passed at such a sale, on the facts was only the right, title and interest of the particular judgment-debtor in the property or the property itself. Looked at in that light it is not a question of *lis pendens* but involves the question whether, defendant 1's interest is bound by the sale which is the main question in the case that will be presently considered. There appears, therefore, to be no substance in the reliance by the appellants on the question of *lis pendens*.

[35] It may at this stage be mentioned that during the course of the arguments before us, an application has been made on behalf of the respondents to admit as additional evidence, a certified copy of a registered document dated 26-2-42 whereby all the right, title and interest of appellants 1 and 2 in this appeal in the mortgaged property including the right of redemption are purported to have been transferred in favour of the original defendant 3, the Raja of Madhupur. This document was sought to be admitted with a view to urge that even if the present appellants had any subsisting interest they have lost the same by virtue of this deed of transfer and that, therefore they cannot maintain this appeal. We have declined to admit the same. It is to be noticed that the purported transfer is stated to be only by appellants 1 and 2 but even if all the three appellants had been parties to the transfer, it would not follow that the present appellants would lose their right to prosecute the appeal. Order 22, R. 10, Civil P. C. only provides for the continuance of the proceedings by the assignee pending the suit with the leave of the Court, but does not deprive the original assignor of his right to continue the proceedings, *vide Joti Lal* v. *Sheodhayan*, A. I. R. (23) 1936 Pat. 420 : (15 Pat. 607).

[36] The main question therefore that arises in this case for decision is whether defendant 2 has, by his purchase in court auction in execution of the decree in O. S. 51/26 become validly entitled to the suit properties subject to the suit mortgage, and whether defendant 1 has lost all interest therein by such court auction sale. The contention for the appellants is that the judgment in O. S. 24/30 has conclusively established as between himself and defendant 4 that defendant 1 was the legal successor to the estate of late Raja Raghunath Deb and that since the plaintiff does not challenge the correctness of the decision, the suit which was brought by him

on the 2nd mortgage against defendant 4 and the decree obtained therein and the execution proceedings thereupon do not at all bind him and do not have the effect of conveying away to defendant 2, the title in the suit properties which was vested in defendant 1 at the date of the court auction sale. The contention on behalf of the plaintiff respondent is that though defendant 1 was not a party to the decree in O. S. 51/26, and the execution proceedings thereon, his interest in the properties was sufficiently represented by defendant 4, having regard to the facts and circumstances of the case and that consequently all the proceeding therein bound defendant 1 and have the effect of passing to the purchaser, defendant 2, the title of the original mortgagor in the property. The learned Subordinate Judge has agreed with the respondents' contention relying mainly on the case in *Sanna Govappa* v. *Rodda Sanna Govappa*, A. I. R. (16) 1929 Mad. 482 : (120 I. C. 65) and on the definition of the word "legal representative" in S. 2, cl. (11), Civil P. C.

[37] There can be no doubt about the fundamental principle that the title of a person to property cannot normally be affected by any proceedings to which he is not a party. As pointed out by the Privy Council in *Khiarajmal* v. *Daim*, 32 I. A. 23 at p. 32 :

"a Court has no jurisdiction to sell the property of persons who were not parties to the proceedings before it. As against such persons, the decrees and sales purporting to be made would be a nullity and may be disregarded without any proceedings to set them aside."

But it cannot also be disputed that there are certain well-recognised exceptions to the same. The only question is as to the limits of the exception and as to the principle regulating it. The Privy Council cases in *Malkarjan* v. *Narhari*, 27 I. A. 216 : (25 Bom. 337 P. C.)) and *Khairajmal* v. *Daim* 32 I. A. 23 : (32 Cal. 296 P. C.) recognise that though a person may not be a party to an action, his interest in the property may still be bound if he can be said to have been sufficiently represented in the proceedings. Learned counsel for the appellants argues that the only exception recognised by the above Privy Council cases is the case where the proceedings in Court have been initiated against the right person who dies during the pendency of the proceedings and a wrong legal representative is substituted, whom the Court expressly or impliedly decides to be the right legal representative. It is contended that it is only in such cases that the Privy Council have upheld court auction sales in application of the larger principle that when a Court which had jurisdiction to deal with the proceedings pending before it decided wrongly as to who the legal representative is, a *bona fide* court-auction purchaser is not to be affected thereby. Learned counsel argues that the Privy Council does not lay down any general principle of representasion applicable in such cases and relies on the cases in *Pukhraj Jeshraj* v. *Jamsetji Rustum*, A. I. R. (14) 1927 Bom. 63 : (50 Bom. 802) and *Amarchand* v. *Parmanand*, A. I. R. (21) 1934 ALL. 474 : (150 I. C. 323) in support of the position that the principle of the above two Privy Council cases is not to be extended. He urges that *Sanna Govappa* v. *Rodda Sanna Govappa*, A. I. R. (16) 1929 Mad. 482 : (120 I. C. 65) which the learned Subordinate Judge relied upon and which formulates a general principle of representation in broad terms is erroneous. It is also pointed out that in a later case in *Manikyanayanim Varu* v. *Lakshminarasimha*, A. I. R. (20) 1933 Mad. 43 : (139 I. C. 465) and *Pukhraj Jeshraj* v *Jamsetji Rustum*, A. I. R. (14) 1927 Bom. 63 : (50 Bom. 802) was followed and that the case in *Sanno Govappa* v. *Rodda Sanna Govappa*, A. I. R. (16) 1929 Mad. 482 : (120 I. C. 65) was not even referred to as an authority.

[38] I am unable to agree with the contention of the learned counsel for the appellants that the principle of representation in such cases is so limited and circumscribed as the learned counsel would have it. There are quite a large number of reported cases in the various High Courts which have held the proceedings against a wrong person to be binding against the person really interested under a variety of circumstances. The Privy Council in *Khiarajmal* v. *Daim*, 32 I. A. 23 at p. 33 : (32 Cal. 296 P. C.) recognise this when they state as follows:

"The Court had no jurisdiction to sell the property of persons who are not parties to the proceedings *or properly represented on the record*."

The Privy Council also say in the same case at p. 35 as follows:

"The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family and in refusing to disturb judicial sales on the mere ground that some members of the family who were minors were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased and no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is, *de facto*, manager of a Hindu family property, or *has the assets out of which the decree is to be satisfied under his control*."

In *Court of Wards* v. *Ramaput Singh* 14 M. I. A. 605 : (10 Beng. L. R. 294) a suit was brought against the widow of the deceased debtor and a decree was obtained thereon and property sold in execution. It was held that the sale bound the son of the deceased debtor, who and not the widow turned out to be the real heir. A perusal of the decision in the case shows that in so holding their Lordships laid stress both on the course of the proceedings which

showed that the estate of the deceased was throughout intended to be bound and the widow was treated as the sole legal representative by the Court, on objection taken, and also on the fact that the widow happened to be the registered proprietor of the estate after the deceased. It is instructive, however, to notice that their Lordships followed the case in *Eshan Chunder* v. *Buksh Ali Sowdagur*, Marsh Rep. 614 also reported in *Baksh Ali Sowdagur* v. *Eshan Chunder*, W. R. Special Number, 119 (F. B.), and approved of the decision of Peacock C. J. therein. In this case as in the case in *Court of Wards* v. *Ramaput Singh*, 14 M. I. A. 605 : (10 Beng. L. R. 294) the creditor filed a suit against the widow of the debtor and obtained a decree thereon, and brought the properties of the deceased debtor to sale. It was held that the auction purchaser obtained title to the property and that the sale was binding on the son of the deceased debtor who was the real owner. Their Lordships relied largely on the fact that the proceedings in Court clearly showed that the decree and the execution proceedings were intended to be taken as against the deceased debtor's estate, that the widow was intended to be sued as representing the debtor's estate and that there is no suggestion of any fraud or collusion. This case has been specifically referred to and approved in *Khiarajmal* v. *Daim*, 32 I. A. 23 : (32 Cal. 296 P. C.) as also in *Bissessur Lall* v. *Luchmessur Singh*, 6 I. A. 233 : (5 C. L. R. 477 P. C.). In this later case, their Lordships summarise the facts of the case in *Ehsan Chunder* v. *Bukhsh Ali Soudagur*, Marsh. Rep. 614 and *Court of Wards* v. *Ramaput Singh*, 14 M. I. A. 605 : (10 Beng. L. R. 294) as showing that :

"in execution proceedings the Court will look at the substance of the transaction and will not be disposed to set aside the execution upon mere technical ground when it is found that it is substantially right."

A similar view of the principle of substantial representation was taken by the Privy Council in the case in *Hari Saran* v. *Bhubanessarih Debi*, 16 Cal. 40 : (15 I. A. 195 P. C.). There can, therefore, be no doubt that the principle of representation and the binding character on the true legal representative, of execution sales, in proceedings taken against the wrong legal representative on the principle of valid representation, is not so limited and circumscribed as that contended for by the appellants' counsel.

[39] The exact principles, which determine such representation have not, however, so far as I am aware, been authoritatively formulated in any decision of the Privy Council and there is a certain amount of conflict on that matter in the decisions of the various High Courts. The Madras High Court in a series of cases commencing from *Janki* v. *Dhanu Lall*, 14 Mad. 454 have recognised a principle of representation much wider than that applicable to a case where there has been an express or implied decision by the Court that the particular person before it is the proper legal representative. (See *Kadir Mohideen* v. *Muthu Krishna*, 26 Mad. 230 : (12 M. L. J. 368), *Ramaswami Chettiar* v. *Oppliamani Chetty*, 33 Mad. 6 : (4 I. C. 1059), *Gnanambal Ammal* v. *Veeraswami Chetti*, A. I. R. (3) 1916 Mad. 1022 : (31 I. C. 920), *Madhayar Ayudu* v. *Subbama*, A. I. R. (4) 1917 Mad. 979 : (35 I. C. 124), *Soorayya* v. *Chinna Anjaneyalu*, A. I. R. (6) 1919 Mad. 16 : (52 I. C. 509), *Nallappa* v. *Nilana Gowda*, A. I. R. (13) 1926 Mad. 487: (93 I. C. 625), *Kolaremathu Amma* v. *Madhavi Amma*, A. I. R. (15) 1928 Mad. 243 : (103 I. C. 409), *S. Govappa* v. *R. S. Govappa*, A. I. R. (16) 1929 Mad. 482 : (120 I. C. 65), *Chaturbhuj Doss Khushal Doss & Sons* v. *Rajamenicka Mudali*, A. I. R. (17) 1930 Mad. 930 : (54 Mad. 212). The entire case law on this matter as far as the Madras High Court is concerned, has been fully reviewed and some general principles have been attempted to be formulated in the later two cases in *S. Govappa* v. *R. S. Govappa*, A. I. R. (16) 1929 Mad. 482 : (120 I. C. 65) and *Chaturbhuj Dass Khushal Dass & Sons* v. *Rajamanicka Mudali*, A. I. R. (27) 1930 Mad. 930 : (54 Mad. 212). It is unnecessary to notice all these decision in detail and it is sufficient to refer to the last of these cases as showing that in Madras the position appears to have been accepted as stated by Reilly J. in his judgement as follows :

"If a plaintiff in good faith sued a person who appears to him to be the proper legal representative of his deceased debtor and that representative has an existing interest to defend the estate and there is no fraud or collusion in the proceedings, then a decree so obtained is binding on the deceased's estate whoever may be actually entitled to the residue of the estate after the debts have been paid."

In the view of that learned Judge "this is both good sense and good law as laid down by the Privy Council". The other learned Judge Madhavan Nair J. also laid down the principle in substantially the same terms as follows :

"In my opinion there is no justification for confining the principle enunciated in this decision only to those cases where a wrong representative is brought on record in the course of execution proceedings. The question to be considered whether it arises in the course of execution proceedings or in the course of the suit is this : whether the estate of the deceased person was sufficiently represented by the legal representative who has been actually brought on record. I think the same principle should govern all cases where a wrong representative has been brought on record, where such representative has been added in the course of the suit or in the course of the execution proceedings. The same consideration should apply also to a case where the suit

itself is instituted against the wrong legal representative at the very commencement."

It may be pointed out that the decision in the later case of *Manikyanayanin Varu* v. *Lakshminarasimha*, A. I. R. (20) 1933 Mad. 43 : (139 I. C. 465) cannot be said to weaken the authority of these prior decisions in the Madras jurisdiction since it makes no reference at all to any of the prior decisions and also since on the facts that case can be distinguished.

[40] It is unncessary for me for the purpose of this case to consider whether the principles as so broadly formulated in the Madras cases are entirely correct. The cases in *Pukhraj Jeshraj* v. *Jamsetji Rustum*, A. I. R. (14) 1927 Bom. 63 : (50 Bom. 802) and *Amarchand* v. *Parmanand*, A. I. R. (21) 1934 ALL. 474 : (150 I. C. 323) relied upon by the counsel for the appellants show that a somewhat stricter view has been taken in other High Courts. A perusal of the large number of reported cases on this matter shows that questions arose for decision under the following circumstances: (a) Proceedings have been taken against a person who has the *prima facie* title, the real title being in a person who is not a party to the proceedings; (b) proceedings have been taken against only one or some of the proper legal representatives, the others not being parties thereto; (c) proceedings have been taken against a person who was found to be in actual possession of the property of the deceased claiming to succeed to him or to represent, the persons legally entitled not being a party. A further distinction has arisen in some of these cases as to whether the proceedings have been *initiated* against the wrong person or whether the wrong person was brought on the record during the proceedings.

[41] While there is a conflict of decisions in respect of (a) and (b) above, there is a fair unanimity of reported decisions right from the earliest times in respect of (c) to the effect that proceedings taken *bona fide* by the creditor against the person actually in possession by virtue of the assertion of a claim to succeed to or represent the estate of the deceased debtor, are binding against the real legal heir, whether such proceedings were commenced or continued against the wrong person and irrespective of any express or implied decision by the Court that the person so impleaded was the proper legal representative. The earliest reported case on this question is the case in *Ishanchunder* v. *Bukhsh Ali*, Marsh 614, Weekly Reporter, Special Number, p. 190 which I have already referred to and which has been approved by the Privy Council in the case in *Court of Wards* v. *Ramaput Singh*, 14 M.I.A. 605 : (10 Beng. L. R. 294) *Khiarajmal* v. *Daim*, (32 I.A. 23 : 32 Cal. 266 P.C.) and in *Bissesur Lal* v. *Luchmessur Singh*, 6 I.A. 233: (5 C.L.R. 477 P. C.). It may be noticed that on the facts of that case, it was found that, after the original debtor's death the widow's name was entered in the collector's books as the owner of the property and that the creditor alleged that the widow was in possession of the estate. The execution sale as against her was held to bind the real heir. In *Prosunno Chunder* v. *Kristo*, 4 Cal. 342, a creditor suing on a debt due to him from a deceased debtor, obtained a decree for sale against a person who took possession of the property of the deceased honestly beleiving her to be the widow and legal representative of the deceased, though it appeared ultimately that she was not a widow, but only a concubine and that the deceased had left a will in favour of another. It was held that the decree was binding against the real legal representative. This was followed in *Chunilal Bose* v. *Osmond Beeby*, 30 Cal. 1044 where the proceedings taken against the *prima facie* heir, who had taken possession of the estate, was held to be binding against the true legal representative. In *Jatha Naik* v. *Venkatapa*, 5 Bom. 14 where the sale in execution of a decree obtained against the wrong legal representative of the deceased judgment-debtor was held not binding on the real heir the case in *Ishan Chunder* v. *Bukhsh Ali Sowdagur*, Marsh. Rep. 614 was accepted, but distinguished on the ground that that was a case where the defendant therein, though not an heir of the deceased, was in possession of the estate of the deceased and was sued in a representative capacity. In *Premraj Motiram* v. *Javarmal*, 18 I. C. 381 : (15 Bom. L. R. 41) where a decree against the wrong person was held not binding it was bound on the facts that the person against whom the decree was obtained was not in possession of the property of the deceased. In *Pukhraj Jeshraj* v. *Jamsetji Rustum*, A.I.R. (14) 1927 Bom. 63 : (50 Bom. 802) which has been relied on on behalf of the appellants is also a case where it does not appear that the wrong person against whom the decree was obtained was in possession of the property of the deceased. In *Mt. Kaniz Abbas* v. *Lala Baladin*, A. I. R. (12) 1925 Oudh 330 : (28 O. C. 177) the mortgagee obtained a preliminary decree against a mortgagor who died before a final decree was passed, and the widow of the mortgagor was entitled only to the 1/4th share of the property, but she was in actual possession of the entire property and was mutated in the revenue Court on the basis of that possession in respect of the entire property and was substituted as the only legal representative. It was held that the final decree and the further proceedings thereon were binding on the real heir. *Ramaswami Chettiar*

v. *Oppliamani Chetty*, 33 Mad. 6 : (4 I. C. 1059), *Granambal Ammal* v. *Veeraswami Chetti*, A. I. R. (3) 1916 Mad. 1022 : (31 I. C. 920) and *Nallappa* v. *Nilana Gowda*, A. I. R. (13) 1926 Mad. 487 : (93 I. C. 625) were all cases in which the wrong legal representative was in actual possession of the estate of the deceased and the decree in execution proceedings obtained against him was held binding on the true legal heir. *Madlayar Ayudu* v. *Subbama*, A. I. R. (4) 1917 Mad. 979 : (35 I. C. 124) was a case in which the decree against a wrong person was held not binding on the true legal representative; but it was recognised in that case that if the decree had been obtained against the person in possession it would be binding. In *Jharu* v. *Pardhana*, A. I. R. (26) 1939 Lah 277: (183 I. C. 487) the position was accepted, referring to the case in *Ehsan Chunder* v. *Bukhsh Ali Sowdagur*, Marsh. Rep. 614 and *Court of Wards* v. *Ramaput Singh*, 14 M. I. A. 605 : (10 Beng. L. R. 294) that if the person against whom the decree was obtained was in possession of the estate, the decree would be binding. It was accordingly held that in the circumstances of that case there was proper representation and that the decree was binding. *Lalsa Rai* v. *Udit Rai*, A. I. R. (11) 1924 ALL 717 : (75 I. C. 114) and *Amarchand* v. *Parmanand*, A. I. R, (21) 1934 ALL. 474 : (150 I. C. 323) seem disposed to take the contrary view and appear to hold that a decree against a wrong person even though he may be in possession of the estate of the deceased is not binding against the true legal representative. The former is a case where the true representative intervened before the actual sale in pursuance of the decree and sued for a declaration that the decree was not binding on him and it may be distinguishable on the ground that there the protection of the rights of a *bona fide* purchaser in Court was not involved. *Amarchand* v. *Parmanand*, A. I R. (21) 1934 ALL. 474 : (150 I. C. 323) however was a case in which the title involved was that of the purchrser in execution of a decree obtained against the wrong legal representative who was in possesion and it was held that the decree and the execution sale were not binding on the true legal representative. It appears to me that the case in *Amarchand* v. *Parmanand*, A.I.R. (21) 1934 ALL. 474: (150 I. C. 323) has not sufficiently considered the relevant provisions of the Civil P. C. and the cases of the Privy Council which recognise the principle of substantial representation for the protection of the rights of the *bona fide* purchaser in court auction, where such rights come into conflict with the rights of the real heir of the deceased debtor who was not eo nomine a party to the proceedings which led the court auction sales. The principle of substantial representation in connection with such matters has been indicated in *Subramania Ayyar* v. *Arumuga Chetty*, 26 Mad. 330 and *Ramaswami Chettiar* v. *Oppliamani Chetty*, 33 Mad. 6 : (4 I. C. 1059). It is based upon the fact that interests of the real representative and of the person wrongly impleaded are identical in respect of all matters arising on the proceeding in question, though they may be rivals in respect of their title to the debtor's property. If, therefore, he acts without any fraud or collusion he may be presumed to have done what all the real legal representatives would have done if he had been a party. The real legal representative could not, therefore, be prejudiced by his not being a party and the creditor would not be saddled with the undue burden or having to determine for himself at his risk and peril who the real legal representative is. That the identity of interests as regards the particular proceeding is the basis of representation in legal proceedings can be clearly gathered from the decision of the Privy Council in *Krishnayya* v. *Rajah of Pittapuram*, A. I. R. (20) 1933 P. C. 202 : (57 Mad. 1). That case no doubt deals with a totally different matter arising under S. 33, Evidence Act, but the case is instructive. Their Lordships in that case pointed out at p. 207 (1) that one of the essential elements of substantial representation as between parties to two different proceedings is that that the interest of the party to the first proceeding in the answer to be given to the question at issue in that proceeding is the same as that of the party to the second proceeding and therefore

> "the relevant party in the first proceeding, in fact represented in the first proceeding, the relevant party in the second proceeding and may grammatically and truthfully be described as a representative of the party to the second proceeding."

As their Lordships say, "he was in effect fighting that person's battle as well as his own." There can be no doubt that judged with reference to this test, a person in possession of the estate of the deceased debtor by virtue of a claim to succeed to him has the same identical interest as his rival claimant, who equally claims to succeed the deceased in proceedings taken to realies the debt out of the property in his possession. Therefore at least in so far as the validity of the title of the court-auction-purchaser in such proceedings is concerned, such a person fully represents the real heir.

[42] This result also follows from a consideration of the relevant provisions in Ss. 50 and 52, Civil P. C. which deal with the remedies of a creditor to realise his debt from the

estate of his debtor. Section 50 relates to a case where a creditor has obtained a decree against the original debtor, but the debtor dies before the decree is fully satisfied. The said section declares that he can execute the decree against the proper legal representative to the extent of the property which has come to his hands and has not been duly disposed of. Section 52 says that where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment or sale of any such property which is in the possession of such legal representative. Sub-s. (2) of the said section provides for cases where the legal representative is not in possession of the property and we are not concerned with that. What is necessary to note is that this S. 52 is sufficiently wide in terms to apply both to the case of the original debtor dying during the pendency of the suit and of his dying before the institution of the suit. In either case, a decree may be obtained against the legal representative for payment of the money out of the property of the deceased in his hands. Now the expression "legal representative" has been defined in S. 2, cl. (ii) as not only the person who in law represents the estate of the deceased, but also to include one who intermeddles with the estate of the deceased. Whatever may be the connotation of the words "intermeddles with the estate of the deceased" in this definition, there can be no doubt that a person in possession of the estate of the deceased by virtue of a claim to succeed to him or represent him and therefore liable to pay his debts out of the property in his possession, is a legal representative of the deceased at least to the extent of the property in his possession, for the purpose of satisfying the debts of the deceased out of such property. If that is so, Ss. 50 and 52 give a clear right to the creditor to obtain satisfaction of their debts out of that property in the hands of the intermeddler by proceedings taken against that intermeddler alone. It follows that such proceedings bind the real legal representative. That a person in such situation is a legal representative is recognised by the decisions in *Gnanambal Ammal* v. *Veeraswami Chetty*, A. I. R. (3) 1916 Mad. 1022 : (31 I. C. 920), *Madhayar Ayudu* v. *Subbama*, A. I. R. (4) 1917 Mad. 979 : (35 I. C. 124); *Kusum Bandhu* v. *Ramdayal*, A. I. R. (11) 1924 Cal. 362 : (69 I. C. 179); *Nagendra Nath* v. *Hasan Chandra*, A. I. R. (20) 1933 Cal. 865 : (149 I. C. 927). In the last case it was stated as follows :

"It is one of the essential tests with regard to the case of persons who intermeddle with the estate of another before they can be called as legal representatives of the deceased person, that they must retain possession of properties belonging to the estate with the intention of representing the estate."

It has also been pointed out in *Chockalingam Chettiar* v. *Karuppan Chettiar*, A. I. R. (35) 1948 Mad. 385 at p. 387 : ((1948) 1 M. L. J. 82)) that intermeddling referred to in S. 2 (ii) must involve

"an assumption of a representative capacity in relation to the estate and not in assertion of a claim of right, adversely to the estate."

That is a person in possession by way of "intermeddling" to be treated as legal representative must claim to succeed to the deceased debtor and hold it as his representative in the same way as his real heir would have done, if he had been in possession. There can be no doubt, therefore that by virtue of this specific provisions in the Civil P. C. above pointed out, a decree *bona fide* obtained against a wrong person who is in possession of the estate of the deceased as above stated is binding on the real legal heir. In *Lasa Rai* v. *Udit Rai*, A. I. R. (11) 1924 ALL. 717 : (75 I. C. 114) and *Amarchand* v. *Parmanand*, A. I. R. (21) 1934 ALL. 474 : (150 I. C. 323) it has been remarked that the definition of the word "legal representative" in the Civil P. C. is only for purposes of the Civil P. C., but does not alter the substantive law. It may be so, but it is applicable to the procedure provided in S. 52 which relates as such to an action commenced after the death of the debtor as to one continued after his death.

[43] It is however necessary to emphasise that in order that S. 52 may be applicable, the decree must have been obtained against the wrong person as representing the deceased debtor and with a view to get satisfaction out of the estate of the deceased. In an ordinary money decree obtained against an individual, the decree-amount is realised by attachment and sale of the judgment-debtor's property, which means normally, his right, title and interest. But if the suit is so framed as to indicate clearly the intention of the creditor to obtain satisfaction out of the property of the deceased and is brought as against the legal representative as defined in S. 2 (ii) and a decree obtained accordingly, the Code gives the power to the Court by Ss. 50 and 52 of selling the property of the deceased debtor himself and not merely the particular judgment-debtor's right, title and interest. In order therefore that proceedings taken against a wrong legal representative should bind real heir, it is essential that the proceedings themselves taken as a whole, must show that the estate of the deceased was intended to be bound and satisfaction intended to be obtained therefrom.

[44] In a case, however, where the proceedings are for realisation of the amount due on a mortgage created by the deceased debtor, it is obvious that such proceedings stand on a different footing from proceedings which result in a simple money decree. In such a suit, the clear intention of the creditor is to realise his debt from the very property which was originally given to him as security for the debt by the deceased debtor. Indeed by virtue of the provisions of the Civil P. C., he cannot get satisfaction out of any other property until the security is exhausted. Order 34, R. 5 (3) clearly shows that the Court is given powers specifically in a mortgage-suit, properly constituted, to direct the sale of the mortgaged-property itself. It is also well settled that in a sale in execution of a mortgage decree, the purchaser normally gets not the right, title and interest of the judgment-debtor at the date of the sale, but the rights of the original mortgagor as they stood on the date of the mortgage. (See *Karamat Ali* v. *Gorakhpur Bank Ltd*, A. I. R (9) 1922 ALL 495 at p. 496 Col. 2 : (44 ALL. 488) and *Kalipada Mukerji* v. *Basanta Kumar*, A. I. R (19) 1932 Cal. 126 at p. 132 Col 1: (59 Cal. 117) Therefore, while it may be that in an ordinary simple money suit where it is not made out that the proceedings were intended to be taken against the estate of the deceased and that the provisions of Ss. 50 and 52 have been properly utilised, the Court may have no jurisdiction to sell the property of the real heir in a proceeding against the wrong person and therefore such sale is a nullity, in a mortgage suit where by the very terms of the Civil P. C., the Court has jurisdiction to sell the mortgaged property itself and where the wrong legal representative is on the record, the sale is valid and binding against the true heir and is not vitiated by any want of jurisdiction. At best all that can be said is that if there are any defects, it is an irregular sale which the real heir can challenge and get set aside by appropriate proceedings in time.

[45] I have therefore no hesitation in coming to the conclusion that where a mortgagee institutes a suit *bona fide* against the person in possession of the estate of the deceased mortgagor, who is in such possession in assertion of a claim to succeed to that estate, and where a person purchases the mortgaged property *bona fide* in execution of that decree, such purchaser gets the full title to the mortgaged property by virtue of such sale and the real heir is bound thereby and that his only remedy, if at all, in a proper case is to get the sale set aside by appropriate proceedings in time.

[46] It is in the light of these principles, that the relevant facts in this case have to be appreciated and the question at issue decided. Those relevant facts may now be stated. The original proprietor of Killa Patia was one Raja Raghunath Deb. He executed on 26-2 13 a simple mortgage for Rs. 1,07,000 mortgaging the said Killa Patia in favour of one Bhaban Sahu, predecessor in interest of the plaintiff-respondents which is the subject-matter of this suit. He also executed a second mortgage for the same property for Rs. 5 000 on 13-8-13 in favour of the same mortgagee. It was this second mortgage that was the subject-matter of the suit instituted by the said mortgagee in O. S. 51/26. That suit was instituted after the death of the original mortgagee, Raghunath Deb, who died on 4-11-13. It was instituted against one Achutananda Roy, defendant 4 in the present suit. Between the date of death of Raja Raghunath Deb and the institution of the suit, O. S. 51/26, there was litigation about succession to the estate of Killa Patia. On Raghunath Deb's death, one Madan Mohan Deb claiming to be the adopted son of Raghunath Deb took possession of the estate. Achutananda (the present defendant 4) filed O. S. 762/17 against the said Madan Mohan alleging that he was the legitimate son of Raghunath Deb and impugning the adoption of Madan Mohan Deb. He lost the suit in the first Court and filed an appeal F. A. 1/20 in the High Court. During the pendency of the appeal Madan Mohan Deb died and the Government appear to have taken possession of the estate. It is not very clear from the records, why the Government intervened, but it looks not unlikely that it took possession on the footing of escheat. However that may be, it is undisputed that the Government was in possession of the estate immediately on the death of Madan Mohan Deb and that Achutananda brought the Government on the record in his appeal on the death of Madan Mohan. That appeal in the High Court was ultimately compromised as between Achutananda (defendant 4 herein) and the Government by the terms of which the Government consented to the appeal of Achutananda being allowed. Defendant 4, Achutananda was put in possession of the estate by the Government by virtue of this compromise on 10-3-22. It was in these circumstances that the mortgagee, Bhaban Sahu, instituted his suit O. S. 51/26 on his second mortgage against the present defendant 4 Achutanada alone. [After stating various proceedings and evidence his Lordship proceeded:] These various proceedings therefore, show that the action of the present plaintiff's predecessor in the present suit. in filing a suit on his second mortgage against the person then in possession of the mortgaged property namely, defendant 4, in assertion of a claim to have succeeded to the

original mortgagor, was perfectly *bona fide* and that all the proceedings that he has taken to bring the property to sale in execution of his mortgage decree were also *bona fide* and that the purchase by defendant 4 must be taken to be equally *bona fide*. The present defendant 1 had full knowledge of the execution proceedings and made an unsuccessful attempt to stop the same, but did not intervene in the execution sale to assert his rights of redemption and refrained from taking any proceedings to have the sale set aside or declared null and void, though he failed to obtain possession, and now after the lapse of nearly 10 years from the date of the execution sale his representatives have come forward with these applications.

[47] It has been noticed that even such interest as defendant 1 may have had was likely to have been completely extinguished by this date since defendant 2 has admittedly been in continuous possession of the suit mortgaged properties from 4-9-32 when he obtained delivery of possession up to date for a period much over 12 years. Of course, if the case had to be decided on that footing alone, it might have been necessary to consider, in view of the fact that the present applications for relief under the Orissa Money-lenders Act were filed in 1941 (before the lapse of 12 years), whether subsequent continuance of possession should be taken into account and also whether anything had transpired during all these years to render the possession of defeddant 2 not adverse to defendant 1. But this is mentioned only to show that the appellants appear to be fighting a battle from which they themselves are likely to derive no benefit except by way of speculation.

[48] In view of all the facts and circumstances of this case as above pointed out, I have come to the clear conclusion that defendant 2 has become the valid purchaser of the property involved in the present suit in the court auction held in execution of the decree in O. S. 51/26, subject to the present suit mortgage, and that defendant 1 has no subsisting interest therein and that consequently defendant 1 or his alleged successors, the present appellants, have no subsisting interest. They are, therefore, not entitled on this ground to any relief under S. 10 (1), Orissa Money-lenders Act.

[49] The appeal must accordingly be dismissed with costs.

D.H.Z. *Appeal dismissed.*

A. I. R. (38) 1951 ORISSA 230 (C. N. 52)

RAY, C. J. AND NARASIMHAM J.

Radhamohan Rana and others, Petnrs v. Gobinda Gopalananda, Opposite Party.

Civil Revn. Nos. 51 and 52 of 1950, D/- 20-4-1950.

(a) Civil P. C. (1908), O. 39, R. 2 — Disobedience of injunction — Effect.

In a suit by an outgoing trustee for impugning an order of Endowments Comr the Ct passed a preliminary order for injunction at the instance of the pltf. The deft appeared to show cause but defaulted at subsequent hearing and an 'ex parte' decree was passed granting the declaration prayed for and also a perpetual injunction. The 'ex parte' decree was however set aside and the suit was restored to the file. The deft then obtained possession of the temple under the order of the Hindu Religious Endowments Commissioner and thereby committed a breach of the injunction order.

Held, that the deft being under a 'bona fide' belief that the proceedings for injunction having come to an end with the passing of 'ex parte' decree could not be revived by reason of the restoration of the suit, and he could not be held guilty of wilful violation of the order of injunction. Hence he could not be proceeded against for contempt of Ct. (Paras 2, 3)

Anno: C. P. C., O. 39, R. 2, N. 6, Pt. 7.

(b) Orissa Hindu Religious Endowments Act IV (4) of 1939 as amended by Orissa Act XXXI (31) of 1947, S. 59 (3) — Good faith — Disobedience of injunction — Trustee when protected — Orissa General Clauses Act I (1) of 1937, S. 2 (17).

Per Narasimham J. — For purposes of Orissa Hindu Religious Endowments Act so long as the impugned act is done honestly, even negligence on the part of the doer will nevertheless indicate good faith on his part in view of the definition of 'good faith' in S. 2 (17), Orissa General Clauses Act.

Where a newly appointed trustee dispossesses the old trustee in pursuance of an order of the Endowments Comr in spite of an order for injunction issued against him by a Civil Ct, prior to the commencement of the Amending Act and there is no finding as to the absence of good faith on the part of the new trustee, no proceedings for disobedience of an injunction order can be started against him in view of the statutory protection given to him by S. 59 (3) of the Act as amended in 1947. (Para 10)

M. S. Rao, for Petnrs — L. K. Dasgupta and S. Mohanty, for Opposite Party.

RAY C. J: The two revisions were heard together & this order will govern them. Both of them are directed against the orders of the Cts below visiting the petnrs with some punishment for having disobeyed an order of injunction passed by the Ct under O. 39, R. 2, C. P. C. & against the consequential order of directing the defts to restore possession of the subject matter of dispute back to the pltf which had been taken in violation of his order of prohibition in the order of temporary injunction.

(2) It is fundamental that nobody shall be proceeded against in contempt except for wilful violation of a Ct's order — be it a prohibitory or stay or injunction order — as the case may be. The circumstances of this case have to be

set out in order to examine the question whether the petnrs were guilty of wilful violation. The circumstances are: (i) The opposite party, who was a trustee of Khirachora Gopinath Jiu Temple at Remuna, & the endowment thereof, was dismissed by the Hindu Religious Endowment Comr on his finding that the endowment was a public one. He appointed the petnrs, as trustees, in exercise of his powers under the Hindu Religious Endowments Act. As provided in the Act, the aggrieved person, namely, the outgoing trustee, brought a civil suit, in which these civil revisions arise, for having it declared that the temple & endowment were private of which he was the hereditary trustee & that the Hindu Religious Endowments Comr's order declaring the same as public was wrong & was liable to be set aside. (ii) The Hindu Religious Endowments Comr was not impleaded as a party-deft to the suit at the beginning. While the suit was proceeding as between the newly appointed trustees & the outgoing trustee, the latter moved the Ct to restrain, by an order of injunction, the newly appointed trustees, namely, the defts, from interfering with his possession & management of the endowment & performance of sebapuja. The learned trial Ct issued a preliminary order of injunction calling upon the defts to show cause why the preliminary order should not be made absolute. Along with that, an interim order of injunction was passed. Service of notice accompanied the interim order of injunction. The defts put in an objection against the order being made absolute. This objection was never attended to by the trial Ct nor was the order ever made absolute. On some date, fixed for hearing, the defts defaulted & the Ct passed an ex parte decree. The scope & effect of the ex parte decree was to set aside the Hindu Religious Endowments Comr's order declaring the temple & endowment to be public, & to grant perpetual injunction, against the trustees, from interfering with the pltf's management of the endowment, & performance of sebapuja. Necessarily, with the passing of this ex parte decree, the interim order of injunction become exhausted. It was, however, replaced by the order of perpetual injunction incorporated as a part of the decree. The defts, however, are not charged with having violated the said perpetual injunction order, but they later filed an appln for setting aside the ex parte decree. Eventually, the decree was set aside, & the suit was restored to its file. It appears from the defts' appln to the Hindu Religious Endowments Comr, under amended S. 59 of the Act, that they were genuinely under the belief that they were not, at the moment, bound by any order of injunction. They made out this point in the following manner, namely, that the interim order of injunction came to an end either with their filing objection against that order which was never adjudicated upon, or, at any rate, on the disposal of the suit by the ex parte decree. At any rate, the latter position is an obvious one, & cannot be taken exception to. This ex parte decree having been set aside, the question arises whether the interim order of injunction was revived. There is nothing in the order setting aside the ex parte decree nor is there any other order incorporated in the order-sheet to show that the Ct meant to revive the pending proceedings in the matter of injunction as well. Without such an express order & without determining whether cancellation of ex parte decree automatically revives the pending proceedings of an injunction, it is clear that the defts could be held justified to be under a genuine belief that they were not under the restraint of any order of injunction. In such a state of things, if they took possession of the disputed property appertaining to the endowment, they cannot be said to have been guilty of wilful violation of an order of injunction of the Ct prohibiting them from either taking over possession or otherwise interfering with the pltf's possession.

(3) I quite appreciate the view taken by the Cts below that the prerogative right of prohibiting a party from committing violation of its primary & prohibitive order should not be lightly interfered with, though that order may seem to be technically unsound. The spirit behind the order is fully appreciated by this Ct. Reversal of their order should not lend support to any theory that the Ct could not be rightly advised upon strict enforcement of its order of prohibition or restraint whenever such an order is called for in the exigencies of a particular case. Any other view shall lead to disturbance of peace & good order in the society. In the special circumstances, however, in this case as already stated, I would set aside the order punishing the petnrs for violation & contempt of Ct.

(4) In the course of the argument, our attention was invited to sub-s (3) of S. 59 of the Act, & it was contended that even if there is wilful violation of an order of injunction passed, in such circumstances, as prevail in this case, sub-s (3) gives the party complete immunity from any sort of legal proceedings which would include a proceeding consequent upon violation of the Ct's order of injunction prohibiting them from doing anything which the statute entitled them to do under the authority of the Hindu Religious Endowments Comr in their capacity as public servants within the meaning of sub-s (4), provided that is done in good faith. This opens a question of some significance. An argument against this contention may take the shape that the legal proceeding is not for having taken possession but for breach of the Ct's order which supervened. What was meant by sub-s (3) referred to such acts or offences that would ensue directly & solely from the act of taking possession. It would save the man from committing criminal trespass & from being liable to damages for having taken possession of the property & so on & so forth. In view of the importance of the question, it is difficult for me, as at present advised, to come to any definite decision. The solution swings between two extremes — on one side the paramountcy of the law incorporated in statute has to be maintained, & on the other side, the sovereignty of the Ct & its order have also to be respected. As it does not strictly arise in this case, in view of its having been successfully disposed of on the point, already considered, I should not express any opinion.

(5) It would be proper to leave a word of caution for the guidance of the civil Ct. Such matters will ever & anon arise as the Hindu Religious Endowments Comr's order declaring a temple to be a public, dismissing an old trustee,

and appointing a new one, in his place, or directing delivery or taking up of possession under S. 59 will often come for invasion in a civil Ct. The civil Ct, having jurisdiction over the matter, shall be deemed to have right to maintain 'status quo ante' in relation to the subject-matter of dispute & restrain continuing injuries to any one or the other of the parties in litigation. A case may arise in which the Hindu Religious Endowments Comr, impleaded as a deft, may be restrained, or, in other words, may be asked to stay his hands under S. 59 of the Act. It may also happen that he may either directly or through his agents refuse to obey. A question of conflict of jurisdiction should naturally arise. If the civil Cts are fully aware of their responsibilities, the occasion for such an eventuality could be avoided. The civil Ct, when asked to issue an order of injunction to restrain the hands of the deft, whosoever he may be, has always to consider the balance of convenience within which is included consideration of matters of public policy. Whenever the Civil Ct should find that some statutory authority is acting within the limits of the powers conferred upon him by law, as a matter of balance of convenience, he should generally consider it to be in favour of the said authority & his agents. Rare cases, however, may arise in which such authorities may be acting mala fide and in abuse of their powers. In such a case, I can pronounce, without hesitation, that the hands of the Civil Ct are long enough to restrain them, although wise regulation of powers, with reference to the public policy & the balance of convenience, would reduce the happening of such conflicting jurisdictions to a nullity.

(6) I shall now address myself to the advisibility of acceding to Mr. Dasgupta's contention that the question of punishment apart, possession taken wrongfully should not be maintained. What he contends is this that in deference to the Ct's authority & dignity, even notional possession shall be delivered to him, which may later be placed in the hands of a receiver or be disposed of in any manner conformable to the interest of the endowment. But this contention, however, overlooks the question whether this taking of possession is unlawful. Section 59 stares the contention in the face. Besides, we have no reason to presume that the defts are either trespassers or are guilty of malfeasance or misfeasance within the knowledge of the Hindu Religious Endowments Comr. Their actions are within the supervising authority of the Hindu Religious Endowments Comr. We should, therefore, set aside the order of the Cts below directing that the possession shall be restored back to the pltf; but door must be left open to the pltf to apply to the Ct for appointment of a receiver or to take such other appropriate steps in case the defts are found to be interfering unduly with the property rights of the endowment & committing acts of waste in abuse of their powers. In this matter the Hindu Religious Endowments Comr shall be given an opportunity to be heard & his view should be given every deference in arriving at a certain arrangement.

(7) In the result, the civil revisions are allowed. Each party should bear his own costs throughout.

(8) NARASIMHAM J: I agree with my Lord the Chief Justice that the two petns should be allowed.

(9) In C. R. No. 52 of 1950 the only point for decision is whether the punishment of the petnrs for having violated an order of injunction issued by the lower Ct was justifiable. In my opinion sub-s (3) of S. 59, Orissa Hindu Religious Endowments Act as amended by Orissa Act, 1947 is a complete answer to such a charge. The petnrs merely obeyed the order of the Endowments Comr dispossessing the opposite party & putting the petnrs in possession of the temple & its properties in exercise of the extraordinary powers conferred on the Endowments Comr by the amending Act, 1947 (Orissa Act XXXI (31) of 1947). Mr. Dasgupta however contended that Orissa Act XXXI (31) of 1947 cannot affect an order of injunction issued prior to the coming into force of that Act as in the present case. But so far as I could see there is nothing in Orissa Act XXXI (31) of 1947 to indicate that from the date of the commencement of that Act the Comr has no power to put into possession a newly appointed trustee even though there might have been an order of injunction issued against him by a civil Ct prior to the commencement of that Act. The Legislature deliberately conferred drastic powers on the Comr by the amending Act of 1947 & empowered him to put a newly appointed trustee in possession by using even force, if necessary. Prior to 1947 the power to put a new trustee in possession remained with the civil Ct under the old S. 59, Orissa Hindu Religious Endowments Act. When the Legislature in 1947 deliberately transferred that power from the civil Ct to the Endowments Comr himself with a view to secure effective compliance with his own order it is difficult to understand how any previous order of injunction that might have been issued against any party by a civil Ct could in any way affect the statutory powers conferred on the Endowments Comr by the amending Act or else how the protection conferred by sub-s (3) of S. 59 (as amended) of the O. H. R. E. Act to a person acting under the instructions of the Endowments Comr can be in any way whittled down. The main purpose for which the amending Act was made by the Legislature cannot be rendered infructuous by any such limited construction.

(10) Doubtless if it could be held that the petnrs did not act in good faith they cannot claim the protection of sub-s (3) of S. 59, O. H. R. E. Act. The expression 'good faith' has been defined in S. 2(17), Orissa General Clauses Act, 1937 as follows:

"a thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not."

This definition is an important departure from the definition of the same expression occurring in S. 52, Penal Code where

"Nothing is said to be done or believed in 'good faith' which is done or believed without due care & attention."

Thus though for the purpose of the Penal Code where an act is done negligently even though it may be done honestly, a plea of good faith may not stand, for the purpose of the O. H. R. E. Act, however, so long as the impugned

act is done honestly, even negligence on the part of the doer will nevertheless indicate good faith on his part. In the present case there is no finding by either of the two Cts to the effect that the action of the petnrs was not done in good faith. Consequently I would hold that proceedings for disobedience of an injunction order cannot be started against them in view of the statutory protection given to them by sub-s (3) of S. 59, O. H. R. E. Act as amended.

(11) In C. R. 51 of 1950 the question for decision is whether the order of the lower Ct restoring possession of the temple properties to the opposite party can be sustained. I must say that an order of that nature would frustrate the object for which S. 59 was amended by Orissa Act XXXI (31) of 1947. That section as amended requires the ex-trustee to give up possession to the new trustee under the orders of the Endowments Comr & then seek his redress by institution of a suit in the usual way. Whether in such a suit the Ct will have power to appoint a Receiver & thereby dispossess the new trustee who has been actually put in possession of the temple properties by the Endowments Comr under S. 59 is a question on which it is unnecessary to express any opinion at present. It is sufficient to note that in the present case where there is no application for appointment of a Receiver or any finding that the new trustees (the petnrs) are mismanaging the temple properties, the order of the lower Ct directing them to give up possession to the previous trustee (the opposite party) was clearly wrong.

K.S. *Revision allowed.*

A. I. R. (38) 1951 ORISSA 233 (C. N. 53)

JAGANNADHADAS AND PANIGRAHI JJ.

Nilmoni Hota, Deft-Applt v. Govinda Chandra Das, Pltf-Resp.

Second Appeal No. 135 of 1947, D/- 26-9-1950.

Tenancy Laws — Orissa Tenancy Act II (2) of 1913, S. 26 (2) — Purchase of occupancy land by co-sharer proprietor prior to 1913 — Bengal Tenancy Act VIII (8) of 1885, S. 22 (2).

When a co-sharer purchased occupancy land prior to 1913, his occupancy right in such land is certainly extinguished but the holding continues and he can hold the land subject to payment of rent to the other co-sharer proprietors under S. 22 (2), Bengal Tenancy Act. The right acquired by him would not be affected by S. 26 (2), Orissa Tenancy Act. The fact that the co-sharer was recorded in the Current Settlement Register as holding the land under S. 26 (2), Orissa Tenancy Act does not affect his status acquired before 1913. When in such a case the touzi is sold for arrears of land revenue the right of the co-sharer in the occupancy holding does not pass to the purchaser.

(*Paras 2, 4*)

B. K. Pal, for Applt — P. C. Chatterji, for Resp.

PANIGRAHI J: This appeal raises a point of some novelty but not of difficulty. The facts necessary to be stated are that the father of the deft-applt was the owner of two-thirds share in touzi No. 1075 & this two-third share was recorded in the registers of the Collectorate as touzi No. 5989. He had also purchased 3.28 acres of lands appertaining to holding Nos. 34 and 35 (which are the subject-matter of the suit) by sale deeds, Ex. A — series of the years 1895, 1906, 1907 & 1909. These lands were acquired by purchase from tenants who had occupancy rights therein. The deft was recorded in the Current Settlement Register as holding these lands under S. 26 (2), Orissa Tenancy Act. Touzi No. 5989 was put up for sale by the Collector for realising arrear of land revenue on 24-10-40 & was purchased by the pltf. The pltf took delivery of the same through the revenue Ct on 19-1-42. In Nov 1943 he instituted a suit alleging dispossession by the deft-applt in Dec 1942. The pltf's case was that the interest of the deft in the occupancy holding also passed to the purchaser at the revenue sale. That plea is resisted by the deft on the ground that what actually passed to the purchaser at the revenue sale was only the interest in the estate & not the interest in the holding which the deft had purchased. The question that is to be considered is which of these contentions is to prevail.

(2) Mr. B. K. Pal, appearing for the deft-applt, contends that the law applicable to this case is S. 22 (2), Bengal Tenancy Act which was operative in Orissa before the introduction of the Orissa Tenancy Act in the year 1913. Section 22 (2), Bengal Tenancy Act corresponds to S. 26 (2), Orissa Tenancy Act, but there is a substantial difference in the language of the two sub-sections. Under S. 22(2), Bengal Act, as it stood before its amendment in 1907, a co-sharer-proprietor purchasing the occupancy right in a land would be entitled to hold the land subject to payment to his co-proprietors of the rent which may from time to time be payable to them. Section 26 (2) of the Orissa Act, on the other hand, declares that such person shall have no right to hold the land as a ryot but shall hold it as a proprietor & shall pay to his co-sharers a fair & equitable sum for the use and occupation of the same. The difference in language seems significant & created different rights in the purchasing co-proprietor under the two Acts. Under the Bengal Act the purchase of the holding by one co-sharer would not enure to the benefit of the other co-sharers & there would be no merger of interest of the ryot with that of the landlord. All that S. 22 (2), Bengal Tenancy Act declared before its amendment in 1907 is that the occupancy right in a holding would be extinguished in the event of its purchase by a co-sharer proprietor. That sub-section, as it stood before the amendment, was as follows:

"22 (2) If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, it shall cease to exist; but nothing in this sub-section shall prejudicially affect the rights of any third person."

This section was the subject of controversy for a long time & came up for interpretation before the Calcutta H. C. In 'Jawadul Haque v. Ramdas', 24 Cal 143: (1 CWN 166 S B) & 'Rammohan v. Sheik Kachu', 32 Cal 386: (1 C L J 1 F B), the view taken by that H. C. was that S. 22 (2) did not extinguish the holding, that occupancy right is only an incident of the holding & the extinction of the occupancy right did not necessarily put an end to the holding itself. The amending Act of 1907 did not alter the law as laid down in these two cases. It merely

emphasises the position that the purchasing co-proprietor shall hold the land subject to payment of proportionate rent to his co-sharers, & that he was not to be deprived of the benefit of his purchase nor would his purchase enure to the benefit of the other co-sharers who did not contribute to the purchase. The result was the creation of an intermediate status for the purchasing proprietor, which was certainly not that of an occupancy ryot nor that of a tenant-at-will. The position was merely that he had right to retain possession of the land subject to the payment to his co-sharers of their shares of the rent. In the latest decision of the Patna H. C., reported in 'Upendra Pratap Narain v. Dulhin Ishwarwati Kuer', 27 Pat 610: (A I R (37) 1950 Pat 115 F B), the majority view follows the law as laid down in 'Jawadul Haque v. Ramdas', 24 Cal 143: (1 C W N 166 S B). It was held in that case that a co-sharer-landlord who had purchased a transferable occupancy holding was entitled to retain it in his possession as his purchased land on a partition taking place between him & his co-sharers. In 1908, S. 22 (2), Bengal Tenancy Act was further amended in its application to East Bengal & Assam. The sub-section, as applicable to East Bengal, declares in language identical with that used in S. 26 (2), Orissa Tenancy Act, that the purchasing co-proprietor shall have no right to hold the land as a ryot but shall hold it as a proprietor. It has been held in 'Abhoy Charan v. Ram Sunder', A I R (17) 1930 Cal 109: (124 I C 323), that this amendment made in 1908 has no retrospective effect & that a purchaser before the introduction of the amendment would not lose the right he had before the amendment was made. It was accordingly contentded by Mr. Pal that all the purchases made by his client being prior to 1913 when S. 26 (2), Orissa Tenancy Act took the place of S. 22 (2), Bengal Tenancy Act, the right acquired by him would not be affected by the Orissa Tenancy Act, 1913. We are satisfied that this contention is correct & must prevail, the result being that the deft-applt can retain possession of the lands that he had acquired by purchase prior to 1913. His occupancy right in such lands is certainly extinguished but the holding continues & he can hold the land subject to payment of rent to the co-sharer proprietors. The remark made against his name in the Current Settlement Record-of-Rights does not affect the legal position or his status which he had acquired before the passing of the Orissa Tenancy Act.

(3) The correct position, therefore, appears to be that the applt was by reason of his purchase of the occupancy holding a tenant under the general body of proprietors & was liable to pay rent to them under S. 22 (2), Bengal Tenancy Act, as amended in the year 1907 & that there was no merger of the two interests, provision for which was subsequently enacted in S. 26 (2) of the Orissa Act. The provision in the Bengal Act was expressly to the effect that he

"shall be entitled to hold the land subject to the payment to the co-proprietors or joint tenure-holders of the shares of the rent which may be from time to time payable to them."

The Section expressly provides for payment of "rent" instead of "a fair & equitable sum for the use & occupation of the same" as laid down in S. 26 (2) of the Orissa Act.

(4) Another distinction to be noted is that under the previous law the purchasing co-proprietor was "entitled to hold the land" whereas it was laid down in the Orissa Act that he shall have no right to hold the land as a ryot. The difference in language is, in my opinion, deliberate & while the Orissa Act enacted that there should be a merger of the ryoti interest in the proprietary interest the law prior to the introduction of the Orissa Tenancy Act, 1913 was otherwise. The purchasing co-proprietor was certainly not a ryot because S. 22 (2) of the Bengal Act before its amendment in 1907 declared that the ryoti interest shall cease to exist. He had therefore some interest in the land which was not illusory or intangible. The right to hold the land subject to payment of rent to his co-proprietors was recognised by the law as a real right. The question accordingly is whether such right would pass to the purchaser at a revenue sale of the touzi. Section 13 of the Bengal Act XI (11) of 1859 empowers the Collector to put up to sale that share of the estate which has been separately registered & in respect of which a separate account has been kept. Section 54 declares the rights of a purchaser of a share in the estate sold under S. 13 & lays down that when a share or shares of an estate may be sold under the provisions of S. 13 or S. 14 the purchaser shall acquire the share or shares subject to all encumbrances & shall not acquire any rights which were not possessed by the previous owner or owners. The section declares in affirmative terms what the purchaser shall acquire & also contains a negative declaration as regards what he shall not acquire. On a plain reading of the section it appears that all that the purchaser acquires is only the share which the defaulting proprietor had in the estate; & what he does not acquire is any right which the previous owner did not possess. If I am right in my view of the provision in S. 22 (2) of the Bengal Act, as stated above, it cannot be said that the previous owner owned, in the land that he purchased from the occupancy ryot, any interest as owner of the estate, since S. 22 (2) kept the two interests separate & recognised the status of the purchasing co-proprietor as a tenant paying rent, to the general body of co-proprietors. It therefore follows that the deft-applt did not possess the interest, that he had purchased as proprietor. The section does not say that the purchaser at the revenue sale shall acquire all the rights which were possessed by the previous owner; in terms it expressly says that he shall not acquire any rights which were not possessed by the previous owner. This can only mean that the purchaser acquires no more than what was the property of the previous owner, viz., his share in the estate. The holding did not become the private land of the proprietor; it was held by him in a different capacity & therefore would not pass at the revenue sale to the auction-purchaser.

(5) I would accordingly allow this appeal with costs.

(6) DAS J: I agree.

D.H. *Appeal allowed.*

A. I. R. (38) 1951 ORISSA 235 (C. N. 54)

JAGANNADHADAS AND PANIGRAHI JJ.

Bholanath Panigrahi, Pltf-Applt v. Shyamsundra Bose and others, Defts-Resps.

Second Appeal No. 299 of 1947, D/- 7-11-1950.

Limitation Act (1908), Arts. 142 and 144 — Adverse possession — Essentials — Landlord and Tenant — Non-transferable holding transferred — Possession of transferee for over 12 years, without landlord exercising his right of re-entry — Transferee acquires tenancy rights by adverse possession.

In order that possession may be adverse it must be actual, exclusive, and adequate in continuity, in publicity and in extent. It is not necessary that such possession should also be to the knowledge of the person against whom possession is asserted. It is sufficient that the possession be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercised vigilance, to be aware of what is happening.

When a non-transferable holding is transferred in its entirety, it amounts to an abandonment by the tenant of that holding. The landlord is entitled to exercise his right of re-entry on the date of transfer. The possession of the transferee is adverse from its very inception as he has entered upon the land under a void transaction. Time therefore runs against the landlord from the date of the transfer, and if the adverse possessor remains in possession for over twelve years, the title of the tenant is completely extinguished. The landlord's right to recover the same is also similarly extinguished if he does not enforce his right to re-enter or recover within the period of limitation. In such a case the adverse possessor acquires the tenancy rights. (*Paras 4, 7*)

Anno: Lim. Act, Arts. 142 and 144, N. 16, 63, 86.

L. K. Das Gupta, for Applts — M. S. Rao and B. K. Basu, for Resps.

PANIGRAHI J: This is an appeal against the reversing judgment of the Subordinate Judge, Cuttack, directing the dismissal of the pltf's suit for ejectment & damages. The facts — which are not in dispute — are that one Bai Panigrahi, an ancestor of the pltf & defts 2 to 6 who constitute one family, purchased some lands by two registered kabalas dated 27-8-1914 & 24-7-1917 from one Burunda Naik & his son respectively who were then the recorded tenants of those lands. The lands appertained to khata No. 249 in touzi No. 2219. As a result of the partition of the touzi the disputed plot fell in the separated touzi No. 7288 which was purchased by deft 1 at a revenue sale on 18-3-1918. In the Current Settlement the suit plots, which measure 70 decimals, were recorded in Khata No. 120 & in the remarks column the transferee's name was noted as being in possession by virtue of the two kabalas mentioned above. Deft 1 the landlord of the separated touzi brought rent suit in the year 1938 against Bhagat, son of Padi, & obtained a rent decree in Rent Suit No. 4078 of 1938-39. The holding was put up to sale in execution & purchased on 25-10-1938 by deft 1. In due course deft 1 took delivery through Ct on 26-1-1940. The pltf, therefore, filed the suit in 1944 for a declaration of his title & for possession with mesne profits. The pltf's case is that he has acquired occupancy right by reason of his adverse possession against the landlord for over twelve years & that the decree obtained against the original tenant, who had his right in the holding at the time of the suit, is not binding upon the pltf. The main contention on behalf of the first deft was that the pltf was never in possession of the disputed lands.

(2) Both the Cts below found that the pltf entered into possession under the sale-deeds mentioned above & was in possession right up to deft 1's purchase of the suit lands in rent Ct sale. The primary Ct further held that the pltf's possession since 1917 — when the disputed land became a separate holding — was adverse to the landlord & that he had acquired an occupancy right by being in adverse possession for over twelve years before the rent suit. The appellate Judge, however, differing from the trial Ct, held that the pltf should prove adverse possession for twelve years from the date of the auction-sale in favour of deft 1, in order to succeed in the suit. In the view of the lower appellate Ct the pltf was an unrecognised transferee & the decree against the recorded tenant was a valid decree. He further held that the pltf's possession as a tenant of the land & his payment of water-tax cannot be said to be adverse as it had not been brought to the notice of deft 1 nor could any knowledge be imputed to him. In any event, knowledge of deft 1 can be said to have commenced from the date of publication of the Current Settlement Record of Rights, & not before that. In this view of the facts the appellate Ct reversed the judgment of the learned Munsif & dismissed the pltf's suit.

(3) The only point that falls to be considered in second appeal is whether the pltf has acquired the status of an occupancy raiyat by reason of his adverse possession for over twelve years prior to the date of the rent suit. Mr. Das Gupta learned counsel for the pltf-applt contends that it is not necessary for the pltf to establish that the landlord had knowledge of his possession which was adverse since its inception as he had purchased a non-transferable holding. It cannot be seriously challenged that the suit plots were recorded as complete holdings in the separated touzi after the partition of the original touzi, & that the landlord was sixteen-annas landlord of the tenant who was the full owner of the holding. If, therefore, the original tenant is shown to have lost possession to a trespasser who completes his title by being in possession for over twelve years, it cannot be said that the holding is still represented by the original tenant who has completely lost his title after the expiry of twelve years. It is also urged that if the possession is overt, the landlord must be deemed to have had knowledge unless he is kept out of such knowledge by some attempt at concealment on the part of the possessor. This argument is met by Mr. Rao, learned counsel for the resp, by the contention that the alleged adverse possession of the pltf is only an encumbrance on the holding which is voidable by the auction-purchaser & that as in the present case the landlord himself happens to be the auction purchaser there was no need for avoidance. Mr. Rao also attempted to raise a new point before

us that the transferor was all along in occupation of the land as the sub-tenant of the pltf & he relied upon the evidence of a solitary witness who, in the opinion of the Cts below, had been gained over. Another point that was urged by Mr. Rao is that sale in favour of the pltf's ancestor being only of portions of a holding, the landlord is not bound to exercise his right of re-entry & that the original tenant continues to be liable for the rent. We are satisfied that the last two arguments of Mr. Rao are untenable in view of the admitted facts in this case. The only point, therefore, on which the decision of this appeal should depend is whether the pltf has acquired the right of the recorded tenant by reason of his adverse possession for over twelve years as against the landlord.

(4) In order that possession may be adverse it must be actual, exclusive, & adequate in continuity, in publicity & in extent. It was, however, held in some of the reported cases, that such possession should also be to the knowledge of the person against whom possession is asserted. But this view of the law can no longer be maintained as correct in view of the decision of the Judicial Committee in 'Secretary of State v. Devendralal Khan', 61 I A 78: (A I R (21) 1934 P C 23), where the contention was raised on behalf of Govt that the adverse possession of the deft was not brought to their notice. Lord Macmillan, after giving a general exposition of the requirements of adverse possession, observed that there was no authority for such a requirement. It was held,

"It is sufficient that the possession be overt & without any attempt at concealment, so that the person against whom time is running ought, if he exercised vigilance, to be aware of what is happening."

This view has been reiterated in a later case of the P. C. reported is 'Srish Chandra v. Baijinath', 62 I A 40: (A I R (22) 1935 P C 36). It is therefore now well established that, in order to constitute adverse possession, it is not necessary that the acts of possession should be exercised to the knowledge of the pltf. When a non-transferable holding is transferred in its entirety, it amounts to an abandonment by the tenant of that holding. The landlord is entitled to exercise his right of re-entry on the date of transfer. The possession of the transferee is adverse from its very inception as he has entered upon the land under a void transaction. Time therefore runs against the landlord from the date of transfer, & if the adverse possessor remains in possession for over twelve years, the title of the tenant is completely extinguished. The landlord's right to recover the same is also similarly extinguished if he does not re-enforce his right to re-enter or recover within the period of limitation. This is the principle laid down in 'Probhavati Dasi v. Taibaturinessa', 19 C L J 62: (A I R (1) 1914 Cal 196), where Jenkins C. J. observed that the only way of overcoming the bar of limitation would be by establishing a case within S. 18, Limitation Act, & that the statute of limitation operates to create a limited interest of tenancy in the person who has been in continuous possession for the requisite period . The case reported in 'Nalini Kanta v. Govinda Ramanuja', A I R (21) 1934 Pat 458: (150 I C 102) lends support to the contention that time would run against the landlord from the date of his knowledge but that case was not one in ejectment & is easily distinguishable. The case reported in 'Rajendra Narayan v. Nilmani Behera', 3 Cut L T 64: (A I R (24) 1937 Pat 593) is more to the point & follows the P. C. view in 'Secy of State v. Devendra Lal', 61 I A 78: (A I R (21) 1934 P C 23), cited above.

(5) Having regard to the concurrent findings of the Cts below that the pltf had been in possession right from the date of his purchase to the date of the rent sale in favour of the first deft, that is to say, for a period of nearly twenty years prior to the institution of the rent suit, it cannot be asserted that the landlord was unaware of time running against him if, by the exercise of ordinary vigilance, he could have known it.

(6) Mr. Rao very strenuously argued that the pltf did not file any rent receipts in proof of his possession, but it is not shown that the landlord received any rent from the recorded tenant during this period. The fact that the transferee's name was recorded in the Current Settlement shows he was in possession prior to the date of the Settlement.

(7) I have therefore no hesitation in holding that the pltf had been in adverse possession of the suit holding for over twelve years prior to the institution of the rent suit openly & continuously & that he had acquired the tenancy right by such adverse possession. The auction sale of the suit holding did not have the effect of conveying the holding as the pltf was not made a party to the rent suit. The pltf is accordingly entitled to a decree as prayed for.

(8) The judgment of the learned Subordinate Judge is set aside & that of the trial Ct is restored. The appeal is allowed with costs throughout.

(9) DAS J: I agree.

R.G.D. *Appeal allowed.*

A. I. R. (38) 1951 ORISSA 236 (C. N. 55)

JAGANNADHADAS AND PANIGRAHI JJ.

Nilambar Bewa, Deft-Applt v. Fagu Prusty, Pltf-Resp.

A. F. O. D. No. 38 of 1949, D/- 30-8-1950.

(a) Evidence Act (1872), Ss. 101 to 103 — Application for probate — Proof — Succession Act (1925), S. 222.

When an appln is made for the grant of probate of a disputed will, the Ct called upon to do so has to be fully satisfied that the document has been duly and validly executed and attested and that it is the legal declaration of the intention of the testator with respect to the property which he desires to be carried into effect after his death. The onus, in such cases, rests on the person who propounds the will to establish that it is the will of a free and capable testator who at the time had a sound disposing state of mind. Where circumstances exist, which excite the suspicion of the Ct, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved the contents of the document. This onus is all the greater where the person who propounds the will takes a benefit. Where there is conflict of evidence and the best evidence relating to the factum of the execution

and the circumstances relating thereto has not been given, the Ct may well hold the will not proved. *(Para 3)*

Anno: Evidence Act, Ss. 101 to 103 N. 52; Succession Act, S. 222, N. 5.

(b) *Evidence Act (1872), Ss. 101 to 103 — Probate — Will not registered — Proof — Succession Act (1925), S. 222.*

When a will which has not been registered during the lifetime of the testator, and has not seen the light of the day for about three years after the death of the testator is put forward and a probate is asked for, something more is required than the bare and formal proof of execution and attestation, by calling in a few only of the persons connected with it. It has to be satisfactorily made out that it is the free and conscious act of the testator and for this purpose the best evidence of all the circumstances connected with the execution of the will has to be fully made out. *(Para 4)*

Anno: Evi. Act, Ss. 101 to 103, N. 52; Succession Act, S. 222, N. 5.

S. N. Sengupta and R. N. Sinha, for Applt — K. M. Swain, for Resp.

DAS J: This is an appeal against the judgment of the learned Dist J. of Cuttack, granting probate to one Fagu Prusti, of the will of one Narayan Prusti. The appct is the brother of the testator, who is also the executor under the will. The objector, who is the applt before us, is the wife of the testator. The will is said to have been executed on 30-5-38. The testator admittedly died two months thereafter on 2-8-1938. He was about 35 years old at the time of his death. He left him surviving the applt, his wife Nilambar Bewa, and a daughter aged about 6 years, Padma Dei. Subsequent to the birth of his daughter, he appears to have had two male children, one after another, but they had both died before the date of the alleged will. It would appear from the evidence of the applt that the second of the male children was born about a year prior to the testator's death & died when he was a baby less than 10 months' old. The will purports to be executed in favour of one Brajabandhu Prusti, the minor son of Fagu Prusti, the resp. In support of the due execution of the will, two persons purporting to be the attestors thereof, have been examined as P. Ws. 1 & 2 & the will has been marked as Ex. 1. The wife who has examined herself as D. W. 1 & who appears to be literate & claims to be acquainted with the writing & signature of her husband, denies that the signature in the alleged will is that of her husband. The will also purports to bear the thumb impression of the testator. No documents have been filed on either side for comparison of the alleged signature or thumb impression in the will. The will has not been registered & it has been produced by the resp for the first time in the year 1941 in connection with certain land revenue proceedings. It would appear that the applt, Nilambar Bewa, applied for mutation of her name in the place of her deceased husband in respect of his properties. But the resp, Fagu Prusti objected on behalf of his minor son & produced the will in support of his objection before the Revenue Ct as appears from Ex. 4, the order in the land-revenue proceedings dated 24-10-41. The proceedings terminated against the applt & we have been informed at the Bar that the applt has thereupon filed a title-suit which is now pending & has been stayed to await the disposal of this appeal.

(2) The applt has, in addition to challenging the genuineness of the will, contended that her husband died undivided, implying thereby that the will is invalid. This contention has presumably been raised with a view to take advantage of the provisions of the Hindu Women's Rights to Property Act of 1937, which has been made applicable retrospectively to the agricultural property in Orissa by Orissa Act of 1944. She has also raised the contention that the properties of the testator disclosed in the probate proceedings & specifically mentioned in the will are far less than what the testator died possessed of. Neither of these questions, namely, as to the testamentary capacity of the testator or the extent of the properties in respect of which the will may become operative are matters with which the Ct is concerned in these probate proceedings. It is therefore unnecessary to say anything regarding the same. It may also be mentioned that under the terms of the alleged will, the appct is to be the executor only during the minority of his son who, at the time of the alleged execution of the will, was 14 years old as spoken to by P. W. 1 & who therefore must have been major by 1944 when this appln was made. It is doubtful whether under the circumstances, the appct had a right to apply for the probate. No such question has been raised before us & it is unnecessary therefore to say anything further about it.

(3) When an appln is made for the grant of probate of a disputed will, the Ct called upon to do so has to be fully satisfied that the document has been duly & validly executed & attested & that it is the legal declaration of the intention of the testator with respect to the property which he desires to be carried into effect after his death. The onus, in such cases, rests on the person who propounds the will to establish that it is the will of a free & capable testator who at the time had a sound disposing state of mind. But where circumstances exist, which excite the suspicion of the Ct, it is for those who propound the will to remove such suspicion & to prove affirmatively that the testator knew & approved the contents of the document. This onus is all the greater where the person who propounds the will takes a benefit. These propositions are well-established & beyond any question. See 'Barry v. Butlin', (1838) 2 Moore P C 480: (46 R R 123); 'Tyrrell v. Palnton', (1894) P D 151: (70 L T 453. No doubt mere unreasonableness or inofficiousness of a will is not to be treated as a suspicious circumstance, if there is cogent & reliable proof of valid execution by the testator in a sound disposing state of mind. See 'Monghibhai v. Pragji Dayal', A I R (12) 1925 P C 198: (89 I C 88). Nor should any mere circumstantial improbabilities be allowed to outweigh reliable & positive testimony. See 'Chotey Narain Singh v. Ratan Koer', 22 Cal 519: (22 I A 12 P C). It is also true to say that bare conflict of testimony as to the factum of valid execution by the testator or as to his capacity is not to be treated as an item of suspicion within the meaning of the rules laid down in 'Barry v. Butlin', (1838) 2 Moo P C 480: (46 R R 123) & 'Tyrell v. Painton', (1894 P D 151: 70 L T 453). See 'Jarat Kumari v. Bissessur

Dutt', 39 Cal 245: (13 I C 577); 'Sarojini Dassi v. Haridas Ghose', A I R (9) 1922 Cal 12: (49 Cal 235); & 'Prasannamoyi Debi v. Baikuntha Nath', A I R (9) 1922 Cal 260: (49 Cal 132). But where there is such conflict of evidence and the best evidence relating to the factum of the execution & the circumstances relating thereto has been given, the Ct may well hold the will not proved. See 'Bindeshri Prasad v. Mt. Baisakha Bibi', A I R (7) 1920 P C 70: (61 I C 431) & A I R 1930 P C 140 (sic). It is in the light of these well-established principles that the evidence & the circumstances in this case have to be considered. A perusal of the learned Judge's judgment discloses a lack of grasp of the above principles & it therefore falls to us to make an independent appreciation.

(3a) The will purports to be addressed in favour of Brajabandhu Prusti, son of Fagu Prusti, as the donee thereunder. At the outset, it specifies the property which at the time is said to be owned by the testator. Its provisions may be translated as follows:

"I have been suffering from 'Vatha Roga' for a long time. I have no child excepting a daughter named Padma Dei. I have no expectation of having any children in future. I have been looking on you Brajabandhu Prusti from your childhood with affection as a son. You have also been conducting yourself like a son, being obedient & well-behaved. I am therefore very much attached to you. Consequently, I am placing much hope in you for future. My father-in-law Gopal Sahu having seen my weak condition, has kept away my wife, his daughter, for a long time in his house. He is also a habitual litigant & I am therefore apprehensive that he will after me, involve any property which I may leave, in waste & loss. In order to avoid disputes & for securing proper arrangement for the offering of Pindas, in order to secure salvation in the other world, & because there is uncertainty as to what may happen to me in course of time, I am executing this will, of my own accord freely with a sound & settled mind. The above mentioned Brajabandhu Prusti will after my death get, & in my place become the owner & possessor of all the property which I have mentioned above & all other property which I may acquire during my lifetime. No other person can raise any objection to this. Any such objection will be untenable in view of this will. This is proper for you (Brajbandhu Prusti) the donee under this, viz., you as well as Fagu Prusti whom I am appointing as executor during your minority, will carry out duly the arrangement hereunder mentioned for Khork Poshak (maintenance) of my daughter Padma Dei & of my wife Nilambara Dei, viz., for the mother annually 2 bharans of paddy & eighteen rupees & for the daughter till her marriage annually one Bharan of paddy & twelve rupees, will be regularly supplied, also for the marriage of my daughter an expense of not less than Rs. 150/- will be incurred ,also towards her Jautuk (marriage gift) one mana of Sarad paddy land in Ratisinga village will be given. If she is unwilling to take the land, she will be given the value thereof. Aslo according to family usage, her usual requirements will be met. The funeral ceremonies of myself & my wife will also be duly performed. So long as my wife & daughter are in Joint mess like me or if they leave our ancestral house & go anywhere else, they will not be entitled to receive maintenance as above. If my wife leaves the ancestral house & goes away elsewhere, she will not be entitled to take my daughter with her, if my wife goes outside as above, my executor will look after my daughter as her guardian. If necessary, he can for the purpose have resort to Ct in his capacity as guardian. Also if you both give any trouble in the matter of supplying maintenance as above they will be entitled to take the necessary proceedings through Ct & realise what is due to them. I have appointed your father Fagu Prusti an executor in order that he may look after all matters as above stated in case I happen to die during your minority. You will be entitled to take over all the responsibility from Fagu Prusty, on your attaining majority if you so choose."

This is written by one Krupasindu Das of Talakusuma, & attested by four persons, (1) Laxman of Gurupailo, (2) Harekrishna Gochhait of Baharana, (3) Dharanidhara Das of Soralio, & (4) Dadhi Sahu of Tala Kusuma. It has also been signed by the resp, Fagu Prusti, & one Jagannath Prusti, another cosharer in token of their agreement to the will. Out of these seven persons connected with the will only the attestors, namely, Dharanidhara Das & Harekrishna Gochait have been examined as P. Ws. 1 & 2 respectively. The testator is a resident of the village Baharana. P. W. 1 who is a resident of a different village gave evidence that he happened to go over to the testator's village that day in order to place some orders for preparation of certain ornaments with one Hari Sahu, whose house is close to the testator's house. He says that when he was sitting there, he was called by the testator for attesting the will. He went to the testator's house & saw there the scribe preparing a draft & remained there for about an hour. The executant signed & thumb-marked the will in his presence & in the presence of others who all attested the will in the presence of each other & in the presence of the testator. P. W. 2 who belongs to the same village as that of the testator, is his neighbour, with one house intervening. He says that the testator executed a will two months prior to his death & that one Krupasindhu scribed the will & he & others attested the will. He says that a draft was prepared first, that it was read to the executant, & that a fair copy was made & also read over, that the executant signed & thumb-marked the same & that all the rest of them thereupon attested. This is practically all the evidence on the strength of which the learned Judge has found in favour of the will.

(4) It appears to us that this evidence is wholly insufficient to satisfy the Ct with reference to the standards above indicated. When a will which has not been registered during the lifetime of the testator, & has not seen the light of the day for about three years after the death of the testator is put forward & a probate is asked for, something more is required than the bare & formal proof of execution & attestation, by calling in a few only of the persons connected with it, as in this case. It has to be satisfactorily made out that it is the free & conscious act of the testator & for this purpose the best evidence of all the circumstances connected with the execution of the

will has to be fully made out. When such evidence is available & not given, it raises grave doubts even as regards the truth of the case relating to execution & attestation. In the present case, apart from the non-registration & late production of the will, there are a number of other circumstances which have not been sufficiently explained. The most material witnesses have not been examined. All the attesting witnesses, excepting one, happen to be residents of villages different from that of the testator. In a case of this kind, the scribe is generally the most important witness, but he has not been examined. It was said by P. W. 1 that the scribe was his neighbour & that he was suffering from a severe type of diabetes. When cross-examined, he says that he saw the scribe only a month prior to his giving deposition. This is no proof that the scribe was not available as a witness in these proceedings owing to any serious illness. One of the important questions that arise in a case of this kind is as to the custody of the alleged will from the moment of its execution till it sees the light of the day. The resp, the proponent of the will, has produced it into Ct, but has not examined himself. Admittedly he was connected with the execution of the will & he has signed it in token of his consent. According to the evidence of P. Ws. 1 & 2, he was also present at the time when the will was written & the will itself was for the benefit of his son. He is obviously very much interested in the will, though he may take no direct benefit under it, excepting by way of management of the property till his son attains majority. On the evidence of P. Ws. 1 & 2, the testator was having joint mess with him at the time of the alleged execution of the will & for sometime prior thereto. In the circumstances, he was the best person to explain the circumstances relating to the execution of the will & the entire background of the testator's situation which may have operated on his mind for making the particular provisions therein. He should also have been in a position to explain how the various persons from different villages happened to figure as attestors & why the will was not registered & in whose custody the will was after execution & how it came to his hands. The non-examination therefore of these two important witnesses, namely, the scribe & the resp, cannot but raise grave suspicion in the mind of the Ct as to the genuineness & bona fides of this will. Out of the two witnesses actually examined, P. W. 1 is in the nature of a chance witness. P. W. 2 says in his evidence that the testator was in a sound state of mind when he executed the will, but he adds curiously enough that he was 'then' having a fit of epilepsy. This clearly shows that, according to this witness, the will was executed when the attestor had at best probably just recovered from an epileptic fit. It is therefore obviously necessary to scrutinise the evidence carefully as to whether the alleged will represents a free & volitional act of the testator at a time when he was in a position to give his consideration to all the circumstances which would normally operate on a person's mind when he proposes to make a will. The only evidence of this as given by P. W. 2 consists in his statement that the testator called him from his house & told him that since his wife had left him, he would execute a will leaving maintenance allowance for his wife & daughter, & that the scribe prepared a draft which was read over to the executant & was altered according to his suggestion. The other witness, P. W. 1 purports to corroborate this evidence as to the draft & alteration thereof at the suggestion of the testator. According to his evidence, he had been sent for & came to the place while the scribe was still preparing the draft. P. W. 2 however specifically says that by the time P. W. 1 came to the place, Ex. 1 (which was the original will) was almost written out. This, if true, must indicate that P. W. 1 was not on the scene at the time of the draft. P. Ws. 1 & 2 therefore cannot be said to corroborate each other in their evidence relating to the draft of the will. The draft itself is not forthcoming, the scribe not having been examined. In these circumstances, it is difficult to accept the evidence of P. Ws. 1 & 2 as enough to satisfy the requisite standard of proof in such a case, though nothing specifically has been definitely or clearly brought out as against them for their speaking in support of a forged will. This difficulty is all the more strengthened when the provisions of the will & the background of the circumstances in which the will is said to have come into existence are scrutinised & examined.

(5) The testator was only about 35 years old by the time he made the will. It is clear that he was having children in the usual course through his wife. The last of his children having died within about a month or two prior to the date of his making the alleged will, there is no apparent reason for thinking that by that time, he had lost all hope of having any male children. It is true that he died within about two months after the alleged execution of the will, but this is by itself no indication that he was then apprehensive of death. Both according to the wife, D. W. 1 as also according to the neighbour, P. W. 2, he died accidentally by getting drowned in a tank when he had an epileptic fit. There is some evidence that the testator was subject to attacks of epileptic fits, but whether he was so afflicted with this as a disease so as to make him apprehensive of death or whether thereby he was in any state of prolonged illness or debility, does not appear from the evidence. The will itself does not refer to any such health-condition of the testator, but merely states that the testator was suffering from "Bata Roga". Therefore it has not been satisfactorily established that either the family condition or the health condition of the testator was such at the time as would predispose him at the age of 35 to make a will. This is a matter on which the resp, Fagu Prusti, could have thrown some light by examining himself.

(6) There is some suggestion in the will that the testator was greatly attached to the legatee, Brajabandu Prusti, of which, however, there is absolutely no proof. Some attempt has been made in the evidence to make out that the testator & his wife, the applt, were not pulling on well with each other & that the applt had left her husband's house about three or four years prior to his death & stayed away with her parents & that she came back to the husband only within 21 days prior to his death. But there is absolutely no mention of any

thing of this in the will itself. P. Ws. 1 & 2 have given some indefinite evidence to the above effect without categorically & definitely affirming it. The applt has been cross-examined on this point, but has strongly repudiated the suggestion. According to her, she was throughout with her husband until his death, but had gone to her father's place three years prior thereto to attend a marriage ceremony there & stayed there on that occasion for about 15 days & returned. Here again the resp Fagu Prusti, with whom the testator was said to be having joint mess during his wife's absence was the best person to speak to this matter & his non-examination tells against this story. Learned counsel for the resp also relied on Ex. 3, which is a portion of a post card dated 19-4-36 purporting to have been written to the testator. This post-card was shown to the applt when she was being examined & she admitted that portion was to be her handwriting. That portion Ex. 3 may be translated as follows:

"Marriage is not yet settled. If the motor comes, the marriage will not take place. If the motor is only for Rs. 600/-, it may take place. The daughter-in-law is not yet fixed. If you would have given horoscope we should have got it seen. You might have given Padma's horoscope. The disgrace you have offered is uncommon in this world. Please write how your health is. What more can I say? Anyhow you have offered disgrace. My father is not in Nua Bazar. How are you managing mess & drink."

This is relied on to show that the husband & wife were not pulling on well with each other at the time. Apart from the fact that the contents of this portion have not been specifically put to the applt in her cross-examination there is nothing in the disjointed & rather unintelligible sentences in this letter to lead to an inference that there was any ill-will between the husband & the wife at the time or that the same continued until his death. It is therefore clear that no alleged ill-will between the husband & the wife as an operative cause for the making of the will has been made out.

(7) The provisions of the will completely disinherit the wife & the only young daughter of the testator & give the property to the nephew. No such family situation has been established which would prima facie have predisposed the testator to have made such a will. It has been urged that a provision has been made for the maintenance of the wife and the daughter & for the marriage & other expenses of the daughter & that that provision was fair & reasonable having regard to the extent of the property & that therefore there is no reason to attribute any unnaturalness to the will. It has been pointed out also that the property is small & has been valued even by the Collector only at Rs. 2100/- & that the provision for maintenance for both the mother & daughter together comes to about 3 bharans of paddy & Rs. 30/- annually & is reasonable. It is suggested that the testator may well have been unwilling that the family property should get into the hands of his father-in-law, who being a litigant would waste it away so as not to make the property ultimately available to the family members or reversioners. There is absolutely no proof that the father-in-law is a litigant. The only thing that has been brought out, is an answer in the cross-examination of the applt, wherein she stated that her father goes to Cuttack, say once a week in connection with his Ct affairs, which may well be quite bona fide & honest on his part in connection with his own affairs. The provision for maintenance itself is rather curious. It says that the wife & the daughter will not be entitled to receive the maintenance so long as they are in joint mess like him (that is presumably with the brother Fagu Prusti); or if they leave the ancestral house & go anywhere else. The provision for maintenance thus appears to be hedged in with unreasonable restrictions apart from the question whether in quantum it is fair in relation to the property. The will also says that if the wife leaves the ancestral house, she will not be entitled to take the minor daughter with her & enjoins on the executor to take steps, if required, to assert his rights as guardian of the minor daughter. Admittedly the applt & her daughter have left the ancestral house of the testator shortly after his death, but no proceedings have so far been taken, which is unlikely if the will is true & meant to be acted upon.

(8) It is clear, therefore, looked at either with reference to the inherent probabilities or as regards the positive evidence given, that there is every reason to doubt the genuineness or bona fides of the will, Ex. 1. In my view, the resp has not discharged the burden which lies heavily on him. The will, Ex. 1 must be held not to have been proved. The appln for probate must accordingly be dismissed.

(9) The appeal is therefore allowed with costs both here & in the Ct below.

(10) PANIGRAHI J: I agree.

D.H. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 240 *[C. N. 56.]*

SPECIAL BENCH

JAGANNADHADAS, PANIGRAHI AND NARASIMHAM JJ.

Brajasundar Deb Pltf.-Applt. v. *Binode Rout and others—Defts.—Resps.*

Second Appeal No. 25 of 1944 D/- 8-3-1949.

(a) Grant — Service grant — Resumption of — Onus.

There is a clear distinction between the grant of an office to be remunerated by the use of land and the grant of land burdened with service. In the former case the land will *prima facie* be resumable; in the latter case *prima facie* it will not; but the terms of the grant or the circumstances in which it was made may establish a condition of the grant that it was resumable. The onus will be upon the grantor to make out such a condition. [Para 5]

(b) Land tenures—Service tenure — Liability to attachment—Civil P. C. (1908), S. 60 (1) (f) — Tenancy Laws — Orissa Tenancy Act (II [2] of 1913), S. 192.

In a pure service-tenure resumable at the will of the landlord, there can be no saleable interest vested in the tenant, and his interest (if any) will not be attachable under S. 60 (1) (f), Civil P. C. which applies to rent suits also by virtue of S. 192, Orissa Tenancy Act. [Para 8]

(c) Record of Rights—Entry in—'Jagiri ghenan tenancy'—Expression 'Jagir' may mean resumable service-tenure but when used in conjunction with word 'ghenan' makes such tenancy heritable and transferable without permission of landlord and as such it cannot be held to be resumable. [Para 10]

(d) Tenancy Laws—Orissa Tenancy Act (II [2] of 1913), S. 117 (3)—Presumption as to correctness—Earlier entry if by itself sufficient to rebut presumption of correctness of later entry.

The presumption of correctness, under S. 117 (3), attaches only to the Current Settlement record-of-rights and as regards the previous record-of rights the proviso to S. 117 (3) says that such entry shall be admissible as evidence of the facts existing at the time such entry was made. Therefore, an entry in an earlier record-of-rights will not by itself be sufficient to rebut the presumption of correctness in the later record-of-rights. [Para 9]

(e) Record of Rights—Entry in—Tenant recorded as 'sthitiban' with note that low rental was fixed because of services rendered by him to landlord—Meaning of—Presumptive value of entry—Tenancy laws—Orissa Tenancy Act (II [2] of 1913). Ss. 3 (23), 28 and 232.

A settlement entry cannot be said to be inconsistent because in one column the status of the tenant is shown as 'sthitiban' and in another column it is noted that the low rental is fixed because of the services rendered by the tenant to the landlord. [Para 11]

The status of a tenant as a settled raiyat is in no way inconsistent with his paying lesser rental than the fair rent because of the services rendered by him. There is no provision in the Orissa Tenancy Act which prohibits a settled raiyat from entering into a contract with his landlord for a substantial reduction in the rent of his holding in lieu of the services rendered by him to the landlord. Neither S. 28 nor S. 232, operates as a bar to such a contract and on the other hand the definition of the expression 'tenant' given in S. 3 (23) shows that such a contract is possible. [Para 6]

Such an entry has presumptive value to the effect that tenancy was created burdened with some service and the only right left to the zamindar is to ask for full assessment of rent when the services are terminated or are no longer required. [Para 11]

L. Mohanty—for Appellant; S. N. Songupta—for Resps.

Narasimham J.—This is an appeal from the appellate judgment of the District Judge, Cuttack, reversing the judgment of the Munsif, Cuttack, and dismissing the suit brought by the plaintiff-appellant for eviction of the defendants from certain plots appertaining to khata No. 197 in village Deulsahi and for other consequential reliefs.

[2] The plaintiff is the proprietor of Aul estate and village Deulsahi is within his zamindari. In the last settlement (1922 32), the said khata (Ex. 6) was recorded in the names of defendants 1 to 4 as 'sthitiban' with a rental of Rs. 11-7-0 but it was further noted that the rental was fixed at a low figure in view of the rendering of 'chela' service by the tenants to the zamindar. In the Revision Settlement records-of-rights finally published in 1911 (Exs. 5 & 5-a) the same rental was shown as payable; but as regards the status of the tenants the following entry was made: 'Chela jagiri ghenan".

[3] The plaintiff's case as set forth in the plaint was that the disputed lands were given as jagir (service tenure) to one Dinabandhu Dakhinkabat in lieu of remuneration for services which he rendered to the Zamindar as 'chela' and that a nominal quit rent (*ghena jama*) of Rs. 11-7-0 was fixed because of the services rendered by the tenant to the landlord. Subsequently the said Dinabahdhu Dakhinkabat failed to pay even the quit rent and thereupon the Zamindar brought the property to sale in execution of a rent decree. Defendant 1 purchased it and continued to perform the services as 'chela' to the Zamindar and remained in possession of the lands. During the last settlement, however, the said defendant fraudulently got the lands entered as his 'sthitiban'. The plaintiff, however, maintained that the lands were granted on pure service tenure and that the plaintiff was entitled to resume the same and eject the defendants in consequence of their failure to render the services. The defendants' case, however, was that the lands were settled with the ancestors of Dinabandhu Dakhinkabat by the ancestors of the plaintiff more than 100 years ago on tenancy rights; but that the rent was fixed at a low figure because of the services rendered by the tenant to the zamindar. The stipulation, however, was that if the services were not rendered the zamindar would be entitled to assess the lands to fair rent. The defendants claim that the current settlement entry recording them as 'sthitiban' was correct and that the plaintiff was in no case entitled to evict them from the lands though he may seek for assessment of fair rent in view of the fact that services are no longer rendered by them.

[4] The plaintiff has miserably failed to prove the case as set forth in his plaint. There is absolutely no evidence on record to show that the disputed lands were granted to Dinabandhu Dakhinkabat as 'jagir' by way of remuneration for the services rendered by him to the zamindar as 'chela'. The only witness examined by the plaintiff, namely, Keshabanand Das (P.W. 1) frankly admitted in his cross-examination that he entered the services of the plaintiff only in 1921 and that he had never seen the said Dinabandhu Dakhinkabat. He also admitted that there were no papers in the zamindar's shirasta showing the settlement of the lands of jagir with the said Dinabandhu or the rendering on services by the said Dinabandhu to the zamindar. Thus there is neither oral nor documentary evidence to prove the actual origin of the tenancy. The learned Advocate on behalf of the plaintiff has, however,

relied mainly on the settlement entries (Exs. 5, 5a and 6) and certain admissions made by defendant 1 in his pleadings and in his evidence.

[5] In a case of this type where the right of the tenant is associated with the rendering of service to the landlord, the main question for decision is whether the lands were originally granted burdened with service or else whether the original grant was merely of an office to be remunerated by the use of certain lands. The distinction between these two classes of grants was pointed out by the Privy Council as early as 1870 in *Alexander John Forbes* v. *Meer Mahomed Tuquee*, 13 M I.A. 438: (5 Beng. L. R. 529 P.C.) and reiterated in *Lakhamgouda* v. *Baswantrao*, A. I. R. (18) 1931 P. C. 157 : (132 I. C. 736). I may quote the following passage from the latter decision :

"The distinction to be borne in mind is between the grant of an office to be remunerated by the use of land and the grant of land burdened with service. In the former case the land will *prima facie* be resumable, in the latter case *prima facie* it will not but the terms of the grant or the circumstances in which it was made may establish a condition of the grant that it was resumable. The onus will be upon the grantor to make out such a condition."

To a similar effect are the observations of the Bombay High Court reported in *Lakhamgavda Basaprabhu* v. *Keshav Annaji*, 28 Bom. 305 : (6 Bom. L. R. 364).

[6] It is, therefore, necessary to consider how far the settlement entries and the other pieces of evidence adduced in the case show that the landlord is entitled to resume the lands and evict the defendants therefrom. In the current settlement it is clearly noted that the status of the tenants is 'sthitiban'. That expression means 'status of settled raiyat' (see Appen. 18 to Dalziel's Settlement Report) Doubtless it was further noted that the rent payable was fixed at a low figure because of the 'chela' services rendered by the tenant to the landlord. It was argued that this entry regarding the performance of service to the landlord was inconsistent with the status of the tenant as 'sthitiban' and that consequently the said current settlement entry may be deemed to have been rebutted by the other entries in the khatian itself. In support of this argument reliance has been placed on *Sankar Malik* v. *Braja Sunder Deb*, A. I. R. (27) 1940 Pat. 587 : (191 I. C. 89) in which also similar entries in respect of a service-tenure in the same zamindari were held to be inconsistent. That case is doubtless distinguishable from the present case on facts because in that case apart from the settlement entry there was other evidence (which was accepted by the Courts) to the effect that the lands were settled with the tenant on condition of his rendering service. But apart from this distinction on facts, with great respect to the learned Judge who decided that case, I cannot accept the view that the two entries in the settlement khatian are inconsistent. The status of a tenant as a settled raiyat is in no way inconsistent with his paying lesser rental than the fair rent because of the services rendered by him. There is no provision in the Orissa Tenancy Act which prohibits a settled raiyat from entering into a contract with his landlord for a substantial reduction in the rent of his holding in lieu of the services rendered by him to the landlord. Neither S. 28 nor S. 232 operates as a bar to such a contract and on the other hand the definition of the expression 'tenant' given in S. 3 (23) shows that such a contract is possible. The reason as to why an entry of the above type was made by the settlement authorities in the zamindari of Aul will be clear from a perusal of Paras. 60 and 395 (pp. 22 and 139) of Mr. Dalziel's Settlement Report. The settlement authorities were fully aware of the distinction between 'the grant of land in lieu of services' and 'the grant of land burdened with services' and they made careful enquiries with a view to ascertain whether the lands were originally settled as raiyati holdings and then a portion of the rent was commuted to service or else the lands were held purely on condition of rendering service. In the former class of cases they gave the raiyati status to the tenant. In the latter class of cases, however, the lands were shown as 'jagir' resumable by the landlord when the services were no longer required. I may as well quote the following passage from Para. 395:

"The main question of status that arose at attestation was concerning the recording of the so called ghenan jagirdars who are common in this estate. These persons perform services and also pay quit rents, and an enquiry was made as to whether they were really jagirdars or ordinary raiyats performing service in lieu of rent. Many such tenants were recorded as settled raiyats at attestation but at S. 116 stage the landlord succeeded in most cases in getting the status changed to jagir, the tenants themselves presenting little opposition."

Thus from the Settlement Report itself it is clear that the settlement authorities made careful enquiries and recorded such tenants as 'sthitiban' only when they were satisfied that the tenancy was originally created as a raiyati holding and there was a commutation of rent to service. In fact the Zamindar of Aul hotly contested the proceedings before the settlement authorities and in several instances got the entries corrected but so far as the present khata No. 195 was concerned his objection was disallowed (Ex. B). The settlement entry is thus not based on any mistaken view of law (as has been inferred in some unreported decisions of the Patna High Court) but it is based on a care-

ful enquiry regarding the origin of the tenancy in every individual case. Consequently, the presumption of correctness under S. 117 (3), Orissa Tenancy Act, applies with great force and a very heavy burden is cast on the plaintiff to rebut this presumption by reliable evidence.

[7] The next question for decision is whether the presumption of correctness attaching to the settlement entry has been rebutted by evidence. I have already pointed out that on the plaintiff's side there is no evidence worth the name to show the origin of the tenancy. Similarly, his reliance on the evidence of defendant 1 seems futile. Defendant 1 himself has no personal knowledge of the origin of the tenancy. All that he has stated is that he never performed any service to the landlord. In his written statement also he never admitted that the lands were settled with the ancestors of Dinabandhu Dakhinkabat by way of remuneration for services to be rendered by them to the Zamindar. On the contrary, his clear case was that the lands were settled with them on tenancy rights; but that the rent was fixed at a low figure in view of the services rendered and the agreement was that the rent may be enhanced to the prevailing rent of the locality if the services were no longer required. I do not find anything either in the written statement or in the evidence of defendant 1 which would go to support the plaintiff's case or rebut the settlement entry.

[8] It is an admitted fact that the suit lands were put up for sale in execution of a decree for arrears of rent due thereof and purchased at court auction in 1924 by defendants 1 to 4. The previous tenant was one Dinabandhu Dakhinkabat whose name stands recorded in the Revision Settlement Khatian. The conduct of the landlord in his bringing the tenancy lands to rent sale shows unmistakably that he recognised the existence of a saleable interest in the lands of the tenant. If, as now claimed by the landlord, the tenancy was resumable being a pure service-tenure, it is inexplicable as to why he brought the lands to sale instead of suing for ejectment of the service tenant. In a pure service-tenure resumable at the will of the landlord, there can be no saleable interest vested in the tenant, and his interest (if any) will not be attachable under S. 60 (1) (f), Civil P. C. *Omprasad* v. *Rahimoddin*, A. I. R. (33) 1946 Nag. 147: (I. L. R. (1946) Nag. 112) and *Neti Anjaneyalu* v *Sri Venugopala Rice Mill Ltd.*, 45 Mad. 620 : (A. I. R. (9) 1922 Mad. 197 F. B.). That section applies to rent suits also by virtue of sub s. (2) of S. 192, Orissa Tenancy Act. Thus the conduct of the landlord in bringing the property to sale for arrears of rent due thereof in 1924 is consistent with the current settlement entry recognising the tenant to have the status of a settled raiyat and is totally inconsistent with the present claim of the landlord to resume the tenancy on the termination of the services by the tenant.

[9] It was next argued that in the Revision Settlement Khatians (Exs. 5 and 5 A) the tenancy was clearly noted as 'chela jagiri ghenan' and that nothing has intervened between the date of the final publication of the Revision Settlement record-of-rights of 1911 and the date of the final publication of the Current Settlement record-of-rights (about 1930) to change the the status of the tenants. The presumption of correctness, however, attaches only to the Current Settlement record of-rights and as regards the previous record-of-rights the proviso to sub-s. (3) of S. 117, Orissa Tenancy Act, says that such entry shall be admissible as evidence of the facts existing at the time such entry was made. Therefore, an entry in an earlier record of-rights will not by itself be sufficient to rebut the presumption of correctness in the later record-of-rights. The various cases on which Mr. Mohanty has relied as regards the relative value to be given to conflicting entries in two records-of-rights (*Raghunath Misra* v. *Ram Behera*, A. I. R. (9) 1922 Pat. 548: (1 Pat. 167), *Abhiram* v. *Chintamani*, A. I. R. (14) 1927 Pat. 164: (6 Pat. 342) and *Naurangi* v. *Kanhaiya*, A. I. R. (17) 1930 Pat. 568: (123 I. C. 390)) all relate to the corresponding provisions either in the Bengal Tenancy Act or in the Bihar Tenancy Act which are however, inapplicable to the present case. In those Acts, there is no express provision in the statute itself regarding the value to be attached to previous settlement entries and there is no provision corresponding to the proviso to sub-s. (3) of S. 117, Orissa Tenancy Act. In the Orissa Tenancy Act, however, there is an express statutory provision regarding the relative value to be attached to the earlier and later settlement entries and in view of that provision any discussion of the case law on the subject is quite unnecessary.

[10] But the Revision Settlement record-of-rights does not in any way materially help the plaintiff. There is absolutely no evidence on record as to what is meant by the expression 'jagiri ghenan.' Doubtless the expression 'jagir' may mean resumable service-tenure but its use in conjunction with the word 'ghenan' may change the meaning completely. There is no glossary attached to the Revision Settlement of Mr. James for the purpose of ascertaining the meaning of the expression 'jagiri ghenan.' But there is an earlier Settlement Report (1892 to 1901) of Aul Estate made by Babu Debendra Nath Bose in which there are some passages

dealing with the rights of ghenan tenants and jagir tenants. In paras. 59 and 66 of that Report ghenan tenancies in Aul estate have been noted to be heritable and transferable and those tenants have a higher status than ordinary raiyats because the holding is transferable without the consent or permission of the landlord. In para. 60 of that Report, there is a reference to jagir grants which are said to be resumable. But a careful reading of paras. 59, 60 and 66 of that Report would indicate that the settlement authorities made a distinction between 'ghenan tenancies' on the one hand which are heritable and transferable and pure jagir tenancies' which are resumable on the termination of services. Though there is no discussion about 'jagiri ghenan tenancies' it would *prima facie* appear that the use of the word 'ghenan' makes such tenancies heritable and transferable without the permission of the landlord. If there is such a right how can it be held that such a tenancy is resumable? At any rate, the burden is very heavy on the landlord to show what exactly was meant by the expression 'ghenan jagir' used in the Revision Settlement and in the absence of any evidence on his side and in view of the observations given in paras 59, 60 and 66 of Mr. Bose's Settlement Report, I would hold that even the Revision Settlement entry does not indicate that the tenancy is resumable.

[11] Mr. Mohanty has relied on *Sanniyasi* v. *Salur Zamindar*, 7 Mad 268, *Maga Devi* v. *Vakrama*, 14 Mad. 365 and *Radha Pershad Singh* v. *Budhu Pershad*, 22 Cal. 938 in support of his argument that service-tenures are resumable on the termination of services. But these three cases are clearly distinguishable on facts. In the last case there is a clear finding that the service-tenure was created for the purpose of doing the private work of the zamindar and that it was not a grant of an estate burdened with the performance. In the former two cases there is no clear discussion about the difference between 'the making of a grant in lieu of services' and 'the making of a grant burdened with services'. But the general trend of discussion seems to indicate that the tenancies were of the former class. In the present case, however, not only is there total absence of any evidence on the side of the plaintiff to show that the tenancy was created by way of remuneration for services rendered by the tenant to the landlord but there is the current settlement entry which indicates that a permanent tenancy was created though a lesser rent than that prevailing in the locality was fixed because of certain services rendered by the tenant to the landlord. The presumption of correctness attaching to it has not been rebutted. Mr. Mohanty has also relied on two unreported decisions of the Patna High Court in S. A. No. 154 of 1937 and S. A. No. 45 of 1941. Both these decisions are decisions of single Judges who felt themselves bound by the Division Bench decision reported in *Sankar Malik* v. *Breeja Sundar*, A. I. R. (27) 1940 Pat. 587: (191 I. C. 89) which I have already referred to in the preceding para. With great respect to the learned Judges, I am unable to accept the reasoning that the settlement entry is inconsistent because in one column the status of the tenant is shown as 'sthitiban' and in another column it is noted that the low rental is fixed because of the services rendered by the tenant to the landlord. Such an entry has presumptive value to the effect that the tenancy was created burdened with some service and the only right left to the Zamindar is to ask for full assessment of rent when the services are terminated or are no longer required.

[12] I would, therefore, dismiss the appeal with costs.

[13] **Das J.** — I agree with the judgment of my learned brother Narasimham J. in this case.

[14] The appeal has been referred to a Special Bench because it raises questions as to the effect of inconsistent entries in the earlier and later settlement records relating to the same holding and as to the effect of resumption of service tenures. On these matters there have been some conflicting decisions. It is unnecessary, however, for me to deal with the matter at any length as the same has been dealt with by my Lord the Chief Justice in S. A. No. 193/43 which I fully accept and also since my learned brother has covered the ground elaborately in his judgment in this case.

[15] As pointed out by them, in the face of clear statutory provisions in S. 117, sub-s. (3) and the proviso thereto, of the Orissa Tenancy Act, specifying in unambiguous terms the exact value to be attached to entries in the current record-of-rights and the entries in the earlier record-of-rights, all the decisions which are inconsistent with the same must be taken to be wrongly decided.

[16] As regards the effect of resumption of service tenures, it is enough to say that resumption means no more than the taking back of that which was once given (*See Siyyadi Garu* v. *Nissanka Bahadur Garu*, 30 I. C. 416 : (A. I. R. (3) 1916 Mad. 826). If as a result of resumption, the landlord claims to eject the tenant, he must show that he had granted the land itself for the service on conditions which will enable him to take back the land on the termination of the service. In accordance with

the normal rule that a person suing in ejectment must make out his title to eject, the landlord who claims ejectment on resumption has got to make out the nature and the conditions of the grant. It is no doubt true that in some of the earlier cases, namely, *Radha Parshad Singh* v. *Budhu Pershad*, 22 Cal. 938, *Sanniyasi* v. *Salur Lamindar*, 7 Mad. 268 and *Maga Devi* v. *Vakrama*, 14 Mad. 365, it has been assumed that resumption in the case of personal service tenures entitles the landlord to eject. The case in *Radha Pershad Singh* v. *Budhu Pershad*, 22 Cal. 938 has been followed in some subsequent cases in Patna, 57 I. C. 47 and *C. J. Shillingford* v. *Gena Tatma*, A. I. R. (25) 1938 Pat. 141 : (174 I. C. 588). In some later cases in Madras, it has been pointed out that ejectment of the tenant is not the necessary result of resumption and that the facts giving rise to that right must be made out. (See *Fatmatul Kubra* v. *Mt. Achchi Begam*, 21 I. C. 831 : (11 A. L. J. 1009) and *Siyyadi Garu* v. *Nissanka Bahadur Garu*, 30 I. C. 416 : (A. I. R. (3) 1916 Mad. 826). The Privy Council case in *Bommrauze Bahadur* v. *Venkatadry Naidu*, 7 M. I. A. 128 at p. 142 shows that resumption consists normally in putting an end to the grant and remitting the services and requiring the grantee to pay full assessment. The cases in *Alexander John Forbes* v. *Meer Mahomed Tuquee*, 13 I. A. 438 : (5 Beng L. R. 529 P. C.), *Lukhamgavda Basaprabhu* v. *Kashav Annaji*, 28 Bom. 305 : (6 Bom. L. R. 364), *Lakhamgouda* v. *Baswantrao*, A. I. R. (18) 1931 P. C. 167 : (132 I. C. 736) show clearly that the onus is on the grantor to make out his right to resume and also to eject as a result of resumption. Reliance has been placed in course of the discussion on Ss. 235 and 237, Orissa Tenancy Act, which show that nothing in the Act affects any incident of service tenure or affects any custom or usage not inconsistent with any of the provisions in the Act. This does not mean that where the special incidents or the customary rights of the particular service tenure are not made out on the evidence, there is any presumption in favour of the right of resumption or against occcupancy rights of service tenure-holders. If there are any such special incidents or customary rights, it is on the person who invokes them to establish them. As pointed out by my learned brother in his judgment and also by my Lord the Chief Justice in S. A. 193/43, the rent of occupancy ryots under the Orissa Tenancy Act may be partly payable in cash and partly by service under a special contract by virtue of the definition of "tenant" in S. 3, sub-s. (2).

[17] In the result I agree that the appeal should be dismissed with costs throughout.

[18] **Panigrahi J.** — I agree that the appeal should be dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 245 *[C.N. 57.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Ratna Munda — *Accused* — *Applt.* v. *The State.*

Cri. Appeal No. 30 of 1950, D/- 10-8-1950.

(a) Evidence Act (1872), S. 33 —Previous deposition of witness —Admission of —Proof of condition laid in S. 33 —Waiver of.

Under S. 33, a previous deposition cannot be admitted in evidence unless the conditions for its admission are made out. There can be no waiver on the part of the accused in a criminal case as regards any statutory requirements. It is no doubt true that in a civil proceeding, strict proof of these conditions can be waived; that is so only because in a civil proceeding the facts required to be proved can be admitted by the opposite party & a waiver in a civil proceeding amounts to proof by waiver. But the conditions of S. 33 must be strictly proved & they cannot be waived in a criminal proceeding. [Para 3]

Anno : Evi. Act, S. 33, N. 14.

(b) Penal Code (1860), Ss. 100, 304 — Murderous attack—Right of private defence.

An accused is perfectly justified in resisting an aggressive attack on him by taking the weapon from out of the deceased & inflicting injuries on him to the extent that may be required according to his assessment of the circumstances at the time for the purpose of preventing any further assault on himself by the deceased. If in the course of it he kills the originally aggresive person, S. 100 completely protects it. While no doubt it is true that the exercise of the right of private defence subsists only so long as an apprehension of the aggresive attack continues, it is also well settled that an accused who has had to face an aggressive murderous attack by the deceased & who had to struggle with him in order to get possession of the weapon which was used against him, cannot be expected to exercise any cool judgment in the situation. His responsibility is not to be judged by any mere meticulous standards. [Para 6]

Anno : Penal Code, S. 100, N. 1; S. 304 N. 9.

(c) Criminal P. C. (1898), S. 164 — Questioning accused as to motive of confession.

Per *Panigrahi J.*—It is not correct to rule out a confession recorded under S. 164 as inadmissible on the ground that the accused was not asked the motive of his confession. The Code does not require any such question to be put. [Para 8]

Anno : Cr. P. C., S. 164, N. 11, 13.

(d) Criminal P. C. (1898), S. 342—Examination of accused—Nature of.

Per *Panigrahi J.*—The object of S. 342 as has been repeatedly pointed out is to enable the accused to explain any circumstances appearing against him. It is intended to be exploratory rather than inquisitorial. [Para 8]

Anno : Cr. P. C., S. 342, N. 14.

B. M. Patnaik Asst. Govt. Advocate—for the State.

Jagannadhadas J. — The applt. before us, one Ratan Munda, has been convicted under S. 304, Penal Code, for having caused the death of one Tuti Munda on the evening of 22-9-1949

& has been sentenced to undergo R. I. for five years.

[2] The prosecution case is as follows : 22-9-1949, was the Nuakhoi day when the villagers were in a festive mood. The deceased who had taken drink on that occasion came out of his house with a Falsia telling his wife that he was going to kill the accused & finish him off that day & ran towards the house of the accused which was about 120 cubits away. He is said to have entered into the house & attempted to assault the accused with the Falsia, but the accused managed to ward off the assault. He struggled with the deceased to wrest away the Falsia from his hands. There was a tussle between the two & ultimately the accused was able to get hold of the Falsia with which he dealt severe blows on the deceased & ran away from the place. After having run away from the place, he is said to have made some extra judicial confessions. The wife of the deceased came to know of this & ran up to the house of the accused, & found her husband lying dead with serious injuries on his body. She went to P. W. 1 another villager, a relation, who also came & saw the dead body. P.W. 1 lodged F.I.R. with the police. Thereafter there was the usual investigation & the post mortem examination of the dead body of the deceased.

[3] The post mortem report, Ex. 2, & the evidence of the doctor P. W. 7, clearly disclose that the deceased died as a result of having received serious injuries with a weapon like a Falsia which is said to have been used in this case. There is no doubt, therefore, that the deceased died as a result of severe injuries dealt on him with a Falsia. The actual evidence of the prosecution is to the following effect: P.W. 2 the wife of the deceased gives evidence that the deceased started out from his house that evening telling her specifically that he was going to murder the accused with the Falsia in his hand & that he ran towards the house of the accused in spite of her attempt to stop him. P W. 5 another witness who was near about the house of the accused tending cows says that he at the time found the deceased entering into the house of the accused with a Falsia in hand saying that he would kill the accused that day. P.W. 8 another witness who happened to be going that way at the time heard the deceased saying that he would finish off the accused says that though he did not see what happened inside the house of the accused, he heard Ghada Ghada noise emanating from the house of the accused after the deceased went in & that thereafter he left the place out of fear. P. W. 3 who is an eye witness & whose evidence will be presently noticed, also says that the deceased while on the way, before entering the house of the accused was saying that he will finish off the accused that day. Therefore, there can be no doubt on this evidence that the deceased, whatever may have been his reason or motive rushed that evening into the house of the accused with a Falsia in hand to kill the deceased with the same. The evidence, however, of the actual murderous assault by the accused against the deceased is that of P.W. 3 & of another witness by name, Lunda Munda, who was examined in the committing Mag's Ct. but who was not examined in the Sessions Ct. So far as the evidence of the witness, Lunda Munda, is concerned, the prosecution attempted to prove by the evidence of P. W. 14 that he was ill and not able to attend the Ct. & that, therefore, his deposition in the committing Mag 's Ct. should be admitted in evidence. The learned Ses. J. while being of opinion that the evidence of P. W. 14 was not enough to make out strictly the precondition for the admission of Lunda Munda's evidence under S. 33, Evidence Act, still admitted the same & marked it as Ex. 14 on the ground that the lawyer for the defence waived his objection to it. This is a wholly irregular procedure. It has been often pointed out that there can be no waiver on the part of the accused in a criminal case as regards any statutory requirements. It is a matter beyond dispute that under S. 33 a previous deposition cannot be marked unless the conditions for its admission are made out. It is no doubt true that in a civil proceeding, strict proof of these conditions can be waived; that is so only because in a civil proceeding the facts required to be proved can be admitted by the opposite party & a waiver in a civil proceeding amounts to proof by waiver. This principle has been very clearly reiterated by their Lordships of the Privy Council in *Chanichal Singh* v. *Emperor*, A.I.R. (33) 1946 P. C 1 : (I. L. R. (1945) Kar. P. C. 366), where they point out that the conditions of S. 33, Evidence Act, must be strictly proved & that they cannot be waived in a criminal proceeding. We must, therefore, rule out the deposition of Lunda Munda in the Committing Ct. marked as Ex. 14. The evidence of P. W. 3 who is the only other eye witness to the assault by the accused against the deceased shows that he saw the accused inflicting several blows on the deceased with a Falsia when the deceased was in a lying posture at the entrance of the house of the accused. He says that on seeing the same he himself ran away out of fear. On this evidence which there is no reason to doubt, it must be taken as proved that the deceased died as a result of murderous assault by the accused with a Falsia when as a fact the deceased ran up to

the accused with a Falsia with the avowed object of killing him.

[4] It may be mentioned that there is in this case an extra judicial confession under S. 164, Cr. P. C., made before the Mag. P. W. 11 & marked as Ex. 3. The learned Ses. J. has ruled out the judicial confession as inadmissible, but has to some extent relied on the extra judicial confession made to P W. 6. It is unnecessary, however, in this case to make use either of the extra judicial confession or the judicial confession because the evidence of the witnesses noticed above is quite clear & satisfactory to establish that the accused dealt serious & severe blows on the deceased as a result of which he died on the spot.

[5] There is no direct evidence of what exactly happened after the deceased rushed into the house of the accused with a Falsia in hand, & before P. W. 3 found the accused dealing blows on the deceased with a Falsia in front of his house. This is only a matter for reasonable inference from the circumstances. The accused in his statement says that the deceased gave him a blow with the Falsia & that only the blunt side of the blade thereof struck him in his attempt to ward it off, that he fell down as a result thereof & that there was tussle for the Falsia between them & that he succeeded in snatching it away. This version appears very likely having regard to the evidence & the circumstances & may be taken as true. The accused, however, does not admit having himself assaulted the deceased with the Falsia but says that he ran away from the place after he secured possession of the Falsia. His suggestion is that in the course of the struggle for the Falsia, the deceased may have received injuries & died as a result thereof. This, however, is most unlikely having regard to the number & nature of the injuries disclosed in the post mortem certificate & must be rejected in view of the evidence of P. W. 2. The denial by the accused of any assault by him can only be ascribed to nervousness. At this stage we may notice that while the post mortem certificate shows as many as 15 injuries, it unfortunately does not appear therefrom, nor has it been elicited from the doctor, P. W. 7, whether all of them were ante mortem. The evidence was probably intended to convey the idea that all the injuries were ante mortem but this is a matter which in a case of this kind should have been expressly clarified. In the evidence as recorded there is certainly room for the argument on behalf of the accused that at least some of the injuries were post mortem in the sense that the accused may have inflicted one fatal blow which immediately brought about the death of the deceased & that he may have dealt all other blows actually after the life was extinct though still under a feeling that the deceased may have been alive.

[6] However that may be, the real question that arises in this case is whether or not the accused is in the circumstances of the case protected completely by the exercise of the right of private defence. The learned Ses. J. was of the view that though the circumstances show that the accused had the right of private defence, he exceeded it by dealing quite a number of fatal blows mercilessly on the deceased after the earlier blow or blows brought him down to the ground, that the infliction of the injuries when the deceased was in a lying condition was unjustified & that this amounts to excess of the right of private defence. It is necessary in the first instance to point out that in making the assumption that the deceased was dealt a fatal blow when standing which brought him to a lying condition the learned Judge acted on the evidence, Ex. 14, which we have ruled out as inadmissible. Once that is excluded, there is no other evidence on which it can be said that the deceased was brought into lying condition in the first instance by an earlier fatal blow given while standing. It is possible that the accused dealt all the blows only when the deceased fell down during the course of the struggle between him & the deceased for the possession of the Falsia which he succeeded in securing. The limits of the exercise of the right of private defence in such cases are indicated in Ss. 100 & 102, I. P. C. As is clear from the evidence there was a definite attempt by the deceased to kill the accused with the Falsia. The accused was perfectly justified in resisting that aggressive attack on him by taking the Falsia from out of the deceased & inflicting injuries on him to the extent that may be required according to his assessment of the circumstances at the time for the purpose of preventing any further assault on himself by the deceased. If in the course of it he kills the originally aggresive person, S. 100 I. P. C. completely protects it. While no doubt it is true that the exercise of the right of private defence subsists only so long as an apprehension of the aggresive attack continues, it is also well settled that a person in the position of the accused at the time who has had to face an aggresive murderous attack by the deceased & who had to struggle with him in order to get possession of the Falsia which was used against him, cannot be expected to exercise any cool judgment in the situation. His responsibility is not to be judged by any mere meticulous standards. The law on the subject has been laid down in quite a number of cases and it is sufficient to

refer to the cases in *Dalipsingh* v. *Emperor*, A. I. R. (10) 1923 Lah. 155 : (25 Cr. L. J. 676), *Ahmad Din* v. *Emperor*, A. I. R. (14) 1927 Lah. 194 : (28 Cr. L. J. 252) and *Chheda* v. *Emperor*, A. I. R. (20) 1933 Oudh 380 : (35 Cr. L. J. 55). These cases adopt the passage in Mayne's Criminal Law at p. 231 which is the correct law :

"Where the assault has once assumed a dangerous form, every allowance should be made for one, who with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystandar, would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."

The learned Government Advocate argues that having regard to the large number of injuries in this case, a good many of which each by itself might have proved fatal, the accused as soon as he found that he had dealt one fatal injury or probably two, must have desisted from the rest & that the fact of his having persisted in inflicting so many injuries is a clear indication that he was acting out of vindictiveness & anger & not in self-defence. To adopt this view is to indulge in speculation. We have no means of knowing from the evidence which injury was inflicted earlier & which was inflicted later. We cannot find anything in this case from which we can come to any satisfactory conclusion that the accused inflicted deliberately certain injuries out of mere anger & revenge after the apprehension of an aggressive attack from the deceased passed away. In the circumstances we cannot agree with the learned Ses. J. that the accused had exceeded the limits of private defence.

[7] In the result, the accused must be found completely protected by the right of private defence. He is accordingly found not guilty. His appeal must be allowed. The conviction and sentence must be set aside and the accused acquitted.

[8] **Panigrahi J.** — I agree that this appeal be allowed as this is a case of justifiable homicide. I would like to point out, however, that the learned Ses. J. is not correct in ruling out the confession recorded under S. 164, Cr. P. C., as inadmissible on the ground that the accused was not asked the motive of his confession. The Code does not require any such question to be put & the Mag. has recorded his reasons why he was satisfied that this is voluntary. The Mag. in Para. 7 of the confession says that the confessant was properly cautioned. Sufficient time was given to him for a cool reflection. There was no extraneous influence operating on him. It is, therefore, believed that he makes a clean breast. The accused was produced before him on 18-10-49, 19-10-49 & again on 20-10-49 on which date his confession was recorded. He was warned on more than one occasion & then he was asked whether he had been influenced or tutored by anybody to make a confession & he was told that the statement, he would make, might be used as evidence against him. The Code does not prescribe any other requirement, not certainly any question relating to the motive of the accused as to why he was going to confess. I have also noticed in the examination of the accused under S. 342, Cr. P. C., that the learned Ses. J. put a question regarding the number of injuries on the person of the deceased. The question is as follows:

"The doctor says that there were 15 injuries on the body of the deceased. All those injuries could not have been caused only when the Falsia was being dragged. can you explain how they were caused?"

This question is in the nature of cross examining the accused & should not have been put. The object of S. 342 as has been repeatedly pointed out is to enable the accused to explain any circumstances appearing against him. It is intended to be exploratory rather than inquisitorial. In the present case, however, this question has not prejudiced the accused & therefore, is not of much consequence.

V.S.B. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 248 *[C. N. 58.]*

PANIGRAHI AND NARASIMHAM JJ.

Sm. Padmavati Jemma— Pltf—Applt. v. *Ramchandra Ananga Bhim Deo and others Defts—Respts.*

First Appeal No. 37 of 1948, D/- 9-11-1949.

Hindu law—Maintenance—Illegitimate daughter.

Under Hindu law an illegitimate daughter is not entitled to maintenance from the estate of her putative father, which has descended to his lawful heirs & her right to maintenance cannot be recognised merely on the ground that she may also form part of her putative father's family. [Para 10]

(b) Hindu law— Maintenance — Custom—Illegitimate daughter.

A single instance of the grant of cash allowance to an illegitimate daughter is quite insufficient to prove a special family custom entitling an illegitimate daughter to maintenance out of the estate of her putative father. [Para 9]

(c) Evidence Act (1872), Ss. 101 to 103 — Zamindari lands—Lands whether form part of Zamindari —Proof.

The evidence that certain lands were successively alienated as Inams for about 100 years but frequently resumed & regranted to other persons by the Zamindars is quite insufficient to show that the lands do not form part of the Zamindari. The plaintiff must prove that the lands were pre-settlement Inams. Dharmilla Inam is a post-settlement Inam & is included in the assets of the Zamindari. [Para 5]

Anno: Evidence Act, Ss. 101 to 103, N. 1, 8.

(d) Limitation Act (1908), Art. 144—Tacking.

The possession of the persons who are not the predecessors-in-interest of the pltf. cannot be tacked on to the possession of the pltf. [Para 7]

Anno: Lim. Act, Art. 144, N. 92.

(e) Limitation Act (1908), Art. 144 — Grant of Melawaram right.

Where the lands are all along tenanted lands & the grants made to the grantees were merely the grants of melawaram right the grantees cannot claim to have acquired any permanent right in the lands. [Para 8]

Anno: Lim. Act, Art. 144 N. 10, 11, 16.

(f) Civil P. C. (1908), S. 35 — Successful deft. disentitled to costs.

In a suit for maintenance by illegitimate daughter out of the estate of her putative father the conduct of the successful deft. in challenging even the paternity of the pltf. & in making wild & irrelavant allegations against her chastity disentitles him from claiming costs either in the lower Ct. or in the appellate Ct. [Para 11]

Anno: C. P. C. S. 35, N. 7.

H. Mohapatra*—*for Applt.*; *P. V. R. Rao and P.C. Chatterji*—*for Resps.

Narasimham J.—The pltf. claims to be the illegitimate daughter of Sri Krupamaya Ananga Bhima Deo, the late Zamindar of Bodokhemidi estate which is an impartible estate under the Madras Impartible Estates Act, 1904. The principal deft. (deft. 1) is the present Zamindar of Bodokhemidi estate & is the legitimate son of Sri Krupamaya Ananga Bhima Deo. The other defts. are said to be tenants established on the suit lands by deft. 1. The pltf's case was that her father gave her certain landed property described in sch. 'A' of the plaint situated in village Kattubati & known as 'Kheta Dholia' lands for her maintenance & that deft. 1 wrongfully resumed these lands & settled them with the other defts. She, therefore, prayed for being put in possession of the suit lands or else for a decree directing deft. 1 to pay her either the value of the lands or else the annual Rajabhagam (rent) due from these lands. There was also an alternative prayer for a decree for maintenance at the rate of Rs. 30 per month till her marriage & for making the maintenance a charge on the properties of deft. 1 described in Sch. 'B'.

[2] Sri Krupamaya Ananga Bhima Deo died in September, 1922 & his estate was managed by the Ct. of Wards for some years during the minority of deft. 1. The estate was released on 2-12-30. The gift of the 'A' schedule lands in favour of the pltf. was made by Sri Krupamaya Ananga Bhima Deo by a document (Ex. 9) dated 25-2-1922. The pltf. was born sometime in 1920 or 1921 & though her paternity was strenuously contested in the lower Ct. the finding was that Sri Krupamaya Ananga Bhima Deo was her father & this finding was not seriously challenged before us. Some time in 1924 the Ct. of Wards resumed the said lands & in lieu thereof settled a maintenance allowance of Rs. 71 per month for the pltf. & her mother Sri Kumuda Angalagi (P. W. 1). This maintenance allowance was paid regularly during the time of the Court of Wards. But when deft. 1 took up the management of the estate in 1930 he stopped it altogether. Sri Kumuda Angalagi then instituted a suit for maintenance alleging that she was a concubine under the exclusive keeping of Sri Krupamaya Ananga Bhima Deo & as such entitled to maintenance from the impartible estate. That litigation was fought up to the H. C. & in the end (*vide* Ex. 4 [b]) she was granted a decree for maintenance at the rate of Rs. 50 per month.

[3] The lower Court found in favour of the pltf. on the question of her paternity but dismissed the suit chiefly because the pltf. failed to show that either under the Hindu law or by virtue of any special family custom she was entitled to maintenance from the estate of her putative father after his demise. The Ct. further held that the grant of 'A' schedule lands in village Kattubati by Sri Krupamaya Ananga Bhima Deo ceased to be operative after his death by virtue of the provisions of the Madras Impartible Estates Act, 1904 & that she acquired no right over the said lands either by virtue of the grant or by adverse possession as claimed by her.

[4] The main points canvassed by Mr. H. Mohapatra on behalf of the applt-pltf. are these: (i) the 'A' schedule lands do not form part of the impartible estate of Bodokhemidi & that any alienation of the same made by the previous Zamindar would, therefore, be valid even after his death & would not be hit by the Madras Impartible Estates Act, 1904; (ii) in any case, the pltf. has perfected her title to those lands by adverse possession; (iii) in the family of Bodokhemidi Zamindars there was a special family custom by which illegitimate daughters were also entitled to maintenance out of the estate; and (iv) under the ordinary Hindu law also an illegitimate daughter was entitled to maintenance from the estate of her putative father which has descended to his lawful heirs.

[5] *Point No. 1.*—Mr. Mohapatra's contention on this point is that for about 150 years the suit lands in Kattubati village had been alienated by successive Zamindars to various persons & that consequently those lands never formed part of the Bodokhemidi zamindari. In support of this argument, he has relied mainly on the evidence of one Ujal Das Nahar Bisoi (P. W. 4) who stated that those lands were first given as service Inams to one of his ancestors nearly 100 years ago & that the lands remained in the possession of the family for about 50 years. Subsequently they were resumed by the Zamindar & granted successively to two illegitimate descendants, namely, Gopinath Deo & Naba Lal Deo who enjoyed the same for some years. Subsequently they were again resumed & gran-

ted to the pltf. by Sri Erupamaya Ananga Bhima Deo. This witness' evidence even if believed would merely show that for about 100 years the lands were successively alienated as Inams but frequently resumed & re-granted to other persons. But his evidence is quite insufficient to show that the lands do not form part of Bodokhemidi zamindari. But if the pltf. could establish that the lands were pre-settlement Inams, that is to say, grants made by the Zamindars long before the coming into force of Permanent Settlement Regulation there may be some scope for Mr. Mohapatra's argument. But the ptf's. own witnesses (P. Ws. 4 and 5) admitted that the lands were *Dharmilla* Inam grants. It is beyond question that a 'Dharmilla Inam' is a post-settlement Inam & that it is included in the assets of the zamindari. Moreover, the very fact that the Zamindars never made the grants irresumable but on the contrary resumed them on successive occasions & re-granted the same to other persons indicates unmistakably that the lands were treated as coming within the ambit of Bodokhemidi zamindari.

[6] *Point No. 2.*—The plea of adverse possession is also equally futile. The pltf's possession of the property dates only from the date of the grant, namely, 25-2 1922. She was in possession for hardly two years when the Court of Wards dispossessed her & settled a monthly cash allowance as maintenance. The learned lower Ct. rightly rejected the applt's contention that as the cash allowance was settled by the Ct. of Wards in lieu of maintenance she must be deemed to have been in continued possession of the lands through the Court of Wards till the stoppage of that allowance by deft. 1 in 1930. In Ex. 1 (a) which is a letter issued by the Manager of the Court of Wards to the pltf's mother on 29-9-23 it was clearly stated that the pltf. had no claim to the lands after the Ct. resumed the same & settled a cash allowance in her favour. Therefore the pltf's possession was hardly for two years & no claim by adverse possession can in any case arise.

[7] Mr. Mohapatra, however, tried to show that the possession of the previous Inamdars, namely, Naba Lal Deo, Gopinath Deo & the ancestors of P. W. 4 was also adverse to the Zamindar & the period during which they were in possession must be added to the period of possession of pltf. 1 in determining the question of adverse possession. This argument, however, cannot stand. Neither Naba Lal Deo nor Gopinath Deo nor the ancestors of P. W. 4 can be said to be the predecessor-in-interest of the pltf. and consequently their possession cannot be tacked on to the possession of the pltf. Moreover their possession was not continuous but was interrupted frequently by resumption & re-settlement.

[8] It cannot also be seriously contended that at any time there was adverse possession of the lands by any of the alienees. From the very beginning the grant was merely the grant of Melawaram right. P. W. 4 admitted that when his ancestors were in possession of the lands more than 50 years ago there were already tenants on the lands who used to execute muchilikas in favour of his ancestors. Doubtless in his cross examination he tried to show that his ancestors themselves reclaimed the lands & made them fit for cultivation.. But P. W. 3 admitted that there were tenants on the lands during the time of Sri Gopinath Deo & Nahar Bisoi (referring to an ancestor of P. W. 4). Similarly, P. W. 2 also admitted that there must have been tenants on the lands when they were gifted to the illegitimate offsprings of the previous Zamindars. Therefore there seems to be no doubt that the lands were all along tenanted lands & the grants made to Nahar Bisoi (ancestor of P. W. 4) & the illegitimate offsprings of the previous Zamindars were only grants of melawaram right. None of these grantees can claim to have acquired any permanent right either in the nature of occupancy right or any right by adverse possession because their possession was at no time adverse to the Zamindar.

[9] *Point No. 3.*—Now I take up the plea of special family custom which is the main strength of the pltf's case. But the evidence led by her to show that there was a special family custom by which illegitimate daughters of Zamindars of Bodokhemidi were entitled to maintenance out of the estate is quite meagre & unreliable. There is no documentary evidence to prove this custom & the pltf. has relied mainly on the oral evidence of her mother Sri Kumuda Angalagi (P. W. 1) & two other witnesses, namely, Appalanarasingham (P. W. 2) & Binayak Patra (P. W. 5). The pltf's mother (P. W. 1) has obviously no personal knowledge of the grant of maintenance to illegitimate daughters of the previous Zamindars. In her cross-examination she had to admit:

> "Former daughters, like my daughter, of Bodokhemidi Zamindars, were given lands, but I cannot give their names. I cannot give any particulars of any such grants. I cannot give any particulars of such cases in other Zamindaris."

Thus her evidence does not help the pltf. in any way. P. W. 2 had worked as Manager of Bodokhemidi estate from 1924 to 1930. His evidence shows that illegitimate dependants of the Zamindars were paid touzis (cash allowances) from the estate during the time that he was Manager. He gave the names of several dependants but those names all relate to males. The only ins-

tance in which an illegitimate daughter was given maintenance allowance as proved by him is that of one Godabari Jemma who is also another illegitimate daughter of Sri Krupamaya Ananga Bhima Deo. The pltf. was also receiving cash allowance from the estate during the time of the Court of Wards. Therefore, even if the evidence of P. W. 2 be believed, it only shows that from 1924 to 1930 the illegitimate daughters of Sri Krupamaya Ananga Bhima Deo were given cash allowances. His evidence is quite inadequate to prove a special family custom. He has obviously no knowledge of the custom, if any, which prevailed in the family prior to 1924. Similarly, the evidence of P. W. 5 does not materially help the pltf. The only special instance which this witness proves is the grant of maintenance to one Muktamala, an illegitimate sister of Lakshminarayan Deo about 100 to 150 years ago. His knowledge about that grant is based on hearsay. Even if it be taken as true, a single instance of the grant of such allowance to an illegitimate daugher is quite insufficient to prove a special family custom. No papers of the estate showing grant of any allowance to Muktamala or to any other illegitimate daughter of the Zamindar have been proved. No Ct. can from such meagre evidence infer that there was any special family custom in Bodokhemidi estate as pleaded by the pltf.

[10] *Point No. 4.*—Lastly I take up the rights of the pltf. under the ordinary Hindu law. In Mulla's Hindu Law, 10th Edn., Art. 522 at p. 609, it is clearly stated that there is no provision in the Hindu law for the maintenance of illegitimate daughters. To a similar effect is the observation at p. 823 of Maine's Hindu Law, 10th Edn. In the lower Ct. it appears to have been conceded that under the ordinary Hindu law the pltf. is not entitled to any maintenance. Mr. Mohapatra has, however, relied on certain passages at p. 228 of Raghavacharlar's Hindu Law, 3rd Edn. where the learned author seems to be of the view that as a member of the family an illegitimate daughter also must be held to be entitled to a maintenance allowance in the same way as an illegitimate son. But the authorities, however, cited by him do not lend support to such a broad proposition. Doubtless in an old Bombay decision reported in *Parvati* v. *Ganapatrao*, 18 Bom. 177 there are some observations which may lend support to the view that an illegitimate daughter was also entitled to maintenance out of the family property. In *Natarajan* v. *Muthiah Chetty*, A. I. R. (13) 1926 Mad. 261 at p. 266: (95 I. C. 972), a single Judge (Kumaraswami Sastri) reviewed the previous decisions on the subject & held that an illegitimate daughter was entitled to maintenance until she married or attained majority. But his decision was reversed by a Division Bench of the same H. C. in *Vellayyappa* v. *Natarajan*, 50 Mad. 340: A. I. R. (14) 1927 Mad. 386) where there is a full discussion of the law regarding the rights of maintenance of an illegitimate daughter. In that decision, the arguments that an illegitimate daughter was entitled to maintenance as a member of her father's family was advanced & repelled. That litigation was taken up to the Privy Council on other grounds; (see *Vellayyappa Chetty* v. *Natarajan*, 58 I. A. 403: (A. I. R. (18) 1931 P. C. 294)), but no appeal was taken up against the decision of the Division Bench disallowing maintenance to illegitimate daughters. It is conceded that there is no written text in the scriptures recognising the right of an illegitimate daughter to maintenance. In the absence of any written text & in view of the case law as mentioned above, I do not think I will be justified in recognising such right merely on the ground that an illegitimate daughter may also form part of her putative father's family. The case seems to be rather hard; but the law seems to be definitely against the pltf. Moreover, in view of the fact that the pltf. was more than 21 years at the time of the institution of the suit even *Natarajan* v. *Muthia Chetty*, A. I. R. (13) 1926 Mad. 261: (95 I. C. 972) will not materially help her because in that case the right of maintenance of an illegitimate daughter was limited to her 18th year.

[11] I would, therefore, affirm the judgment & decree of the lower Ct. & dismiss the appeal. Both parties will bear their own costs. As rightly pointed out by the lower Ct., the conduct of deft. 1 in challenging even the paternity of the pltf. & in making wild and irrelevant allegations against her chastity disentitles him from claiming cost either in the lower Ct. or in the appellate Ct. Applt. should pay the Ct.-fee which would have been payable if she had not been permitted to appeal in *forma pauperis*.

[12] **Panigrahi J.**—I agree.

D.H. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 251 *[C. N. 59.]*

RAY C. J. AND NARASIMHAM J.

Thangudu Varaha Narasimhamurty — *Petnr.* v. *The State.*

Cr. Misc. Nos. 158 & 170 of 1950, D/-31-1-1951.

(a) Public Safety — Preventive Detention Act (1950), S. 7 — Grounds of detention — Insufficiency — Distinction between grounds & facts — Grounds stating that detenu was hoarding food grains for selling in black-market — Sources of information not disclosed — Sufficiency — Constitution of India, Art. 22 (6).

Insufficiency of the grounds supplied to a detenu would not render the detention order invalid *ab initio*. [Para 7]

Unreasonable delay, however, in communication of the grounds or communication of inadequate or vague & indefinite grounds would make further detention of the detenu illegal. [Para 9]

There is, however, a distinction between 'facts' & grounds'. Grounds are mainly, if not solely, the reasons of detention. They are inferential deductions in terms of the social orders sought to be maintained in the interest of the general public. In order to fulfil the constitutional guarantee of affording opportunity to be heard in defence, the acts, that bear out the offensive conduct of the persons accused & bear the next proximate relation to it, are also to be given out as a part of the grounds, the ambit whereof is to be determined in the particular facts of every case. The rules, in this connexion, are bound to be flexible rather than hard & fast. In this view of the matter, the facts, illustratively stated, are incidents, events & circumstances informations, suspicions, conjectures & the like including the sources of informations & the agencies set up in that behalf; they may constitute the background which determines the nature & character of the acts manifesting the grounds that eventuate necessity for detention. They may amount to proofs that set the machinery in motion. They are zealously guarded by the Legislature against disclosure. [Para 10]

Where the grounds stated that the detenu (a wholesale licensed dealer in foodgrains) was engaging himself in the activity of hoarding considerable quantity of foodgrains from out of their normal circulation so vitally necessary for the life of the community & thereby offended against the provision of S. 3 (1) (a) (iii) & also disclosed that the object of such hoarding was to profiteer by selling the hoarded stock in the black-market:

Held, that the grounds disclosed were not insufficient for enabling the detenu to make a representation, although all the sources of information which led the authorities to the conclusion that detention was essential to prevent the detenu from selling in the black-market, were not disclosed. [Paras 10, 18]

Selling in the black-market amounts to interfering with the normal supply to the community at large. It hampers the scheme set on foot by the Govt. responsible for good social order, for ensuring distribution of supplies essential to the community & for keeping the same going on, particularly, in times of scarcity & shortage of foodgrains. [Para 11]

The act complained of was not done by him as a licensed dealer but stood completely outside it. Hence it could not be argued that the self-same act of the detenu, as a licensee, could be dealt with in a punitive measure rather than preventive. [Para 17]

(b) Constitution of India, Art. 19 (1) — Applicability to preventive detention legislation.

The principle of reasonable restriction or reasonableness of law imposing restriction upon the liberty of citizens has no application to the laws prescribing preventive detention. [Para 13]

P. V. B. Rao & G. N. Murty — for Petnr; Govt. Advocate—for the State.

Ray C. J. — These cases arise out of two petns. presented by the self-same petnr. Thangudu Varaha Narasimhamurty, impugning the validity of two detention orders, one, dated, 8-11-1950 & another, dated, 26-11-1950. The second order replaced the first. Except for some verbal alterations, the orders are the same in all essential particulars. By the time the first Misc. Case was filed, the second order of 26th November had not been passed. Therefore, the petnr. thought it appropriate that he should impugn the second order, virtually the order authorising the detention, by another petn. The latter is registered as Misc. Case No. 170. At its admission for hearing, it was directed to be heard along with the previous case, Cr. Misc. Case No. 158 of 1950.

[2] The petnr. has been directed to be detained since 8-11-1950, till 7-2-1951, for a period of three months. The detention order has been passed under the provisions of sub-cl. (iii) of cl. (a) of sub-s. (1) of S. 3, Preventive Detention Act, 1950 (Central Act, IV [4] of 1950), read with S. 4 thereof, by the Sub-divisional Mag. of Berhampur, district Ganjam. The order reads as follows:

No. CC. 768/50 Office of the Subdivisional Magistrate, Berhampur,
Dated, 26-11-1950.

ORDER UNDER THE PREVENTIVE DETENTION ACT, 1950.

Whereas I, K. Ramamurty, I. A. S, Sub-divisional Magistrate, of Berhampur, Ganjam district, am satisfied that with a view to preventing T. K. N. Murty, proprietor of Neelakhanteswar Rice Mills, Berhampur from acting in any manner prejudicial to the maintenance of supplies & services essential to the community, it is necessary so to do, I, K. Ramamurty, I. A. S., Sub-divisional Mag. Berhampur, in exercise of the powers conferred by sub-cl. (iii) of cl. (a) of sub-s. (1) of S. 3, Preventive Detention Act, 1950 (IV [4] of 1950) read with S. 4 thereof, am pleased to direct that the said T. V. Murty, be detained for a period of three months until 7-2-1941 & removed to the District Jail, Berhampur, for the purpose of detention in the said Jail.

This cancels the previous order dated 8-11-1950 & takes effect from the same date, i.e , from 8-11-1950.

[3] The grounds of detention issued on the same date were received by the detenu on 27-11-1950. The grounds are:

"That on 5-10-50 you hoarded 596mds. of fine paddy, 96 mds. of fine rice & 25mds. of superfine rice, with an intention to sell in blackmarket.

It is necessary for the maintenance of supplies & services essential to the community, to prevent you from doing these acts by detaining you under Act (IV [4] of 1950.)

You have a right of representation against this order which you may exercise by presenting it in writing through the Sub-Divisional Magistrate, Berhampur, within 15 days from the receipt of these grounds."

[4] It may be noted that he had been informed of his right of representation, & the grounds for his detention, on 8-11-1950, the date when the detenu had been taken into custody by virtue of the first order. There is no substantial difference between the two versions of the grounds supplied.

[5] The cases had come up before us on 22-12-1950. In course of the hearing, it appeared to us that in virtue of S. 9 of the Act, in every case where a detention order had been made

under sub-cl. (iii) of cl. (a) of sub-s. (1) of S. 8 by an officer satisfied under sub-s. (2) of the section, it was necessary that the State Govt. to which the officer concerned was subordinate should, within 6 weeks from the date of detention, place before the Advisory Board the grounds on which the order had been made the representation, if any, made by the person affected by the order & also the report made by such officer to the State Govt. We, therefore, made enquiries of the Govt. Advocate, who was representing the State Govt., if the mandatory provisions had, in the case before us, been complied with. He took time to make necessary enquiries & inform us. By consent of parties, further consideration of the matter had been set down for 23-1-1951.

[6] We heard the learned counsel of both parties in relation to matters relevant to the consideration of petnr's case. On conclusion of the hearing we directed that the petns. be dismissed & that the reasons for the dismissal should be communicated later. On behalf of the Ct., I now proceed to give the reasons in the following few paras.

[7] (a) The main ground that was urged strenuously by Mr. P. V. B. Rao, the learned counsel for the petnr. was that the grounds supplied being vague, indefinite & inadequate for making an effective representation to the State Govt. the order of detention was bad in law. He relied upon a few decisions in support of his contention. None of the authorities cited lend support to the contention that insufficiency of grounds would render the detention order invalid *ab initio*. In the very scheme of legislation for preventive detention authorised by the Constitution of India, the grounds for detention must have to be supplied later than issue of a detention order & its execution by the concerned authority, & service thereof on the detenu. If the grounds are such as are sanctioned by law, & warrant, to the satisfaction of the concerned authority, an order of preventive detention, it cannot be invalidated by the failure on the part of the said authority to comply with the conditions subsequent. Communication to the detenu of the grounds of detention is a subsequent condition. The purpose thereof is to give him an opportunity, as early as possible, to demur to the correctness, sufficiency & validity of the grounds in his defence, & to establish his innocence. Reference, in this connexion, may be made to S. 7 of the Act. The section runs as follows:

7. (1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, communicate to him the grounds on which the order has been made, & shall afford him the earliest opportunity of making a representation against the order, in a case where such order has been made by the Central Govt. to that Govt. & in a case where it has been made by a State Govt. on an officer subordinate thereto, to the State Govt.

(2) Nothing in sub-s. (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.

[8] The section speaks for itself & does hardly convey an idea that communication of the grounds would be either contemporaneous with or previous to the issue of detention order, or, for the matter of that, the detention of detenu. It is not contended, here, that there has been any unreasonable delay in communicating the grounds to the detenu. The contention advanced in the form stated above must necessarily fail.

[9] (b) The authorities cited do, however, establish that unreasonable delay in communication of the grounds or communication of inadequate or vague & indefinite grounds would make further detention of the detenu illegal. From this premise, it must follow that the Ct. approached for the purpose of issue of a writ of Habeas Corpus, shall be completely justified in directing the release of the detenu. This position of law has now been established beyond any controversy, & we do not dispute its correctness. In several cases of preventive detention that came before us previously, we have acted upto this very rule.

[10] (c) The question that then arises is whether the grounds communicated, in the present case, are insufficient for the purpose of enabling him to make a representation in an effective manner so as to establish his innocence. We are of opinion that the grounds are definite & adequate for the purpose. The contention of the learned counsel proceeds from a misconception about the distinction between 'facts' & 'grounds'. Grounds are mainly if not solely, the reasons of detention. They are inferential deductions in terms of the social orders sought to be maintained in the interest of the general public. In order to fulfil the constitutional guarantee of affording opportunity to be heard in defence, the acts, that bear out the offensive conduct of the persons accused & bear the next proximate relation to it, are also to be given out as a part of the grounds, the ambit whereof is to be determined in the particular facts of every case. The rules, in this connexion, are bound to be flexible rather than hard & fast. In this view of the matter, the facts, illustratively stated' are incidents, events & circumstances, information, suspicions, conjectures & the like including the sources of informations & the agencies set up in that behalf; they may constitute the background which determines the nature & character of the acts manifesting the grounds that eventuate necessity for detention. They may amount to

proofs that set the machinery in motion. They are zealously guarded by the Legislature against disclosure. In the present case, the ground of his detention was that he was engaging himself in the activity of secreting considerable quantity of food-grains from out of their normal circulation so vitally necessary for the life of the community & thereby offended against the provision of S. 3 (1) (a) (iii) of the Act The ground also discloses that the object of such hoarding was to profiteer by selling the hoarded stock in black-market. Extent of hoarding is mentioned too. Variety of facts from multitudinous sources besides the confirmatory fact of hoarding might have come to the notice of the concerned authorities in order to lead them to the conclusion that the petnr. unless prevented was about to indulge in selling the essential food-grains in black-market. All the relevant facts need not be disclosed. It so clearly appears from sub-s. (2) of the section. It might as well be that there was previous information as to the habit of black-marketing & no steps could be taken until the authorities had proof of one or more tangible relevant acts.

[11] (d) Pre-existence of obnoxious antecedents assignable to a person carries with it susceptibilities or propensities of habitual indulgence in or recurrence of similar conduct in future. Hence flows the necessity for prevention by adoption of preventive measures such as preventive detention of the person concerned. Mr. Rao tried to argue that as a licensed wholesale dealer in food-grains, such as paddy, rice, wheat, gram & pulses &c., he was entitled to 'hoard'. This argument overlooks the distinction between storing'. & 'hoarding'. The dictionary meaning of the word 'hoard', as a noun, is 'a hidden stock, a place for hiding anything', & 'to hoard' means 'to amass and deposit in secret'. That both the acts of 'hoarding' & 'selling in black-market are prejudicial to the maintenance of supplies essential to the community admits of no doubt. It is sought to be argued by Mr. Rao that, in its bearing on maintenance of essential supplies, selling in black-market is as good as selling in open market, & it helps rather than defeats supply of the relevant commodity. The character of the resulting consequences of an act is to be judged not from the uncommon level of the rich & the substantial section of the community but from the economic level of the mass. The emphasis is upon the words "essential to the community". Viewed in this light, it can be predicated without any fear of contradiction, that selling in the black-market amounts to interfering with the normal supply to the community at large. It hampers the scheme set on foot by the Govt. responsible for good social order, for ensuring distribution of supplies essential to the community, & for keeping the same going on, particularly, in times of scarcity & shortage of food-grains. It is complained that the Act is defective in the sense that it does not define nor enumerate essential supplies or prejudical acts. With the best use of human ingenuity, such enumeration or definition is difficult of performance. Each case must be decided on its own facts. In this context, the Ct. is always at an enormously relative disadvantage in coming to a conclusion of its own so as to be in a position as against the concerned executive authority's decision to hold that the condemned act does not come within the purview of the prescribed prohibited. acts; but, however, it is quite plain that the difficulty of the kind does not arise in the present case.

[12] (e) It is next argued that preventive detention as a measure of social control with a view to safeguard the maintenance of supplies & services essential to the community is beyond the range of reasonable restrictions on the citizens' right to personal liberty & freedom. A more effective & reasonable measure of protection against the relevant social & communal evils could be effected by the Govt. requisitioning the secreted stocks & distributing the same to community by putting them back within the orbit of normal circulation. And besides, as a licensed dealer, the petnr. is liable to punishment for violating the terms & conditions thereof amongst which are included omission to keep proper accounts & selling in black market &c. Any one or both of the last named measures could have been resorted to by the State Govt. or its subordinate authorities. In not doing so & in giving preference to the measure of preventive detention, they acted mala fide in the discharge of their functions.

[13] (f) The principle of reasonable restriction or reasonableness of law imposing restriction upon the liberty of citizens has no application to the laws prescribing preventive detention. An argument on this line had been advanced to their Lordships of the S. C. in the case of *A. K. Gopalan* v. *State*, 1950 S. C. R. 88: (A. I. R. (37) 1950 S. C. 27: 51 Cr. L. J. 1383). Art. 19 (5), Const. Ind. was prayed in aid for the purpose of impugning the validity of the Act. This argument could not be sustained according to the majority view of the Ct. The point has been elaborately dealt with & discussed in the judgment of Kania C. J. The discussion begins at p. 100 of the S. C. Report, 1950, Vol. I & ends at p. 117. I would quote a passage from that learned judgment by way of

negativing the contention advanced before us. His Lordship the Chief Justice observes:

"Article 22 envisaged the law of preventive detention. So does Art. 246 read with Sch. 7 List I, Entry 9, & List III, Entry 3. Therefore when the subject of preventive detention is specifically dealt with in the Chapter on Fundmental Rights, I do not think it is proper to consider a legislation permitting preventive detention as in conflict with the rights mentioned in Art. 19 (1). Article19 (1) does not purport to cover all aspects of liberty or of personal liberty. In that Article only certain phases of liberty are dealt with. 'Personal liberty' would primarily mean liberty of the physical body. The rights given under Art 19 (1) do not directly come under that description. They are rights which accompany the freedom or liberty of the person. By their very nature they are freedoms of a person assumed to be in full possession of his personal liberty. If Art. 19 is considered to be the only Article safeguarding personal liberty several well-recognised rights, as for instance, the right to eat, or drink, the right to work, play, swim & numerous other rights & activities & even the right to life will not be deemed protected under the Constitution. I do not think that is the intention. It seems to me improper to read Art. 19 as dealing with the same subject as Art. 21. Article 19 gives the rights specified therein only to the citizens of India while Art. 21 is applicable to all persons. The word citizen is expressly defined in the Constitution to indicate only a certain section of the inhabitants of India. Moreover the protection given by Art. 21 is very general. It is of 'law' whatever that expression is interpreted to mean. The Legislative restrictions on the law-making powers of the legislature are not here prescribed in detail as in the case of the rights specified in Art. 19. In my opinion, therefore Art. 19 should be read as a separate complete article."

[14] The items in List I, Entry 9 & List III, Entry 3 of Sch. 7, do authorise the Central as well as the State Legislatures to enact laws of preventive detention in relation to maintenance of supplies & services essential to the community & the limits put upon such legislative powers, according to the majority view of the S. C., are to be found out in Arts. 21 & 22 of the Constitution & not in Art. 29 (19?) which are mutually exclusive.

[15] (g) An argument has been advanced to us by way of indicating that by non-disclosure of further facts, the petnr. was prevented from making a defence to which he had a right. It is not, however, made clear to us how he has, if at all, been prejudiced in making an effective representation to the State Govt. which was the only permissible mode of making out his defence under the Act. In this connection too I would quote a passage from the judgment of Kania C. J. in the same report at p. 125:

"A right to lead evidence against facts suspected to exist is also not essential in the case of preventive detention. Article 22 (6) permits the non-disclosure of facts. That is one of the clauses of the Constitution dealing with fundamental rights. If even the non-disclosure of facts is permitted, I fail to see how there can exist a right to contest facts by evidence & the non-inclusion of such procedural right could make this Act invalid."

[16] (h) To meet Mr. Rao's argument, I cannot do better than quote a passage from Willis on Constitutional Law:

"Businesses affected with a public interest may be subject to social control in the exercise of the police power when such social control is not applied to any other members of society. In fact until quite recently at least, there has been some social control which may be applied to businesses affected with a public interest which cannot be applied elsewhere. It is a proper exercise of the police power to apply this social control to this particular class of businesses because of the social interest in general economic progress, although other social interests, like the social interest in the individual life, are also involved."

[17] (i) To the argument of Mr. Rao the learned counsel for the petnr. that for the self-same act of the petnr., as a licensed dealer, could be dealt with in a punitive measure rather than preventive, I would reply that the act, complained of, is not done by him in his jurisdiction as a licensee but stands completely outside it.

[18] (j) Before concluding, I shall point out that the executive action of inspecting his mill-premises & the examination of relevant accounts were undertaken within the petnr's knowledge. The grounds communicated to him contained sufficient information so as to lead him to make out, to the satisfaction of the State Govt. or the Advisory Board, by his representation that the stocks suspected to have been hoarded for the purpose of sale in black-market did really belong to his customers & were beyond his power of disposition. As I have already said, we have had the privilege of looking to the Advisory Board's report & recommendation to the Govt. of Orissa. We do not feel inclined to think that he has at all been prejudiced in his defence by any omission & deficiency in the grounds or particulars supplied to him.

[19] In the premises aforesaid, we hold that the petns. have no merit & be dismissed.

[20] **Narasimham J.**—I agree.

V.B.B. *Petitions dismissed.*

A. I. R. (38) 1951 Orissa 255 *[C. N. 60.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Sri Jagannath Mahaprabhu and another— *Applts.* v. *Bhagaban Das and others* — *Resps.*

Second Appeal No. 208 of 1947, D/- 6-2-1951.

(a) Hindu Law— Religious endowment—Dedication, partial or absolute—Test —"Amrit Manhi"—Use of—Words & Phrases.

The test to determine whether the dedication is absolute or partial, is whether the dedication amounts only to a charge upon the property to meet the expenses of some religious acts or ceremonies the surplus being left at the disposal of the shebait. [Para 8]

Strong evidence is required to show that the interest of the deity in the properties is only a charge on the

income thereof contrary to the prima facie import of the settlement entries. [Para 11]

The word "Amrit Manhi" literally means food offering & there is no warrant for holding that it indicates only a partial dedication. [Para 7]

Nor can the subsequent dealings by the family of the marfatdar with the property belonging to the deity as if it was their own personal property derogate from the completeness of the trust itself in favour of the deity, because persistent abuse of trust cannot furnish the basis of a claim which the Ct. will recognise. [Para 6]

The evidence that the shebaits have been appropriating major portion of the income without utilising it for purposes of the deity, cannot be taken as relevant to show the terms of the original grant, because such appropriation of income might very well be nothing more than misappropriation. [Para 12]

(b) Lim. Act (1908), Arts. 142 & 144 — Shebait — Adverse possession against deity—Possession of a shebait is in accordance with the title of the deity. [Para 9]

Anno: Lim. Act, Arts. 142-144 N. 49.

(c) Lim. Act (1908), Art. 134-A—Starting point.

In order to bring a case within the mischief of Art. 134-A, it is not enough that anyone in the family of the pltf. must have known of the alienation. What the Article contemplates is the actual knowledge of the person himself who goes to Ct. as the pltf. [Para 9]

Anno: Lim. Act, Art. 134-A N. 4a.

P. Mohanty — for Applts.; M. M. Das & D. Sahu —for Resps.

Panigrahi J. — The point debated in this appeal is whether the properties in dispute are the absolute Devottar of the Deity Jagannath Mahaprabhu, pltf. 1 in the suit, or whether they are properties merely charged with service to the said Deity. Pltfs. 2 & 3, defts. 1 & 2, defts. 11, 12, 13 & 14 constitute members of a family whose common ancestor was one Bishnu Charan Das. These descendants of Bishnu Charan are described as marfatdars of the Deity, Sri Jagannath Mahaprabhu, & the suit properties have been described as Amrita Manhi of the said Deity who is pltf. 1. The Settlement Records show that ever since the time of the Provincial settlement the suit properties, along with some other properties, were in the possession of the members of Bishnu Charan's family. They have also been accessively recorded in the three Settlement Registers as Amrita Manhi of Lord Jagannath. In the last Settlement, however, the marfatdars have been recorded as being in possession of seperate plots & it is not denied that the family which consits of three branches is in possession of different plots in three separate shares. The first deft. & the husband of the second deft. executed a permanent lease under Ext. A, dated 4-4-30 of 33 decimals of lands out of these properties in favour of defts. 8 & 9. On 4-4 32 the second deft. executed another permanent lease in favour of the same lessees by a deed, Ext. A-1 in respect of 17 decimals out of these properties. Between 1942 & 1944, again, defts. 1 & 2 executed two more leases, two kebalas & one usufructurry mtge. in favour of defts 3 to 7, 10 & 11. It would thus appear that defts. 3 to 11 are alienees from defts. 1 & 2 of properties which have been admittedly recorded as Amrita Manhi in the name of pltf. 1.

[2] Pltfs. 2 & 3 instituted the suit out of which this appeal arises—claiming a declaration on behalf of pltf. 1 that the several alienations made by defts. 1 & 2 are not binding on the Deity, Jagannath Mahaprabhu, & praying for setting aside the alienations & for possession as a consequential relief. The suit was instituted on 24-4-44. Defts. 3, 8 & 9 are the only alienees who contested the suit, the other alienees having remained ex parte. The substantial contention raised on behalf of the contesting defts. was that the suit properties are not the devottar properties of the first pltf. & that the alienors have been treating them as if they were their own personal properties for over twelve years & that consequently their right to alienate them is not open to challenge.

[3] Both the Cts. below have concurrently found that the suit properties constitute the Devottar properties of pltf. 1. But in view of the fact that the properties were admittedly being used as personal properties by the members of the marfatdar's family, they gave a declaration that they are not absolute Devottar but are merely charged with service to the Deity. The pltfs' prayer for setting aside the alienations made by defts 1 & 2 was rejected on the view that the properties not being absolute Devottar, were alienable subject to the performance of service to the Deity with which they were charged. The pltfs. have come up in appeal to this Ct. against this decision.

[4] In second appeal, it is contended before us by the learned counsel for the resps. that the very use of the word "Amrita Manhi" in the Settlement Records connotes partial dedication & that the view of the Cts. below is supported by the decisions in *Basoo Dhul* v. *Kishen Chunder*, 13 W. R. 200 and *Parikhit Mohanty* v. *Dayanidhi*, 2 Cut. L.T. 57. Secondly, it is urged that the suit is barred by limitation so far as the claim to set aside the alienations under Exts. A & A-1 is concerned, as these were made more than twelve years prior to the institution of the suit.

[5] It is unnecessary to load this judgment with too many details as the admitted facts are beyond controversy. It appears that in the year 1837, there was an enquiry by Govt. into the character of these properties & one Raghunath Das, grandfather of the first deft., claimed as marfatdar of pltff. 1, these properties as the Amritta Manhi or food offering of that Deity.

That claim was recognised by Govt. & the lands were exempted from payment of any public revenue. In 1860, Bavan Das, father of the shebait deft. made a statement that these properties had been dedicated as the Amrita Manhi of Jagannath Mahaprabhu & that he was utilising the usufructs of the lands for that purpose. This statement was made in March 1860 in a memorandum of appeal to the Dist. Ct. against a judgment obtained by a lessee of these properties from a member of the marfatdar's family. In 1890, pltff. 1 was recorded as the owner of the properties at the Provincial Settlement. In view of these records, the Cts. below were justified in taking the view that the properties belonged to the Deity.

[6] It is not disputed that the properties were dedicated to the Deity as "Amrita Manhi" or food offering. But there is no evidence as to when & in what circumstances the dedication was made. It is, however, pointed out by the contesting defts. that the evidence indicates that only Rs. 15 was being utilised for the "PANGTHI BHOG" of Sri Jagannath by the family members of the marfatdar, although the lands recorded in the name of the Deity covered an extent of as many as one hundred acres. It is next urged that the family of the marfatdars had no other property of their own excepting the property recorded in the name of pltff. 1. Thirdly, it is said that the residential house of the marfatdars stands on a plot of land belonging to pltf. 1. It is accordingly argued that the properties in dispute must have been the family properties of the shebait before they were dedicated to the Deity as "Amrita Manhi" & that what was actually dedicated to the deity was not the property itself but only a portion of the income therefrom such as would be sufficient to meet the expenses of the "PANGTHI BHOG". This argument of the resps. which is conjectural, can only be answered conjecturally. As already pointed out above, it is impossible to decide—on the materials placed before us—how the original endowment had been made. From one of the papers in Ex. 4 series it appears that some of the properties at any rate had been gifted by Makadam Maguni Panda for the Amrita Manhi of Lord Jagannath & that Raghunath Das was the marfatdar in respect of these properties. The resps, therefore, cannot claim the properties to have been their ancestral properties. Nor can their subsequent dealings with the property as if it was their own personal property derogate from the completeness of the trust itself in favour of the deity, because a persistent abuse of trust cannot furnish the basis of a claim which the Ct. will recognise. It may be that the income of the properties is being used by the members of the family for their own maintenance, but this is in perfect accord with usage & custom. Whether they are entitled to appropriate the income of the properties, after making the customary offerings to pltf. 1, & whether they have a beneficial interest in the bhog so offered or in the balance of the income left after such offering, are matters which are wholly outside the scope of the present suit. On the materials placed before us we are bound to hold that no personal claim to the suit properties can be recognised & that the absolute character of the title vesting in pltf. 1 must be upheld.

[7] The word "Amrit Manhi," literally means food offering & there is no warrant for holding that it indicates only a partial dedication. In the case reported in *Basoo Dhul* v. *Kishen Chunder*, 13 W. R. 200, it was proved that Budh Gir who had created the endowment had obtained the lands by private purchase & that he had charged them with an annual payment of 300 chhanas of cowries, equivalent to Rs. 80 for the food of Lord Jagannath & it was further directed that the remaining profits from the lands were to be appropriated by one Ballav Ghir, the marfatdar. The Govt. declared in 1794 that the lands were subject to payment of Rs. 80 for Jagannath Mahaprabhu & that the remainder of the income was to be used by the gosain for his own purposes. Having regard to the very clear & express terms of the endowment, the Ct. held that the property could be sold subject to the charge with which it was burdened, but it should be noticed that it was pointed out in that very case that property wholly dedicated to religious purposes could not be sold. I find nothing in that case to warrant the contention that the use of the word "Amrita Manhi" itself indicates partial dedication. That case was followed by Verma J. in *Parikhit Mohan* v. *Dayanidhi*, 2 Cut L. T. 57, to which reference has been made above. It does not appear from this report whether the dedication was absolute or whether the property was subject to a charge as in the previous Calcutta case. This case is certainly no authority for the proposition that "Amrita Manhi" itself means that the property is subject only to a charge & does not constitute absolute Devottar. In the absence of the grant itself I can see no legal authority for justifying a conversion of devottar property into secular property & upholding such a singular claim on the part of the marfatdar as against the trust. The onus rested upon the resps. to show, by the clearest & the most unimpeachable evidence, the legitimacy of his personal acquisition.

[8] In *Srinivasachariar* v. *Evalappa Mudaliar*, 49 I. A. 237: (A. I. R. (9) 1922 P. C. 325), the Privy Council had to deal with a case where a similar claim was put forward on behalf of a trustee on the strength of a patta granted to an ancestor of the trustees, with no indication that those particular items were temple lands or that the pattadar held them as Dharmakarta. In negativing this contention their Lordships observed:

"It must, of course, be plain that it would require circumstances unique to warrant the . . . transformation of these endowment lands into the private property of the trustee."

The distinction between an absolute dedication & a partial dedication has been pointed out in several cases & the test is whether the dedication amounts only to a charge upon the property to meet the expenses of some religious acts or ceremonies the surplus being left at the disposal of the Shebait. The cases reported in *Ashutosh Dutt* v. *Doorga Churn*, 6 I. A. 182 : (5 Cal. 438 P. C.) and *Nimai Churn* v. *Jogendronath*, 21 W. R. 365 are cases where it was proved that the shebaits had proprietary interest in the lands & that only portion of the income had been dedicated for religious worship. The contention of the resps. in the case before us cannot get any support from above two decisions on which considerable reliance was placed. The Cts. below were in error in holding that all that was endowed to pltf. 1 was only a portion of the income from the properties for the performance of a particular service & not the entire extent of the suit properties.

[9] The only other point that requires to be considered is whether the two leases Exs. A & A-1 in favour of defts. 8 & 9 are not liable to be set aside on the ground that they were executed within 12 years before the institution of the suit. It is conceded by Mr. M. M. Das, the learned counsel-for the resps., that the only article applicable to the case is Art. 134A, Limitation Act, which prescribes a period of twelve years in suits to set aside transfer of immovable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment made by the manager thereof for valuable consideration. The period of limitation commences from the date when the transfer becomes known to the pltf. It cannot be, & in fact it was not, contended that the possession of defts. 8 & 9 can by any means be regarded as adverse to pltf. 1. Both these lessees took their leases with full knowledge that the property was Devottar & that the lessors were only the shebait marfatdars of pltf. 1. It is well settled that the possession of a shabait is in accordance with the title of the Deity & the lessors were holding the Deity's lands as his trustees & it is only this right that has been transferred to defts. 8 & 9 & the lands are held by them in that capacity. No question of adverse possession therefore arises. The only article applicable as has been held by the Cts. below is Art. 134-A but in applying the Article to the facts of the case the Cts. below appear to have taken the view that the pltfs. must have known about the alienations ever since the time they were actually made because they belonged to the family of defts. 1 & 2. The pltfs., however, gave evidence in the case that they came to know of the alienations only in 1944. Even if reliance is placed on Ex. 1 (a) a sale deed executed by one of the pltfs. in favour of deft. 8 in 1937 & knowledge of alienation is attributed to him on the strength of that sale deed, the suit would be well within time. There is no material for holding that the pltf. had any means of knowing the alienations earlier. In order to bring the case within the mischief of Art. 134A, it is not enough that any one in the family of the pltf. must have known of the alienation. What that Article contemplates is the actual knowledge of the person himself who goes to Ct. as the pltf. There is no material to show that that was the case here & accordingly there is no bar of limitation to the maintainability of the suit, as regards any of the alienations.

[10] The judgment under appeal is set aside & the pltfs. shall be entitled to a decree as prayed for. The appeal is accordingly allowed with costs.

[11] **Jagannadhadas J.** — I agree with my learned brother. The suit properties have been admittedly recorded in three successive settlements as the Amritamanhohi property of the first plaintiff Shri Jagannath Maha-prabhu showing the deity as the owner of the properties. Strong evidence is required to show that the interest of the deity in the properties is only a charge on the income thereof contrary to the prima facie import of the settlement entries. I agree with my learned brother that the use of the word "Amritamanhohi" is not sufficient to prove that the deity's interest in the property is only by way of a charge on the income. A perusal of the judgment in *Basoo Dhul* v. *Kishen Chunder*, 13 W. R. 200 and *Parikhit Mohan* v. *Dayanidhi*, 2 Cut. L. T. 57, does not support any such assumption, as has been pointed out by my learned brother.

[12] I also agree with my learned brother that in cases of this kind the evidence that the Shebaits have been appropriating major portion of the income without utilising it for purposes of the deity, cannot be taken as relevant to show the terms of the original grant, because such appropriation of income might very well be

nothing more than misappropriation. It may be that where a grant of this kind otherwise appears to be the grant of a mere interest of the property by way of a charge on the income, evidence of subsequent conduct of the shebaits may be given as evidence of the measure of the charge if that question remains in doubt. I wish to say nothing about it one way or the other. The difficulty in the way of the contesting defts. in this case is not merely that there is no evidence that the dedication was only of a mere charge on the income of the property, but even the evidence of user by the family of the Marfatdars that has been relied on, affords no clear material for decision as to the nature of the services for which the charge is available or the measure of the income which has to be appropriated for the same. It is impossible therefore to uphold the view of the Cts. below that the deity first pltf. has only a charge on the income of the properties. The suit properties must, therefore, be held to be absolutely dedicated to the first pltf. The alienations would accordingly be invalid.

[13] I agree also with my learned brother that the requisite knowledge of the pltfs. under Art. 134 (a), Limitation Act, has not been made out so as to bar the recovery of the properties covered by any of the alienations in the suit.

[14] I accordingly concur in the order proposed.

V.B.B. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 259 *[C. N. 61.]*

RAY C. J. AND NARASIMHAM J.

Siba Prasad Moda — Petnr. v. State of Orissa.

Supreme Court Appeal No. 27 of 1950, D/- 21-12 1950.

Constitution of India, Art. 14—Equality—Meaning—Graded punishment if offends rule of equality —Penal Code (1860), S. 53.

Equality intended under Art. 14 is not to be judged by equality of sentence Punishments, graded according to age, gravity of the offence in the context of fact- & attending circumstances that lend colour to the perversity involved in the crime & other circumstances, do not offend the rule of equality that law assumes as to members of the society. The object of punishment is to reform the society by holding out deterrents as precedents. Punishment must be such as would be felt as punishmeut by the offender. It must be commensurate with the degree of shock that it causes to the consience of the society. [Para 4]

Where the H. C. in restoring a sentence of imprisoment passed on a Marwari merchant by the trial Ct. which was commuted to a fine of Rs 200 in appeal, observed in the judgment that the accused being a Marwari merchant, a fine of Rs 200 would amount to absolutely no punishment whatsoever, & that he had to be sentenced with imprisonment & it was urged that it was a departure from the rule of natural justice:

***Held* that the implications of the impugned observation in the judgment were that the accused being a monied man of substance, a fine of Rs. 200 would not prove appropriately deterrent so as to prevent him & others from repeating the offence. There was no discrimination on the ground that he was a Marwari or that he was a merchant & the finding did not detract from maintaining equality between man & man in the administration of law.** [Para 3]

Anno: Penal Code, S. 53 N. 1.

K. Patnaik & M. Mohanty — for Petnr.; Govt. Advocate —for the State of Orissa.

Ray C. J. — This is an appln. for leave to appeal to the S. C. against our order in Cr. Revn. No. 458 of 1946 enhancing the sentence. It has been, however made clear by the two counsel, who appeared before us & were permitted to argue one after the other, that they did not challenge the conviction. It has also to be noted that in the learned lower appellate Ct. too the applt. did not challenge the conviction but pleaded for reduction of sentence The learned Ses. J. was successfully persuaded to commute the sentence of imprisonment of 6 months (which has since been restored by us) to a fine of Rs. 200.

[2] Mr Patnaik the leading counsel in the case would argue that our judgment violates the principles laid down in Art 14 of the Constitution, inasmuch as, we have said, in our judgment that the accused being a Marwari merchant, a fine of Rs. 200 would amount to absolutely no punishment whatsoever, & that he has to be sentenced with imprisonment; & that accordingly the sentence of imprisonment originally awarded by the trial Ct. should be restored. It is urged that it is a departure from the rule of natural justice.

[3] The implications of the impugned observation in our judgment are that he being a monied man of substance, a fine of Rs. 200 will not prove appropriately deterrent so as to prevent him & others from repeating the offence. There was no discrimination on the ground that he was a Marwari or that he was a merchant. Besides, in the course of hearing we observed that if the sentence of fine be imposed, it was likely that the man on whose behalf he was attempting to bribe the public servant would bear it & the real delinquent would go scot-free. We are, therefore, of opinion that this contention is not maintainable. Our finding does not detract from maintaining equality between man & man in the administration of law.

[4] Equality intended under Art. 14 is not to be judged by equality of sentence. Punishment graded according to age, gravity of the offence in the contxt of facts & attending circumstances that lend colour to the perversity involved in the crime & other circumstances do not offend the rule of equality that law assumes as to members of the society. The object of punish-

ment is to reform the society by holding out deterrents as precedents. Punishment must be such as would be felt as punishment by the offender. It must be commensurate with the degree of shock that it causes to the conscience of the society. However, in such a general observation, we are strongly supported by Sir Iqbal Ahmad C. J., of the Allahabad H. C. in the case of *Emperor* v. *Kesri Chand*, A. I. R. (32) 1945 ALL. 207 : (47 Cr. L. J. 132). His Lordship observes :

"The sentence imposed upon an accused must be commensurate with the gravity of the offence & must amount to a punishment. The fine of Rs. 5000 considering that the accused was a substantial contractor was no punishment to him."

[5] True, at the time, the judgment was delivered, the Indian Constitution had not come into force, but I do not think this reasoning would make any difference. Though it was not embodied in any written constitution before, equality of man in the eye of law was always fundamental in administration of justice. It is a rule of natural justice on which all laws are based.

[6] We are also, with great respect, in entire agreement with the decision of his Lordship Sir Iqbal Ahmad C. J. in which he lays down certain principles bearing on the manner of imposing punishment. I would quote the passage :

"The main, indeed the only function of law is the preservation of society. The merits of law or a particular enactment are judged by the contribution it makes to the development of a healthy society. The 'social conscience' is the ultimate forum to pass the final verdict on its value or utility. Every piece of legislation is judged by the above standard. If & in so far as it makes the preservation of solidarity of the society or the State, it receives the approbation of 'social conscience.' If otherwise, it is condemned."

The same thing can be said of administration of justice.

[7] The observations in our judgment to the effect that

"The Allahabad case on which the learned Ses. J. has relied was decided more than 17 years ago & since then conditions have changed considerably. Drastic laws for the prevention of corruption amongst public official have been enacted by the Legislature & provisions have been made for passing deterrent sentences on corrupt officials."

were made by way of reply to the argument put forth by the learned counsel for lighter punishment based on the reasoning adopted by the learned Judges in the reported decision of *Emperor* v. *Dinkarrao*, 55 ALL. 654 : (A. I. R. (20) 1933 ALL. 513 : 34 Cr. L. J. 623). We must congratulate Mr. Mohanty that he has left no stone unturned to support his client's case. He has been fair & candid in citing to us the authority of the later Allahabad case which gives ample support to the view that we have taken.

[8] With regard to the decision in the earlier Allahabad case, it is regrettable that it was cited before the Ses. J. & also before us notwithstanding that its roll as a precedent has been considerably shaken. In his judgment, his Lordship Malik J. (as he then was) has observed, with reference to that decision (reported in *Emperor* v. *Dinkarrao*, 55 ALL. 654 : (A. I. R. (20) 1933 ALL. 513 : 34 Cr. L. J. 623), that it will not serve as a general rule in the matter of assessment of sentences. I would quote his Lordship :

"The learned Advocate-General has argued that the decision in *Emperor* v. *Dinkar Rao*, 55 All. 654 : (A. I. R. (20) 1933 All. 513 : 34 Cr. L. J. 623) is taken by the subordinate Cts. as of general authority & we must lay down that mere fact that trap was laid for the accused should not be any ground for awarding a lighter sentence. *I may, however, point out that the question of sentence must in each case depend upon a variety of considerations & is a matter primarily in the discretion of the Ct. which passes the sentence.* This Ct. in passing the sentence of a nominal fine in *Emperor* v. *Dinkar Rao*, 55 All. 654 : (A. I. R. (20) 1933 All. 513 : 34 Cr. L. J. 623) did so in view of the facts of that case & never intended to lay down any general principles in the matter of awarding sentences in cases of bribery . . . & all that I need say is that this Ct. did not when deciding the case in *Emperor* v. *Dinkar Rao*, 55 All. 654 : (A. I. R (20) 1933 All. 513: 34 Cr. L. J. 623) intend to fetter the discretion of the lower Cts. in any manner as to the adequate sentence to be passed in cases of abetment of bribery."

[9] Further argument that has been put forth by Mr. Mohanty is based upon an observation quoted from the authority of the I. P. C. The passage reads :

"The person, who, without any demand express or implied on the part of the public servant, volunteers an offer of a bribe, & induces that public servant to accept it, will be punishable under the general rule (law of abetment) . . . as an instigator. But the person who complies with a demand, however signified, on the part of a public servant, cannot be considered as guilty of instigating that public servant to receive a bribe. We do not propose that such a person shall be liable to any punishment . . . We are strongly of opinion that it would be unjust & cruel to punish the giving of a bribe in any case in which it could not be proved that the giver had really by his instigations corrupted the virtue of a public servant, who, unless temptation had been put in his way, would have acted uprightly."

This passage, however, has absolutely no application to the present case. It is difficult to understand why this passage is cited from time to time which is, if at all, only relevant for the purpose of establishing whether man is guilty or not. Whatever the authors might have intended will not prevent us either from punishing a man or when punishing to sentence him properly if the section itself permits. The Legislature has laid down the quantum of punishment that has to be inflicted for the particular offence. The difference of sentences for the same offence in different cases depends upon the

various other considerations which are special to each particular case.

[10] We are, therefore, of opinion that this is not a fit case in which we would grant leave to appeal to the S. C. The petn. is, therefore, rejected.

[11] **Narsimham J.** — I agree.

V.B.B. *Leave refused.*

A. I. R. (38) 1951 Orissa 261 *[C. N. 62.]*

RAY C. J. & NARASIMHAM J.

Bana Behera & others—Appellants v. *The State of Orissa.*

Supreme Court Appeal No. 12 of 1950, D/- 18-9-1950.

Constitution of India, Art. 134 (1) (c) — Criminal case — Leave to appeal to S. C.—Principles enunciated by S. C. in A. I. R. 1950 S. C. 162 in granting special leave under Art. 136 are equally applicable when leave to appeal is sought under Art. 134 (1) (c)—H. C. will refuse to grant leave unless special circumstances are shown to exist. [Paras 2, 3]

M. Mohanti & V. Pasayat—for Applts; Advocate General—for the State.

Ray C. J.—This is an appln. by the accused persons under Art. 134 (1) (c) of the Constitution invoking our jurisdiction to certify that the criminal case in which they have been convicted is a fit one for appeal to the S. C. The learned counsel, in substance argues that the subtleties that once arose for consideration in the matter of special leave to appeal in criminal cases to the P. C. ought not to arise in the case of leave to appeal to the S. C. His contention is that unlike the Judicial Committee of the P. C. the S. C. is a Ct. of Appeal within the meaning of the said Art. 134 (1) (a) & (b). Under the circumstances, he would argue that more liberalised consideration ought to apply.

[2] Bound as we are by the decisions of the S. C. in this matter, we cannot find our way to concede to this contention. We should invite attention to a recent decision of the S. C. in the case of *Pritims Singh* v. *The State*, A. I. R. (37) 1950 S. C. 169 : (51 Cr. L. J. 1270). There Fazl Ali J. while agreeing with a similar contention in its broad outlines, has expressed himself in the following passage namely:

"Though the S. C. is not bound to follow the decisions of the P. C. too rigidly since the reasons, constitutional & administrative, which sometimes weighed with the P. C. need not weigh with the S. C. it was necessary that an uniform standard should be laid down in matters of special leave under Art. 136 of the Constitution."

His Lordship has said :

"On a careful examination of Art. 136 along with the preceding Article, it seems clear that the wide discretionary power with which this Ct. is invested under it is to be exercised sparingly & in exceptional cases only, & so far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this Article. By virtue of this Article, we can grant special leave in civil cases, in criminal cases, in income tax cases, in cases which come up before different kinds of tribunals & in a variety of other cases. The only uniform standard which in our opinion can be laid down in the circumstances is that Ct. should grant special leave to appeal in those cases where special circumstances are shown to exist."

Besides, his Lordship has further said that some of the principles laid down by their Lordships of the P. C. are useful as furnishing in many cases a sound basis for invoking the discretion of this Ct. in granting special leave. He has been very particular to point out that leave should not be granted in a case which when entertained will constitute the S. C. a third Ct. of fact. We have examined the circumstances in this case in the light of these principles as enunciated by his Lordship and we do not find that there is any special feature in this case which will entitle us to certify that this is a fit case for appeal. There is not much dispute about the finding of facts which have been very carefully considered & arrived at. The case does not present either complexity of law or of fact, or, in short, there are no such special features, as are required, according to his Lordship, in the present case.

[3] Mr. Mohanty, learned counsel for the applts. urges that the test laid down by his Lordship applies in case the case comes under Art. 136 of the Constitution, that is to say, in a case where special leave to appeal is prayed for in the S. C. & as such, it is not applicable to the case before us which is one under Art. 134 (1) (c). I do not find any merit in this distinction. His Lordship has said :

"The assumption that once an appeal has been admitted by special leave, the entire case is at large & the applt. is free to contest all the findings of fact & raise every point which could be raised in the H. C. or the trial Ct. is entirely unwarranted. Only those points can be urged at the final hearing of the appeal before the S. C. which are fit to be urged at the preliminary stage when leave to appeal is asked for, & it would be illogical to adopt different standards at two different stages of the same case."

[4] Suppose, we concede to Mr. Mohanty's argument & we apply a different standard & certify the case as fit one for leave to appeal which at the same time does not fit in with the test laid down by his Lordship. The position would necessarily arise that our jurisdiction will be greater than that of the S. C. This is a contention, if accepted, will land us in absurdity. The hearing of the appeal must be confined to those circumstances which could be urged before them at the stage of the preliminary hearing of the case in which special leave had been granted. So far as the final

hearing is concerned, two different standards cannot be laid down. In the circumstances, this petn. must be dismissed.

[5] **Narsimham J.**— I agree.

K.S. *Petition dismissed.*

A. I. R. (38) 1951 Orissa 262 *[C. N. 63.]*

PANIGRAHI J.

Banamali Behera & others — *Applts.* v. *Padmalabha Misra*—*Resp.*

Second Appeal No. 48 of 1949, D/-3-10-1950.

(a) Evidence Act (1872), S. 90 — Old documents, are not necessarily presumed to be correct — Scope of S. 90.

No presumption of correctness need necessarily attach to documents which purport to be 30 years old. All that S. 90 lays down is that a Ct. may presume that such documents have been written or attested by the person who purports to have written or attested them Where the writer of the documents was alive & yet he was not called into the box to prove them, the mere production of them without anything more cannot carry the case of the person relying on them very far. [Para 6]

Anno. Evidence Act, S 90, N. 6.

(b) Evidence Act (1872), S. 35 — Rent realised shown in current settlement — Entry cannot be outweighed by rent receipts purporting to show different amount.

The mere fact that the entry in the rent receipts purported to show that a higher rent was realised cannot outweigh the value to be attached to the Current Settlement entry which definitely shows that a certain sum was being realised as the annual rent on the holding. [Para 6]

Anno. Evid. Act, S. 35, N. 19.

(c) Evidence Act (1872), Ss. 101-103—Ejectment suit — Nature of tenancy—Burden of proof.

In a suit for ejectment, the burden is heavily upon the pltf. to prove the nature of tenancy of the defts & he cannot make out his title on the failure of the defts. to establish affirmatively that they have been paying rent at a uniform rate though that is no doubt a material element in ascertaining the character of their tenancy especially when they had set up a permanent title. [Para 7]

Anno. Evid. Act, Ss. 101, 103, N. 30, 37; T. P. Act, S. 105, N. 43.

(d) Tenancy Laws —Orissa Tenancy Act (II [2] of 1913) — Lease held agricultural one & governed by Tenancy Law & not by T. P. Act — T. P. Act (1882), S. 117.

A deed evidencing a sale of Mafi Kharidar & Lakhrajbajiaftidari lands recited that the purchaser could cultivate them himself or get them cultivated by others; the holding was agricultural land at the time of the sale & was recorded as agricultural land & the rent for the lands came to be settled as if they were agricultural holdings. The status of the defts. whose house stood on the holding was shown as that of occupancy raiyats while that of the purchaser as an intermediate tenure holder:

Held that the lease to the defts. was agricultural lease, even if it was granted originally for purposes of putting up a building thereon. The way in which such holdings had been treated during Settlement operations showed that the status given to pattadars, dar-pattadars, & dar dar-pattadars, was very much like that of 'chandana' holdings. For the purposes of the Tenancy Act they had been treated as if they were agricultural holdings & the purpose of the lease was agricultural. The fact that the suit land along with other situated in a temporarily settled area was surveyed & the rents settled would show that the relations between the parties were governed by the provisions of the Orissa Tenancy Act; and as the local legislation regulates the relations between landlord & tenant the T. P. Act did not apply. [Para 8]

Anno. T. P Act, S. 105, N. 49; S. 117, N 3.

(e) T. P. Act (1882), S. 106 —Annual rent fixed— Building on land — Tenancy is not from month to month.

It would be anomalous to hold that where the rent fixed is annual the tenancy is from month to month merely because a house stands upon the holding. [Para 9]

Anno. T. P. Act, S. 106, N. 15 & 16.

(f) T. P. Act (1882), S. 106 —Lease on annual rent —No registered document —Tenant is tenant at will —Tenancy commencing from before T. P. Act —Tenancy is not tenancy at will. [Para 9]

Anno. T P. Act, S. 105, N. 32; S. 106, N. 6.

(g) T. P Act (1882), S. 106 — Tenant in possession for 70 years paying uniform rent —Apart from question of nature of tenancy whether agricultural or not, tenancy cannot be terminated without proper & reasonable notice.

Where the tenants have put up a dwelling house & have been proved to have remained in occupation of the land for as long as 70 years, paying a uniform annual rent, the tenancy cannot be terminated without a reasonable notice being served on them, whether the tenancy is agricultural or not. A notice not signed either by the lessor or his agent is of no value. [Para 10]

Anno. T. P. Act, S. 106, N. 19.

(h) Tenancy laws—Orissa Tenancy Act (II [2] of 1913), as amended by Act (X [10] of 1946), S. 236— Section is retrospective.

Section 236, Orissa Tenancy Act, as amended by Act X [10] of 1946 is retrospective in its operation & whatever might have been the position before the Act came into force, the Legislature has clearly conferred the status of permanency in their holdings, on all tenants of homesteads. It does not matter whether the holding was, at its inception, agricultural or otherwise. For the purpose of the Act, all homestead tenancies are put on the same footing as agricultural tenancies & the relations between the landlord & tenant which had formerly been regulated by custom & usage have been declared to be regulated by the law applicable to occupancy raiyats. The tenants will be protected from eviction where they have acquired the status of occupancy raiyats under the Amending Act X [10] of 1946. [Para 11]

S. N. Das Gupta—for Aplts.; *S. K. De & D. S. Das —for Resp.*

Judgment. — It is not necessary to reserve judgment & keep back my decision from the parties in this case. The facts giving rise to the appeal are simple but the law argued at the Bar is not as simple.

[2] The pltf.-resp. filed a suit in ejectment— out of which this appeal arises—in respect of an extent of 136 cf. an acre in C. S. Plot No. 2007 in Cuttack Town, against the defts. alleging that they were darpattadars under him in respect of this property. The pltf. served a notice

to quit on 19-4-46 & filed the suit a month later. His case was that the deft. is a tenant-at-will & is liable to be evicted at any time. The deft. pleaded that he had a house on the suit holding for at least 70 years & had acquired permanent occupancy right in the land, that the notice to quit was neither proper nor duly served upon him, & that he is protected from eviction by virtue of the recent amendment to S. 236, Orissa Tenancy Act, by Act X (10 of 1946. Exhibit A, the Current Settlement Khatian shows that the status of the deft in respect of the suit land is that of a dar-pattadar & that of the pltf. Madhyasatvadhikari.

[3] The learned Munsif found that the origin of the tenancy was not known but that the deft. had been in occupation of the land for over 70 years. He also found that the original lease was for building purposes & that it contained permanent structures, that the defts had been in possession from father to son for three gene rations, paying a uniform rent throughout. He further found that the documents relied on by the pltf. did not prove that there was any variation in the amount of rent paid & also observed that he was not inclined to place much reliance on the genuineness of the rent receipts. The learned Munsif recorded a further finding that the notice to quit (Ex. 3) was invalid as it had not been signed by or on behalf of the pltf. The pltf's suit was accordingly dismissed.

[4] On appeal the Addl. Subordinate Judge differed from the finding of the trial Ct that the defts. had acquired a right of occupancy on a permanent basis. In his view the rent had varied at different times, there was no evidence to prove payment of a uniform rent & no formal notice to quit was necessary He accordingly allowed the pltf's appeal & gave a decree in his favour.

[5] In second appeal it is urged for the defts. firstly, that the lower appellate Ct. erred in appreciating the evidentiary value to be attached to Ex. 2 & 2-a, Exs. 5 series & Ex. 6 & that the correct inference to be drawn from these documents ought to have been that the pltf had failed to prove that there had been a variation in the rent paid; secondly that the holding was an agricultural holding, to start with, & though the lease of a portion of the holding was for residential purposes the lease itself should have been deemed to be a lease of agricultural land only &, as such governed by the provisions of the Orissa Tenancy Act; and thirdly that the recent amendment to S. 236 of the Act, by Act X [10] of 1946 affords protection to all tenants of homesteads irrespective of the nature of the holding.

[6] So far appreciation of the documentary evidence is concerned it is pointed out by Mr. Das, learned counsel for the pltf., that the finding recorded by the Ct. below is conclusive & is not open to challenge in second appeal. The documents relied on by the pltf. are Exs. 2 & 2/a, being counterfoils of certain rent receipts, Exs. 5, 5/c, being wasilbaki papers, & Ex. 6, the rafa book. The trial Ct critically examined these papers & particularly the manner of their production which seemed suspicious, & held that the father of the plts. was realising a rent of Rs. 2 uniformly. With regard to Exs. 5, 5/b & 5/c, the trial Ct. particularly noticed that the rent of Rs. 2/4 shown therein appertained to 15 decimals of land—a fact which appears to have been ignored by the lower appellate Ct The lower appellate Ct appears to have proceeded on an assumption that the entries in all these documents, purporting to be thirty years old, must necessarily be correct. No such presumption need necessarily attach to old documents. All that S. 90, Evidence Act, lays down is that a Ct. may presume that such documents have been written or attested by the person who purports to have written or attested them. In this case, as the trial Ct. has observed, the writer of these papers was alive & yet he was not called into the box to prove these papers. With regard to Exs. 2 & 2/a, which purport to show that a sum of Rs. 2/8/0 was paid by the defts through one Bhagwan Mohanty an agent of pltf., they, too, have not been properly proved as the agent was not examined. Mere production of these documents without anything more cannot therefore carry the case of the pltf. very far. The lower appellate Ct. appears to have ignored this aspect of the matter & assumed that the mere production of these documents, purporting to be thirty years old, is sufficient proof of the correctness of the contents thereof. I am not satisfied that the assessment of the evidentiary value of these documents by the lower appellate Ct. is altogether satisfactory. I have myself gone through documents & find that they are not above suspicion or challenge. In any case, the mere fact that the entry in these papers purported to show that a higher rent was realised cannot outweigh the value to be attached to the Current Settlement entry, as evidenced by Ex. A which definitely shows that a sum of Rs. 2 was being realised as the annual rent on the holding. In the circumstances it must be held that there was no variation in the rent paid as alleged by the pltf. Some argument seems to have been addressed challenging the validity of the entry in Ex. A, on the ground of absence of any entry against the item "Settled Rent" in that document. I can find no difficulty in under-

standing the reason for the non-mention of the settled rent in this case, because it had already been settled between the parties at Rs. 2 & in the case of such tenancies it was not necessary for the Settlement Office to fix a separate rent unless the parties themselves challenged it & wanted him to fix a fair & equitable rent. The presumption attaching to the correctness of the entry in Ex. A has not been rebutted by such evidence to the contrary as can be accepted as wholly reliable.

[7] The lower appellate Ct. confined itself to a discussion of the rate of rent only as the other points found in favour of the defts. were not seriously challenged in appeal. Mr. De points out that the presumption attaching to the entry in the Court (current ?) Settlement Record cannot apply to a non-agricultural holding. That is a perfectly sound proposition. But it is not admitted in this case that the plot in dispute is a non-agricultural holding. I shall refer to this point later. The lower appellate Ct. did not attach value to Ex. 4, M. O. acknowledgment showing receipt of Rs. 6 from the defts. towards rent of the years 1943 to 1945, on the erroneous impression that only production of rent receipts is proof of payment of rent. Exhibits 2/a & 2/b were accepted at their face value because the defts. called for the rent receipts in the possession of the pltf. Exhibits 5, 5/b & 5/c & 6 were accepted & the entries therein were used in proof of the payment of rent because the documents were thirty years old. But, as I have said earlier, the fact that the entries in Ex. 5 series related to 15 decimals of land was lost sight of. These documents were produced by P. W. 2 although he had not been summoned, & appear to have been almost thrust upon the defts. The learned lower appellate Ct. seems to have laboured under the impression that unless the defts. produced the rent receipts, their case of payment of a uniform rent could not be accepted. This is not the correct way to approach the question. The pltf. having come to Ct. to eject, it was heavily upon him to prove the nature of tenancy of the defts. & he cannot make out his title on the failure of the defts. to establish affirmatively that they have been paying rent at a uniform rate though that is no doubt a material element in ascertaining the character of their tenancy especially when they had set up a permanent title. I am, therefore, unable to accept the finding of the learned Subordinate Judge that the rent paid in respect of the suit holding was variable, & am inclined to agree with the finding of the learned Munsif that a uniform rent of Rs. 2 per year had been paid by the defts. & their ancestors as shown in Ex. A.

[8] The next point urged is whether this is a lease governed by the provisions of the Orissa Tenancy Act or whether it is governed by those of the T. P. Act. Exhibit 1, dated 14-3-1916 filed by the pltf. shows that he purchased under it 8 & odd acres of Mafi-Kharida lands & 2 acres of Lakhrajbajiaftidari lands. All these were agricultural lands at the time of purchase. The sale deed Ex. 1 recites that the lands were sold & that the purchaser could cultivate them himself or get them cultivated by others. The holding on which the deft.'s house stands was, therefore, agricultural land at the time of the sale in 1916 & was recorded as agricultural land. Accordingly, the rent for the lands came to be settled as if they were agricultural holdings, & the status of the defts. was shown as that of occupancy raiyats while that of the pltf. as an intermediate tenure-holder. The contention put forward on behalf of the pltf. is that if the lease was granted not for agricultural purposes but for other purposes like the putting up of a building on the land, the lease would be governed by the T. P. Act & not by the Orissa Tenancy Act the land having ceased to be agricultural land. There is, however, authority for the contrary view : see *Asraf Ali* v. *Emperor*, 27 I. C. 839 : (A.I.R. (2) 1915 Cal. 784 : 16 Cr. L. J. 215), *Abdul Karim* v. *Abdul Rahman*, 13 I. C. 364 : (15 Cr. L. J. 672), *Babu Ram* v. *Mahindra Nath*, 8 C. W. N. 454 and *Ram Pado* v. *Atore Dome*, A. I. R. (12) 1925 Cal. 202 : (84 I. C. 743). The way in which such holdings have been treated during settlement operations makes me think that the status given to pattadars, darpattadars & dar-darpattadars, is very much like that of 'chandna' holdings. For the purposes of the Tenancy Act they have been treated as if they were agricultural holdings & the purpose of the lease is agricultural. The fact that the suit land along with other situated in a temporarily settled area was surveyed & the rents settled would show that the relations between the parties are governed by the provisions of the Orissa Tenancy Act; and as the local legislation regulates the relations between landlord & tenant the T. P. Act would not apply.

[9] Even if the contention of Mr. De were to prevail, the tenancy of the defts. would be a lease from year to year as the rent reserved is annual; and it would be anomalous to hold that though the rent fixed is annual the tenancy is from month to month merely because a house stands upon the holding. Mr. De's contention is that if the lease is held to be governed by the T. P. Act the status of the tenant is no better than that of a tenant-at-will. There is considerable force in this argument because admittedly there is no registered document evi-

dencing the lease; but it is for the pltf. himself who wants to eject, to show that the tenancy commenced after the T. P. Act came into force. On the other side, it is argued that in view of the finding of the learned Munsif that the tenancy has been in existence for at least 70 years the legitimate inference should be that the land was granted for building purposes, prior to the passing of the T. P. Act.

[10] There is, however, yet another difficulty in the way of the pltf. Even if his contention were to be accepted, namely, that the tenancy is not of a permanent character, but is only that of a tenancy-at-will in the absence of a contract to the contrary, the pltf. before terminating the tenancy under the T. P. Act, should serve a proper notice to quit on the deft. It may be that a formal notice may not be necessary if the demand for possession is made & reliance is placed by Mr. De on the case *Ramkishun* v. *Bibi Sohila*, A. I. R. (20) 1933 Pat. 561 : (145 I. C. 567) which follows *Ramdhani Gope* v. *C. V. Scott*, A. I. R. (12) 1925 Pat. 256 : (85 I. C. 77) for the view that no notice is necessary in the case of a tenant-at-will. The decision in the latter case turned upon the construction of the document which itself stipulated that no notice would be required before termination. That decision must, therefore, be confined to the facts of that particular case & cannot lend support to the view that in every case of a tenant at will the landlord can straightway re-enter without even making a demand for possession. In cases like the present, where the defts. have put up a dwelling house & have been proved to have remained in occupation of the land for as long as 70 years, paying a uniform annual rent, the tenancy cannot, in my opinion, be terminated without a reasonable notice being served on them. Unfortunately for the pltf. though Ex. 3 purporting to be a notice was served on the deft., it was not signed either by the lessor or his agent, & therefore no value can be attached to this document. I looked for evidence on the side of the pltf. to see if any demand for possession was made but Mr. De has been unable to point to any such evidence. Apart from the fact, therefore, whether the tenancy is agricultural or not & whether it is governed by the Orissa Tenancy Act or the T. P. Act, the fact that no valid notice was served on the defts. would be sufficient to dispose of this suit.

[11] Another & more formidable argument has been addressed on behalf of the defts. & this is based on the applicability of S. 236, Orissa Tenancy Act, as amended by Act X [10] of 1946. That section is retrospective in its operation & will govern the facts of this case. It lays down that the incidents of tenancy of any tenant in respect of his homestead shall be regulated by the provisions of the Act applicable to occupancy raiyats. Whatever might have been the position before the Act came into force, the Legistature has clearly conferred the status of permanency in their holdings, on all tenants of homesteads. It does not matter whether the holding was, at its inception, agricultural or otherwise. For the purpose of the Act, all homestead tenancies are put on the same footing as agricultural tenancies & the relations between the landlord & tenant which had formerly been regulated by custom & usage have been declared to be regulated by the law applicable to occupancy raiyats. In this view of the matter, the defts. will be protected from eviction as they have acquired the status of occupancy raiyats under the Amendment Act X [10] of 1946.

[12] My conclusions, therefore, are that the tenancy of the defts. is governed by the provisions of the Orissa Tenancy Act, that they had a permanent tenancy right in the suit holding before the Amendment Act X [10] of 1946 came into force & that they have been given statutory protection subsequently, that the notice to quit purporting to have been served by the pltf. is of no effect & that the pltf. has not made out his case for ejecting the defts. The judgment of the learned Subordinate Judge is accordingly set aside & that of the learned Munsif restored & the pltf's suit shall stand dismissed. This appeal is allowed with costs throughout. Leave to appeal is granted.

R.G.D. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 265 *[C. N. 64.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Haribansha Singh Deo—Applt. v. *Sudhanshu Sekhar Singh Deo and others—Resps.*

F. A. Nos. 45 to 48 of 1948, D/-25-4-1950.

Court-fees Act (1870), S. 5 — Bench of Judges — Power to decide question of payment of deficit court-fees.

There is no provision in S. 5 for the determination of the question relating to the payment of deficit court-fee on a memorandum of appeal by a bench of the Court. The juxtaposition of the phrase "such Judge" with the phrase "Chief Justice" in that section indicates that single Judge is meant and that it can have no reference to a Bench of Judges. [Para 2]

Anno. C. F. Act, S. 5, N. 17.

P. Misra and L. K. Das Gupta — for Applt. (in Nos. 45 & 47 respectively); S. N. Sen Gupta—for Resps. (in both).

Jagannadhadas J.—These appeals have been posted before this Bench for orders in connection with the payment of alleged deficit court-fees payable by the respective appellants in each of the appeals. All these appeals have been

made analogous since they are against a common judgment in separate suits tried together. The alleged deficit court-fee payable is only in respect of the appeal memoranda to this Court. There is no question before us now of any deficit payable by any of the appellants in these appeals on their plaints in the trial Court.

[2] The question that has been raised is whether this Bench has the jurisdiction to deal with this matter. The determination of the proper court-fee payable on an appeal memorandum to the High Court is regulated by S. 5, Court-fees Act. Under that section, when a difference arises as to the court-fee payable, the question is to be determined primarily by the taxing officer of the High Court. The taxing officer under the said section may, in a proper case, refer the matter to the taxing Judge. There is no provision for the determination of the question by a Bench of the Court or by any other Judge of the Court, unless the Chief Justice constitutes that Judge as the taxing Judge specially for the particular matter or unless the Chief Justice chooses to deal with the matter himself. In *Deoji Goa* v. *Tricumji Jivandas*, A. I. R (22) 1935 Pat. 396 : (14 Pat. 658 S. B.), Wort J appears to have been of the opinion that the taxing officer had jurisdiction to refer a question arising under S. 5, Court-fees Act to a Bench. He relied on the argument that the section when it provides for reference to "such Judge" in the singular, contemplates the plural also. It appears to have been thought that the Chief Justice could appoint a Bench of two Judges "especially in this behalf to hear a particular matter" It appears to me, with great respect, that this argument is not sound as a matter of construction. The wording used in the section

"he shall refer it to the final decision of the Chief Justice or such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf."

It appears to me to be clear that the juxtaposition of the phrase "such Judge." with the phrase "Chief Justice" indicates that a single Judge is meant and that it can have no reference to a Bench of Judges. In the above reported case, the other two learned Judges have not in terms dealt with this point. On the other hand, there are quite a number of cases in which it has been repeatedly held that neither the taxing officer nor the taxing Judge has the power to refer a matter arising under S. 5, Court-fees Act to a Bench of the Court and that on a proper reference such a matter has to be decided only by the taxing Judge. It is sufficient to refer to the cases in *Kuldip Sahai* v. *Harihar Prasad*, A. I. R. (11) 1924 Pat. 161 : (3 Pat. 146), *Krishna Mohan Sinha* v. *Raghunandan Pandey*, A I. R. (12) 1925 Pat 392 : (4 Pat. 336 F. B), *Dhanukdhari Prashad* v. *Ramadhakari*, A. I. R. (20) 1933 Pat. 81 : (12 Pat. 188), *Khachera* v. *Kharag Singh* 33 ALL. 20 : (7 I. C. 315) and *Gangaram Tillockchand* v. *Chief Controlling Rev. Authority* A I. R (14) 1927 Bom. 643 : (52 Bom. 61) in support of the above view.

[3] We are therefore, of the opinion that this matter cannot be dealt with by us as a Bench. The matter will be placed before the taxing Judge for his decision and it is open to him to treat this as a reference by the taxing officer to the taxing Judge and deal with it accordingly.

[4] **Narasimham J.**—I agree.

V.S.B. *Order accordingly.*

A. I. R. (38) 1951 Orissa 266 *[C. N. 65.]*

RAY C. J. & PANIGRAHI J.

Ratnakar Ray & others — Petnrs. v. *Kulamoni Roy & others — Opposite Party.*

Civil Revn. No. 168 of 1948, D/-4-2-1949.

Civil P. C. (1908), O. 9, R. 9—Restoration appln. — Notices.

Where all the defts. had filed written statements but only some were contesting the suit, & there was no order for *ex parte* hearing against those not contesting, & on the date of the hearing the pltfs. not taking any further steps, the suit was dismissed under O. 9 R. 8, the Ct. must issue, upon an appln by the pltfs. under O. 9, R, 9, notices not only to the contesting defts. but also to those who were not contesting. If restoration were ordered after issuing notices only to those defts who were contesting, the order would be one passed in contravention of O. 9. R. 9 (2). [Paras 4 & 5]

Anno. Civil P C., O. 9, R. 9, N. 1.

D. Mohanty —for Petnrs; S. Misra — for Opposite Party.

Ray C. J. — This is a petn. by defts. 4 to 11 for revising an order passed by Munsif of Cuttack restoring a suit which had been dismissed under O. 9 R. 8, C. P. C. The suit was one for specific performance of contract of lease of some waste lands as well as Nijchas lands. The contract had been entered into by defts. 1 to 2, who admittedly are the proprietors. The contract is said to have been entered into on different dates (29-9-44 & 6-2 45) in respect of waste lands & Nijchas lands respectively. The defts. 1 & 2, however, executed a registered permanent lease in respect of the very same lands in favour of deft. 3 on 4-8-45 The latter about two years after his lease sold his lease-hold interest to defts. 4 to 12 of whom defts 4 to 11 are the petnrs. before us. Admittedly, defts 4 to 12 were actively contesting the suit. The position in relation to the other defts. is that defts. 1 to 2 filed a written statement alleging that as the plff. had failed to pay the promised consideration, they were at liberty

to grant the subsequent lease in favour of deft. 3. The deft. 3 filed a written statement opposing the pltfs.' case & asserting the validity of his lease free from equity in favour of any contract alleged by the pltfs. & his right to transfer to the defts. 4 to 12. The defts. 1 to 3 did not consider it necessary to take any further steps in support of their defence & what course they were likely to take at the hearing of the suit is difficult to speculate. One thing, however, is certain that the Ct. never considered that these defts. had withdrawn from the contest. It appears to be so from the fact, as it is conceded at the Bar, that the Ct. never set down the suit as ex parte against those defts. In law therefore, anyone of them or all could come & appear at any time in course of the hearing & contest the suit. They might or might not have the necessity for summoning any witnesses or producing any documents. On the date of hearing the pltfs. as well as defts. 4 to 12 filed petns. for adjournments. The Ct. rejected the prayers of both & called upon them to take further steps in the suit. Following this order, defts. 4 to 11 intimated their readiness to go on with their defence & filed Hazira of their witnesses. The pltfs., however, did not take any further steps. Under the circumstances, the Munsif dismissed the suit under O. 9 R. 8, C.P.C. Then followed an appln. under O. 9, R. 9 for restoration of the suit to its orginal file. This petition was registered as Misc Case. No. 24/48. On a date later than it was registered, the 2nd Addl. Munsif, Cuttack, passed this queer & unusual order :

"Requisites filed. Issue notice on the contesting Opp. Parties 4 to 11 fixing 27-4-48 for return."

overriding the earlier order to issue notice to all opposite parties. According to this order, notices of the petn. for restoration were issued & served upon defts. 4 to 11. Accordingly, no notices were issued to defts. 1, 2, 3 & 12. The petn. therefore, was heard in presence of those defts. only & was allowed. As against this, the present revn. has been filed.

[2] The contention of Mr. Mohanti, the learned counsel for the petnrs., is that the proceeding is illegal & the order invalid, in as much as, as required under O. 9 R. 9 (2) that no such order of restoration can be made until notices of the appln. had been served on all the opposite parties. From the petn. for restoration it appears that all the defts. in the suit had been arraigned as opposite parties. It is difficult to understand how could the learned Munsif at that stage discriminate some of the opposite parties as against the others on the ground that some were contesting & others not. It appears that this Order No. 44 dated 6-4-48 in Misc. Case. No. 24/48, is to the order of the pltfs. but not as required by law we take a serious notice of this sort of order which implies nothing but slackness & negligence on the part of the Presiding Officer as well as of the Bench Clerk concerned.

[3] We have now to consider whether this omission invalidates the order. Mr. Misra, appearing for the opposite parties, has invited our attention to two decisions, one of Allahabad H. C. & the other of Bombay H. C., in support of his contention that the order was partly under O. 9, R. 3 & partly under O. 9, R. 8 according as it was against non-appearing defts. & the appearing ones. Those cases do, no doubt, spilt the order in that fashion. The references are *Makundi Singh* v *Prabhu Dayal*, A. I. R. (13) 1926 ALL. 169 : (48 ALL. 97) and *Damu Diga* v *Vakrya Nathu*, A I R (7) 1920 Bom. 54 : (44 Bom. 767). Those cases, however, do not relate to a proceeding for restoration of the dismissed suit but concern with right to fresh suit on the same cause of action against those defts who did not appear on the date of hearing of the previous suit. As the point as was considered by their Lordships, is not before us, I should reserve my opinion with regard to the correctness of these decisions with great respect for an occasion when it arises.

[4] So far as the present order is concerned, it is clear, however, that there is nothing to show that defts. 1, 2, 3 & 12 did not appear on the date fixed. It is conceded by Mr. Misra frankly enough that very rightly as it appears from the materials that defts. 1, 2, 3 & 12 were not called out by the Ct. at the time when the suit was taken up for hearing. In these circumstances, it is difficult to say that they did not appear. Besides the statement of Mr. Misra we do not find anything on record to show that these defts. had been called upon & that either they did not respond or refused to take any steps in the case or anything of the kind. Appearance does not mean physical appearance by the defts. themselves or their pleader If appearance had any meaning it is this that the party concerned must be in readiness to see to the progress of the suit or the defence in such a manner as he thinks best in his own interest. The defts. may have nothing further to do according to their particular line of defence until the actual hearing of the suit begins which in fact had never begun. As I have already said that to the knowledge of the Ct these defts. had never been set down *ex parte*. Under the circumstances & on the facts it is not clear that the order of dismissal as against these defts. can be taken to be one under O. 9, R. 3. Conceding that this order was against them as one under O. 9, R. 3, the pltfs. must make it clear whether they want to have the order of restoration

effectively passed against them. That they do so want appears from their own petn. in which they implead them as opposite parties. If the suit had not been set down *ex parte* against them & if they were going to be bound by the order of restoration that had been passed, I do not understand how any order affecting them could be passed in their absence. Some support is prayed in aid from the absence of a provision in the terms or the like of sub-r (2) of R. 9 of the Order from R. 4. But that does not necessarily mean that in any default under O. 9, R. 3 restoration can be had in the absence of the opposite parties. There may be a case in which deft. has not at all appeared or having appeared has not filed any defence. In such cases it is quite possible that the Ct. in its discretion, may say that no notice is necessary to be served upon him in the matter of restoration, as he must be served again after the suit is restored to its file. But what about the case in which the deft. had entered into contest, & had put the pltf. to proof of his case? In these cases certainly the dismissal of the pltf's suit, be it under whatever provision of the Code, gives rise to a valuable right in his favour. It is difficult to conceive that they can be deprived of that right without being heard. It may be said even without restoration the pltf. has a right to fresh suit on the same cause of action. It may be so, but that does not answer the deft's cause. It may be for the purpose of a fresh suit lot of moneys is necessary by way of payment of court-fees and the pltf. may not be able to institute a fresh suit. There is always many a slip between cup & lip. Under the circumstances, the right to prevent restoration of the suit is no doubt a valuable right.

[5] In the circumstances, it is clear that the order under revn. has been passed in contravention of O. 9, R. 9 (2) of the Code & cannot be maintained.

[6] In the result, the civil revn. is allowed with costs. Hearing fee is assessed at one gold mohur.

[7] Under the circumstances, the petn. for restoration should be reheard after notice to all the defts.

[8] **Panigrahi J.**—I agree.

R.G.D. *Revision allowed.*

A. I. R. (38) 1951 Orissa 268 *[C. N. 66.]*

JAGANNADHADAS & NARASIMHAM JJ.

Krishna Chandra Gajapati Narayan Deo — Pltf. — Applt. v. *Rokkam Venkatapparao Dora—Deft.—Resp.*

Second Appeal No. 153 of 1944, D/- 10-1-1949.

Madras Survey & Boundaries Act (VIII [8] of 1923), Ss. 13 & 14 — Rival claims to plot of land—Effect.

The question as to whether the determination of the boundary of a village (whether a boundary dispute existed or not) under S. 13, Madras Survey & Boundaries Act, 1923, will affect title to a piece of land lying within the said boundary, would depend very much on the nature of the claim to that land & the questions that fall for decision before the Survey Officer. For instance, if the claim to a particular plot of land is itself based on the ground that it lies in a particular village belonging to one of the parties & the Survey Officer while determining the boundary holds that the plot lies in the adjacent village, such determination of the boundary, unless set aside by a suit under S. 14 of that Act, would undoubtedly conclude title in respect of that plot. But where the rival claim regarding title to a plot of land is confined to the question whether it is the Inam land of one of the parties or the Jeroyati land of the other, & has nothing to do with the question as to whether the plot lies within the boundary of one village or of the adjacent village, the dispute merely relates to the title of the plot in dispute as distinguished from a dispute as to its boundary. In such a case the decision under S. 13 will not adversely affect the title (if any) or operate as a bar merely because there has been no suit to set aside the decision under S. 14. [Para 12]

M. S. Rao—for Applt.; *P. V. B. Rao—for Resp.*

Narasimham J.—This is the pltf's second appeal against the order of the Dist. J. of Ganjam Puri reversing the decision of the Special Deputy Collector, Chicacole Division & dismissing the pltf's suit for recovery of arrears of rent for the three Fasli years 1342 to 1344.

[2] This litigation has had a chequered career. The pltf's suit was brought in 1936 & it was first dismissed by the then Deputy Collector on 27-10-1937 in S. S. NO. 752 of 1936. On appeal, the Dist. J. set aside the order of dismissal & remanded the suit for fresh disposal. The suit was then heard by a Special Deputy Collector who decreed the claim. On appeal, the learned Dist. J: revsd. the decision of the Special Deputy Collector & dismissed the suit. Thereupon, the pltf. preferred a second appeal to the Hon'ble H. C. who directed the rehearing of the appeal by the Dist. J. on the ground that the lower appellate Ct. misconcieved the scope of the previous litigation between the parties in the year 1902. After remand, the lower appellate Ct. again dismissed the suit chiefly on the ground that the decision in O. S. NO. 23 of 1902 operated as *res judicata* between the parties. This appeal is against that order of dismissal of the lower appellate Ct.

[3] In the plaint it was stated that the lands for which the rent was claimed were lying in Gorrebanda village & that they were about 20 acres in extent. The Zamidar (the pltf-applt.) claimed the lands as part of his jeroyati lands in village Gorrebanda. It is the admitted case of both the parties that a major portion of the

lands in that village are the inam lands of the resp. for which he was paying Kattubadi of Rs. 55 per annum to the Zamindar. The resp's main defence was that the lands in dispute were also included in his inam lands in that village & that consequently the applt. was not entitled to any jeroyati rent apart from the Kattubadi of Rs. 55 per annum.

[4] Sometime in 1934 the applt. applied to the Revenue authorities for the survey & preparation of record of rights of some jeroyati lands which (according to him) were lying unsurveyed in some villages of the estate. Along with that appln. (Ex. H), he gave a list of the lands (Ex. H-1) proposed to be surveyed, including in that list about 34.50 acres of land which were said to lie *near* Gurrebanda village. The survey of these lands was sanctioned by Govt. & it has been well proved that the survey authorities included the said lands in village Thammayapetta which is adjacent north of Gurrebanda. A notice under S. 13, Madras Survey & Boundaries Act, 1923 (Ex. H-3) was also issued by the survey authorities on 27-3-1936. It appears that while the survey operations were proceeding the resp. filed an objection urging that the said lands formed part of his inam lands. But on 29-5-1935 an intimation was given to him by the survey authorities (Ex. X-a) to the effect that as the survey would be subsequently followed by a record of rights the question of title would be decided by the Record of Rights Officer. Apparently on receipt of this reassuring letter, the respt. did not pursue his objection & allowed the survey to be completed in the usual course. Subsequently, when the preparation of record of rights was in progress he filed an objection before the Settlement Officer claiming the lands as part of his inam lands in village Gurrebanda. This objection was disallowed by the Settlement Officer on 12-5-1938 (Ex. T). It will be noticed that these proceedings took place while the present suit under appeal was pending. The final publication of the record of rights was, however, posponed pending the disposal of this litigation (*vide* Ex. XII).

[5] The learned trial Ct. came to a finding to the effect that the lands in dispute were part of the jeroyati lands of the Zamindar & not part of the inam lands of the resp. His finding was mainly based on some documents of the Zamindar showing realisation of jeroyati rent in Gurrebanda village from 1884 & also some documents Exs. E. 2, B-1, R. 2 & E-1) signed by the resp's father himself showing payment of rent for jeroyati lands as distinct from payment of Kattubadi for the inam lands. In setting aside this decision of the trial Ct, the learned Dist. J. has been mainly influenced by the decision of the H. Ct. in Appl. No. 182 of 1903 against the decision of the lower Ct. in O. S. No. 23 of 1902. He further observed that the pltf-applt. had given discrepant statements as regards the area & identity of the lands & that the plaint was liable to be rejected on the ground of indistinctness.

[6] MR. M. S. Rao on behalf of the applt. raised the following two important questions of law: (i) The lower appellate Ct. completely misconceived the effect of the decision in O. S. No. 23 of 1902 & that the decision in that suit would not, in any way, affect the right of the pltf. to claim arrear rent for the lands in dispute. (ii) The lower appellate Ct. further erred in its interpretation of S. 13, Madras Survey & Boundaries Act, 1923 & that the said section operates as a complete bar to the resp's claim of the disputed lands as part of his inam lands of village Gurrebanda.

[7] *Point No. (i)*—The plaint & the judgment of the H. Ct. in O. S. No. 23 of 1902 have been proved in this case (Exs. VIII, VIII a & XI) & they show unmistakably that in 1902 the then Maharaja of Parlakhimedi instituted a suit against the father of the resp. for resumption of the inam lands in village Gurrebanda. In the sch. attached to the plaint (Ex. VIII-a) it was clearly stated that the whole of village Gurrebanda excluding some Kheta Banjar lands were the inam lands. That suit was dismissed by the H. Ct. in 1907 (Ex. XI), on the ground that the duties of the inamdar were of a public character partaking of the nature of police duties & that consequently the inam was not resumable. It is conceded by the learned advocates for both parties that so far as the inam lands of village Gurrebanda are concerned, this decision of the H. Ct. concludes the matter. The main point of controversy centres round the identity of the lands known as Kheta Banjar lands which were excluded from the scope of that litigation. On behalf of the resp. it is urged that the lands in dispute in the present litigation are part of the inam lands of the village whereas on behalf of the applt, it is urged that the disputed lands form part of the Kheta Banjar lands which were admittedly excluded from the scope of the previous litigation.

[8] When the appeal was remanded by the H. Ct. to the lower appellate Ct. for rehearing, both parties were given adequate opportunities to lead further evidence regarding the identity of the lands in the present suit with special reference to the lands which formed the subject matter of litigation in O. S. No. 23 of 1902. Additional documentary evidence was adduced by both parties. It will, therefore, be of mere

academic interest to consider the question of burden of proof when a plea of res judicata is raised by one of the parties to a litigation. The resp. has given evidence on oath & stated that the suit lands formed part of his inam lands in village Gurrebanda. On behalf of the applt. the evidence (both oral & documentary) to show that the suit lands were included in Kheta Banjar lands is wholly unsatisfactory. [After reviewing the evidence the judgment continued:] Judging the evidence as a whole, I think the only reasonable inference is that it is not proved satisfactorily that the lands in dispute in the present litigation formed part of Kheta Banjar lands of village Gurrebanda. The pltf's right to realise rent in respect of the jeroyati lands which formed part of the village Gorrebanda can arise only if it be shown that those lands were not included in the inam lands of the village & his failure to prove this fact must be fatal to the whole suit.

[9] *Point No. (ii).*—As already pointed out, the disputed lands have now been surveyed as part of village Tammayapetta though there is undoubtedly some confusion as to the exact location or precise area of the disputed lands. The deft. himself clearly admitted in his objection before the Settlement Officer (EX. T) that the disputed lands have now been included in village Tammayapetta.

[10] The next question is whether the decision of the Survey Officer under S. 13, Madras Survey & Boundaries Act, 1923, as notified in EX. H-3, will have the effect of debarring the resp. from claiming the lands as his inam lands in view of his failure to institute a suit within the period prescribed by S. 14 of that Act. The effect of S. 13, Madras Survey & Boundaries Act, 1923 & the corresponding section of the older Act of 1897 have been the subject of several decisions of the Madras H. C. But for the purpose of this appeal, it is unnecessary to discuss them at great length. Mr. M. S. Rao on behalf of the applt. relies mainly on *Ponnuswami* v. *Mariappa Servai*, A. I. R. (30) 1943 Mad. 420 : (210 I. C. 282) whereas the learned advocate for the other side relies on the following observations in an F. B. decision reported in *Sivaprasad* v. *Narasimhamurthy*, A. I. R. (27) 1940 Mad. 187: (I. L. R. (1940) Mad. 501 F. B.) & a later decision of Byers J. reported in *Nagarathnam Pillai* v. *Guruswami Pillai*, A. I. R. (30) 1943 Mad. 727: (211 I. C. 124) :

"When it was a matter of a boundary dispute the survey officer had to decide where the boundary should lie & if he decided that the piece of land in dispute fell within the boundary of one of the opposing parties his order did affect the title to that particular piece of land. Where there was no boundary dispute, but in making the survey the survey officer found that two persons were claiming title to the same holding, he would for the purposes of the register have to decide whose name should be inserted therein as the owner, but this in itself did not mean that the Act empowered the survey officer, or the appellate authority to decide who was in law entitled to the property under survey."

[11] Strictly speaking, the F. B. decision in *Sivaprasad* v. *Narasimhamurthy*, A. I. R. (27) 1940 Mad. 187 : (I. L. R. (1940) Mad. 501 F. B.) will not be applicable to the facts of the present case because it dealt with the interpretation of the relevant provisions of the older Act of 1897 in which the existence of a boundary dispute was necessary for giving finality to the decision of the Suvery Officer. But the observations of Leach C. J. quoted above have undoubtedly a wider import.

[12] The question as to whether the determination of the boundary of a village (whether a boundary dispute existed or not) under S. 13, Madras Survey & Boundaries Act, 1923 will affect title to a piece of land lying within the said boundary would depend very much on the nature of the claim to that land & the questions that fell for decision before the Survey Officer. For instance, if the claim to a particular plot of land is itself based on the ground that it lies in a particular village belonging to one of the parties & the Survey Officer while determining the boundary holds that the plot lies in the adjacent village, such determination of the boundary unless set aside by a suit under S. 14 of that Act would undoubtedly conclude title in respect of that plot. But where the rival claim regarding title to a plot of land has nothing to do with the question as to whether the plot lies within the boundary of one village or of the adjacent village, how can it be said that the determination of the boundary under S. 13 would affect title? In fact in the judgment of Abdur Rahman J. *Ponnuswami* v. *Mariappa Servai*, A. I. R. (30) 1943 Mad 420 at p. 423 : (210 I. C. 282) this point was specially emphasised by the following observations :

"It may be that if the dispute merely related to the title of the plot in dispute as distinguished from a dispute as to its boundary, the order passed by the survey officer would not have become final."

This observation applies with full force to the present case. Neither the claim of the Zamindar nor the claim of the inamdar resp. to the lands in dispute has anything to do with the question as to whether the said lands lie within Gorrebanda village or within Tammayapetta village. On the other hand, as early as 1881 the Zamindar stated that the lands lay in Gorrebanda village. Similarly in the litigation of 1902 also he clearly described Kheta Bhanjar lands as lying within the ambit of Gorrebanda village. In his appln. for survey in the year 1934 (EX. H-1) he slightly changed his case & stated that

the lands lay *near* Gorrebanda village. His right to realise jer ayati rent from the suit lands (according to him) arose from the fact that they were not included within the inam lands of the resp. & not from the fact that the lands have been surveyed now within the limits of village Tammayapetta. Similarly the resp's claim regarding the lands in dispute has nothing to do with the boundaries of either Gorrebanda village or Tammayapetta village. His case all along has been that the lands were included within his inam lands which in the litigation of 1902 were admitted by both parties to lie in Gorrebanda village. Therefore, I would hold that dispute between the parties regarding their respective title to the lands in dispute has nothing to do with the determination of the boundaries of either Tammayapetta or Gorrebanda & consequently the decision of the survey officer under S. 13 of the Act will not adversely affect the deft's. title (if any) merely because he failed to institute a suit to set aside the decision under S. 14 of that Act. In fact when the deft. objected at the time of survey the survey authorities themselves assured him that the question of title would be left open (vide Ex. X-a).

[13] Therefore, though the lower appellate Ct. seems to have completely overlooked the nature of the objections raised by the pltf as regards the effect of S. 13, Madras Survey & Boundaries Act, I am satisfied that section cannot operate as a bar.

[14] There being no other point of law the second appeal fails & is dismissed with costs.

[15] **Jagannadhadas J.**—I agree.

R.G.D. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 271 *[C. N. 67]*

RAY C. J. & PANIGRAHI J.

Bhagabat Charan Jena & others— *Pltfs.*—*Applts.* v. *Ram Narayan Mohanty*— *Deft.*—*Resp.*

A. F. A. D. No. 161 of 1945, D/-5-1-1949.

(a) Bihar and Orissa Co-operative Societies Act (VI [6] of 1935), S. 48 —Jurisdiction of Registrar.

Explanation (2) of S. 48, conveys nothing more & nothing less than that the Registrar can decide the question as to whether the person joined in the appln. for registration of the society or admitted to membership after registration is in accordance with the rules & bye-laws of such society. Any question as to liability of somebody other than the recorded member is foreign to this Expln. & also to anything as dispute within the meaning of S. 48. The liability may flow from consideration other than membership &, therefore, the salient question which he has to decide & of which only he has the jurisdiction to decide is whether the particular person is a member or not. He has no jurisdiction to decide that persons other than members past or present or their legal representatives or their sureties are liable for the loan incurred by a member.

[Para 4]

D. Sahu —for Applts.; S. P. Mohapatra —for Resp.

Ray C. J.—This is pltf's appeal in a suit for a declaration that the award passed by the Registrar, Co-operative Societies, is not binding against them & for the consequential relief of restraining the society from executing the award against them.

[2] The pltfs 2 & 3 are brothers & the pltfs. 1 & 4 to 7 are cousins of one Kali Charan Jena. In this appeal it is not controverted that they were members of a joint Hindu Mitakshara family with Kali Charan (deft. 2) at all material times. Kali Charan is a member of Routmandarini Co-operative Society of which deft. 1 (resp 1) is the Secretary. Kali Charan as a member, took a loan of Rs 500 on 3-9-29 for the purpose of paying off certain debts incurred for purchase of lands—a purpose recognised under the bye laws. In the Loan Register, he got certain persons as sureties who undertook the liability in case Kali Charan did not pay the loan to the Society. Ultimately, Kali Charan not having been able to pay, there was a reference by the Society to the Registrar of Co-operative Societies under S. 48, Bihar & Orissa Co-operative Societies Act. The reference is not before us &, therefore, we have only to infer from the Registrar's award as to what the scope of the reference was. In the earlier part of the award, there is a recital as to what was referred to him; but it does not make clear that the question of membership or otherwise of the present pltfs. was at all before him. On the contrary, he opens his award with the words "Whereas the Routmandarini Co-operative society aforesaid has made a reference in writing to me complaining that the deft. 1 (deft. 2 before us) a member of that society owes Rs. 500 by way of principal, Rs. 200-11-0 by way of interest upto 7-9-1941 on account of ..... & the said member deft. 1 refuses to pay or evades payments of the same."

This negatives the contention of Mr. Mohapatra, the learned counsel for the resp., that there was any reference before him as to whether the present pltfs. here (defts. 5, 6, 7, 9, 10 & 11 before the Registrar) were members of the Society. In his concluding portion of the award, he says:

"I hereby give the following decision, namely, that the said deft. 1 jointly & severally with defts. 2, 3 & 4 the said sureties do pay the Routmandarini Co-operative Society Rs. 500 as principal, Rs. 200-11-0 as interest upto 7-9-41, total Rs. 700-11-0 & further interest on the principal sum of Rs. 500 at the rate of 9 per cent. per annum from 8-9-41 together with all costs till the date of realisation."

[3] On the margin of the para. in which the aforesaid words appear, we find mention of the following words: "defts. 5, 6, 7, 9, 10 & 11."

On fair interpretation, it may be said that these words were intended to be inserted after the words "defts. 2, 3 & 4 the said sureties." Later by way of giving reasons why he held the liability against defts. 5 to 11 before him, he says:

"Because they have been benefited with the loan incurred by deft. 1 as Karta of the joint family.

[4] Mr. Mohapatra relies very much upon the construction of this observation, particularly he lays emphasis on the words "loan incurred by deft. 1 as karta of the joint family." From this, he argues that the award purported to decide that defts. 5 to 11 before the Registrar were members of the Society through deft. 1 as karta of family. I cannot accede to this contention. On the contrary, the observation seems to mean something far from it. What he means to say is that in incurring the loan he acted as Karta of the family because the loan was for the benefit thereof. This is quite different from saying that he was all the while a member of the Society on behalf of the family. In the latter case, all his actions should, generally & ordinarily, be binding on the family as members of the Society. In some particular circumstances, a cause of exoneration may be pleaded by the other members of the family but that does not make him the less a member on behalf of the family. The decision that persons other than members or past members or their legal representatives or their surities are liable for the loan incurred by a member is a question which is not within the jurisdiction of the Registrar of Co operative Societies. In order to demonstrate this, we have to look to the statutory provisions bearing upon the question. To start with, a 'member', as defined in S. 2 (f), Bihar & Orissa Co-operative Societies Act, 1935, includes

"a person joining in the appln. for registration of a society & a person admitted to membership after registration in accordance with the rules & bye-laws of such society."

It is urged, as it has been held by the lower appellate Ct., that the question whether a person is or was a member of a registered society or not is a dispute over which the Registrar, within purview of S. 48, may assume jurisdiction. The Expl. (2) of the section, to my mind, conveys nothing more & nothing less than that the Registrar can decide the question as to whether the person joined in the appln. for registration of the society or admitted to membership after registration is in accordance with the rules & bye-laws of such society. Any question as to liability of somebody other than the recorded member is foreign to this Expln. & also to anything as dispute within the meaning of S. 48. The liability may flow from consideration other than membership & therefore the salient question which he has to decide & of which only he has the jurisdiction to decide is whether the particular person is a member or not. This membership may be acquired either individually or in a representative manner. Of course, this point is not free from difficulty but for the purposes of the present case, we assume that a person may constitute, by his act & by the assent given by the members of the society in accordance with the rules & bye-laws himself a member not only as an individual but also a representative of a joint Hindu family. But this is a fact which has to be established before any liability can be fixed upon an outsider on the footing that he is a member through another person. Liability on account of one's being represented through another member & liability on the ground that one is benefited by the loan incurred by a member of the Co-operative Society may, in the particular event of a case, coincide but that is not the question for solution. The Registrar has been given a special jurisdiction which excludes the ordinary jurisdiction of a civil Ct. either to the benefit or to the detriment of the citizens. Such provision, barring the jurisdiction of the civil Ct. which is the ordinary forum for all civil disputes between subjects inter se or between them and others, must be very strictly construed. The distinction that I want to make out is that the liability of the present pltfs. (defts. 4 to 11 before the Registrar) as members of the society, having been such members through their representative, the deft. 2, is distinct & separate from their liability for the debts of deft. 2 on any other grounds of which the member may be legion. With regard to the first, the Registrar has the jurisdiction to determine & with regard to the other he has not. In the facts of the present case, it may be quite permissible that the society may sue in the ordinary civil Ct. for recovery of these debts from Kalicharan & the present pltfs. with success on the ground that the pltfs. are liable as Kalicharan in that particular transaction acted for the benefit of the family as its manager. But this ground of liability, however, can never be the subject of adjudication within the jurisdiction of the Registrar. Therefore, the only reference that can be authoritatively made with regard to the liability of the pltfs. should be on the ground that the joint family, of which they are members, was a member of the society through Kalicharan as Karta or representative, as the case may be. Such a reference, as I have already said, was never before the Registrar nor has he decided such a dispute, namely, whether the pltfs. were members of the society or not. If the Registrar held them liable, it was on a

ground other than their membership. In this view, the award, so far as binds the pltfs, is without jurisdiction. Mr. Mohapatra has invited our attention to a decision of the Patna H. C. in the case of *Bindeswari Prasad* v. *Shiva Dutt*, 19 P. L. T. 328 : (A. I. R. (25) 1938 Pat. 315 F. B.). This decision is not at all inconsistent with the view that I have expressed above. This decision proceeds to lay down that a Hindu Joint Family may be a member of a Co-operative Society under the Bihar & Orissa Co-operative Societies Act & the rules & bye-laws (which are the same as rules & bye-laws in force in Orissa) through one of its representatives. In the case before them, it had been throughly proved & found that Lachminarayan, the recorded member, was taken in as a member with the consent of all the adult members of the family by a rural society & that with their consent, he had put in a joint family property & not his undivided share therein in the Hasiat Register & besides, his father withdrew his appln. for membership on the ground that his son represented them all. In these facts, it was found that the joint family was a member through Lachminarayan &, therefore, the liquidator's order of contribution as against the family was a binding one. Under the circumstances of the case, however, we are quite clear in our mind that deft. 2 (Kalicharan) has not been proved to have been a member in representative capacity so far as we have been able to gather from the facts & circumstances before us. The award, therefore, will be set aside as against the pltfs. It may be said, however, that it is quite open, subject to law of limitation standing in their way, if at all, to the members of the society to refer the question of pltfs'. membership through deft. 1 over again to the Registrar.

[5] In the result, the appeal is allowed with costs, the judgment of the learned lower appellate Ct. is set aside & that of the learned Munsif restored.

[2] **Panigrahi J.**— I agree.

R.G.D. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 273 *[C. N. 68.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Bansidhar Nanda & others—*Defts-Applts.*
v. *Shyamsundar Nath Suthu*—*Pltf.-Resp.*

Second Appeals Nos. 108, 138 & 142 of 1944 D/- 11-5-1949.

Tenancy Laws — Orissa Tenancy (Amendment) Act (VIII [8] of 1938), S. 31B — Transfer of occupancy holding in permanently settled estate without consent of landlord.

Usage includes what the people are in the habit of doing in a particular place & evidence as to the trans-

ferability (of occupancy holding permanently settled estates) & the other incidents of similar tenures in adjoining villages is admisible as evidence of such usage. If it be one regularly & ordinarily practised by the inhabitants of the place where the tenure exists there will be usage. What is necessary to be proved is that such transfers have been made with the knowledge & without the consent of the landlord & that no successful objection to such transfer has been made by the landlord. [Para 6]

If, therefore, the pltf. landlord succeeds in proving that there was a usage whereby 25 per cent. of the consideration money as mutation fee was paid on the transfer of occupancy holdings in permanently settled estates without the consent of the landlord, S. 237, Orissa Tenancy Act would give him the right to enforce the payment of such fee. [Para 6]

(It was held that such a custom had grown up throughout Orissa). [Para 7]

Consequently such a transfer being valid, the mutation fee payable by the transferee comes within the meaning of "fees lawfully payable by him at the time of the transfer" in S. 31-B. [Para 14]

S. N. Sengupta — for Applts.; *P. Mohanty & B. N. Das—for Resp.*

Panigrahi J.—The suits out of which these three appeals arise were instituted by the pltf.-resp., who is the proprietor of Darpan Estate, a permanently settled estate in the Dist. of Cuttack, for recovery of mutation fees from the applts. who are transferees of ryoti holdings within the estate. The suits were instituted in the Ct. of the Rent Suit Officer in Rent suits Nos. 729 & 786 of 1941 & 1942 (out of which the S. A. Nos. 108 & 138 of 1944 arise) & were tried with a batch of 68 suits. Rent Suit No. 415 of 1943 out of which the S. A. No. 142 of 1944 arises was tried along with a batch of 111 suits. All these suits were instituted by the proprietor resp. under S. 31-B, Orissa Tenancy Act, for the recovery of mutation fees.

[2] The pltf's case is that the applts in S. A. 108 & S. A. 138 of 1944, who constitute one family & who are common in both the appeals, obtained by registered sale deeds, dated 5-10-1904 & 15-9-1922 respectively, certain occupancy holdings from the recorded ryots & that the applts. in S. A. 142/44, who purchased on 10-9-23 became liable under law & custom or usage to pay transfer fee at the rate of 25% of the consideration money. It is further alleged that the pltf. came to know of the transfers & recognized them on 19-8-41 by mutating the names of the applts in his records, & hence his claim to recover 25% of the consideration money as mutation fee, together with interest & costs of the suit. The defts. denied the alleged custom or usage entitling the pltf. to recover mutation fee at 25% of the consideration money, or at any other rate. They further averred that Killa Darpan being a permanently settled estate, was expressly excluded from the operation of S. 31, Orissa Tenancy Act (old) & the new S. 31-B of

the Act was not applicable to the case. The applts.' specific case was that the Ct. of Wards, while managing the estate of the pltf, used to recover at the rate of Re. 1 for each transfer' irrespective of the consideration, & they are willing to pay at this rate.

[3] The Rent Suit Officer, after a careful analysis, of the evidence & in a well reasoned judgment, held that there existed in fact a custom or usage in the plif's estate which enabled him to charge 25% of the consideration money for registering the transfer of occupancy holdings, that for some years when the estate was under the management of the Ct. of Wards the transfer fee was levied at a flat rate of Re. 1 under a mistaken impression, but that in the year 1914 this mistake was rectified by a proceeding of the Board of Revenue & that since that date collection of mutation fee at 25% of the consideration money was enforced. He therefore found that the pltf. had succeeded in establishing the usage & granted a decree to him in terms of the plaint.

[4] The learned Dist. J. who heard the appeals against the decrees of the Rent Suit Officer, agreed with the reasoning & findings of the lower Ct & confirmed the decrees passed by the Rent Ct.

[5] In second appeal, Mr. Sen Gupta appearing for the applts has confined his arguments to two points, *viz*: (1) That the evidence on the record does not justify the inference that a usage had grown up &, (2) That S.-31B, Orissa Tenancy Act, has no application to the present case as no fee was lawfully payable at the date of the transfer. On the other side, it is pointed out that transfer of occupancy holdings was well recognized & never depended upon the consent of the proprietor. It is also urged that in the neighbouring estates, as well as in the temporarily settled areas, the levy of a transfer fee at 25% of the consideration money had been recognized as a well-established custom.

[6] To support a usage it is not necessary to prove that it is ancient or uniform. Usage may also be in course of growth. It is enough if it appears to be so well known & acquiesced in that it may be reasonably be presumed to have been tacitly accepted by the parties to the transfer. The two essential ingredients are: that it should be well known in the locality & that it should have been acquiesced in. As was laid down in *R. Dalglish* v. *Gwguffer Hussain* 23 Cal. 427 usage includes what the people are in the habit of doing in a particular place & evidence as to the transferability & the other incidents of similar tenures in adjoining villages is admissible as evidence of such usage. If it be one regularly & ordinarily practised by the inhabitants of the place where the tenure exists there will be usage. What is necessary to be proved is that such transfers have been made with the knowledge & without the consent of the landlord & that no successful objection to such transfer has made by the landlord. If, therefore, the pltf. succeeds in proving that there was a usage whereby 25% of the consideration money was paid on the transfer of a holding, S. 237, Orissa Tenancy Act, would give him the right to enforce the payment of such fee. Reliance was placed on Para. 321 of the Settlement Report prepared by Mr. Maddox in which after tracing the growth of transferability of occupancy holdings, he says:

"In Cuttack thani rights appear to be commonly sold without the previous sanction of the proprietor & the latter appears in most parts to invariably recognise the new tenant on payment of the customary mutation fees."

He further says:

"In conclusion we may say thani is now-a-days transferred but that the zamindar does not record the transferee in his sherista as thani rayot without a fee."

This was recorded in 1900.

[7] The Survey & Settlement Report of Darpan Estate was undertaken at about the same period & the Final Report on the Settlement of Killa Darpan, prepared in 1901 says:

"These at least show that transfers are allowed in the estate for the above classes of tenures except under Chandna which is rare."

The Report also gives instance of the transfer fee payable to the proprietor varying from 10 to 25% of the purchase money according to the nature of the tenure when mutation is applied for. The average rate of money paid per acre for selling occupancy holdings, as worked out from 20 instances of recorded transfers, is shown to be Rs. 33, & against this rate the remark is made that

"this rate does not seem to be actual. It is usually higher but shown lower in the document for lessening the proprietor's quarter (of transfer fee)."

Mr. James (as he then was) in his Final Report on the Revisional Settlement of Orissa (1906 to 1912) also notes that sales of holding had become common after the Settlement operations undertaken by Mr. Maddox had been completed. He says:

"It is probable that the custom of free transfer would, in many parts, have become established if the Revisional Settlement had not come & brought the question into prominence."

Mr. Macpherson in his Report of the year 1908 wrote on the proposals to allow transfers subject to the payment to the zamindar of a salami of 25% of the purchase money & his opinion is quoted in Para. 72 of Mr. James' Report:

"Had there been no revision or maintenance of records in Orissa before the next land-revenue settlement the rayots would have gone on quietly transferring their lands &, save in isolated cases landlords

would have raised no objection & would have gone on quietly receiving the rents from the transferees with or without the express recognition of the latter . . . . . This quiet evolution of custom has been checked by revisional operations & we find that landlords who had winked at or taken no steps to interfere with the numerous transfers that have occurred in the past ten years are now demanding the most exhorbitant price for the purchase of their consent."

Mr. Dalziel, the Settlement Officer, reporting on the Revisional Settlement of 1922-32 also remarks that the status of the occupancy rayot in the permanently settled estates was much the same as in the temporarily settled areas & that a mutation fee of 25% was being charged in case of transfer of occupancy holdings. It cannot, therefore, be seriously disputed that a custom had grown up throughout Orissa, by which occupancy holdings were freely transferred without the consent of the landlord but that, on recognition of such transfer, a proprietor became entitled to levy a transfer fee at the rate of 25% of the purchase-money. In this case the pltf. produced his mutation register maintained in the estate showing that hundreds of applns. were being made to the proprietor & that in the large majority of cases mutation was allowed on receipt of 25% of the consideration money. We see, therefore, no reason to differ from the findings of the Cts. below that the evidence on the record amply justifies the inference that the proprietor was collecting at the rate of 25% of the purchase money at least from the year 1906, with an interruption of only eight years, when, under the orders of the Ct. of Wards, a flat rate of Re. 1 was being charged.

[8] Exhibit 31 dated 12-12-1914 & Ex. 32 dated 12-4-1915, show that the Ct. of Wards finally decided to levy mutation fee at 25% of the purchase money in all cases of transfer by gift or sale, & from that date onwards, according to the evidence, 25% of the consideration money is being charged. There is, therefore, no force in Mr. Sen Gupta's contention that the levy was either not uniform or that the practice had not matured into usage. I have no doubt in my mind that in so far as the period subsequent to the year 1915 is concerned the Ct. of Wards introduced a uniform rule of levying the mutation fee at 25% of the purchase money & it does not appear that this was objected to by the rayots or that payment was made at any other rate.

[9] Apart from any consideration of gradual growth of practice maturing into an usage the order of the Ct. of Wards is definite evidence of a rule that was enforced & was acquiesced in by the people of the locality. This evidence, to my mind, is clear, definite & precise & rules out all considerations based on mere speculation. The contention of Mr. Sen Gupta has, therefore, been rightly negatived.

[10] The next contention raised on behalf of the applts. raises a very important point, but I entertain no doubts about it. The argument is developed on the basis of the reasoning adopted in *Gagambehari Das* v. *Sarabhuj*, 13 Cut L. T. p. 1 : (A. I. R (34) 1947 Pat. 412), where the applicability of S. 31-B, Orissa Tenancy Act to a transferee by an execution sale was considered. In that case the pltf's suit was for recovery of mutation fee from the defts. who were the auction-purchasers of an occupancy holding in a temporarily settled area. The pltfs. based their claim on S. 31-B read with S. 250, Orissa Tenancy Act; and the decision in that case turned round the interpretation of the words "fees lawfully payable by him at the date of the transfer" occurring in S. 31 B. Section 31, as it stood before the amendment, provided a machinery for compelling the proprietor to recognize a transfer by private sale. Section 31 (4) provided that:

"save as provided in that section & in Ss. 95 & 96 no transfer of an occupancy holding or a portion of the holding, otherwise than by succession or by a sale in execution of a decree for arrears of rent shall be valid against the landlord of the holding unless & until he has consented thereto."

And sub s. (5) of S. 31 laid down:

"Nothing in this section shall apply to the transfer of an occupancy holding or a portion of a holding in a permanently settled estate."

The effect of S. 31 (4) is that except in the cases provided in Ss. 31 (1), 31-A, 95 & 96 or in the case of a transfer by succession or sale in execution of a decree for arrears of rent, no other transfer by way of an execution sale in a Civil Ct. or in execution of a money decree shall be valid *unless & until the landlord has consented thereto*. The effect of this is that a transferee at a sale in execution of a money decree acquires no right in the holding unless & until the landlord has consented thereto. The consent of the landlord therefore validates the transfer & until such consent has been obtained the law does not recognize the fact of the transfer so far as the landlord is concerned. Their Lordships therefore held, in the case cited above, rightly, if I may say so with great respect, that there was no fee lawfully payable at the date of the transfer, as such fee became payable only after the transfer, on the landlord's consenting to the transfer. The fee was payable under a contract, arrived at between the parties, namely, the landlord & the transferee, on a date subsequent to the date of the transfer, & consequently S. 31-B had no application to that case. This case, however, has absolutely no application to the

facts before us. It has to be noted that S. 31 itself is not applicable to the transfer of an occupancy holding in a permanently settled estate as S 31 (5) expressly excludes its operation. There is, therefore, no question of the transfer remaining invalid "unless & until the landlord consents thereto", in the case of a transfer whether by private sale or by execution sale in a permanently settled estate. The validity or otherwise of such transfer depends on S. 237, Orissa Tenancy Act, which says:

"Nothing in this Act shall affect any usage or customary right not inconsistent with or not expressly or by necessary implication modified or abolished by its provisions."

Illustration (2) to the section, as it stood before the introduction of the Orissa Tenancy Amendment Act of 1938 runs as follows:

"The usage under which a rayot in a permanently settled estate is entitled to sell his holding without the consent of his landlord is not inconsistent with & is not expressly or by necessary implication modified or abolished by, the provisions of the Act. That usage, accordingly, where it may exist, will not be affected by this Act."

If, therefore, there was a custom in this estate that an occupancy holding could be transferred without the consent of the landlord, the liability to pay a mutation fee would be an incident of the transfer & would not be dependent upon the subsequent consent of the landlord validating the transfer.

[11] I have already shown by quotations from the Settlement Reports that the custom of levying 25% of the consideration money had been well-recognized in permanently-settled estates & that such fee was payable on the landlord effecting a change in his register. No single instance has been brought to our notice of a proprietor ejecting a rayot on the ground that he has transferred his holding by private sale or gift. I have no doubts in my mind that the validity of such transfer did not at all depend upon the consent of the landlord. I may here quote the opinions recorded by some of the most experienced Settlement Officers of the District which Mr. Maddox summarises in his report, at p. 218. In the estates of Deogaon, Matkatnagar, Asureswar, Bakhrabad & Jajpur the opinion of the Settlement Officers was that the landlord's consent was not necessary at the time of the sale, but when mutation is recorded in his sherista a mutation fee is charged. Mr. Maddox adds:

"My experience is that thani is freely sold & that it is only in a few parganas that the purchasers are recorded as pahi. Indeed there are many cases in which thani holdings have been sold in civil Cts. in execution of decrees & the new tenants have been perforce recognized by the zamindar. In all cases of voluntary sale, the zamindar, before recognizing the transfer, requires that all arrears of rent should be paid up in full & further demands from the vendee a *rusum* that may amount to 1/4th of the price .... In conclusion, we may say that a thani is now-a-days transferred but that the zamindar does not record the transferee in his sherista as thani rayot without a fee."

[12] Mr. Dalziel also notes the practice in the several permanently settled estates in his report & in respect of Killa Pattia he says that on the transfer of rayoti rights 25% is charged as mutation fee & the custom prevails of obtaining the consent of the landlord. In the case of Killa Bishnupur "the transfer of land by rayoti holdings is generally allowed on payment of a mutation fee of 25% of the consideration money." In Killa Harishpur "transfers are invariably recognised on payment of 25% of the consideration money." In the case of Killa Aul it is remarked that "the landlord's consent is considered necessary for the transfer of occupancy holdings, but no case of refusal to consent is reported." In Killa Kalkalla which adjoins the Darpan Estate the status of the rayot is not different from that in the other permanently settled areas. I am therefore unable to find in any of the permanently settled areas of the district, except in the single instance of Kanika, any case of a rayot being ejected on the ground that his holding has been transferred whether by private alienation or by sale in execution of a decree. It is also abundantly clear that the previous consent of the landlord was not necessary for the transfer & that the only right that the landlord had was to levy a transfer fee at 25% of the purchase money at the time of effecting a change in his records. I am therefore unable to accede to the contention of Mr. Sen Gupta that no fee was lawfully payable at the date of the transfer in the present case on the ground that the transfer itself was invalid, on the analogy of a sale in execution of a money decree of a holding in a temporarily settled area.

[13] I may also refer, at this stage, to another decision of the Patna H. C. reported in *Nilmoni Misra* v. *Gourmohan De*, 5 Cut. L. T. 88 where it was held that S. 31-B applies to all cases of transfer, voluntary or involuntary, & that the fee, if payable at the time of the transfer, could be realised within the time prescribed under S. 31-B. It is not clear from the report whether this case arose in a temporarily settled estate, but S. 31, Orissa Tenancy Act, was considered & it was assumed that the validity of the transfer depended on the consent of the landlord. Their Lordships went to the length of laying down that even in the case of a transfer falling within S. 31 (4) the consent of the landlord would not be required after the passing of S. 31-B. The suit in that case was for ejectment of the transferee & the specific question raised

in these appeals, whether any fee was lawfully payable at the date of transfer, was not considered in that case.

[14] I therefore hold, agreeing with the Cts. below, that the transferee were liable to pay a fee at the date of the transfer & that such fee was lawfully payable under well-established usage.

[15] There is, however, one small point yet to be disposed of. In S. A. N. 108/1944 the transfer took place on 5-10-1904. I have held that it is the admitted case of both parties that a flat rate of Re. 1 was being charged as mutation fee from 1906 to 1914 under the orders of the Ct. of Wards & that from 1915, a fee at the rate of 25% of the purchase money was uniformly levied & collected. There is very meagre evidence of what the practice was prior to 1906. I would therefore hold that, in the absence of any positive evidence on the side of the pltf. the applts. in S. A. No. 108/1944 would be liable only to pay at the rate of Re. 1 which was the rate admittedly prevalent in 1906 & that in the other two appeals, *viz.*, S. A. No. 138/1944 & S. A. No. 142/1944 the applts. would be liable to pay at the rate of 25% of the consideration money, together with interest at 6% per annum from the date of recognition of the transfers by the proprietor. The pltf. resp. will also have his costs throughout.

[16] Subject to the above modification, these appeals are dismissed, with costs. Hearing fee is assessed at 10 (Ten) Gold Mohurs.

[17] **J. Das J.**—I agree that on the evidence & the material placed in these cases before us, the usage of transferability of occupancy holdings in the permanently-settled estate of Darpan, without the consent of the landlord, but subject to the payment of mutation fee at 25% of the consideration for the transfer, has been clearly made out with reference to the period subsequent to the order of the Ct. of Wards as evidenced by Exs. 31 & 32, dated 12-4-1914 & 12-4-1915. There is no such clear evidence of usage for any period prior thereto & the pltf. can, therefore, claim mutation fee for the earlier period only the admission of the deft. that the mutation fee payable was at a flat rate of Re. 1 per *kabala*.

[18] I agree accordingly with the order proposed by my learned brother.

R.G.D. *Appeals dismissed.*

A. I. R. (38) 1951 Orissa 277 *[C. N. 69.]*

PANIGRAHI J.

Krupasindhu Panigrahi*—*Accused*—*Petnr.

v. *Rex.*

Criminal Revn. No. 307 of 1948, D/- 11-7-1949.

(a) Criminal Procedure Code (1898), Ss. 110, 117 (5)—Joint trial.

A notice was served on *A, B & C*, required them under S. 110 (a), (d), (e) & (f), Cr. P. C. to show cause why they should not execute a security bond & the Mag. ordered a joint enquiry. Out of them, *A* was not accused of any acts falling within cls. (a), (d), (e) & (f) of S. 110, these being charged specifically against *B & C* only. The acts of high-handedness charged against *A* were of extorting payments & rendering persons homeless. Even according to the police report *A* was 'a leader & employer' of *B & C* & it was not suggested that he employed them to commit the offences sought to be proved against them. Specific acts alleged against *A* ranged over a period of 2 years:

Held that under S. 110, Cr. P. C. every person has to be examined separately for the offences enumerated therein. A joint enquiry under S. 117 (5) was out of question when one charge at least was that two persons were so desperate & dangerous as to render their being at large hazardous to the community. There certainly could not be such intimate connection between two individuals in regard to their individual characteristics as to render them liable to joint inquisition. The order for the joint enquiry of *A* along with *B & C* was therefore set aside. [Paras 5, 6]

Anno. Cr. P. C., S. 117, N. 13.

(b) Criminal P. C. (1898), S. 110 (f) — Desperate character—Proof of.

The characteristic of being a desperate & dangerous character is a personal attribute & should be proved separately against every individual charged with that attribute. [Para 3]

Anno. Cr. P. C., S. 110, N. 15.

(c) Criminal P. C. (1898), S. 112—Order under — Failure to set out substance of 'information'.

An order under S. 112 is not a formal order but is intended to give sufficient notice to the individual against whom the order is made, of the accusation made against him & therefore the order must set forth the substance of the information received. Where the Mag. had not set out the substance of the information before him & had not annexed a copy of the Police report:

Held that it was a grave irregularity which, in the circumstances of the case, vitiated the proceedings. [Para 7]

Anno. Cr. P. C., S. 112, N. 3.

K. Patnaik—for Petnr.; Advocate-General — for Opposite Party.

Order. — The petnr. was served with a notice under S. 112, Cr. P. C., to show cause why he should not be directed to execute a bond to be of good behaviour under S. 110, Cr. P. C. for a period of three years. Along with the petnr. two other persons were also impleaded & served with similar notices & an enquiry M. C. No. 647/47 was started against the three persons by the Subdivisional Mag., Ghumusur. The Police filed a report under S. 110 (d), (e) & (f), Cr. P. C. against these three persons on 24-9-47 & cited 84 instances of acts of misbehaviour & offences alleged to have been committed or threatened to have been committed by one or the other of the persons named in the report covering a period of over twelve years commencing from 1935. The Police also cited 140 witnesses to be examined to prove the

various acts of high-handedness alleged to have been committed at different times by these persons. The Mag. drew up proceedings on the 4th November in the following terms :

"Perused the report of the S. I, of Police, Aska & it appears from the Police report that you (1) Krupasindhu Panigrahi (2) Dondia Gowdo, & (3) Bancha Palo of village Horodapadoro, P. S. Aska, within the criminal jurisdiction of this Ct., habitually commit theft, extortion, cheating, & [illegible]led chief & other offences involving a breach of the peace & so are so desperate & dangerous as to render your[illegible]h say at large, without security, hazardous to the com[illegible]ity as detailed in the police report (copy enclosed [illegible]t with [illegible]ll affect[illegible].

You are, therefore, required [illegible]ause or a 110 (a), (d), (e) & (f), Criminal P. C. to show ca[illegible]oy 11-11-1947 why you Krupasindhu Panigrahi [illegible]d not be ordered to execute a bond of Rs. 2000 with [illegible] two sureties for like amount & Dondia Gowdo & Bancha Palo should not be ordered to execute a bond of Rs. 500 etc. . . . etc. . . ."

[2] Although the order recites that a copy of the Police report is enclosed it is asserted by the petnr. & it is not denied by the learned Advocate-General appearing for the Crown—that no such copy has been served upon the petnr. The petnr. appeared in due course & applied to the Deputy Mag. to take up his case separately & not to try him jointly with the two others as he apprehended that prejudice would be caused to him. He also prayed that his personal attendance may be waived & that he may be permitted to appear through a pleader as he was sick & was not able to attend the proceedings which were likely to occupy a long time. The Deputy Mag. dismissed his petn. & rejected both his prayers on the ground that the Police report showed that the petnr. & the two other persons charged with him were his associates & that there would be no prejudice or illegality in a joint trial. He rejected the petnr.'s prayer for exemption from personal attendance on the ground that the petnr. not being an accused person, S. 540A, Criminal P. C. did not apply. It is against this order that the petnr. has now come up in revn. to this Ct. The petnr. also moved the Dist. Mag. before filing his revn. petn. in this Ct., & the Addl. Dist. Mag who heard his applu., has recommended to this Ct. that the order of the Deputy Mag. should be quashed & that a separate trial should be ordered as, in his opinion, a joint enquiry would be prejudicial to the persons proceeded against:

[3] The case against the petnr. as it appears from the Police report, is that he is a rich landholder & money-lender in village Horodopadoro, under the jurisdiction of the Aska Police Station :

"Since about 12 years he started increasing & adding to his landed properties by making clandestine purchases from one party or other having disputes on lands & also made or attempted to make people quit their lands in his favour by putting them in fear of grievous assault & other kinds of mischief such as rendering them homeless, by setting fire to their houses & by assulting them with the help of a set of ruffians maintained by him solely for the purpose & also by damaging & stealing their crops through the help of the same ruffians . . .

Accused 2 & 3 & two mochis who were all persons of the most desperate & dangerous character were the principal henchmen of their leader, accused 1."

It is then alleged that accused 2 & 3 committed "numerous instances of *zulums* such as setting fire to houses, cutting & carrying away crops from land, committing theft of other properties, assaulting persons, killing & maiming of cattle & of persons with whom their leader & employer had any dispute."

The leader (referring to the petnr. before me) also singly committed high-handedness such as extorting documents, rendering persons homeless, by driving them from their houses, etc. It will be seen from the above that the petnr. himself is not accused of any of the acts falling within cls. (a), (d), (e) & (f) of S. 110. These acts are specifically attributed to the other two accused who are sought to be tried jointly with the petnr. So far as the petnr. himself is concerned, the acts of high-handedness charged against him are

"extorting documents, rendering persons homeless, & by driving them from their houses."

If the Mag. who drew up proceedings against them under S. 110 had only cared to go through this Police Report he would have been able to discriminate the case against the petnr. from that of the rest, & he would not have fallen into the error of holding that joint trial is necessary in the interests of justice. Even according to the Police Report, the petnr. is described as "a leader & employer," & it is not suggested that he employed these persons to commit the offences sought to be proved against them. The specific allegation of being a "desperate & dangerous character" is made only against the other two persons who are roped in along with the petnr. It is well settled that the characteristic of being a desperate & dangerous character is a personal attribute & should be proved separately against every individual charged with that attribute. The Mag. appears to have gone further than even what the Police seek to prove inasmuch as he has drawn up proceedings under S. 110 (a) while the Police restricted their report to cl. (d), (e) & (f) of that section. It is also passing strange that the Deputy Mag. failed to notice that the evidence required to prove 84 instances extending over a period of 12 years is bound to be vague indefinite & conflicting, & that it would be impossible for any person called upon to meet the charge to decide which of the allegations have been made out & to what extent. The number of witnesses cited is equally formidable & the

Police Report does not give the least inkling as to which of these allegations is going to be proved and by which bunch of witnesses. If the character of a person cannot be proved to be of the description contemplated under S. 110 by half a dozen witnesses, it cannot be established by 140 witnesses either. If the object of the Police was to overawe the petnr. & his alleged associates this purpose has been served admirably, but I quite fail to see how a Mag. will be able to analyse the evidence which is bound to be of the character merely of hearsay & suspicion & how he will be able to estimate the character of each of the accused persons.

[4] Mr. K. Patnaik, appearing for the petnr. has placed before me a tabular statement of the acts alleged against the petnr. alone & those he is supposed to have been responsible for along with the two other accused persons. The specific acts attributed to the petnr. are Items 1, 12, 16, 18, 45, 47, 52, 63, 69, 70, 79 & 84 of the tabular statement. These acts range over a period of twelve years. (After discussing these items His Lordship proceeded.)

[5] In spite of the fact that an enquiry under S. 110, Cr. P. C. is bound to be wide in its scope, I cannot understand how a person accused of such elastic, sprawling & pervasive charges as those cited against the petnr in this case can ever hope to meet them & convince a Ct. that he is not a threat to the community at large. Time & again the Cts. have registered their protest against a free & indiscrimate use of this section. Reported cases show that the Police appeal to this section for bringing down a person whom they otherwise cannot harass. Instead of investigating into particular offences & bringing the offender to book recourse is had to the security sections in order to humble local dictators or oppressive money-lenders. The growing tendency of trying to humiliate persons who assume the role of local dictators instead of prosecuting them for substantive offences itself suggests that this loose practice constitutes a serious threat to fairness in our administration of justice. The rule of evidence laid down in S. 117 (4) makes it all the more difficult to try persons without prejudice to an innocent man. When the prosecution chooses to array a hotchpotch of acts described as "threats & instigations" it is extremely difficult for a Mag. to control or analyse the evidence & to estimate its effect on each of the persons standing trial in proof of so sprawling a charge as "being a dangerous & desperate character." Evidence of bad reputation is often admissible only on the assumption that the person accused has a bad reputation & that he is an associate of the other persons. The result is that if the other two persons have a local bad reputation or are dangerous & desperate the mere inclusion of the petnr. as an associate of the other two petnrs. makes the entire evidence admissible against the petnr. There generally will be some evidence of wrong-doing by some of the persons but it is extremely difficult for an individual accused to make his own case stand on its own merits as Mags. are only too prone to believe that birds of the same feather flock together. It is therefore imperative to ascertain before permitting a joint trial that the birds belong to the same feather. According to the prosecution report, the petnr. is a rich landlord & owner of bus service & is otherwise highly respectable. According to the petnr. the present proceedings have been initiated by the Police at the instance of his political rivals. If therefore he chooses to dissociate himself from the two other accused jointly with him, & tries to throw the blame on the others, the inevitable consequence will follow that the other two will try to throw the entire blame on the petnr. A Ct. faced thus with mutual accusations & recriminations between persons standing their trial, is apt to hold that all the three are responsible for the acts of each one of them. The result will inevitably be that persons jointly tried often convict each other. If, on the other hand, the petnr. chooses to stand alone & is silent, he will be taken to have admitted the accusations made against him or his associates. In either event, the result will be disastrous to the petnr. & there cannot be a fair trial. I am in entire agreement with the observation of Walsh J., in *Angnoo Singh* v. *Emperor*, reported in A.I.R. (10) 1923 ALL. 35 : (24 Cr. L. J. 257) that it seems very hard—almost oppressive—to any set of defts. to charge them together unless the whole of the evidence against all of them is precisely the same. To the same effect is the case reported in *Jai Rao* v. *Emperor*, A I.R. (10) 1923 Pat. 104 : (23 Cr. L. J. 100), where it was laid down that a joint trial is not permissible unless there is evidence of something in the nature of a conspiracy. Ordinarily, under S. 110, Cr. P. C. every person has to be tried separately for the offences enumerated therein. Mr. Patnaik relied upon *Deodhari* v. *Emperor*, in A.I.R. (12) 1925 Pat. 131 : (26 Cr. L. J. 738) where it was laid down that the evidence to prove a charge under S. 110 should not be vague generally & of a hearsay character & *In re Rathinam Pillai*, A.I.R. (25) 1938 Mad. 35 : (39 Cr. L. J. 230) where Newsam J., generally laid down that a joint enquiry under S. 117 (5) is out of question when one charge at least is that two persons

are so desperate & dangerous as to render their being at large hazardous to the community. There certainly can be no such intimate connection between two individuals in regard to their individual characteristics as to render them liable to joint inquisition. It was further held in that case that to apply S. 110 to local bosses & faction leaders is undoubtedly to abuse it. The section is intended to apply to criminal maniacs & desperados against whom the only weapon to be used is the weapon of public opinion.

[6] I have, therefore, arrived at the conclusion that the reference made by the Addl. Dist. Mag. that the joint enquiry against the petnr. along with the other two persons, cannot proceed, & that the police, if so advised, may initiate separate proceedings against the petnr., alone, should be accepted.

[7] Mr. Patnaik also complained that the order drawn up by the Mag. is all-too-brief, vague & indefinite & does not give any clue to the petnr. as to the acts charged against him. An order under S. 112 is not a formal order but is intended to give sufficient notice to the individual against whom the order is made, of the accusation made against him. The section in specific terms says that the order shall set forth the substance of the information received. The Mag. who drew up the proceedings has entirely ignored that requirements of this section in so far as he has failed to set out the substance of the information before him. The failure to annex a copy of the Police report is itself a grave irregularity which, in the circumstances of this case, must be held to have vitiated the proceedings. The order does not comply with the provisions of the Code & is bad in law. For a similar case, reference may be made to *Kutti Goundan* v. *Emperor*, 47 M.L.J. 689: (A.I.R. (12) 1925 Mad. 189: 26 Cr. L.J. 673) and *In re Krupasindhu Naik*, 8 M.L.W. 416: (A.I.R. (5) 1918 Mad 219), wherein Kumaraswami J., observed that a notice under S. 110, Cri. P. C., must contain something more than a re-production of the clauses of that section. There should be sufficient indication of the time & place of the acts charged & sufficient detail which should enable the accused to know the facts that he has to meet. It should be remembered that the petnr. is put on his trial on information received behind his back, extending over a period of 12 years or more. Had the proceedings started on a private complaint he would have been entitled to copy thereof, but in the case of a police report, such as the one placed before me, the petnr, gets no clue as to the dates when the persons in respect of whom, & the nature of the acts which one alleged to have been committed by him. I have no doubt in my mind that the notice served on the petnr. is bad in law & is of no effect. But whether that would justify the quashing of the proceedings altogether at this stage is a matter on which I am not prepared to hazard an opinion. There is no legal proceeding against the petnr. according to the view I have taken & the question of quashing the proceedings does not arise. Mr. Patnaik has therefore, very adroitly conceded that if & when proper proceedings are drawn up against the petnr. he will take the earliest opportunity of raising this question again & wanted to reserve liberty to move this Ct. for quashing of proceedings later. I think that this is the only reasonable course to adopt at present.

[8] I should, however, like to observe that the Dist. Mag., or the Head of the Police who is responsible for the initiation of these proceedings should very seriously consider the propriety of clubbing together acts, real or imaginary, extending over such a long period & trying to prove them at great expense & waste of time. It is preposterous to suggest that a case cannot be proved except by examining as many as 140 witnesses. I shudder to think how long this enquiry will occupy if all the witnesses are to be examined, having regard to the leisurely way in which the Prosecuting Officers conduct even petty cases in the Cts. below. It will be the duty of the officers in charge of the prosecution to shift the evidence & reduce the number of witnesses to the minimum possible in the interests of fairness of trial & in order to save avoidable waste of time & money. The enquiry will now be confined to the case against Dandi Gowdo & Bancha Palo alone & if the prosecution ultimately decides to take action under S. 110, Cr. P. C. against the petnr. also, they must await the result of the enquiry against Dandia Gowdo & Bancha Palo. It may perhaps be that as a result of the enquiry against these two persons the prosecution may find that the evidence againt the petnr. is too exiguous to sustain an order under S. 110. That however, is a matter for the prosecutor to decide. So far as this revn. petn. is concerned the order will be that the notice under S. 112, Cr. P. C. served on the petnr. is bad in law & the interim bond taken from him should be discharged; that any enquiry under S. 110 against him should be separately undertaken & should await the result of the enquiry against the two principal accused, who, according to the Police, are desperate & dangerous characters. Subject to this modification this revn. is allowed.

D.R.R. *Revision allowed.*

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A. I. R. (38) 1951 Orissa 281 *[C. N. 70.]*

RAY C. J. & NARASIMHAM J.

P. Venkata Rao*—*Petnr.* v. *King.

Criminal Revn. No. 207 of 1948, D/-27-10-1948.

(a) Criminal P. C. (1898), S. 367—Appreciation of evidence — Credibility of witnesses — Fact that a witness comes from same district or belongs to same community as that of accused is not in itself a good ground for discarding his evidence.

[Para 6]

Anno: Cr. P. C. S. 367 N. 6; Evidence Act, S. 1 N. 9.

(b) Penal Code (1860), S. 161—Evidence—Tainted evidence of decoy witnesses — Necessity of independent corroboration — Evidence Act (1872), S. 114.

Where in a prosecution under S. 161 against a station master for accepting a bribe for supplying wagons to the complainant the whole prosecution story is based upon the tainted evidence of decoy witnesses who are either accomplices or spies of the police in a trap set up for the accused it is unsafe to convict the accused unless there is some independent evidence, either direct or circumstantial to prove his guilt. Where the accused in his explanation to the charge says that the marked currency notes found in his possession were handed over to him by the complainant for safe custody & there is no independent corroborative evidence of the prosecution story that the money was accepted as a bribe so that the prosecution fails to establish the guilt of the accused beyond all reasonable doubt, the conviction of the accused under S. 161 cannot be sustained: A. I. R. (31) 1944 F. C. 66, *Rel. on.* [Paras 7 & 8]

Anno: Penal Code, S. 161 N. 12, Evid. Act, S. 114 N. 3.

S. K. Ray & R. K. Das—for Petnr.; G. B. Mohanty for Advocate-General—for the King.

Ray C. J.— The petnr. P. Venkata Rao, has been convicted under S. 161, I. P. C. & sentenced to rigorous imprisonment for three months & to a fine of Rs. 500 & in default to undergo further rigorous imprisonment for three months.

[2] The complainant, Radhamohan Subudhi (P. W. 8), is a small trader in Dry Fish. He has certain other co sharers & co-partners in the business besides his neighbours & villagers, who also trade in the self-same commodities. It is said that on 19-11-1946, he & one Brahmachari approached the petnr. (who was then the Station Master of Kalupara Railway Station) to settle with him as to what would be the rate per bag of Dried Fish to be paid to him, as inducement or reward, for indenting a waggon for transporting the Dried Fish from Kalupara Rly. Station to various other stations. Their case was that priviously the Station Master had been receiving Rs. 3 per bag but, of late, was making a higher demand. The prosecution story goes on to say that after some higgling & haggling it was settled that he was to receive Rs. 3 per bag. that is a total sum of Rs. 240, for indenting a waggon for 80 bags of Dried Fish to be transported to Sambalpur Railway Station. P. W. 7, Mr. S. Chatterji, the Special Rly. Sectional Officer, deputed on the special duty of detecting corruption, noticed, from a distance, the higgling & haggling between the P. W. 8 & the petnr. After P. W. 8 came out of the Station Master's room, he contacted him & on enquiry, came to learn what had passed between him & the Station Master. He then persuaded him to file with him a complaint addressed to his superior officer, Mr. A. C. Naik, Special Inspector of Police (P. W. 1), Radhamohan, however, did not agree to put in his complaint immediately, but took time to consult his co-partners & other Dried Fish traders before he could embark upon this proceeding. Later, on 20-11-1946, he wrote out a complaint to the dictation of the Sectional Officer (P. W. 7), who carried this to the Special Inspector of Police (Mr. A. C. Naik, P. W. 1). The latter came down to Kalupara Rly. Station. There he, Mr. Chatterji, one Mr. Pal, another Special Anti-corruption Officer, & Radhamohan conferred together, as a result of which it was settled that Radhamohan should receive twenty-four marked ten-rupees currency notes from Mr. A. C. Naik (P. W. 1) & would make over the same to the Station Master, as agreed upon, whereupon the latter should be confronted & searched. Accordingly, Mr. A. C. Naik (P. W. 1) got the services of a First Class Mag. (Mr. U. N. Patnaik) from the Sub-Divisional Mag. of Puri & got permission from him to investigate into this case, which he had no authority to do, it being a non cognizable offence. On 22-11-1946, after the 80 bags of Dried Fish were loaded in a waggon, Radhamohan went to the Station Master to receive R/R on payment of a sum of Rs. 240, as already agreed between them. As soon as he made the payment & came out with the R/R, the Station Master was immediately surrounded by the Deputy Mag. Special Police Inspector & the two Special Sectional Officers & confronted with the question whether he had taken a bribe of Rs. 240. It is said that coming to know that he was being interrogated by a Mag. & a Police Officer, he attempted to throw away the notes underneath the table but was interrupted from doing so. He looked blank & ultimately made a statement which was recorded by the Mag. under S. 164, Cr. P. C. In that he said that the money had been kept with him for the sake of safe custody by Radhamohan, who said that he had to go to his Pentho (seat of collection of Dried Fish) alone in this dark night. After this there was an investigation & the accused was put on trial as a result of which he has been convicted & sentenced as above.

[3] Both the Ots. below have believed the prosecution version of the case & have found guilty.

[4] It is contended on behalf of the petnr. that the entire prosecution story is based upon

the tainted evidence of a number of decoy witnesses who are not better than accomplices, which cannot, in law, be held sufficient to bring the charge home to the accused. Looking to the facts of this case, the only part of the prosecution story on which the conviction ought to be based is as to what passed between Radhamohan & the petnr. at the time he delivered the currency notes & secondly, the episode of conversation that had taken place between them on the 19th as a result of which it is said that it was settled between them that Radhamohan should pay Rs. 240 for the waggon. With regard to the rest of the prosecution case, there is no controversy as the Station Master admits receipt of money. The only question to be decided is whether this receipt of money was the result of a previous arrangment & as a reward for the supply of waggon or it was merely for the purpose of safe keeping. True, much can be said against the defence story, but assuming that that story is not established, still the prosecution is not relieved of the burden of establishing the charge against him by independent evidence. No doubt, there is a number of Govt. Officials, including the Deputy Mag. who have figured as prosecution witnesses; but none of them is either competent to speak or has spoken on the essence of the prosecution version which I have already indicated above. Mr. Das, in support of his argument, has invited our attention to two decisions which are in point. One is the decision in the case of *Lt. Hector Thomas Huntly* v. *Emperor*, A. I. R. (31) 1944 F. C. 66 : (45 Cr. L. J. 753) in which Zafrulla Khan J , observes as follows :

"A charge under S 161, Penal Code, is one which is easily & may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre & of a tainted nature. These considerations cannot however be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If after every thing that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal.

In this case, as in all cases of this kind, the direct evidence of the guilt of the applt. is that of an accomplice, namely that of P. W. 1."

[5] And the other is the decision in the case of *Emperor* v. *Anwar Ali*, 48 Cr. L. J. 964 at p. 965 (A. I. R. (35) 1948 Lah. 27). The passage relied upon reads :

"Naturally, the decoy witness will be extremely keen that his trap should not fail & having in the forefront of his mind that the central thing is that the marked money should be passed to the intended victim, & assuming a certain elasticity of moral character in the decoy witness there is a real danger that he may pass on the money under some pretext which may perhaps not be guilty in the relevant sense or which may even be wholly innocent, but in giving his evidence may represent that he gave the money for the purpose relevant in the case, feeling confident that having taken care that the money was passed with as little publicity as possible: the case on this particular point will resolve itself into a conflict between his evidence on solemn affirmation & the statement of the accused person which must necessarily be made without an oath."

[6] Besides the general principles, enunciated above, which go a great way to retract the independence of the evidence, adduced in the case, there is a very important piece of evidence, in support of the defence, namely, that of P. W. 5. (After stating the evidence the judgment proceeds:) The question that immediately confronts us is whether there is anything on record on which it can be declared without any reasonable doubt this evidence is to be discarded as false & unreliable. The learned Cts. below have not seriously applied their minds to this aspect of the case which supports the defence case in its entirety. They have said that P. W. 5 could not be believed as he came from the same district & belonged to the same community as the accused. We find from record that at the time when P. W. 5 was giving his evidence, he was not a subordinate to the petnr. who had been for a long while transferred from Kalupara to another station. That they came from the same district or belonged to the same community could not be good reasons for discarding his evidence. The very fact that the prosecution did not take opportunity to declare him hostile in order to cross-examine him as well leads to the inference that they had no materials in their possession either to establish that the witness was hostile to the prosecution or intimately connected with the welfare of the accused. He is a public servant & has some position in the society. In the absence of establishing any intimacy between him & the accused & in the absence of any motive as to why he should perjure himself, it would be difficult *not to act upon* his evidence as totally unworthy of credit. Besides, I have noticed certain suspicious features in the surrounding facts & circumstances of the case. The fact that Radhamohan took time to file the complaint bespeaks that he was not such an aggrieved person as he now poses to be. At present he says that he has been the victim of the Station Master's corrupt habit of taking bribe. Under the circumstances, when he finds before him a person in authority asking him to file a complaint, there should be no good reason for him to hesitate & defer. Secondly, one who takes a bribe never defers actual payment until after he has done all in his official capacity in order to show favour to the party. It is said that in this particular case it was agreed that after the goods are loaded the payment should be made

& R/R should be taken. What is the favour that was sought to be purchased at a price from the Station Master ? It was supplying him a waggon for the purpose of transporting his commodity. After that had been done, suppose Radhamohan refused to pay, could he have prevented him from enjoying the favour that had already been shown to him? Thirdly, what is more remarkable is that there is not a word in the written complaint to tell us of the conversation that took place between the Station Master & Radhamohan on the 19th. The complaint is a general complaint & made not with reference to any specific incident. Lastly, it appears from the cross-examination of Radhamohan that he has got his Penthas for procuring Dried Fish at places, such as Parikud, Soran & Gangadharpur. Out of the three places, Gangadharpur itself is a Rly. Station & according to him the other two places are nearer to Gangadharpur than to Kaluparaghat. As a business man, it is not probable that he should incur greater expenses on cartage in order to bring his goods to a distant Railway Station in preference to a nearer one.

[7] It further appears that he maintains accounts of his Fish business of which the total value is Rs.4000 or so in a year. He did not produce these accounts at the trial. As against this it is difficult to believe that he should have in his possession 80 bags of Dried Fish worth about Rs. 3000 to be indented on that single occasion. These circumstances can be reconciled only if it is viewed in the light that the whole thing was stage-managed for the purpose of the police trap. Under the circumstances it becomes very essential that there should be independent evidence as to the talk between Radhamohan & the Station Master on the 19th during the course of which according to Radhamohan it was settled that he was to pay Rs. 240 for getting the R/R after the loading & of the conversation at the time of his delivery of the money to the Station Master. I have already said that these two are the essential facts that could establish the accused's guilt As at present, this has been sought to be established by the tainted evidence of Radhamohan & Brahmachari. They are either accomplices or spies of the police. One cannot be sure to preclude the idea that they were set up by the police to make out a case against the Station Master who had probably earned the reputation of corruption, from the beginning to the end. There must be some independent evidence, either direct or circumstantial, to prove the Station Master's guilt. If Radhamohan had accounts, these accounts must contain entries as to payments made to the Station Master as part of the expenditure incurred for transporting the goods to the various stations. These accounts, if produced, could have, at least, established that he has on previous occasion to pay some bribe to the Station Master or to incur some sort of expenditure otherwise unexplained. Such evidence may not be a direct evidence as to the guilt of this particular Station Master, but it would go a great way to establish that in this particular Station, during this Station Master's tenure of office, such illicit expenses used to be incurred for the purpose of transporting of goods. It would have been a circumstance capable of corroborating the prosecution story. Besides, as has been pointed out by a learned Judge of the Lahore H. C. in the cited case, the police, in contriving to catch the Station Master red-handed, should have posted somebody with an independent status to remain in ambush to hear the conversation that passed between Radhamohan & the Station Master at the time when he delivered the notes. Under the circumstances, the effect of the exculpatory statement of P. W 5 which goes to establish the defence case, cannot be completely ignored. In the result, we are of opinion that the order of conviction & sentence cannot be upheld & must be set aside.

[8] We shall not, however, be understood to say that no prosecution can be based upon police traps of the kind. I should agree, with great respect with the observation of Lord Alverstone, C. J. of England, in the case of *The King* v. *Mortimer*, (1911) 1 K. B. 70 : (80 L. J. K. B. 76).

"The particular transaction of which evidence is given was the result of a police trap, & though I do not like police traps, any more than any one else, still it is only fair to remember that it is almost impossible to detect this class of offence in any other way."

But at the same time that should not lighten the task of the prosecution that lies upon it under the general principles of Criminal Jurisprudence that the accused's guilt must be established beyond all reasonable doubts. This case, as I have shown, stands on its own facts. Besides the statement of P. W. 5, which we could not persuade ourselves to ignore as unworthy of credit, there were various other suspicious features. It is always to be borne in mind that anybody may be easily taken unawares by the police trap. It may not be completely unfounded that this Station Master was not in the habit of receiving brites, but what we have to investigate & settle as a fact is whether on this particular occasion he had received the notes as a bribe after having agreed to do so. As we are not satisfied that the evidence is free from suspicion lacking corroboration, as it does, we are bound to quash the conviction & sentence.

[9] **Narasimham J.**—I agree with my Lord the Chief Justice.

K.S. Conviction and sentence set aside.

A. I. R. (38) 1951 Orissa 284 *[C. N. 71.]*

RAY C. J. & NARASIMHAM J.

The King v. *Tustipada Mandal & others*—*Accused — Respondents.*

Govt. Appeal No. 4 of 1947, D/- 16-10-1948.

(a) Government of India Act (1935), S. 297—Object of section.

The object of the section is to make interprovincial trade & commerce free from discrimination by any of the Province's attempt to support its own trade & commerce or to avail of the opportunity of holding or producing certain commodities to the impoverishment & deprivation of neighbouring province & to encourage, as far as practicable, freedom of commercial intercourse between the provinces. [Para 9]

(b) Orissa Essential Articles Control & Requisitioning (Temporary Powers) Act (I [1] of 1947)—Act, if ultra vires as being contrary to S. 297, Government of India Act — Government of India Act (1935), S. 297 (1).

The Provincial Legislature can be charged with contravening S. 297, only if it contravenes by a legislation relating to trade & commerce within the Province or production, supply & distribution of commodities. It is manifest, therefore, the Provincial Legislature's power to legislate on subjects, relating to any other entry, is not in the least, affected by S. 297. The object of the Act was to regulate & control movement of commodities essential for the life of the society so as to allow their complete depletion. As the Act can be justified by reference to Entries Nos. 14 & 20 of the Provincial Legislative List, it is not *ultra vires.* [Paras 7 & 10]

(c) Orissa Live Stock (Control of Movement & Transactions) Order (1947), Cl. 3 — Preparation & attempt—Distinction — What constitutes attempt to commit offence under Cl. 3 — Orissa Essential Articles Control & Requisitioning (Temporary Powers) Act (I [1] of 1947), S. 10—Penal Code (1860), S. 511.

The dividing line between preparation & attempt is real though fine. So long as the offender is at the stage of preparation, he is not held punishable as it is still open to him to change his mind. The test, therefore, is whether the overt acts already done are such that if the offender changes his mind & does not proceed further in its progress, the act already done would be completely harmless. But where the thing done is such as, if not prevented by any extraneous cause, would fructify into commission of the offence, it would amount to an attempt to commit an offence. Cl. 3 makes an attempt to move or transport without a permit as good an offence as the completed acts of movement or transport from inside the Province to a place outside. The least movement from one terminus towards the other must constitute an attempt & will be punishable under S. 10 of the Act. [Para 11]

(d) Penal Code (1860), Ss. 41 & 42—Orissa Essential Articles Control & Requisitioning (Temporary Powers) Act (I [1] of 1947) & Orissa Livestock (Control) of Movement & Transactions Order (1947) are covered by sections. [Para 18]

Anno. Penal Code, S. 41, N. 1.

(e) Penal Code (1860), S. 79 — Mistake of law—Meaning — Mistake of fact— Mens rea —Error of mixed question of law & fact.

Mistake of law ordinarily means mistake as to existence or otherwise of any law on a relevant subject as well as mistake as to what the law is. [Para 20]

In holding a citizen guilty of any offence, the existence of *mens rea* in him is fundamental. It is only when the mind is at fault that a man can be held guilty of an offence. It is fundamental too that whenever & wherever there is a mistake of fact on which is founded a belief in good faith of justification by law of an act, the requisite state of mind that would make the author of the act guilty is absent. Considered in this aspect there is hardly any difference between mistake of fact & mistake of law; but it has been the policy of criminal jurisprudence of civilised countries that every individual shall be presumed to know the law & shall be debarred from pleading ignorance of law as an excuse. [Para 20]

An error of mixed question of law & fact is treated as a mistake of fact. [Para 23]

Anno. Penal Cede, S. 79, N. 1.

(f) Penal Code (1860), S. 79—Question of justification of offence—Guiding rules.

Where the question of justification of an offence either due to mistake of fact or mistake of law, arises, the guiding rules are :

(i) That when an act is in itself plainly criminal & is more severely punishable if certain circumstances co-exist, ignorance of the existence of such circumstances is no answer to a charge for the aggravated offence.

(ii) That where an act is *prima facie* innocent & proper, unless certain circumstances co-exist, the ignorance of such circumstances is an answer to the charge.

(iii) That the state of the deft.'s mind must amount to absolute ignorance of the existence of the circumstance which alters the character of the act, or to a belief in its non-existence.

(iv) Where an act which is in itself wrong, is under certain circumstances, criminal, a person who does the wrong act cannot set up as a defence that he was ignorant of the fact which turned the wrong into a crime.

(v) Where a statute makes it penal to do an act under certain circumstances, it is a question upon the wording & object of the particular state, whether the responsibility of ascertaining that the circumstances exist is thrown upon the person who does the act or not. In the former case his knowledge is immaterial. [Para 24]

Anno. Penal Code, S. 79, N. 1.

(g) Penal Code (1860), S. 79 — Burden of proof—Evidence Act (1872), S. 105.

The accused has to satisfy that the conditions that could exonerate him existed at the time, when the offence was committed. [Para 26]

Anno. Penal Code, S. 79, N. 1; Evidence Act, S. 105, N. 3.

(h) Penal Code (1860), S. 53—Conviction, if must follow punishment—Criminal P. C. (1898), S. 32.

It is imperative that every conviction of an offence shall be followed by the prescribed punishment while, in case no minimum is prescribed, to reduce it to something nominal is completely within the discretion of the Ct. A. I. R. (15) 1928 Nag. 188, *Dissent. from.* [Para 28]

Anno. Penal Code, S. 53, N. 1; Cr. P. C., S. 39 N. 3.

Advocate-General — for the King ; D. Sahu — for Resps.

Ray C. J. — This appeal is directed against an order of acquittal recorded by Rai Bahadur Charu Chandra Coari, Ses. J. Cuttack, in Cri. App. No. 70-C of 1947, reversing the order of

conviction passed by the Sub-Divisional Mag. Jajpur, in the case of *Emperor* v. *Tustipada Mandal & 5 others*, under S. 10, Orissa Essential Articles Control & Requisitioning (Temporary Powers) Act (I [1] of 1947).

[2] The resps. six in number, belong to the dist. of Burdwan in the Province of Bengal. They were prosecuted for attempting to transport 21 bullocks from the Province of Orissa in contravention of Cl. 3, Orissa Livestock (Control of Movement & Transactions) Order 1947, made & promulgated in exercise of the powers conferred by S. 3, Orissa Essential Articles Control & Requisitioning (Temporary Powers) Act 1947, in supersession of all existing orders on the subject, by the Govt. of Orissa. On 2-6-1947, the resps. were found passing through Dharmasala (in the dist. of Cuttack) en-route Bhadrak with 21 heads of cattle (bullocks), purchased on different dates by one or other of them in different districts of Orissa. They were avowedly moving & transporting cattle to the dist. of Burdwan beyond the provincial boundaries of Orissa. It is admitted that the resps. held no permit nor licence from the Govt. of Orissa as enjoined in Cl. 3 of the Order aforesaid. Under these circumstances they were prosecuted under S. 10 of the Orissa Act I [1] of 1947, & sentenced to pay a fine of Rs. 51 each, & the 21 bullocks seized were forfeited to the Govt. of Orissa.

[3] In appeal, the learned Ses. J. of Cuttack gave them benefit of doubt & set aside their conviction & recalled the order of forfeiture of the bullocks seized.

[4] The points, that were canvassed before him & have been reiterated here, were: (i) if the Act of the Orissa Legislature, referred to above, & the Order, passed thereunder, were *ultra vires* the Provincial Legislature, (ii) that whatever the resps. did in furtherance of movement & transport of the cattle amounted in law to preparation, as distinguished from attempt, to commit the offence. Two other points were raised in this Ct. by the learned counsel for the resps namely, (iii) the trial was vitiated by misjoinder of charges & parties, & lastly (iv) that in view of the Govt. of India's letter addressed to all Provincial Govts., the resps. had reasons to believe *bona fide* that under the laws, then prevailing, there was no imposition of any ban on the movement & transport of cattle from Orissa across its borders. I shall proceed to deal with the points in the order in which they have been stated above:

[5] Point (i):—If Orissa Act I [1] of 1947 is *ultra vires* the Provincial Legislature. The Act is impugned, as being contrary to the provisions of S. 297, Govt. of India Act, which reads:

"297. — (1) No Provincial Legislature of Govt. shall—

(a) By virtue of the entry in the Provincial Legislature List relating to trade & commerce within the Province, or the entry in that List relating to the production, supply, & distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from the Province of goods of any class or description or,

(b) by virtue of anything in the Act, have power to impose any tax, cess, toll, or due which, as between goods manufactured or produced in the province & similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality & similar goods manufactured or produced in another locality.

(2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid."

[6] It is submitted that this section must operate so as to completely neutralize the Provincial Legislature's powers to make laws offending it under any of the entries in the Provincial Legislative List. Reliance is placed in support of this contention on *James* v. *Cowan*, 1932 A. C. 542 : (101 L. J. P. C. 149) and *James* v. *Commonwealth of Australia (No. 2)*, 1936 A. C. 578: (105 L. J. P. C. 115). Of the above two, the last named case is completely beside the point as it concerns the party's right to appeal to His Majesty's P. C. Before dealing with the case of *James* v. *Cowan*, 1932 A. C. 542 : (101 L. J. P. C. 149) so strongly relied upon by Mr. D. Sahu, I shall place side by side S. 92, Commonwealth Constitution to which the Australian case related & S. 297, Indian Constitution, against which the impugned Act is said to offend. The material portion of the section of the Commonwealth Constitution, which reads:

"trade, commerce & intercourse among the States whether by means of internal carriage or ocean navigation, shall be absolutely free".

The relevant portion of S. 297 reads:

"297.—(1) No Provincial Legislature or Govt. shall by—

(a) by virtue of the entry in the Provincial Legislative List relating to trade & commerce within the Province, or the entry in that list relating to the production, supply & distribution of the commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from the province of goods off any class or description;

(2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid."

[7] The contrast of the sections, as expressed, should make it clear that while one amounts to absolute prohibition the other is a conditional one. The Provincial Legislature can be charged with contravening S. 297, only if it contravenes by a legislation relating to trade & commerce within the Province or production, supply & distribution of commodities. It is manifest therefore, the Provincial Legislature's power

to legislate on subjects, relating to any other entry is not, in the least affected by S. 297. This has also been so held by their Lordships of the F. C. in the case of *Bhola Prasad* v. *Emperor*, A. I. R. (29) 1942 F. C. 17: (43 Or. L. J. 481). It would be sufficient, in this connexion, to quote a passage from the judgment of Gwyer C. J. After quoting S. 297 (1) (a), his Lordship proceeds to say:

"It is plain beyond words, that this provision only refers to legislation with respect to entry No. 27 & entry No. 29 in the Provincial Legislative List: it has no application to legislation with respect to anything in entry No. 31. A Provincial Legislature if it desired to pass a law prohibiting export from or import into the Province must therefore seek for legislative authority to do so in entries other than entry No. 27 or entry No. 29. If it can point to legislative powers for the purpose derived from any other entry in the Provincial Legislative List, then its legislation cannot be challenged under S. 297 (1) (a)."

[8] The impugned Act, it has been urged with some force by Mr. D. Sahu, is relatable to entries Nos. 27 & 29, Provincial Legislative List, which entries deal with trade & commerce, & production supply & distribution of commodities respectively—subjects referred to in S. 297 (1) (a). He takes us to the preamble of the impugned Act, which reads:

"Whereas it is expedient to provide for the continuance during a limited period of powers to control the production, processing supply, distribution, transport & prices of essential articles & of trade & commerce therein & for requisitioning of property;

It is hereby enacted as follows:"

& urges that the Act directly impinges upon the bounderies of S. 297 (1) (a). It is contended for the Province of Orissa that the Act is relatable to entry No. 20 of the Provincial Legislative List which refers to:

"Agriculture, including agricultural education & research protection against pests & prevention of plant diseases; improvement of stock & prevention of animal diseases; veterinary training & practice; pounds & prevention of cattle trespass."

[9] The question, that in this context, arises for consideration, is whether the scope of the Act is to be limited to what is stated in the preamble as contradistinguished from what is provided in the text. The key sections of the Act are 3 & 4. According to both of these sections, the Provincial Govt's power under the Act is to be exercised only when it appears to them to be necessary or expedient that certain measures should be taken only to maintain increase or secure supply, distribution & availability at fair prices or production of any essential article. Essentiality of the aricle should be determined according to the existing resource of such articles & their necessity for the life of the society. It would be denying the Provincial Legislature & the Provincial Govt. their bare existence, if by virtue of S. 297, Govt. of India Act, they are made powerless for, or in other words, prohibited from passing such legislation & taking such measures as will be thought expedient & necessary by them to prevent complete depletion of such commodities of the Province without which the members of society in the Province are bound to perish. To provide for the agriculture of the Province is a necessity which cannot be ignored without grave danger & risk to its existence. As at present situated, no agricultural operation can be carried on without proper supply of cattle. Accordingly, "improvement of stock" is intimately & inextricably connected with the Province's agriculture. Under the circumstances, the scope & purpose or pith & substance of the Act are directly, if not solely referable to legislative powers, derivable from the entry No. 20 Provincial Legislative List II. I have read the whole Act & I find absolutely no provisions therein of which the object can be held to come within the mischief of S. 297. The object of the section is to make inter-provincial trade & commerce free from discrimination by any of the Provinces' attempt to support its own trade & commerce or to avail of the opportunity of holding or producing certain commodities to the impoverishment & deprivation of neighbouring province & to encourage, as far as practicable, freedom of commercial intercourse between the Provinces. It would be pertinent here to advert to the construction put upon S. 92 of the Australian Commonwealth Constitution by their Lordships of the Judicial Committee. In spite of the terms of absolute prohibition in the section directed against, any barrier being put to the absolute freedom of inter state commerce, their Lordships observe:

"Thus the only question in this case appears to be whether the Minister did exercise his powers so as to restrict the absolute freedom of inter-state trade. It may be conceded that even if the Minister exercised them for a primary object which was not directed to trade or commerce but to such matters as defence against the enemy, prevention of famine, disease & the like, he would not be open to attack because incidentally inter-state trade was affected."

(In the case before them, their Lordships, however, came to a finding that the direct object of the exercise of powers was to interfere with inter-state trade & in that view held that the impugned section was *ultra vires*.)

[10] In the instant case, however, it is not only not the direct object but even not ancillary nor collateral object of the impugned Act to interefere with inter-provincial trade. The object of the Act was to regulate & control movement of commodities essential for the life of the society so as to allow their complete depletion. There is no word of prohibition of transport under all circumstances across the Provincial

borders. Any such transport or trade was to be controlled for the purpose of its regulation so far as such regulation was needed for preserving the barest minimum of the essential goods for the bare existence of the society. Suppose under this Act, the Provincial authorities allowed free transport of livestock other than plough cattle & milch cows which were essential in view of the then ecomonic condition of the society, greatly shaken by the devastating World War No. II, could it not be said that it was a measure not intended to prevent or prohibit inter-provincial trade or commerce, but meant to prevent famine in the Province by preserving plough cattle, so necessary for carrying on agricultural operations (Entry No 20) the mainstay of the life of the society & to maintain health by preserving milch cows (Entry No. 14) of the Province. There objects could not be achieved except by way of regulating movement & transport of livestock through measures, such as, this Act provides. In my judgment, therefore, as the Act can be justified by reference to entries Nos. 14 & 20 of the Provincial Legislative List, it is not *ultra vires*.

[11] Point (ii):—To appreciate Mr. D. Sahu's submissions, it would be necessary to read Cl. (3), Orissa Livestock (Control of Movement & Transactions) Order 1947. Its material portion reads:

"No person shall move or transport or attempt to transport any livestock .... to any place outside it except under & in accordance with a permit .... issued in this behalf."

The submission is that the offence is committed only when the Provincial boundaries are crossed & not before that. To accede to this contention would amount to virtual abrogation of the law. This is not a case in which there was any dispute as to whereto the cattle were being moved or transported, it being admitted by the accused that they were taking them to the district of Burdwan. The movement & transport being contrary to law the offence must commence as soon after their purchase of the cattle as they begin to move them even a step. The act of movement or transport is to be accomplished between two termini, one is terminus *a quo* & the other is *terminus ad quem*. Any slightest movement from the former towards the latter amounts to movement of transport within the mischief of the clause. The argument can prevail if the accused persons did nothing beyond purchase of the cattle for the purpose of moving or transporting. The dividing line between preparation & attempt is real though fine. So long as the offender is at the stage of preparation, he is not held punishable as it is still open to him to change his mind. The test, therefore, is whether the overt acts, already done, are such that if the offender changes his mind & does not proceed further in its progress, the act already done would be completely harmless. But where the thing done is such as, if not prevented by any extranous cause, would justify into commission of the offence, it would amount to an attempt to commit an offence. In the present case, Cl. (3) makes an attempt to move or transport without a permit as good an offence as the completed acts of movement or transport from inside the Province to a place outside. As I have said the least movement from one terminus towards the other must constitute an attempt & will be punishable under S. 10 of the Act. This contention must fail.

[12] Point (iii):—As to misjoinder of charges & parties, this ought not to detain us for any length of time. The fact that all the resps. came together to purchase cattle, though the purchase was made in the name of either one or the other of them & were going back together driving the entire flock collected by them & admittedly one of them had gone ahead to arrange for a waggon for transport, makes it quite plain that they were acting in concert & the attempts to move or transport were part & parcel of one continuous transaction with which each one of the resps. was connected & in which one was helping the other. It cannot, therefore, be ruled that there was any such deficiency in trial as misjoinder of charges & or of persons.

[13] Point 4:—The fourth and the last point is fraught with difficulties. The facts relevant to elucidation of this branch of contention, are admitted beyond any controversy & they are set out herein below :

[14] That, with the lapse of Defence of India Act, the various orders, passed by the Provincial Govts. controlling the movement & transport of livestocks, made as they had been under the Defence of India Rules; deriving their force from the Defence of India Act, automatically exhausted themselves. The Govt. of Orissa, however, considered that it was expedient in the interest of the life of the community in Orissa that power to control movement & transport & of certain essential articles & trade & commerce therein & requisitioning thereof should continue for a limited period. Propelled by this decision, the Legislature of Orissa passed Act I [1] of 1947, which received the assent of the Governor-General on 28-2-1947, & was published in the Orissa Gazette on 12-3-1947. In pursuance of this Act, livestock, including poultry, constituted, *inter alia* essential commodities for the purposes of the Act. According to the provisions of Ss. 3 & 4, the Provincial Govt. were em-

powered to make & notify necessary orders for regulating of prohibiting production, processing, supply, distribution, transport & prices of essential articles & trade & commerce therein. The powers, thus conferred, without any prejudice to the generality, were specified in sub s. (2) of the section. In fulfilment of this power in order to meet the exigencies of the circumstances flowing from the then condition of the community at large in the Province of Orissa, the relevant order was made which was notified on 23-4 1947. This order was mainly, if not solely, concerned with providing a machinery for grant of licenses or permits as condition precedent to movements & transports of & trade & commerce in essential commodities. In cl. (3) of this order, it was prescribed :

"No person shall move or transport or attempt to move or transport any livestock . . . from any place in the Province . . . . to any place outside it except under & in accordance with permit issued by . . . ."

[15] The offence, which is the subject of this trial, is contravention of this clause which is made punishable under S. 10 of the Act. I have already said that the order containing the clause was notified on 23-4-1947. It appears from the documents, printed at pp. 10 & 11 of the Paper Book that K. P. W. Marar, Esq., Joint Secretary to the Govt. of India, addressed to all Provincial Govts. on 19-3-1947 (a few days after the publication of the concerned Act of Orissa) in the following terms:

"Sir, I am directed to say that with the lapse of the Defence of India Act, various orders passed by the Provincial Govts. controlling the movement of livestock cease to be operative. Their orders were not, however, formally withdrawn & instances have co ne to the notice of the Govt. of India where the public are still under the impression that the movement of livestock is not free. The Provincial Govts. are no doubt aware that under S. 297, Govt. of India Act, no order can be passed by them affecting inter-provincial movement of cattle & any restrictions either by order or by executive action will be *ultra vires*. I am, therefore, to request you to remove any wrong impression that might exist & issue a formal notice intimating that these respective orders are no longer in force. The Rly. Board is also being requested to inform all Rly. Administrations that lapsed orders of the Govt. of India should be ignored & free movement of livestock permitted. I have etc."

Following this letter the Director of Agriculture, Bengal wrote a Memo No. 7464 dated 18-4-47 to the Deputy Director of Agriculture, Burdwan Circle informing :

"Now-a-days there is no restriction on the inter-provincial movement of cattle. A copy of the Govt. of India, letter issued in this connexion is enclosed herewith."

[16] The Deputy Director in his turn forwarded a copy together with the enclosure (Govt. of India's letter) to one Rai Hari Kali Pan Bahadur. It appears that in course of investigation, the resps. produced this letter before the investigating Sub-Inspector (P. W. 1), who deposed:

"The accused all belonged to Bengal. During enquiry they produced a letter from the Director of Agriculture, Bengal to the Deputy Director of Agriculture, Burdwan Circle (Memo No. 7464 dated 18-4 47) regarding import of cattle from Orissa. The letter is marked Ex. 2. This letter contained as an enclosure a copy of a letter purported to have been issued from the Joint Secretary to the Govt. of India to all Provincial Govts. stating that all orders affecting inter-provincial movement of cattle passed by the Provincial Govts. will be *ultra vires*."

It may be noted that the enquiry, referred to, took place on 2-6-1947. From such receipts, printed at pp. 11 to 15, as are relevant to the present case, the resps commenced purchasing bullocks, in question, from the second week of may & completed the same on 1st of June. They started moving on the 2nd of June & were arrested on that day.

[17] On these facts, it is contended by Mr. Sahu, that the actions of the accused were fully justified as they, in good faith & reasonably, believed that they were entitled to move or transport cattle from Orissa to a place beyond its borders & to trade or commerce in livestock inter-provincially. The facts, proved, do not sufficiently make out the defence plea with reference to the material time of commission of the offence. The commission of the offence must, in this case, be held to have commenced from the date of the purchase, that is. from the second week of may though the actual movement or transport, as the case may be, commenced on 2nd of June. This is so in view of S. 11 of the Act, which says:

"Any person . . . . . does any act preparatory to a contravention of an order made under the provisions of this Act, shall be deemed to have contravened the order . . . . . ."

[18] The learned Advocate-General, in counter argumenting the contention of Mr. Sahu, says that the principles underlying the "general exceptions" in Chap. IV, I. P. C., are not applicable to a special or local law offence as the present one. This contention cannot be entertained in view of S. 40 of the Code, wherein it is provided:

"In Chap. IV . . . . . word 'offence' denotes a thing punishable . . . . . under any special or local law as hereinafter defined."

"Special law" is defined in S. 41 & "Local laws" in S. 42. These definitions will, by all means, cover the relevant laws with which we are concerned in this case.

[19] The contention of Mr. Sahu, therefore, deserves consideration in view of the provisions, contained in Chap. IV, I. P. C. under the head "General Exceptions." The section, on which

Mr. Sahu lays his finger in support of his contention, is 79, which reads:

"Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact & and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it."

[20] The next question, that then arises, is whether the resp's case comes within the purview of aforesaid section, that is, whether they, by reason of mistake of fact & not by reason of mistake of law, in good faith, believed themselves to be justified by law, in moving or transporting the 21 heads of bullocks from inside Orissa to a place outside. True that, but for the Act restricting such movement, they would be justified by law to move them. But the question, that falls to be considered, is whether the mistake, which led them to believe in their justification, was a mistake of fact & not a mistake of law. I shall deal with the question of their 'good faith' presently. (Before doing so I shall assume 'good-faith' in their favour). It is contended, on behalf of the Province, that it was a mistake of law rather than a mistake of fact. Mistake of law ordinarily means mistake as to existence or otherwise of any law on a relevant subject as well as mistake as to what the law is. The difficulty, involved in this case, arises out of a discordant note, struck by the Govt of India, as to the competence of a Provincial Legislature or a Provincial Govt. either to legislate or to take any executive action having the purport as well as the effect of prohibiting inter-provincial movement & transport of commercial goods, including livestock. In holding a citizen guilty of any offence, the existence of mense rea in him is fundamental. It is only when the mind is at fault, that a man can be held guilty of an offence. It is fundamental, too, that whenever & wherever there is a mistake of fact on which is founded a belief in good faith of justification by law of an act, the requisite state of mind that would make the author of the act guilty is absent. Considered in this aspect, there is hardly any difference between mistake of fact & mistake of law, but it has been the policy of criminal jurisprudence of civilised countries that every individual shall be presumed to know the law & shall be debarred from pleading ignorance of law as an excuse. If the accused's plea in this case amounted to plea of ignorance of the relevant Act & the relevant order, it must have been summarily ruled out as not sustainable in law; but the plea, before us, is that the mental state of the presumed knowledge of law of the alleged offenders is neutralised by what can be called a knowledge, imparted by an authoritative governmental source to the effect that any law, prohibiting such movement or transport or any executive action taken in that behalf by provincial authorities either legislative or otherwise, is beyond their competence. The real controversy reduces itself to this whether the latter knowledge derived from the source, as it is, produces or leads to "mistake of fact or mistake of law" within the meaning of S 79 of the Code. If the latter, the contention, however much it may evoke sympathy in us for the accused, must fail.

[21] Mr. Sahu's contention is that the knowledge, imparted by the Government of India, is substantially to the effect that there is no law prohibiting the movement or the transport, in question. As such, it is contended, it is a question of fact. This contention leads one to think of an apt analogy. Suppose, for instance, the Official Gazette of Orissa published a list of temporary Acts, that have either exhausted or been repealed, & in the list, Orissa Act I [1] of 1947 & the order, published there under, are included ; later, however, this mistake was rectified in subsequent Gazette. A question arises whether any offence in contravention of the Act can be said to have been committed during this interval. The only answer, that is admissible, is that no such offence can be said to have been committed. Pushing the analogy to its logical conclusion in its application to the present case, it can, as well, be said, in favour of the accused, that they were given to understand that any law prohibiting movement or transport of livestock from Orissa to outside had lapsed & they had no reason either to disbelieve or to discredit the source, from which it came nor had they any reason to doubt its authority. Under the circumstances, can it be said that the mental state, under which one is capable of committing an offence, was in existence in the accused. I am fully alive to the counter contention that the responsibility of the accused in such a case, is to ascertain the validity of the provincial law & is not to be led away by an official letter which cannot occupy the place of law. But I, on my part, should not fall in line with this contention, particularly as the nature of the act, impugned, is not in itself either wrongful or unlawful. On the contrary, it is a lawful act until it is made unlawful. There are circumstances which make out cases of exception to the general rule that ignorance is no excuse. If I can understand any reason behind this exception it is this that there may arise circumstances neutralising the presumption of knowledge of law in every individual. I shall here quote a passage from the judgment of Baggally L. J., (in a case of which the facts are somewhat dissimilar) in the case of *Burns* v. *Nowell*, (1880) 5 Q. B. D. 444 at. p. 454 (49 L. J. Q B. 468) :

"Before a continuous act or proceeding not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, reasonable time must be allowed for its discontinuance; & though ignorance of the law may, of itself, be no excuse for the master of a vessel who may

act in contravention of it, such ignorance may nevertheless be taken into account when it becomes necessary to consider the circumstances under which the act or proceeding alleged to be unlawful was continued, & when & how it was discontinued, with a view to determine whether a reasonable time had elapsed without its being discontinued."

[22] I shall not be understood to use this decision, in view of the quoted passage occurring therein, as an apt precedent, but, merely, as showing that in view of particular circumstances of a case, an exception, to the universally recognised rule that ignorance of law is no excuse, may come into being. Next, I shall advert to a passage in Mayne's Law of India at pp. 136-137 which, I think, is more pertinent to the question, that, at the moment, has engaged my attention :

"Suppose, for instance, that an Act of Parliament was passed in England, applicable to India, which came into operation as soon as the royal assent was given, & that an offence against it was commit'ed in India a week after it came into operation, before the Act could have arrived, or been promulgated in India; I do not think it could be contended that the law was in force in India at the time the act was committed."

[23] It is, however, settled that an error on mixed question of law & fact is treated as a mistake of fact. In this connexion, I shall quote the remarks of Bishop in his commentary on Criminal Law. Art. 378 :

". . . . . So, in criminal jurisprudence, the guilt or the innocence of the prisoner depends on the fact . . . . that he honestly believed it through his misapprehension of law."

In England, the view has unanimously been taken that if the accused is misled into the error of fact on account of an error of law, his mistake shall be treated as a mistake of fact rather than of law. (*Vide R* v. *Reed*, Car. & M. 306 : (174 E. R. 519); *R.* v. *Hall*, 3 C. & P. 409). This sort of conclusion to my mind appears to be more a matter of policy of criminal jurisprudence rather than of strict logical deduction.

[24] For the purpose of elucidation, I shall quote the five invaluable rules, laid down by 15 Judges, in the case of *R.* v. *Prince*, (1683) 2 Ch. C. 154, which has been the guiding star in England & elsewhere whenever the question of justification of an offence either due to mistake of fact or mistake of law has arisen :

"(i) That when an act is in itself plainly criminal, & is more severely punishable if certain circumstances co-exist, ignorance of the existence of such circumstances is no answer to a charge for the aggravated offence.

(ii) That where an act is *prima facie* innocent & proper, unless certian circumstances co-exist, then ignorance of such circumstances is an answer to the charge.

(iii) That the state of the deft's mind must amount to absolute ignorance of the existence of the circumstance which alters the character of the act, or to a belief in its non-existence.

(iv) Where an act which is in itself wrong is, under certain circumstances, criminal, a person who does the wrong act cannot set up as a defence that he was ignorant of the facts which turned the wrong into a crime.

(v) Where a statute makes it penal to do an act under certain circumatances, it is a question upon the wording & object of the particular statute, whether the responsibility of ascertaining that the circumstances exist is thrown upon the person who does the act or not. In the former case his knowledge is immaterial."

[25] The present act of movement & transport of livestock from one Province to another comes within R. (ii) above being an act which is *prima facie* innocent. It is made penal on account of certain circumstances co-existing, namely, the prohibitory orders & laws passed by a Province. Of course, I shall not be taken to be confusing questions of fact with questions of law, as in this rule, no doubt, 'the circumstances' referred to are in relation to "circumstances" relating to facts; but such circumstances will not be different in character in cases of circumstances of mixed question of law & fact. Rule (ii) above must attract the application of R. (iii). Applying R. (iii) in the present case, it may be argued with force that the fact of some public officers of Bengal canvassing the validity of Provincial laws on the subject with the Govt. of India presupposes the fact of the Provincial law & that their authorisation of the accused persons to come & transport cattle from this Province amounts to flying in the face of the Provincial law. The argument, standing by itself, will, no doubt, commend itself very strongly to me to the prejudice of the accused; but keeping the gist of the law of general exception in mind, the bare possibility of the accused's innocence cannot be completely ruled out. In view of their misconception of law, they fell victim to a mistake of fact that the Provincial laws on the subject had lapsed. Lapsing of a particular statutory law & order must always be a question of fact.

[26] Under the circumstances of the present case, however, the accused persons cannot be held "not guilty". The burden was on them to satisfy that the conditions that could exonerate them, existed at the time, when the offence was committed. The only evidence, that is before us, is that on 2nd of June, they were in possession of the letter of the Govt. of India. There is hardly any reason to believe that the mental state of absolute ignorance, advocated in R. (iii) above, existed at the material time, namely, at the time of the purchase, which itself constitutes & completes the offence as stated above.

[27] In this view of the matter, however, the appellate order of acquittal must be set aside & the resps. must be convicted of the offence charged against them. In consideration of the circumstances, set out above, the punishment to be inflicted must be of a nominal character, that is, each of them is sentenced to pay a fine of Re. 1 & in default to undergo R. I. of one week each.

[28] Mr. D. Sahu contended that the order of conviction need not attract any sentence whatever. In this connexion, he relied upon the case

of *Sitaram* v. *Emperor*, A. I. R. (15) 1928 Nag. 188 : (29 Cr. L. J. 506). With great respect, I do not agree with the view taken by the learned Judge, Hallifax, A. J. C., in that case. To my mind, it is imperative that every conviction of an offence shall be followed by the prescribed punishment while, in case no minimum is prescribed, to reduce it to something nominal is completely within the discretion of the Ct. In the ends of justice, we shall also direct that the order of forfeiture of the cattle, seized, to the Govt. of Orissa, should be set aside & the sale-proceeds, in deposit, must be made over to the resps.

[29] The appeal is, therefore, allowed.

[30] **Narasimham J.**—I agree with my Lord the Chief Justice.

V.R.B. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 291 *[C. N. 72.]*

JAGANNADHADAS AND PANIGRAHI JJ.

Rajkishor Mohanty & another — Pltfs.—Applts. v. *Banabehari Patnaik & others — Defts—Resps.*

A. F. A. D. No. 144 of 1945, D/- 8-8-1949.

(a) Contract Act (1872), S. 29 —Contract void for uncertainty—Contract Act (1872), Ss. 46 & 49.

Where a written contract for sale of land is silent about the price & the time for performance, the contract is not void for uncertainty, if it is one that can be made certain within the meaning of S. 29. If on evidence it is found that the parties agreed to the payment of a reasonable & fair price & complete the contract within reasonable time the Ct. can imply such terms in the contract & determine what is reasonable price & what is reasonable time. [Para 6]

Anno : Contract Act, S. 29, N. 1; S. 46, N. 1 ; S. 49 N. 1.

(b) Civil P. C. (1908), S. 100 — Appreciation of evidence by trial Ct.

The greatest weight should be attached to the trial Ct.'s opinion because he saw & heard the witnesses. It is not open to a Ct. of Appeal to set aside the finding of a Ct. unless it appears unmistakably from the evidence that in reaching his conclusions the trial Ct. has not taken proper advantage of having seen & heard the witnesses or has failed to appreciate the weight & bearing of the circumstances admitted or proved. The appellate Ct is free to reverse his conclusions if the grounds given by him are unsatisfactory by reason of material inconsistencies or inaccurracies or if he has misdirected himself in law. [Para 4]

Anno : Civil P. C., Ss. 100, 101, N. 53.

(c) Contract Act (1872), S. 31 — Contingent contract —Contract for sale of lease-hold in khasmahal —Contract mentioning that application for sanction for transfer shall be presented to authorities in due course— Contract held not contingent upon such permission. [Para 7]

Anno : Contract Act, S. 31, N 1.

B. Mohapatra & P. Misra—for Applts ; H. Mohapatra—for Resps.

Panigrahi J.—This appeal arises out of a suit for specific performance of a contract to sell a plot of homestead land bearing plot No. 1051 within Jemmabandi 98 of Cuttack Khasamahal. Four annas share in the suit plot belonged to Raikrishna Mohanty, deft. 2 & the rest belonged to applt. 1, Rajakishor Mohanty. Deft. 2 also owned in his own right the adjoining plot of land bearing No. 1052 within Jammabandi 97. Deft. 2 wanted to sell plot No. 1052 applied to the Khasamahal authorities for permission to sell. Among the objectors were deft. 1 (Dr. Banabehari Patnaik), pltf. 2 (Sachidananda Mohanty) son of pltf. 1 & some other persons. The Khasamahal enquiry was posted to 6-4-1941 when deft. 2 filed Ex. 5, which is a petn. of compromise alleged to have been arrived at between the parties. The main clauses of this compromise are that pltf. 2, Sachidananda should withdraw his objection to the sale of plot No. 1052 & allow deft. 1 to purchase it from deft. 2 and that deft. 2 should sell to Sachidananda (pltf. 2) his four annas share in plot No. 1052. It is said that deft. 2 went back upon this compromise & sold plot No 1051 to deft. 1 on 27-6-41 for a sum of Rs. 500. The pltfs. sued for specific performance of the agreement for sale made by deft. 2 in favour of pltf. 2.

[2] The learned Munsif who tried the suit decreed the suit in pltfs' favour & held that the deft. 1 was not a *bona fide* purchaser for value. On appeal to the Ct. of the Dist. J. by deft. 1 the judgment of the learned Munsif was reversed on the ground that there was no completed contract on 5.4-1941 which could be specifically enforced & that it was void for uncertainty as there was no stipulation about the price to be paid. Specific performance of the contract was, therefore, refused.

[3] In second appeal two contentions have been raised on behalf of the pltf. applts. firstly, that the lower appellate Ct. committed errors of record which vitiated its judgment which cannot consequently be upheld; & secondly that the price for the sale of the plot had been settled prior to 5-4-1941 the day on which Ex. 5 was actually drafted & that even otherwise the Ct. can imply a term in the contract to the effect that a reasonable price should be paid.

[4] The pltfs' case is that the preliminary negotiations for a compromise were started on the 27th or 28th March 1941 at the house of Sri Bichitrananda Mohanty, viz., D.W. 3 who is the father-in-law of deft. 2 & that the price was settled at that time Pltf. 2 who was then at Jaipur was intimated of the agreement & was asked to confirm the same. Pltf. 2 it is said came to Cuttack on the 5th April & confirmed the same. The pltf. relied upon the evidence of P. W. 5 a clerk of Sri Bichitrananda Mohanty. The appellate Ct. rejected this witness's evidence on the ground that the evidence did not disclose that he was an eye-witness to the discussion said to have taken place on 27th & 28th of March. The witness clearly stated that the compromise petn. was drafted 7 or 8 days after the compromise talk took place & that he was present when Ex. 5 was drafted. From this statement made

in cross examination the learned Dist. J. inferred that the witness was not present at the compromise talk which took place 7 or 8 days before the petn. was actually drafted & observed :

"He has nowhere stated affirmatively that he was present when the preliminary negotiation for compromise took place."

The witness said in the course of his chief examination that the consideration was fixed at Rs. 500 or a little more than that & that it was settled at the house of Bichitrananda Babu & that he was present there at the time. The witness was positive that he was present at the meeting where the compromise was settled & in cross examination he stated that this talk took place 7 or 8 days before Ex. 5 was drafted. In cross-examination he was specifically asked about his presence on the day Ex. 5 was drafted & he answered accordingly. It should be remembered that in cross-examination a witness answers only such questions as are put to him & a logical sequence of events cannot be expected in his narrative. The learned Dist. J. refused to attach any weight to the evidence of the first pltf. on the ground that "his past record as a dismissed clerk of the civil Ct. does not add to his reputation." There is also the evidence of P. W. 6 who corroborates the pltf's version that Rs. 500 had been settled as the consideration for the sale for sometime prior to 5-4 41 but his evidence was not accepted by the learned Dist. J. on the ground that he is a typist in the civil Ct. & that as the pltf. is also a clerk in the civil Ct. his evidence was that of a biased witness The learned Dist. J. also relied wholly on the evidence of D W. 3 (father-in law of deft 2) according to whom there was no talk of any sale price when Ex. 5 was drafted. From this statement the lower appellate Ct. drew the inference that there could not have been earlier negotiation or settlement of the price as D. W.-3 was silent on the point. In accepting the evidence of D. W. 3 in its entirety the lower Ct. was very much influenced by the fact that deft. 2 was a *pro forma* deft. only & that he was not interested in deft. 1. This is another error of record which has been pointed out to us. Deft. 2 was examined as D. W. 2 & admitted in his deposition: "My brother Gourkrishna is related to Dr. Patnaik". It is also clear that deft. 2 chose on the advice of his father-in-law to remain *ex parte* in the suit but that surprisingly enough he appeared on the day of trial to be examined on behalf of deft. 1 although he was not summoned to appear & that he went to Ct. on his own admission "at the request of 'Dr. Patanaik". It is obvious from this evidence that throughout the negotiations & the trial of the suit he was acting according to the instructions of his father-in-law, D. W. 3. The learned Dist. J's observation that D. W. 3 is a disinterested witness therefore leaves me unconvinced. The learned Munsif who had the opportunity of seeing these witnesses has, in a minute analysis of their evidence, accepted the evidence of the pltf. as being the more probable & consistent with the proved facts of the case. In doing so he observed:

"In cases like these, where the difference is on a vital point it is safe to see which story fits in with the admitted facts of the case."

I am in entire agreement with this observation It is, therefore, not open to a Ct. of Appeal to set aside the finding of a trial Ct. unless it appears unmistakably from the evidence that in reaching his conclusions the trial Ct. has not proper advantage of having seen & heard the witnesses or has failed to appreciate the weight & bearing of the circumstances admitted or proved. The appellate Ct. is free to reverse his conclusions if the grounds given by him are unsatisfactory by reason of material inconsistencies or inaccuracies or if he has misdirected himself in law. The greatest weight should be attached to his opinion because he saw & heard the witnesses As was observed by Lord Shaw in *Clarke* v. *Edinburgh District Tramway Co., Ltd*, 1919 S. C. (H. L.) 35, it is the duty of an appellate Ct. to put himself the question:

"Am I—who sit here without those advantages, sometimes broad & sometimes subtle, which are the privileges of the Judge who heard & tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

The privileges pointed out by Lord Shaw involve more than questions of credibility. He said:

"Witnesses without conscious bias towards a conclusion may have, in their demeanour, in their manner, in their hesitation, in the nuance of their expression, in even the turns of the eye-lid left an impression upon the man who saw & heard them which can never be reproduced in the printed page."

See also *Watt* v. *Thomas*, (1947) A. C. 484: (1947-1 ALL. E. R. 582). That this is also the law in India has been repeatedly laid down by the Judicial Committee whose latest pronouncement on the subject is to be found in *Veeraswami* v. *Naryya* (1949) (1) M. L. J. 97 (A.I.R. (36) 1949 P. C. 32). It is impossible that the appellate Ct. should take upon itself to say, by simply reading printed & written evidence, which is right when it had not that decisive advantage of hearing verbal evidence & seeing witnesses which the Judge had who had to determine quesitons of fact & to determine which story to believe. I am, therefore, unable to agree with the finding of the learned Dist. J. & would unhesitatingly accept this appeal & restore the judgment of the Munsif.

[5] But the applts stand on even stronger ground as the decision of the points of law raised at the Bar must be in their favour. I am

obliged to my learned brother who pointed out during arguments that on the findings recorded by the learned Dist. J., there arises an implied term in the contract that a fair & reasonable price was stipulated to be paid. We have heard Council for both sides at great length & have come to the conclusion that this contention must be upheld. A contract can only be implied when it is obvious that the parties must have intended it. The rule is that the Ct. has no right to imply in a written contract any stipulation unless, on considering the terms of the contract in a reasonable manner, the implication necessarily arises, that the parties must have intended that the suggested stipulation should exist (*Hamlyan Co.* v. *Wood & Co*) (1891) 2 Q. B. 488: (60 L. J. Q B. 734).) It is not enough to say that it would be a reasonable thing to make such an implication. The principle was laid down by Bowen L. J. in *The Moorcock*, (1889) 14 P. D. 64 (60 L. T. 654) as follows:

"An implied warranty, or, as it is called a covenant in law, as distinct from an express contract or express warranty. really is, in all cases, founded on the presumed intention of the parties & upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction & preventing such failure of consideration as cannot have been within the contemplation of either side."

The law, therefore, raises an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. The stipulation that we are asked to imply in this case is whether the parties agreed to a reasonable price being paid. It is contended that no question of price was at all mooted on 5-4-1941 at the residence of D. W. 3 either it had already been settled, as the learned Munsif held, or because, having regard to the relationship of the parties, the parties tacitly understood that whatever price was considered reasonable would be paid as consideration money. It is, therefore, contended & pressed on us that the Ct. should import a term into the contract that a reasonable & fair price was intended to be paid, in order to give effect to the contract. As a corrollary to this proposition it is also urged that a contract which is otherwise good but omits to mention some term explicitly, does not become void or uncertain for that reason if the uncertainty can otherwise be made certain *id certum est quod certum reddi potest*. There may be difficulties in arriving at what is a reasonable price, but as was observed by the Judicial Committee in *New Birthoom Coal Co., Ltd.* v. *Balaram*, 7 I A. 107: (5 Cal. 932 P. C) these are difficulties which the Ct. is bound to overcome. It has uniformly been the law in England that where the act to be done is not purely personal & can be supplied without the intervention of the mind & act of the party a Ct. can intervene & substitute a reasonable & fair valuation into the contract. Two principles are well settled, *viz.*, (1) where the parties have prescribed a mode in which the value is to be ascertained by reference to an umpire or nominated arbitrators, it is the valuation of the arbitrators, that will give efficacy to the contract & (2) where the agreement is to sell at a fair valuation the Ct. can adopt means adapted to the purpose. The Ct. never proposes to bind a person to any agreement except that which he has made, but sometimes holds the agreement which it executes & that which he has made to be substantially the same: *Milnes* v. *Gery* (1807) 14 Ves. 400: (33 E. R. 574). Where the term, however, appears to be non-essential as was the case in *Gourlay* v. *The Duke of Somerset* (1815) 19. Ves. 429: (34 E. R. 576) but stipulates that the conditions of the leases shall be settled " as shall be judged proper by one J. G.", it was held that the Agency of J. G. was not of the essence of the contract. Where the Ct. finds that the agreement is binding & concluded, it does not require foreign aid to carry the details into execution. Our attention was invited to *Secretary of State* v. *Volkart Brothers*, 50 Mad. 595: (A. I. R. (14) 1927 Mad. 513) where the stipulation in the contract was that the settled lease might be renewed for a further term of 99 years "upon such conditions as may be judged reasonable". Venkatasubbarao J. observed in this case that it is an ordinary function of the Ct. to decide what is reasonable & that questions such as what is reasonable care & what is reasonable enquiry are questions which the Ct. is often invited to decide:

"I find no difficulty in regard to a contract which leaves the parties to fix a reasonable rent. If they will not agree upon a reasonable rent then the Ct. will intervene & fix it."

In *Harichand* v. *Govind*, 50 I. A. 25: (A. I. R. (10) 1923 P. C. 47), the contract provided for the preparation of a contract by a Vakil, & it was urged that there was no concluded contract until the Vakil had prepared it. The Judicial Committee held that the question whether the agreement is a completed bargain or is merely a provisional agreement depends upon the intention of the parties as deducible from the language used by the parties when the negotiations took a concrete shape, & concurred in the view of the H. C. that the stipulation to have a contract prepared by a Vakil was not a condition to which the bargain was subject, but that it was one of the terms of the contract. We have no doubt in our mind, & it is not disputed by the resp. that the Ex. 5 records the settlement of a dispute between pltf. 2, on the one hand & defts. 1 & 2 on the other with regard to the sale of plots Nos. 1051 & 1052 by which the pltf. withdrew his objection to the sale of plot

NO. 1052 to deft. 1 & agreed to purchase plot NO. 1051. The defts. having had the benefit of the contract in respect of plot NO. 1052 cannot be allowed to escape from the subsidiary contract to sell plot NO. 1051 on the ground of difficulty as to valuation. For a similar case see *Dinham* v. *Bradford*, (1877) 5 Ch. 519.

[6] Having regard to the antecedent negotiations the final draft prepared by D. W. 3 the relationship between the parties & the subsequent conduct of deft 2 in closing the bargain with deft. 1 six weeks after the contract no doubt is left in my mind that the intention of the parties was that plot NO. 1051 should be sold to pltf. 2, either at a price already settled according to the pltf. or at a price to be settled by the parties, as is now suggested by the deft. at a future date. If the parties have not been able to come to a settlement with regard to the price, the Ct. is not helpless & is bound to fix a price. This, in our opinion, is only a subsidiary matter & does not affect the enforceability of the contract to sell. Even in a case where there is no intention to make a complete contract at the time of making it, the Ct. will enforce it if the circumstances so justify—See *Thomas* v. *Derring*, (1937) 1 Keen 729: (6 L. J. (N. S.) Ch. 25). The Ct. is bound to carry into effect a contract framed in general terms where the law will supply the details. If such an inference that the parties must have intended the stipulation in question is legitimate & the Ct. is necessarily driven to that conclusion, it must be implied in the contract—See Fry on Specific Performance, 6th Edn., para. 378:

"The material term may well be supplied by construction or inference where the circumstances justify it. If the price is not legitimately ascertainable, the contract is obviously incapable of enforcement."

The question, therefore, is whether such is the case here. I am considerably assisted in coming to a conclusion in this case by the decision of the Ct. of Appeal in *Folley* v. *Classiqus Coaches Ltd.*, (1934) 2 K. B 1: (103 L. J. K. B. 550). In this case the pltf. sold a piece of land to the deft. who, in turn, agreed to purchase from the pltf. all the petrol required by him for running his business "at a price to be agreed between the parties in writing & from time to time." It was held by the Ct. of Appeal, distinguishing an earlier decision of the House of Lords in *May & Butcher* v. *The King*, (1934) 2 K. B. 17n: (103 L. J. K. B. 556n) & following *Hillas & Co.* v. *Arcos, Ltd*, a later decision of the House of Lords reported in (1932) 147 L. T. 503, that a term must be implied in the agreement that the petrol supplied by the pltf. should be of reasonable quality & sold at a reasonable price. Lord Hewart L. C. J., who delivered the judgment in the trial Ct. held that as the parties intended to make a binding contract & thought that they had done so, that was a circumstance which, according to the judgment in *Hillas & Co.* v. *Arcos Ltd.*, (1932-147 L. T. 503) ought to be taken into consideration in deciding whether there is a concluded contract or not. If nothing had been said or if the parties had failed to agree on the price of the petrol, the law would imply that a reasonable price should be paid. In *Hillas & Co.* v. *Arcos Ltd.*, (1932-147 L. T. 503) the House of Lords held that if the parties believed that they had a contract, the Ct. would imply a term in the contract that a reasonable price shall be paid. The old maxim that the document should, if possible, be so interpreted as to operate rather than be inefficient—*ut res magis valeat quam pereat*—should apply. In Ex. 5 no price was fixed for either of the plots agreed to be sold by deft. 2. Nonetheless the parties had no doubt as to what they were bargaining for & intended that it should be a good & binding contract. My construction of the document, therefore, is that they stipulated for a fair & reasonable price. Having regard to the sum of Rs. 500 actually paid by deft. 1, six weeks after the contract for the purchase of the suit plot & the price paid by him for the adjoining plot, I am satisfied that Rs. 500 represents the true value of the plot in dispute. The applts. are, therefore, entitled to succeed & the judgment under appeal should be reversed.

[7] Another contention that was raised by the resps. is that the contract is void for uncertainty & is incapable of specific performance as the permission of the Khasmahal authorities sanctioning transfer has not been obtained. Reliance was placed by Mr. H. Mohapatra counsel for the resps. on the expression in Ex. 5 "for which separate appln. for permission shall be presented in due course" & it was argued that this was a condition precedent to the contract coming into force. The language used does not warrant this inference, *viz.*, that the contract was of the class known as contingent contracts which come into force only on the happening of a certain event. It was suggested that the failure to obtain sanction would invalidate the alienation as the lease under which deft. holds lands from the Khasmahal prohibits an alienation without such prior sanction. Our attention was drawn to the form of the lease printed in the Khasmahal Manual. The provisions of this lease lay down that no alienation of Khasmahal shall be made except with the sanction of the district authorities & that any alienation is made the District Collector has the option to terminate the lease & take possession of the land or levy a penalty. On a plain reading of the provisions of the lease deed we are satisfied that there is no legal bar to the alienation so as to render an alienation void *ab initio*. It is admitted that the Collector has not taken any steps to eject deft. 1 although eight years have expired. The alienation is, therefore, valid

until terminated by the Collector. This contention is accordingly overruled.

[8] In the result this appeal succeeds, the judgment of the learned Dist. J. is set aside & that of the Munsif restored. The applts. will have their costs throughout. Period for execution is three months from to-day as proposed by my learned brother.

[9] **Das J.**—I agree with my learned brother that the appeal should be allowed & that the decree of the Munsif should be restored. The learned Dist. J. disagreeing with the Munsif has found as a fact that there was no completed contract between the parties. The only reason for his so holding is that in his view the price was not fixed nor the time when the *Kabala* was to be executed. The question before us is that accepting his view on the facts, namely, that the price had not been fixed & the time for execution of the *Katala* had not been specified, does it follow on the evidence which he has accepted, that there is no completed contract. The attention of the learned Judge has not been drawn to the principle that there can be a binding contract without fixation of the price. A contract may fix the manner in which the price is to be determined or it may stipulate for a fair price being fixed & it is nevertheless binding, though the price is not specifically ascertained in the contract itself. (*See* Fry on Specific Performance, p. 165, 6th Edn.) Of course it is not within the province of a Ct. to make a contract for the parties. If the parties have no consensus *ad idem* with reference to any essential term of the contract, then there is no binding contract at all. But if the parties, having agreed that there should be a binding engagement between them for sale & purchase, which is definite in every other respect relegate the question of price to a secondary position & if they agree to this extent, namely, that the sale shall be at a reasonable price, such a contract is valid & binding since the reasonableness of the price is one that can be determined by the Ct. if the parties themselves do not ultimately agree about it. Under S 29, Contract Act, it is only agreements the meaning of which is not certain or is not capable of being made certain that are void. A contract to sell at a reasonable price is one that can be made certain within the meaning of this section, that is by fixation of the price by the Ct. on the standard of reasonableness in case the parties do not ultimately agree. This principle has been laid down by the House of Lords in *Hillas & Co.*, v. *Arcos, Ltd.* (1932) 147 L. T. 503 followed in *Folley* v. *Classique Coaches Ltd.*, (1934)-2 K. B. 1 : (103 L. J. K. B. 550). Also *vide* (1941) A. C. 251. This last case shows where the line is to be drawn. As observed by Lord Wright at p. 272 of (1941) A. C. 251 :

> "The Ct. could not indeed make a contract for the parties or go outside the words they had used, except in so far as there were appropriate implications of law, as for instance, the implications of what was just & reasonable, where the contractual intention was clear, but the contract was silent in some detail which the Ct. could thus fill in."

It is also well-settled that such a binding contract for sale at a fair price is capable of specific performance. (See *Secy. of State* v. *Volkart Bros*, 50 Mad. 595 : (A. I. R. (14) 1927 Mad. 519).) Similar considerations apply to the non-fixing of the time of performance.

[10] The question, therefore, in this case is whether on the evidence as accepted by the lower appellate Ct., a reasonable inference can be drawn as a fact that the parties agreed finally between themselves that there should be a sale & that, at a reasonable price or at least whether such a term "for sale at a reasonable price" can be implied as a matter of law. For this purpose it is enough to notice the following undisputed facts :

[11] On the appln. filed by deft. 2 on 20-1-1941 Ex. II, before the Khasmahal Officer for permission to sell the plot No. 1052, pltf. 1 & deft. 1 had both filed objection petns. Exs. II & VI. Thereafter deft. 2 filed a petn., Ex. IV as an amendment to Ex. II whereunder he intimated his willingness to sell the land to deft. 1. Subsequent to it on 17-3-1941, deft. 2 filed another petn., Ex. III in supersession of his previous applns. Exs. II & IV, whereby he requested the Khasmahal Officer for permission to sell plot No. 1052 to pltf. 2 for a consideration of Rs. 400. This was the last petn. of the vendor, deft. 2 pending on the date of Ex. V. There were thus two competitors for the plot No. 1052 belonging to deft. 2, namely, deft. 1 & pltf. 2 & the latest preference indicated by the vendor' deft. 2 was in favour of pltf. 2. Then a settlement was brought about. D. W. 3, the father-in-law of deft. 2 who is a lawyer & whose evidence has been totally accepted by the learned appellate Judge says as follows in his evidence:

> "Ex. V was written in accordance with the terms of my decision which was made in the presence of Raikrishna Babu (D-2), Rajkishore (P 1), Bonu Babu (D-1). None else was present. The parties tacitly agreed to terms. This decision was made between 7 & 8 P. M. on 5-4-1942. The fixing of consideration was then not deemed to be necessary."

Ex. V itself states as follows :

> "The petnr. is the owner in possession of plot Nos. 1051, 1052 in Mouza Ramgarh Samil Hasnabad Jamabandi No. 97."

[12] On the petnr's appln. for permission to transfer the property to the objectors, namely, Dr. Banbehari Patnaik & S. N. Mohanty, putting their objections, have alternatively pressed their claims. Both of them happen to be the petnr's friend. Under the circumstances the petnr. has settled in their presence to the effect that Dr. Banbehari Patnaik will purchase the

disputed plot (No. 1052) which is contiguous to his land. The objector S. N. Mohanty will purchase the other plot adjacent to the disputed plot on its south belonging to the petnr. & his brothers, "for which a separate appln. for permission will be presented in due course."

[13] This is obviously a tripartite arrangement under which out of the two plots belonging to deft. 2, plot No. 1052 was to be purchased by deft. 1, & pltf. 2 was to give up his claim to it & purchase plot No. 1051. It is as a result of this arrangement (*vide* the order of the Khasmahal Officer dated 6-4-1941, marked as Ex. 1) that the permission for sale in favour of deft. 1 was granted. Deft. 1 who has had the advantage of this compromise cannot now be heard to say that there was no binding contract for sale of plot No. 1052 to pltf-2. Even otherwise, the intention of the parties is quite clear that there was a binding contract for the sale of plot No. 1051 as a result of which pltf.2 did not any further pursue his objection to the sale of plot No. 1052 in favour of deft.1. It is obvious that the parties intended that the tripartite arrangement would be binding between themselves notwithstanding that the price was not settled for sale of plot No. 1051. In the circumstances it is proper to infer as a fact that the parties agreed that the sale should be for a reasonable price; or at any rate, the law will imply such a term in order to give effect to the true intention of the parties that there should be a binding contract for the sale. It has been urged that the evidence of D.W. 3 itself shows that on 5-4-41 there was absolutely no talk about the consideration. But this does not negative the implication that the parties have agreed that the sale should be for a fair price. Unless it positively appears that the parties deliberately left the question of price for further agreement between themselves & contemplated that only on such agreement being reached the contract was to be treated as binding, there is nothing in law to prevent a Ct. implying a term that the sale must be for a reasonable price in order to give effect to the main intention of the parties which it finds, namely, that there is to be a binding arrangement between them for sale of the specified item of land. It is just in such situations that the principle in *Hillas & Co.* v. *Arcos, Ltd.* (1932) 147 L. T. P. 503 applies, *viz.* that where the contractual intention is clear the Ct. will fill details by appropriate implication to give effect to the intention. As pointed out by my learned brother there is no dispute in this case that the sum of Rs. 500 is a reasonable price. It is also clear that the sale to deft. was before the expiry of any reasonable time. It must, therefore, be held that there is a binding contract between the parties to sell the plot for Rs. 500 & that the same can be specifically enforced.

[14] My learned brother has reached the same conclusion. In this view of the facts & the evidence, there was an agreement about the quantum of the price also between the parties by the date of Ex. V & the conclusion of the learned appellate Judge negativing this & differing from that of the trial Ct. was unwarranted. I do not, however, feel myself free to disregard the estimate of the evidence on this matter, which the learned appellate Judge has found, sitting as we do in second appeal. I would also like to reserve my views as to the limitation under which the first appellate Ct. can disregard the estimate of the evidence found by the trial Ct, while I agree that considerable weight is to be attached to the view of the trial Ct. on the evidence.

[15] The further question that has been urged by the resp. & the point on which the learned Dist. J. also has negatived the pltf's. claim is that inasmuch as Ex. V shows that the permission of the Khasmahal Officer is to be obtained before the sale-deed is to be executed, the contract is a contingent one & that, therefore, there can be no specific performance. I agree with my learned brother that on a construction of Ex. V, the contract cannot be treated as a contingent one. The contract undoubtedly contemplates an appln. to be made to the Khasmahal Officer but the obligation under the contract is not made dependant on the obtaining of the permission & it rather assumes that the permission is a matter of course. It may be that if the Khasmahal Officer does not ultimately grant the permission the sale may become infructuous. But that is a matter on which if the pltfs. are prepared to take the risk neither the first nor the second deft. can have any reason to demur. Deft. himself admittedly had taken the sale-deed without obtaining the permission of the Khasmahal Officer & he cannot complain if the pltfs. are equally prepared to take the chance.

[16] It has been urged that the property itself is a lease hold from the Khasmahal authorities in favour of deft. 2 & that under terms of such lease the lease-hold is not transferable & that therefore the Court will not direct the execution of the sale-deed which is invalid in law & conveys no title. This argument would be sound if it is correct to say that on transfer the vendee gets no kind of interest or title. This, however, does not appear to be the position. The particular lease under which the suit property has been held by deft. 2 has not been exhibited & is not on record. But the form for the lease of the town Khasmahal property (the suit property is a piece of building site in Cuttack town) is given in Appen. "A" to the Bihar & Orissa Govt. Estates Manual which states as follows:

"No. 2. Except with the previous sanction of the Collector in writing & on payment of a fee, the lessee shall not transfer, assign, subjet or part with the possession of the said demised land or premises or any part thereof.

No. 10. On breach of any of the conditions aforesaid, the Collector may re-enter upon the said demised premises & may determine the lease.

No. 13. In the event of any breach or infringement of the conditions aforesaid the lessee shall be liable to a fine etc."

[17] It is clear from the above terms taken together that while no doubt the lease cannot be transferred without the permission of the Collector, the lease is not *ipso facto* determined by the transfer without permission. The transfer only renders the lease liable to forfeiture & the lease is determined only by the exercise of the power to re-enter. It, therefore, follows that even after the transfer & until the re-entery is made there is still a subsisting though defeasible interest in the leasehold. There is no reason why that defeasible interest cannot be the subject-matter of a sale. I can, therefore, see no objection to the decree for specific performance being granted in this case on the ground that the leasehold is not transferable without the permission of the Khasmahal authorities. Of course the actual sale deed executed by deft. 2 either in favour of deft. 1 or in favour of pltf. 2 cannot by itself fetter the discretion of the Khasmahal authorities though it will undoubtedly form a legitimate circumstance for their consideration.

[18] It, therefore, follows that the appeal must be allowed with costs throughout. The decree for specific performance to be passed afresh by this Ct. on the lines of the decree of the trial Ct. will provide for a period of three months from the date of the decree for the execution of the sale-deed.

R.G.D. *Appeal allowed.*

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* A. I. R. (38) 1951 Orissa 297 *[C. N. 73.]*

RAY C. J. & NARASIMHAM J.

The King v. *S. N. Singh Rai* — *Accused* —*Resp.*

Government Appeal No. 6 of 1948, D/- 23-8-1949.

*** (a) Penal Code (1860), S. 161 — Bribe giver whether accomplice—Evidence Act (1872), Ss 114, 133.**

The very fundamental distinction that goes to the root of the matter is that an accomplice is one who was a participant of the second degree or abettor in the matter of commission of the crime & did not extend any aid to the prosecution for its discovery till after its commission. In the case of a bribe giver, he is an accomplice only when he gives it with the intention of gaining some undue official favour, but not one who gives it in order to aid the detection of a crime. He has not the necessary *mens rea*. [Para 12]

Anno. Penal Code, S. 161 N. 11; Evidence Act S. 114 N 2; S 133 N 2.

*** (b) Evidence Act (1872), S. 114 — Accomplice & spy witness — Corroboration — Evidence Act (1872), S. 133.**

The evidence of a spy does not stand in need of corroboration either as a principle of law or as a fundamental rule of practice necessary for safe administration of justice. It is always for the Judge of fact in each particular case to decide whether it is safe to rely & act upon a decoy witness. Each case depends upon its own merits. This much has to be borne in mind, that he has entered into a design with the police to entrap the prisoner & as such his partiality for the prosecution is a factor which can hardly be ignored. The character, position in life & social standing of the witness would go a great way in helping the Judge to appreciate his evidence. [Para 14]

Per *Narasimham J.* — *(Quære)* Whether a person who after associating himself with the accused for some time in criminal design, has subsequently for some reason or other turned against him & gave information to the authorities & acted as "spy" to entrap the accused, is a "spy" or an accomplice. [Para 16]

Anno. Evidence Act, S. 114 N 2; S. 133 N 2 & 6.

(c) Penal Code (1860), S. 161—Evidence — The mere handing over the notes will not adequately prove that they were paid as bribe — Prosecution either fails or succeeds according as it is proved that the notes were paid as bribe or not—Evidence Act (1872), S. 3. [Para 7]

Anno. Penal Code, S. 161 N. 12; Evidence Act, S. 3 N 5.

G. B. Mohanty for A. G.—for the King; P. C. Chatterji—for Resp.

Ray C. J.—This is an appeal by the State against an order of acquittal in a bribery case. The resp., S. N. Singh Ray, the accused, was the Station Master of Meramundeli Rly. Station (B. N. Rly.) on 2-2-1947, the date of occurrence. The informant, P. W. 3 (Waiz Mohammad) is an agent of Khan Sahib Muhammad Khan, a merchant dealing in timbers & Kendu leaves with headquarters at Sambalpur. The agent had his headquarters at Angul. P. W. 4, Luxmidhar Sahu, is another agent of Khan Sahib, stationed at Meramundeli Rly. Station, who owes subordination to Waiz Mohammad. The latter supplies money to the former for loading & unloading expenses of the goods. Luxmidhar keeps accounts separately relating to transactions in timber Ex. 10, & transactions relating to Kendu leaves, Ex. 10 (1). It is said by both of them that the accused Station Master was in the habit of demanding & receiving bribe @ Rs. 20 for indent & supply of one rly. wagon for consignment of the aforesaid goods.

[2] On 28-1-1947, P. W. 3 filed a petn. of complaint before the Police Inspector of Delhi Special Police Establishment Branch (Govt. of India), Orissa, Sri A. N. Nayak (P. W. 1), complaining against the conduct of the Station Master & informing that he had been asked to pay Rs. 100 on 30-1-1947, being the amount of Rs. 80 towards his arrear dues for having supplied wagons on four previous occasions & Rs. 20, the amount to be paid for the supply of a wagon on that date. The Inspector took up investigation & requisitioned the presence of the Mag., Sri R. Sarangi, with him at Meramundeli Station at the material time. After due consultations between the Inspector & P W. 3, it was settled that the bribe amount of Rs. 100 should be paid in ten ten-rupee G. C. notes of which the denominations were noted by the Inspector & later by the Mag. before

they were handed over to the Station Master. The Inspector & the Mag. lay in ambush at a little distance from the Station Master's Office on the morning hours of 2-2-1947 near about the appointed time for payment. P. Ws. 3 & 4, it is said, went into the Station Master's office & handed over the notes. On their coming out & signalling to the Inspector & the Mag. they immediately rushed into the Station Master's room & on the Inspectors demand, the Station Master produced ten ten-rupee notes from the left pocket of his trouser, being the notes delivered to him by the prosecution witness 3. On comparison, the notes were found to bear the same denominations as had been taken note of by the Inspector & the Mag. Due formalities of preparing the seizure list were gone through & the Station Master was charge-sheeted.

[3] He was tried by the Addl. Dist. Mag. at Cuttack, who, disbelieved the Station Master's defence which was to the effect that the ten ten-rupee notes had been delivered to him by P. W. 3 as he wanted to have one hundred-rupee note in exchange, but left the Station Master's office without waiting for the delivery of the hundred-rupee note. It may be noted here that the Station Master, at first, produced at the spot a hundred-rupee note from the office iron chest on Inspector's demand for the sum received from P. W. 3. I shall deal with the significance of this conduct of his presently.

[4] The prosecution, in support of the charge, examined, besides the Inspector & the Mag. 4 witnesses testifying to the occurrence of "payment by P. W. 3 & receipt by the resp. of the amount as bribe". The learned Mag., in a well-considered judgment has found that the proof, adduced by the prosecution, except raising a grave suspicion against the Station Master, is hardly sufficient to bring the charge home to him. He has, therefore, given him the benefit of doubt. The task before us is whether there are materials enough on record which would enable us to come to a different finding. I would profitably quote from the learned Mag.'s judgment a passage embodying his finding, namely,

"There is no other evidence on the side of the prosecution to show what was the conversation between Waiz Mohammad the Station Master when the former passed the ten ten-rupee notes to the latter. Money may be passed from one hand to another on various pretexts. The prosecution evidence throws a good deal of doubt on the guilt of the accused & does not preclude every reasonable possibilities of his innocence. I give the benefit of doubt to the Station Master accused & acquit him under S. 258, Cr. P. C."

[5] As against this, it has been seriously contended by the learned counsel appearing for the State that the learned Mag. having discarded, in clearest possible terms, the story of exchange set up by the accused & the latter having given no other expln. of his possession of the specified ten ten-rupee notes, the inference of guilt is inevitable. It has, further, been argued that the evidence of P. Ws. 3 & 4, not being evidence of accomplices, does not require any corroboration. It is thus argued that the Mag.'s finding of benefit of doubt for the accused is wrong & should be set aside.

[6] I am not at one with the learned Mag. relating to the discarding of the defence theory of exchange. The learned Mag.'s view is based upon the Station Master's conduct in response to the Inspector demand of the money received from P. W. 3. He says that the Station Master wanted to evade detection by first producing the 100-rupee note from the iron chest & not asserting immediately the story of exchange & citing witnesses in support thereof. This, in my view, may or may not be sufficient to rule out the story of exchange from the area of bare possibility. The Station Master was confronted with the presence of an Inspector of Police & a Mag. who immediately on their appearance had disclosed their identities. He must have certainly been reminded of the conduct of the prosecution witnesses in rushing out of the office room without taking the 100-rupee note & the previous hostile relationship that existed between him & the P. W. 3. Placed in this position, he would as a matter of right, take recourse to such subterfuge as may strike him. It is a question of one's grit & wit.

[7] The rest of the prosecution case depends upon the credibility of the prosecution witnesses. Leaving aside those whose evidence bear on the recovery of the specified G. C. notes from the Station Master, the witnesses on the point are P. Ws. 3, 4, 5, 6. Besides, P. Ws. 3 & 4, the other witnesses do not speak about what conversation took place between P. W. 3 & the Station Master. Their evidence, therefore, does not go farther than proving the admitted fact that ten ten-rupee notes had been made over to the Station Master. The mere handing over the notes will not adequately prove that they were paid as bribe. Prosecution either fails or succeeds according as it is proved that the notes were paid as bribe or not. On this point, there is no other evidence except that of P. Ws. 3 & 4. Both these witnesses are hostile on account of the enmity that exists between their master & the Station Master. On the point of hostility, I would do no more than to quote from the learned Mag's. judgment, a passage set out hereinbelow:

"As to the payment of ten ten-rupee notes by Waiz Muhammad to the Station Master (accused) on 2-2-47 it will be seen from letter dated 20-9-47 (Ex. C) that Khan Sahib Muhammad Khan made a complaint to the Rly. authorities against the Station Master, Meramundeli for not supplying him wagons according to his indent. The enquiry report dated 30-12-46 (Ex. D) of the Traffic Inspector, Khurda Road, will show that the enquiring officer found the complaint of Khan Sahib unwarranted & observed that the real difficulties in getting supply of wagons were being misrepresented to Khan Sahib by his servants. It is in the evidence of D. W. 6 Shadeb Prasad Panda that sometime before the

occurrence the accused Station Master had a quarrel with P. W. 8 Waiz Muhammad for stocking timbers near Meramundeli Rly. Station in such a way as to obstruct motor traffic. From these incidents occurring within a month or two prior to the date of entraping the Station Master (accused) one had to accept with caution the versions of the Khan Sahib's agent (P. Ws. 3 & 4) against the Station Master."

[8] The further defect from which the prosecution suffers is the total absence of any reliable evidence in support of P. W 3's assertion that the Station Master is in the habit of demanding & his master is in the habit of paying Rs. 20 on each & every occasion of delivery of on Railway Receipt for a wagon load of goods. How the two agents (P. Ws. 3 & 4) shift the responsibility on this matter from one another has been dealt with carefully by the learned Mag. in his judgment. The accounts produced do not lend an iota of support to this story.

[9] Besides, there are certain improbabilities attached to the prosecution story. After Khan Sahib's complaint against the Station Master & enquiry that followed it, it would be too daring on the part of the Station Master to demand money from his agent. Secondly, even if the Station Master was in the habit of demanding money, he should not ordinarily be expected to leave them in arrear so as to accumulate just in the manner one would do in supply of merchantable commodities. Lastly, according to P. W. 6, Ibrahim Mulla there were three or four persons in front of the office of the Station Master when this payment was made & it would be difficult to believe that the Station Master should receive a bribe so openly in broad day light.

[10] In the premises aforesaid, it is difficult for me to differ from the learned Addl. Dist. Mag. in his finding that

"Every reasonable possibility of innocence has not been excluded & that he is entitled to an acquittal."

[11] As the learned counsel of both sides have addressed us at length on certain legal aspects & have cited authorities, in fairness to them, before concluding this judgment, I shall dispose of them briefly.

[12] It is contended by the applt's learned counsel that witnesses (P. Ws. 3 & 4) are not accomplices & their evidence does not require corroboration. The resp's counsel contends to the contrary & further urges that the evidence of one accomplice is not available as corroboration of another. He cites the decision of *Mahadeo* v. *The King*, A. I. R. (23) 1936 P. C. 242 : (37 Cr. L. J. 914). The point does not require any further elucidation. The only question that presents some nicety is whether, in the circumstances disclosed in the case, P. Ws. 3 & 4 are accomplices. The very fundamental distinction that goes to the root of the matter is that an accomplice is one who was a participant of the second degree or abettor in the matter of commission of the crime & did not extend any aid to the prosecution for its discovery till after its commission. In the case of a bribe giver, he is an accomplice only when he gives it with the intention of gaining some undue official favour, but not one who gives it in order to aid the detection of a crime. He has not the mens rea. It has been held in the case of *Emperor* v. *Chatturbhuj Sahu*, 38 Cal. 96 : (8 I. C. 119) :

"A person who makes himself an agent for the prosecution with the purpose of discovering & disclosing the commission of an offence, either before associating with wrongdoers or before the actual preparation of the offence, is not an accomplice but a spy, detective or decoy whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, & extends no aid to the prosecution till after its commission is an accomplice requiring corroboration."

[13] Accordingly, P. Ws. 3 & 4 do not require corroboration as accomplice witnesses do. Such witnesses are known as spy or decoy-witnesses. There is a view supported by authority that:

"To establish a case of bribery against the accused for having accepted marked currency notes from a decoy witness employed by the police in furtherance of a trap against the accused, it is not sufficient to prove that marked notes passed from the decoy witness to the accused. It is of the utmost importance in cases of this kind that there should be independent corroboration of the statement of the decoy witness, that the money was received by the accused person for an illegal purpose."

(See *Emperor* v. *Anwar Ali*, A. I. R. (35) 1948 Lah. 27 : (48 Cr. L. J. 964).)

[14] I cannot, however, go so far as that. I should, however, lay down a golden mean. The evidence of a spy does not stand in need of corroboration either as a principle of law or as a fundamental rule of practice necessary for safe administration of justice. It is always for the Judge of fact in each particular case to decide whether it is safe to rely & act upon a decoy witness. Each case depends upon its own merits. This much has to be borne in mind, that he has entered into a design with the police to entrap the prisoner & as such his partiality for the prosecution is a factor which can hardly be ignored. The character, position in life & social standing of the witness would go a great way in helping the Judge to appreciate his evidence. Bearing these principles in mind & for reasons already stated, I cannot place reliance on the evidence of P. Ws. 3 & 4 in the absence of corroboration coming from the source of independent witnesses.

[15] In the result, the appeal fails & is dismissed.

[16] **Narasimham J.** — I agree that the appeal should be dismissed. The only witnesses to directly connect the resp. with the crime are P. Ws. 3 & 4. The unsatisfactory features in their evidence have been fully discussed by the learned lower Ct. & by my Lord the Chief Justice. In view of these unsatisfactory features

it will be unsafe to act upon their evidence & the resp. is thus, in any case, entitled to the benefit of doubt. In this view of the case I do not think it necessary to say whether P. Ws. 3 & 4, on their own statements, are 'spies' or else 'accomplices' who after associating with the resp. for some time in the criminal design, subsequently for some reason or other turned against him & gave information to the authorities.

R.G.D. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 300 *[C. N. 74.]*

RAY C. J. AND PANIGRAHI J.

Bira Naik & another — Pltfs. — Applts. v. *Mahanta Sidhakamal Nayan Ramanuj Das—Deft.—Resp.*

A. F. A. D. No. 172 of 1945, D/- 17-1-9149.

Tenancy Laws—Orissa Tenancy Act (II [2] of 1913), S. 225 — Mortgagee in possession under S. 225—Liability of—T.P. Act (1882), S. 76—Trusts Act (1881), Ss. 90 & 95.

A person depositing the arrears of rent under S. 225 becomes the mtgee. of the tenant by operation of law & is subject to the same liabilities as those of a mtgee. in possession as provided for in S. 76 (c), T. P. Act. Hence he is liable to pay rents not only as they accrue due & fall into arrears but also such as had already been due & in default of payment whereof the property is liable to be sold. [Paras 3 & 4]

Such a mtgee. holds the position of a quasi trustee as against the tenant under S. 90 read with S. 95 of the Trusts Act. [Paras 7 & 17]

A mtgee, in possession under S. 225 is liable to account on the footing of wilful default, that is, he is liable to account not only for the amounts actually received by him but also for the sums which but for his own default, he might have received. [Para 10]

Where a simple mtgee of a tenancy land who has entered into possession of the holding under S. 225 & who has allowed the rent to fall in arrears while in possession, purchases the holding himself at the rent sale, he cannot be allowed to reap the benefits of his own wrong & resist a suit for redemption by the tenant mtgor. on the ground that the equity of redemption has been lost by his purchase at the rent sale. [Paras 4, 11 & 17]

R. N. Sinha & S. N. Sengupta—for Applts.; P. C. Chatterji—for Resp.

Ray C. J.—This is a pltf's appeal in a suit for recovery of possession or in the alternative for redemption of the disputed properties which have been mortgaged as a simple mtge. on 13-9-1913. The disputed lands are 19.37 acres of which 15.44 are tenanted & the rest are *Khasdakhali* lands. During the subsistence of the mtge. the deft. came into possession of the disputed lands under the provisions of S. 225, Orissa Tenancy Act, since 27-11-1934. The present suit was instituted on 19.11-1943 with the prayer that the debt with interest at 12½ p.c. p.a. that accrued due under S. 225 & the mtge. dues under the simple mtge. had been discharged by the date of the institution of the suit & that the pltf. was entitled to recover the properties from the deft. free of previous simple mtge. as well as of the charge created under S. 225. The alternative relief of the pltf. was that in case the mtge. still existed & the mtge. money or any part of it was still due he may be allowed to redeem on payment of such amount as the Ct. deems fit & proper. Before the suit, however, while the deft. was in possession, there was default in payment of rent. The landlord sued for recovery as against the pltf. as recorded tenant. He obtained a decree & put the disputed properties to sale. The deft. mtgee. purchased them on 24 6 1937 for a sum of Rs. 129. The deft. resisted the suit on the ground that the pltf. had lost his equity of redemption, the same having been sold away at the rent decree execution sale.

[2] The points that arise for consideration are whether the deft. was a mtgee. within the meaning of S. 76, T. P. Act or, at any rate, what were his rights & liabilities as a mtgee. under S. 225, or, in other words, whether he had the liabilities of a quasi trustee within the meaning of S. 90 read with S. 95, Trust Act. Lastly, the question further arises whether his purchase will enure to the benefit of the mtgor. (pltf.) or the title acquired thereby can be retained by him, & besides whether he is liable to render accounts for the rents & profits that he might have received during the time of his possession.

[3] Both the Cts. below, relying upon a decision of the Patna H. C. reported in *Fekua Mahto* v. *Lal Sahu*, A.I.R. (26) 1939 Pat. 382 : (18 Pat. 133) had overruled the pltf's. case. The proposition on which they placed reliance as quoted in a passage quoted therein is to the effect that where the mtgee in possession of a tenancy is bound to pay rent & in default the holding is brought to sale by the landlord in execution of a rent decree & purchased by him & later comes into the hands of the mtgee. the mtgor. loses his right of redemption. Quite apart from other considerations, the mtgor. no doubt, will lose his right of redemption if, in such a contingency, the property is sold in execution of a rent decree & purchase either by a landlord, who is not a party to the mtge. or by any other person other than the mtgee. The mtgee's subsequent acquisition of the same property from the hands of the auction-purchaser, whosoever he may be, can hardly be connected with any of his liabilities or rights as a mtgee. except under certain circumstances. In the case cited, there was nothing to show that the mtgee. secured the property back from the landlord auction-purchaser by using the advantageous position that he was occupying in respect of the property as a mtgee. The decision, therefore, has no application to the facts of the present case in which the mtgee. is himself the auction-purchaser. Mr. Rao strenuously contends that not only is he not liable to pay rent during his occupation of the

property which he got under S. 225, but also his purchase is free of the equity of redemption inasmuch as he does not hold the position of a mtgee. within the meaning of the Transfer of Property Act nor the position of a quasi trustee within the meaning of the Indian Trusts Act. A large number of authorities have been cited by the counsel for both sides. Before dealing with them, I should pay attention to S. 225, Orissa Tenancy Act. The section says that when any person having, in a tenure or holding advertised for sale, an interest which would be voidable upon the sale, pays into the Ct. the amount requisite to prevent the sale, that deposit 'shall be deemed' to be a debt bearing interest at 12 p. c. p. a. & secured by a mtge. of the tenure or holding to him. I lay emphasis upon the words "shall be deemed" which necessarily means "shall be deemed as if created by the parties in the manner provided by the law," though, in fact, it has not been so created. The word 'mortgage' occurring in the section has not been separately defined in the Orissa Tenancy Act so as to bear any meaning other than what the word, in its technical & legal connotations would mean. 'Mortgage' is defined in the T. P. Act & the rights & liabilities of the mtgees. & mtgors. are also defined. If Mr. Rao wants to contend that the relationship of the mtgor. & the mtgee. & the position of a mtge. as created or provided for by S. 225 of the Act bear any other meaning, he must have invited our attention to some such provisions either within the purview of this Act or any where else, nor has he been able to cite any authority to that effect. Sub-s. (c) provides that he shall be entitled to possession of the holding or tenure as mtgee. of the *tenant that is carry with it the incidents of 'mtgee. in possession.'* This, with all certainty, means that by the provisions of the Statute & by operation of law, he becomes a mtgee, of the tenant in the same sense & to the same extent as he would be if the relationship were created in the manner provided in the T. P. Act. It is also provided that he shall retain the possession of it *as such* (as mtgee.) until the debt with the interest due thereon has been discharged. The words "has been discharged" occurring as a condition determining the continuance of possession must have a connexion with it & the meaning conveyed is that the possession is co-relative to discharge of the debt. This leaves no doubt in my mind that there will arise two positions namely that with the profits & rents derived & derivable from the said property he should pay himself up & that he will continue in possession till the debts with interest thereon are completely wiped out. Of course, it will be open to the tenant to pay the debts earlier & recover the property. Mr. Rao wants us to accept that the incumbrancer making deposit & acquiring the status of a mtgee. shall be entitled to retain the property without the liability to account for the rents & profits received by him, without liability to pay the public charges due in respect thereof till when he is paid in cash by the defaulting tenant, the amount deposited plus the interest payable according to the terms of the section at 12½ p. c. p. a. which means that the defaulting tenant for the time being forfeits the property & even though the mtgee, recovers more than 100 times the deposit with interest thereon he would still hold it on. This sort of proposition appears to me to be monstrous. It throws to the wind any idea of equity & common sense which must be presumed to be in the minds of the Legislature in enacting the provision. He goes still further to say that if the landlord sues for the arrear of rent accruing due during the time of his possession & brings the property to sale & either purchases it himself or some stranger purchases it, the auction purchaser shall either not be entitled to get possession from him or, if at all, shall be entitled to get possession only after he pays him up or, to use his own language, redeems him. This he argues in the face of cl. (b) of sub s. (1) of the section which reads:

"his mtge. shall take priority of every other charge on the tenure or holding *other than the charge for arrear of rent.*"

[4] If this sub-clause has not the meaning that the rents as they accrue, always become a first charge even prevailing over the deposits made, I do not know what else it means. Under the circumstances, the contention of Mr. Rao, if accepted, will land us not only in an anomalous position but also in grotesquely absued position. Section 225 must be read with the provisions applying to 'mortgages', defining various rights & liabilities as between mtgor. & m'gee under the T. P. Act. The section of the Act which is relevant is S. 76, T. P. Act which defines liabilities of mtgee. in possession. According to sub-s. (c) of this section he (mtgee in-possession) must, in the absence of a contract to the contrary, out of the income of the property, pay the Govt. revenue, all other charges of a public nature & *all rents* accrued due in respect thereof during such possession & any arrears of rent in default of payment of which the property may be similarly sold. This cl. (c) means that he is liable to pay rent not only as they accrued due & fell into arrears but also such as had already been due & in default of payment whereof the property is liable to be sold. In this view the deft had the liability to pay the arrears of rent as they accrued due. His default amounted to civil wrong. If he is allowed to keep the property to himself it will amount to allowing him to reap the benefits of his own wrong. If

any doctrine of equity is well settled beyond any controversy, it is that no one shall be permitted to gain by his own wrong.

[5] There is another reason inherent in the language of the section itself which must lead unmistakably to the conclusion that the liability to pay rent accruing due during the possession of the mtgee. within the meaning of S. 225 must be his. Clause (c) of sub s. (1) of the section delimits the duration of his possession & provides that his retention of possession shall continue until the debt (the amount deposited to save the holding or the tenure from sale) with interest throughout has been discharged. Suppose, the said mtgee. was not liable to pay the rents as they accrued due from time to time during his occupation, but in order to protect his interest he paid all such rents which, as I have already said, constituted a charge even as against him according to cl. (b) of the sub section, but, in fact, the liability to pay such rent was in law with the recorded tenant, the Legislature must have said that he shall be entitled to retain possession until these rent charges, paid by him but not payable by him, had also been with due interest throughout, discharged. Besides, liability to pay public charges in respect of any immoveable property must, in the absence of any contract or covenant to the contrary, lie on the man in possession. This has been so laid down in the case of *Abid Hussain Khan* v. *Kaniz Fatima*, 46 ALL. 269 at p. 273: (A. I. R. (11) 1924 P. C. 102). This was a case which required investigation of the law as it stood in relation to mtgee's liability when he came into possession of the mortgaged property before the passing of the T. P. Act. Their Lordships said:

"In British India a mtgee, in possession of immoveable property under a mtge. made before the T. P. Act of 1882 came into force was under the ordinary law then in force bound to manage it as a person with ordinary prudence would manage it if it were his own, & unless there was an agreement to the contrary with the mtgor, he was bound to pay out of the income of the property the Govt. land revenue which might during his possession be assessed upon it & such charges of a public nature as might accrue due in respect of the property & be payable by the person in possession of the rents & profits, & *was not entitled to charge such payments against his mtgor. in the accounts.*"

[6] What I understand the section to mean is "his right to retain possession until completely reimbursed of the debt with interest due throughout will entitle him to pay the public charges and to deduct the same from the rents & profits that accrued from the holding or tenure in his possession & to adjust the balance only against the debts & interest due to him. To me it appears that it is futile to contend that while such statutory or equitable mtgee. would continue in possession, the mtgor. namely, the tenant would remain liable to pay the rents.

[7] Apart from the section, the very position that the depositor of the amount is constituted by the section a mortgagee is entitled to hold (sic) makes him liable for such liabilities as any other mtgee. should be under the T. P. Act. The strongest possible argument against this view as urged from the Bar was that the mtge. contemplated in the section was not a mtge. constituted by a transanction *inter vivos* between the parties & as such the principles of the T. P. Act were inapplicable. The virtual position of a mtgee. though not actually so, has come up for consideration in several decisions in the P. C. & it has been held that though not a mtgee. under a contract yet he was liable as mtgee. at least on the principle which is applicable in regulating the relation between the principal & the managing agent. The cases are *Papamma Rao* v. *Ramachandra Rozu*, 19 Mad. 249 at p. 254 : (23 I. A. 32 P. C.) and *Kamlapat Motilal* v. *Union Indian Sugar Mills Co. Ltd.*, A. I. R. (16) 1929 P. C. 256 : (119 I. C. 631). The latter case was followed by their Lordships of the Calcutta H. C. in the case of *Shib Dass Dass* v. *Kali Kumar Roy*, 30 Cal. 463 : (7 C. W. N. 532). That was a case in which the mtgee. purchased the right of redemption & that wrongfully & then got into possession. Their Lordships held though S. 76 did not strictly apply he was under liability of a mtgee. as under S. 76, T. P. Act. There can be no doubt that the mtgee. either contractual or statutory or equitable holds the position of a trustee as against the mtgor. (see S. 90, Trust Act). Section 95 of the said Act enumerates & defines the liabilities of a mtgee, *qua* trustee & his liabilities to pay the public charges & to protect the property in a state of prudent management has been clearly provided for. In the case of *Kshetra Nath* v. *Durgapada*, 52 I. C. 902 at pp. 905 & 906 : (A. I. R. (6) 1919 Cal. 309), a mtgee, by operation of law has been held to be a trustee under a resulting trust & it has been laid down that the liabilities provided for in S. 76, cl. (c), T. P. Act did attach to his position as such. Similar view has been taken in cases of Bombay & Madras H. Cs. of which references would be made to *Kalappa* v. *Shivaya*, 20 Bom 492 & *Jayanti Lakskmaya* v. *Pedda Appadu*. 7 Mad. 711. Relying upon the earliest P. C case on the point, the case of *Nuzur Ally Khan* v. *Ojoodhyaram Khan*, 10 M. I. A. 540 : (2 Sar 198 P. C.) it has been held that the mtgee. who wilfully let the revenue payable in respect of the estate fall into arrears & ultimately purchases the property himself, is estopped from saying that the equity of redemption did not subsist for the benefit of the mtgor. Under the circumstances, it is clear that the contention that the equity of redemp-

tion has been lost, having been acquired by the deft. is not maintainable.

[8] The case of *Chandi Maher Mander* v. *Sitabi Bhagat*, 21 P.L.T. 699, though not a case of purchase at auction sale but of acquisition by settlement from landlord by a mtgee. the same equitable view has been taken, namely, that the mtgee. cannot acquire the property & deprive the mtgor. of his rights by his own acts of default. The facts of that case were that the mtgee. committed default in payment of rent; the landlord took possession treating the holding as abandoned & later settled it with the mtgee ; that the holding was treated as abandoned by landlord was due to the default on the part of the mtgee in payment of rent as the mtgee's possession could not be considered to be a possession of the recorded tenant or one authorised by the landlord. The mtgee. thus utilised his possession in order to gain an advantage over the mtgor. with a view to acquire his right.

[9] The next question that has been discussed at the Bar & does directly arise out of the arguments joined by the parties is the liability of the deft. to account. That the liability is there is clear from the language of cl. (c) of sub-s. (1) of S. 225. Unless he accounts for the rents & profits, how else is it going to be established whether his debt with interest has been discharged or not. While urging that in taking the view, that we are taking, we are reading something into the language of s. 225, Mr. Rao, counsel for the resp. himself reads into the section's language which will favour his contention, but with no justification either in the rules of equity or in the rules of law. He virtually contends that he holds the possession as a matter of penalty or forfeiture of tenant's rights; that so long as he holds, he holds it for himself for his benefit without liability to account for the rents & profits & without the liability of public charges as they accrue due from time to time. In other words. he, the recorded tenant of land, goes on making payment of such charges & also continues to be liable to pay the deposited amount constituted the debt within the section & its interest but for the very charitable & beneficial act of making the deposit, he (the depositor) will enjoy the lands free from any liability whatsoever. Such a construction would amount to hold that once the tenant fails to pay the rent & somebody, in order to protect his own interest, pays it up, acquires the property to complete deprivation of the recorded tenant. This amounts to forfeiture & it is a fundamental canon of construction that such forfeiture should not be inferentially construed to have been intended nor is there any clear & explicit language warranting such a construction.

[10] Legal mtge. has been defined as a transfer of a legal estate or interest in land or in other property for the purpose of securing the repayment of a debt. But where the creditor obtains an equitable estate or interest in land or in other properties, the mtge, is called an equitable mtge. In the present case, the deposit made by the mtgee. is constituted a debt within the meaning of the section. In respect of that the mtgee. is the creditor & the tenant is the debtor & an equitable estate in the holding is created by statute in his favour. Under the circumstances. this equitable estate must carry with it all the equitable rights & incidents thereof. It has been ever stated to be the well. settled principle of law & equity, that a mtgee in possession is liable to account on the footing of *wilful default*. that is, he will account not only for the amounts actually received by him but also for the sums which but for his own default, he might have received (Snell's Principles of Equity, 1930 Edn., p. 305). Mr. Sengupta, appearing for the applt. has invited our attention to a decision reported in *Nilkant* v. *Jaenoddeen*, 7 W. R. 30.

[11] In consideration of what I have said above, I hold that (the contention that?) the equity of redemption has been lost by the auction sale in which the deft. purchased the property is not maintainable, & that the deft. is liable to account for the rents & profits in the same manner as indicated in the passage above based on Snell on Equity. If on rendition of accounts of the rents & profits it is found that after the disbursement of the debt with interest under S. 225 & the mtge. money under the simple mtge, any amount is still due in the hands of the deft he will have to pay the same to the pltf. with interest at 12 P.C.P.A. till the date of realisation. In case the rent & profits are insufficient to liquidate the aforesaid dues, the pltf. will have to pay the same before he is allowed to redeem Accordingly, a decree shall be prepared by the Ct. below in the preliminary form & after settlement of accounts the decree shall be made final in terms according as there are sums due from the deft. or from the pltf.

[12] In the result the appeal succeeds & is allowed with costs throughout.

[13] **Panigrahi J.**—I have arrived at the same conclusion but would like to give my reasons for the same. Nothing can be simpler than the facts giving rise to this litigation. Nothing is more far reaching than the discussion of the fundamental legal principles which it has given rise to. The admitted facts are that the deft. entered into possession of the properties over which he held a simple mtge on payment of the arrear rent due on the land when the property was about to be sold at Ct. auction at the instance of the landlord. While in possession he allowed the rent to fall into arrears & the property was again put up to sale & actually sold on 26-4-37 the deft. himself

being the purchaser. The pltf. 1 who was the tenant mtgor. having sold the equity of redemption to pltf. 2 the pltfs.-applts. now sue seeking redemption of the mtge. & recovery of possession of the property.

[14] The decision of this appeal rests upon the correct interpretation of the language used in S. 225, Orissa Tenancy Act, which enables a person having an interest in a holding to deposit the arrear rent due in respect thereof & prevent the sale. The section declares in Cl. (1) (a) of S 225, that the amounts so paid shall be deemed to be a debt & secured by a mtge. of the holding. Sub-section (c) provides that the person so paying shall be entitled to possession of the holding as mtgee. of the tenant & to retain possession of it as such until the debt has been discharged. The applt's contention both in the Cts. below & in this Ct. is that the deft. having entered into possession while the relationship between him & the pltf. was that of a mtgor. & mtgee. "became a mtgee. in possession" within the meaning of S. 76, T. P. Act & made himself liable to pay the rents due on the holding & maintain accounts under sub-ss. (c) & (g) of S. 76. The Cts. below declined to give effect to this contention on the ground that the T. P. Act contemplates transfers by acts of parties & the provisions of Ss. 72 & 76 must be strictly limited to mtges. created by act of parties. On behalf of the resp. it has been contended that the expression 'mtgee. in possession' must be interpreted to mean that under the contract of mtge. the mtgee. should be entitled to enter into possession & cannot be extended to a case like the present one where the deft no doubt, is a mtgee. but gets into possession not as *qua* mtgee. but under a specific provision of the Tenancy Act. This argument does not appeal to me for the reason that the expression "mtgee. in possession" applies to a mtgee who takes over the control & management of the property from the mtgor. whether by agreement or otherwise. The case of a mtgee. who merely collects rents & profits of the mortgaged premises, either under a lease or some other arrangement may stand on a different footing, but where the mtgor. is deprived of the entire control, direction & management of the mortgaged properties, the person having such dominion is & must be regarded to be in possession of the estate. My second reason is that the T. P. Act is not exhaustive of all kinds of transfers of property nor of all kinds of charges that may be created over immoveable property. Even before the T. P. Act was passed, the principles embodied in the Act were applied in this country to such transactions on the principle of equity, justice & good conscience. I am, therefore, of opinion that whether the T. P. Act in terms applies to this transaction or not, the liability to account of a person in possession of another's property is beyond question. The case in point which justifies this conclusion is the one reported in *Papamma Rao* v. *Ramachandra Razu*, 19 Mad. 249: (23 I. A. 32 P. C.) where under an invalid decree a simple mtgee. entered into possession of a mortgaged property. In a suit for redemption the Judicial Committee of the P. C. laid down that the decree for possession in favour of the mtgee. did not preclude redemption, the possession of the decree-holder having only been as mtgee. & having involved liability to account to the mtgor. To borrow the language of the Judicial Committee "the mtgee. thereupon became mtgee. in possession & as such he must submit to be redeemed". Similar cases, where the mtgee. gets into possession otherwise than under the terms of the contract, are to be found reported in *Shib Dass* v. *Kali Kumar Roy*, 30 Cal. 463: (7 C. W. N 532) & *Nilkant* v. *Jaenoddeen*, 7 W. R. 30. The latest case cited on the point is reported in *Kamalpat Moti Lal* v. *Union Indian Sugar Mills Co. Ltd*, A. I. R. (16) 1929 P. C. 256 (119 O. C. 631). In this case the creditor was put in possession of certain properties which had been proposed to be mortgaged to him. The proposed mtge. having fallen through, the question arose as to what the status of the creditor in possession was. Their Lordships of the P. C. in applying S. 76, T. P. Act held

"that no further duty of care could be imposed upon the mtgees. than arises out of the statutory duties imposed upon mtgees. in possession under S. 76, T. P. Act on the one hand, or of the ordinary legal duties of managing agents on the other. They cannot see that any advantage is gained by seeking expressly to define these."

The last observation is significant because wehther the person in possession is to be regarded as mtgee. in possession or merely as a managing agent, his liability to account for the rent & profits received or which in the natural course of events should have been received by him as a prudent manager is beyond question. On behalf of the resp. Mr. Rao has drawn our attention to the case reported in *Kishendutt Ram* v. *Mumtaz Ali Khan*, 6 I. A. 145: (5 Cal. 198 P. C.); *Sorabjee* v. *Dwarkadas Ranchhoddas*, 59 I. A. 365: (A. I. R. (19) 1932 P. C. 199); *Gobindarajam Pillai* v. *Alagapa Chettiar*, I. L. R. (1943) Mad. 418: (A. I. R. (30) 1943 Mad. 202); *Kameshwar Singh* v. *Jhalak Singh*, A. I. R (36) 1949 Pat. 16: (29 P. L. T. 323). In the earliest P. C. case a usufructuary mtgee. purchased a Birt tenure while the mtge. was in force & the Board held that it amounted to an acquisition & enured for the benefit of the mtgor. following the rule of law laid down in some English cases. Their Lordships observed:

"It is difficult to see why, as in the case of a renewable lease, the same equity should not attach to the mtgee., particularly if by reason of his position as mtgee. in possession he has had peculiar facilities for obtaining the surrenders."

In the case reported in *Sorabjee* v. *Dwarkadas Ranchhoddas*, 59 I. A. 366 : (A. I. R. (19) 1932 P. C. 199), the Board again pointed out that S. 63, T. P. Act, embodied the same principle as indicated in s. 90, Trusts Act. A reference was made to the earlier case of the Board, which I have referred to just now. It was pointed out that the equitable principle applied by their Lordships in that case to acquisition by a mtgee. has now been embodied by S. 90, Trusts Act, 1882, in a wider rule dealing with acquisition by tenants for life, co-owners, mtgees & other qualified owners. It was argued before the Board that S. 63, T. P. Act, goes further than S. 90, Trusts Act, & that the mtgor, would be entitled to treat subordinate tenures acquired by the mtgee. for his own benefit as accessions to the mortgaged property without regard to the question whether the mtgee had special advantage by reason of his position as mtgee. in acquiring them. In the *Madras Case*, it was pointed out that S. 90, Trusts Act, affords protection against the mortgaged properties being sold at a disadvantage & prevents certain persons from taking advantage of their position to secure a benefit to themselves in derogation of the rights of those others. In this particular case, it was held that there was no such duty cast upon the mtgee. to pay the revenue & so it was held, on the facts, that he was not a party to any scheme to bring about a default in payment; accordingly, his purchase was upheld. In the latest decision of the Patna H. C, reported in *Kameshwar Singh* v. *Jhalak Singh*, A. I. R. (36) 1949 Pat. 16 : (29 P. L. T. 323), the same principle was applied. It was argued that the tenancy which is transferable by custom or statute & is put up for sale could be purchased by a stranger. There is no reason why a mtgee. should at all be prevented as being in a worse position so as to disentitle him from purchasing the property. It was also argued that in such circumstances, he could not be said to have taken an advantage & derived benefit to himself to the disadvantage of the mtgor. Bennett J. in repelling this contention, held that the rule prohibiting a purchase by a person who holds an advantageous position over the property applies to a mtgee as well. None of these cases in my opinion helps the resp.

[15] The provision embodied in S. 225 was borrowed from S. 177 (1), Bengal Tenancy Act, & was incorporated to provide a special measure of protection to a mtgee. of an occupancy holding as most of them were non-transferable. Under the general law, a person who makes payment for another is entitled to a lien or a charge on the property unless of course he pays voluntarily. This is founded on the well known doctrine of salvage lien & there was a controversy in the Calcutta H. C. as to whether a lien was a personal remedy or could be enforced against a property that is saved from sale. Similar provision is to be found in Madras Revenue Recovery Act & the Bengal Revenue Sale Act, 1859 & the point came to a head in what is known as the famous case of *Kinu Ram* v. *Kamaruddin*, 14 Cal. 809 (F. B), where the majority constituting the Bench declined to give effect to a charge binding on the property & declared that the person who made the payment was entitled only to a personal remedy against the person for whom the payment was made. It is in view of this that the Legislature appears to have incorporated this provision which guarantees repayment of the money deposited by a person having an interest in the said holding such as a mtge. by declaring the amount paid to be a debt & by securing the property by way of mtge. I can, therefore, see no difference between a mtge. created by the statute such as the one contemplated in S. 225 of the Tenancy Act & a mtge. created by act of parties. Mr. Rao for the resp. wanted us to hold that this section was in the nature of a penalty sought to be imposed on the defaulting tenant & that he could not claim any account of the receipts while the mtgee was in possession. Secondly, it was urged that if during the period he was in possession the occupancy right is purchased by the mtgee, the tenant cannot question or seek to recover the land relying upon his title at the time of the mtge. It is not for us to guess what the intention of the Legislature was in enacting this provision. Our duty is to interpret not the meaning of the Legislature but the meaning of the language used by the Legislature. At the time this provision was incorporated, the expressions "mtgee. & mtgee. in possession" had been crystallised into specific provision embodied in the statute. There is no reason why it should be held that these words were used in the Tenancy Act in a sense other than in which they were generally understood. But apart from this being decided as a matter of construction, there is authority for the proposition that, even before the T. P. Act came into force, the mtgee. in possession of immoveable property was, under the ordinary law then in force, bound to manage it as a person with ordinary prudence would manage it as if it were his own, & unless there was an agreement to the contrary with the mtgor. he was bound to pay out of the income of the property the Govt. land revenue which might during his possession be assessed upon it & such charges of a public nature as might accrue due in respect of the property & be payable by the person in possession of the rents & profits. (See *Abid Husain Khan* v. *Mt. Kaniz Fatima*, A. I. R. (11) 1924 P. C. 102 : (46 ALL. 269).

[16] It is worthwhile to note that when the T. P. Act was amended in 1929, the words "and all rent" were for the first time introduced into

S. 76 (c) removing all doubts whether the rent payable by the tenant to his landlord was a charge of a public nature. It is, therefore, clear that the deft. while he held the character of a mtgee. entered into possession & wae as such bound, whether under the T. P. Act or otherwise, to pay all rent accruing due in respect thereof during such possession.

[17] As I have said, either S. 76, T. P. Act, applies or it does not. If it applies, the liability of the resp. to account is created by the provision of the statute itself; if it does not, the applt's contention is that he would be liable even otherwise to account & cannot take advantage of the auction sale as the right of the mtgor. is protected under the provisions of the T. P. Act. It may be noticed that a mtgee. is not a trustee for the mtgor, but the Indian Trust Act imposes certain obligations upon the mtgee. which are in the nature of a trust. Chapter IX of the Indian Trust Act deals with certain obligations in the nature of a trust & S. 90 provides against any advantage gained by qualified owners such as, tenant for life, co-owner, mtgee. & the like. The conditions under which the advantage gained by such qualified owner will be deemed to have been held on behalf of the beneficiary are laid down in the section. Similarly, S. 88 provides against such acts committed by a person holding a fiduciary character & the residuary S. 94 provides for cases not directly coming within the scope of any of the preceding sections. Section 94 says that in any case not coming under the scope of any of the preceding sections where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest. Section 95 makes applicable all the sections of the Trusts Act defining the duties, liabilities & disabilities of the trustee to such persons. If the case covered by S. 90 Illus. (c) is a complete answer to the resp's contention, & if S. 94 is the section applicable, then the liabilities of the trustee defined in Ss. 15 & 19 of the Act will apply to the case under S. 95 of the Act. In either view of the case, I am led to the conclusion that the resp. was a mtgee in possession & as such was liable to be redeemed & liable to render account of his receipts during the period of his possession. I have, therefore, no hesitation in concurring with the judgment delivered by my Lord just now & the order regarding interest & accounting proposed by him. The result is the appeal shall be allowed with costs throughout & the mtgee. deft. shall be called upon to render accounts of his receipts either actual or such as he should have received & to make over the excess collections after taking the accounts with interest at 12 p. c. p. a.

K.S. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 306 *[C. N. 75.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Tirthabasi Ghose and others—Appellants v. *Bhuyani Trinayani Dasi — Respondent.*

Misc. Appeal No. 10 of 1946, D/- 31-3-1949.

(a) Hindu law — Wife — Maintenance—Charge decree for maintenance against husband — Execution.

Where a Hindu wife obtains a charge decree for maintenance against her husband, she has a right to proceed against any item of the property charged and therefore a purchaser of the property subject to the charge will not be entitled to resist the execution of the decree on the ground that there is other property available which is sufficient to meet the claim. [Para 7]

(b) Hindu law — Wife — Maintenance—Nature of — Charge decree for maintenance—Execution—Civil P. C. (1908), S. 38—Hindu Women's Rights to Property Act (XVII [17] of 1937).

Per *Narasimham J.* — The right of a wife to claim maintenance from the estate of her husband is essentially different from that of a widow to claim maintenance from the estate of her deceased husband. The former is based on the relationship between the two and the personal obligation arising out of it. The latter is, however, limited to those instances where she cannot succeed to her husband's estate as his heir. The Hindu Women's Rights to Property Act, 1937 may have the effect of extinguishing such rights of a widow but it has left the rights of the wife unaffected. When those rights have been embodied in a decree and a charge has been created in respect of several items of her husband's property, and there is nothing in the decree to indicate that its life is limited to the life of the husband, the executing Court has no other option except to execute the decree as it stands. So long as the charge remains and the decree stands unmodified it will not be open to the executing Court to say that the decree is unexecutable because after the death of the husband the widow as his heir has inherited his properties. All that can be reasonably urged on behalf of persons who have purchased the property from the husband subject to the charge is that in view of the improved financial position of the wife caused by her inheriting her husband's property, the maintenance allowance may be substantially reduced or (if the evidence justifies it) may be cancelled altogether. But this can be done only by a separate suit and not by way of an objection in an execution proceeding. [Paras 9 & 12]

Per *Jagannadhadas J.*—In the case of a charge decree for maintenance the fact of the death of the husband by itself does not in any way alter the foundation of the decree and does not make the decree inexecutable prima facie the decree enures for the lifetime of the decree-holder as against the charged property. No doubt where a widow succeeds to her husband's property she has no longer any right to maintenance, because her right to a share is in lieu of her maintanance and she cannot obviously be a maintenance-holder in respect of the very property which she owns for her life. But where some of the properties of her husband which have been charged for her maintenance, have passed away from the husband's estate by the date of his death, she obviously cannot succeed as an heir to those properties and there can be no question of her being entitled to those items as owner and, at the same time of getting maintenance out of them. There is no scope for the operation of the principle of merger. There is, therefore, no reason why her right to maintenance out of those properties should be held to have vanished. Those properties continue to be her husband's assets by virtue of the charge, for purposes of obtaining satisfaction of the decree, but have ceased to be her husband's property for purposes of any

succession on account of their having been alienated away. Her right to maintenance out of them may, therefore, be held on principle to have remained intact on the analogy of A.I.R. (31) 1944 Mad. 401, subject, of course, to any modification on the question of quantum by any separate proceedings. [Paras 18 & 19]

Anno. C. P. C., S. 38, N. 8.

(c) Transfer of Property Act (1882), S. 52 — Charge decree for maintenance — Decree remaining unsatisfied — Purchaser of property charged is bound by decree by virtue of S. 52.

Per *Jagannadhadas J.*—Where a charge decree for maintenance continues to remain unsatisfied, purchasers of some of the items charged would be bound by the decree by virtue of S. 52, T. P. Act and are in the position of judgment-debtors under the decree in respect of execution against those items of property. They may also be regarded as persons in possession of the assets of the original judgment-debtors whose property they have purchased subject to the charge, to the extent required for satisfaction of the decree out of the items so purchased and in that sense his legal representatives. [Para 16]

Anno. T. P. Act, S. 52, N. 11, 40.

B. K. Pal — for Appellants; *A. B. Ray and M. S. Rao — for Respondent.*

Narasimham J.—This is an appeal by some of the judgment-debtors against the order of the Subordinate Judge of Cuttack dismissing in part their objection under S. 47, C. P. C. to the execution of a maintenance decree obtained by the respondent Bhuyani Trinayani Dasi against her late husband Srichandan Bhuyan Brundaban Chandra Roy in O. S. NO. 484 of 1908. The maintenance decree (EX. F) was passed on 16-8-1909 and several items of zamindari properties of Srichandan Bhuyan Brundaban Chandra Roy were charged with liability for the maintenance of the respondent. Two of those items are touzi NOS. 1453 and 1463 appertaining to Balasore Collectorate. The maintenance decree was slightly modified when the litigation was taken up to the High Court in 1917. But for the purpose of the present appeal it is unnecessary to discuss in detail the history of that litigation. It is sufficient to note that the aforesaid two touzis and several other properties of Srichandan Bhuyan Brundaban Chandra Roy were made subject to the maintenance charge of the respondent. Touzi NO. 1463 was purchased by one Pitambar Ghose through his authorised agent in a court-sale on 23-9-1916 and in the sale certificate (EX. E) it was expressly stated that the sale in favour of the auction-purchaser was subject to the charge created by the aforesaid maintenance decree. Touzi NO. 1453 was also purchased on 4-7-1923 by the said Pitambar Ghose from one Jadunath Panda who had acquired the said touzi from Srichandan Bhuyan Brundaban Chandra Roy by purchasing the same in a court sale in execution of his mortgage decree. The said Srichandan Bhuyan Brundaban Chandra Roy died on 4-2-1943. During his life-time his wife (the respondent) had executed the maintenance decree on several occasions. The present application for execution (Execution case NO. 125 of 1944) out of which this appeal arose was filed on 28-7-1944 and it related to the maintenance due to her for three years from August 1941 to the end of July 1944. It will be noticed that a portion of the claim refers to the period after the death of her husband Srichandan Bhuyan Brundaban Chandra Roy. The decree-holder's case was that the aforesaid two touzis were subject to the maintenance charge decreed in her favour and that the appellants having acquired the said touzis with full knowledge of the existence of the charge decree in her favour were bound by the same. The appellants are all the descendants of Pitambar Ghose.

[2] The learned Subordinate Judge disallowed the respondent's claim in respect of touzi NO. 1453 on the ground that in a previous litigation (O. S. NO. 522 of 1913, EX. 5 and MISC. CASE NO. 95 of 1931) to which the respondent was a party it was decided that the said touzi was not liable to sale in execution of her decree for maintenance. As regards touzi NO. 1463, however, he held that the said Pitambar Ghose acquired it subject to the maintenance charge of the respondent and that consequently the execution should be allowed to continue in respect of that property.

[3] Several objections had been taken in the lower Court by the appellants-judgment-debtors one of them being that the respondent was the sole heir of Srichandan Bhuyan Brundaban Chandra Roy and that there was a merger of her maintenance decree with her right as heir. The respondent on the other hand contended that her husband had adopted one Gourhari Saha some time before his death. The learned lower Court believed the story of adoption. It is, however, unnecessary in this litigation to come to any decision as to whether the said Gourhari Saha was validly adopted by Srichandan Bhuyan Brundaban Chandra Roy. Even if it be held that he was validly adopted the respondent as a widow would also have a substantial interest in her husband's property by virtue of the provisions of the Hindu Women's Rights to Property Act, 1937.

[4] The main point urged by Mr. Pal on behalf of the appellants is that the aforesaid maintenance decree became unexecutable on the death of Srichandan Bhuyan Brundaban Chandra Roy because after that date the respondent being his widow became an heir to this property by virtue of the Hindu Women's Rights to Property Act, 1937 and that an heir under the Hindu law was not entitled to any maintenance. He further urged that the other properties left by the said Srichandan Bhuyan Brundaban Chandra Roy to his widow were considerable and that she has adequate means to maintain herself out of those properties.

[5] There is, however, no clear evidence about the exact value of the property left by Srichandan Bhuyan Brundaban Chandra Roy. Undoubtedly in 1909 he was a very substantial Zamindar as will be clear from the list of the zamindari properties that were made subject to the maintenance charge of his wife in the decree in O. S. NO. 484 of 1908 (EX. F). But from a perusal of the case reported in *Debendra Nath* v. *Trinayani Dasi*, (1945) 24 Pat. 245 : (A.I.R. (32) 1945 Pat. 278) (which also arose out of the execution of the same maintenance decree) it appears that most of the properties charged with the payment of maintenance to the respondent had passed out of the hands of her husband even during his life-time. The evidence in the present case merely shows that the husband left about 80 acres of *chas* lands and some other properties. But there is absolutely no evidence as to the amount of income derived from those properties and how much will fall to the share of the respondent even if the story of adoption be taken as true.

[6] The essential facts are practically admitted. Touzi NO. 1463 was made subject to the maintenance charge of the respondent decree-holder in the decree dated 16 8 1909 (EX. F). That touzi was purchased by the ancestor of the appellants on 23-9-1916 in a court-sale and in the sale certificate (EX. E) the existence of the charge on the basis of the aforesaid maintenance decree was clearly mentioned. The purchaser purchased the property with the full knowledge of the existence of the charge. In this case therefore it will be of mere academic interest to discuss the various conflicting decisions regarding the effect of ss. 52 and 100 of the Transfer of Property Act, when a property is purchased during the pendency of a litigation regarding the creation of a charge on the said property by a maintenance decree (See *Gangabai Pandurang* v. *Pagubai Narayan*, I. L. R. (1941) Bom. 1 : (A.I.R. (27) 1940 Bom. 395), *Ramchandra Gururao* v. *Kamala Bai*, A.I.R. (31) 1944 Bom. 191 : (I. L. R. (1944) Bom. 274) and *Kulandaivelu Pillai* v. *Sowbagyammal*, A.I.R. (32) 1945 Mad. 350 : (1945-1 M.L.J. 261).

[7] It cannot be seriously disputed that the respondent decree-holder has the right to proceed against any item of property charged. As early as 1867, it was pointed out by the Bombay High Court in *Ramchandra* v. *Savitribai* (4 Bom. H.C.A.C. 73) that :

"By Hindu law the maintenance of a widow is a charge upon the whole estate, and, therefore, upon every part thereof."

Similarly in *Sham Lal* v *Banna*, 4 ALL. 296 : (1882 A.W.N. 42 F.B.), the Full Bench declared :

"When the maintenance has been expressly charged on the purchased property, it will be liable, although it be shown that there is property in the hands of the heirs sufficient to meet the claim . . . ."

In *Thimmanayanim Bahadur* v. *Venkatappa Nayanim Bahadur*, A. I. R. (15) 1928 Mad. 713 at p. 716 : (109 I.C. 872 F. B.), the right of the maintenance decree-holder to choose the property against which she may proceed was clearly recognised. Again in *Debendranath* v. *Trinayanidasi*, I.L.R. (1945) 24 Pat. 245 : (A. I. R. (32) 1945 Pat. 278) it was pointed out that "every part of the property charged is liable for the payment of the decretal debt". Therefore the fact that the respondent has chosen one of the several items of the charged property for this execution proceeding will not be a ground for resisting her claim.

[8] The main question for consideration is whether the death of the respondent's husband in 1943 has had the effect of making the maintenance decree unexecutable. It is doubtless true that from the date of his death the respondent as his widow became entitled to a share of his property (if the story of adoption be believed) or the whole of his property (if there was no adoption) by virtue of the Hindu Women's Rights to Property Act, 1937. There is sufficient authority to support the view that a Hindu widow who has become an heir of her husband's property cannot claim maintenance out of that property, *Venkata Subbarattamma* v. *Krishniah*, A. I. R. (30) 1943 Mad. 417 : (208 I. C. 638) and *T. Sarojini Devi* v. *T. Sri Kristne*, I.L.R. (1945) Mad. 61 at p. 69 : (A. I. R. (31) 1944 Mad. 401). In the latter Madras decision Patanjali J. pointed out :

"It may well be that, if the Act (referring to the Hindu Women's Rights to Property Act, 1937) conferred upon the widow a right of succession in respect of all her husband's property, the right of maintenance allowed to her under the ordinary Hindu law as compensation for her exclusion from inheritance would no longer be available, although nothing is said in the Act about rights of maintenance."

This point has been fully discussed in a recent decision of the Oudh Chief Court reported in *Misri Lal* v. *Mst. Simatra*, (23 Luck. 277) where after an exhaustive discussion of all the authorities on the subject it was pointed out that the right of a Hindu widow to claim maintenance out of the joint family property of her husband was extinguished after the passing of the Hindu Women's Rights to Property Act, 1937. In the aforesaid Madras decisions, however, the right of maintenance of a Hindu widow from the agricultural lands left by her husband was recognised because till then the said Act had not been applied to agricultural lands left by her husband was recognised because till then the said Act had not been applied to agricultural lands by the Provincial Legislature. But this argument is no longer available in the Province of Orissa because by Orissa Act V of 1944 the provisions of the Hindu Women's Rights to Property Act, 1937 were applied to agricultural lands in the Province with retros-

pective effect from the date of the commencement of the latter Act.

[9] But the main difficulty against the appellants' case arises from the fact that the lower Court was acting merely as an executing Court and had, therefore, no jurisdiction to go behind the decree. It may be that in a properly constituted suit the appellants may be able to succeed in establishing that the respondent had no right to claim maintenance from the date of the death of her husband and thus extinguish the effect of the maintenance decree in O. S. No. 484 of 1908. It is also not unlikely that even if they are unable to completely extinguish the said decree they may be able to get the maintenance allowance reduced to a substantial extent after taking into consideration the exact value of the assets of Srichandan Bhuyan Brundaban Chandra Roy that were inherited by his widow. Even before the passing of the Hindu Women's Rights to Property Act, 1937, it was fully recognised that a maintenance decree itself may be varied due to change in circumstances: *Ruka Bai* v. *Ganda Bai*, 1 ALL. 594, *Venkanna* v. *Aitamma*, 12 Mad. 183; *Bangaru Ammal* v. *Vijayamachi Reddiar*, 22 Mad. 175; *Gopika Bai* v. *Dattatraya*, 24 Bom. 386 : (2 Bom. L. R. 191); *Kewalmal* v. *Isri Bai*, 93 I. C. 353: (A.I.R. (13) 1926 Sind 135), *Sheo Mangal* v. *Boahikuar*, A. I. R. (23) 1936 Oudh 60 : (11 Luck 607) and *Sundari Ammal* v. *Venkat Rama*, 66 M. L. J. 680 : (A. I. R. (21) 1934 Mad. 384). But in all these cases the question arose not in an execution proceeding but in a separate suit. In the present case, however, there is a decree in favour of the respondent and that decree does not say in any way that it shall cease to be operative after the death of the respondent's husband. On the other hand, the very fact that it is a maintenance decree reasonably indicates that it would be operative during the life-time of the decree-holder. The Court took special care to specify various items of property of the husband which should be subject to the maintenance charge and this safeguard was specially adopted with a view to prevent the husband from defeating the maintenance of his wife by alienating his properties. Therefore, so long as the charge remains and the decree stands unmodified I do not think it will be open to the executing Court to say that the decree is unexecutable because after the death of the husband the widow as his heir has inherited his properties.

[10] In *Gopikabai* v. *Dattatraya*, 24 Bom. 386 : (2 Bom. L. R. 191), Parsons J. pointed out the desirability of inserting suitable words in the maintenance decree so as to enable the Courts, on application, to set aside or modify their orders as circumstances might require. If in the present maintenance decree also such words had been inserted it would have been open for the appellants to apply in the execution proceeding itself for reduction of the rate of maintenance due to change of circumstances but unfortunately for them there are no such words in the decree and it must be executed as it stands. In *Ranmalsangji* v. *Bai Kundankuvar*, 26 Bom. 707: (4 Bom. L. R. 531) it was observed:

"But here the claim is under the special provisions of a decree expressly dealing with the circumstances of this particular case. And that decree, passed in relation to those circumstances, contained no provision whatever that the rights thereby conferred on the respondent should be dependent upon her place of residence or upon any other matter whatsoever. It conferred in terms an unconditional and absolute right to the maintenance specified therein. There is neither necessity nor justification for any conjecture as to the reasons for that decision or as to the propriety thereof. It is binding in execution on the parties thereto, and neither of them could go behind it or add to it a condition which it does not contain. A decree for maintenance right may be so framed as to admit of modification of its terms with reference to post decretal changes in the circumstances or in the relations of the parties. No authority has, however, been cited to show that such modifications could be made on application in execution when the decree contains no provision in that behalf."

Though the aforesaid case is distinguishable on facts from the present case the principle laid down therein is applicable with equal force and with respect I would agree entirely with those observations.

[11] In *Muttia* v. *Virammall*, (10 Mad 283 F. B.) it was held that a decree for maintenance obtained by a widow in a suit against her husband's brother could not be executed after his death against the joint family property in the hands of other members of the family. But it was expressly observed that the decision would have been different if the defendant had been sued as representing the family or if the *maintenance had been charged* on the joint family property. Following this decision, in *Subbanna Bhatta* v. *Subbanna*, 30 Mad. 324 : (17 M. L. J. 180) it was held that a maintenance decree obtained by an illegitimate son against his father such maintenance being charged on the joint family property of the father and his legitimate sons, could be enforced against the sons after the father's death The present case is of a similar type. Though the maintenance decree was against the husband such maintenance was charged on his property. So long as the charge remains, the decree is enforceable against the successor-in-interest of the husband even after his death. To hold otherwise would be to defeat the very purpose for which the charge was created.

[12] Mr. Pal has relied on *Chinna Goundan* v. *Kalyana Sundaram*, A. I. R. (28) 1941 Mad. 126 : (1940-2 M. L. J. 881) and *Venkayya* v. *Raghavamma*, A. I. R. (29) 1942 Mad. 1: (I. L. R. (1942) Mad. 24) for the view that where the basis on which a decree is passed has disappeared, such a decree becomes unenforceable. *Chinna Goundan* v. *Kalyana*, A. I. R. (28) 1941 Mad.

126 : (1940) 2 M. L. J. 881) is, however, clearly distinguishable because there the decree ceased to be executable by the operation of a statute. This position admits of no doubt. For example there are some provisions in the Orissa Money-lenders Act (see sections 11 and 17) which say that some decrees shall be deemed to have been satisfied under certain circumstances. No executing Court can execute a decree against the express provisions of an Act. In the present case, however, this analogy will not apply because the Hindu Women's Rights to Property Act, 1937, does not expressly say anything about the enforcibility or otherwise of maintenance decrees obtained prior to the date of the commencement of that Act. In *Venkayya* v. *Raghavamma*, A. I. R. (29) 1942 Mad. 1 : (I. L. R. (1942) Mad. 24), the principles of English law regarding divorce and alimony were applied and it was held that a decree obtained by a Hindu wife against her husband for maintenance ceased to be enforceable if subsequent to the decree the wife resumes cohabitation with her husband. Therein it was pointed out that the basis on which a decree for maintenance was passed in favour of the wife namely the living of the wife separately from her husband for good reasons had disappeared by the act of the parties. By returning to her husband, she became disentitled to claim maintenance and therefore it was held that the previous decree became ineffective and the parties were restored to the position which they occupied when they were married. I do not think it will be proper to apply the principle of this decision to the present case. The basis on which the decree was obtained by the respondent against her husband cannot be said to have disappeared. The decree was based on the relationship of husband and wife and the fact that the husband by his own conduct compelled his wife to live apart from him. Till his death the conditions remained as they were at the time of the passing of the decree and the only change that has been brought about is the change in her status from a wife to that of a widow and the consequent right to inherit his property under the Hindu Women's Rights to Property Act, 1937. The right of a wife to claim maintenance from the estate of her husband is essentially different from that of a widow to claim maintenance from the estate of her deceased husband (*see Sham Devi* v. *Mohan Lal*, A.I.R. (21) 1934 Lah. 167). The former is based on the relationship between the two and the personal obligation arising out of it. The latter is, however, limited to those instances where she cannot succeed to her husband's estate as his heir. The Hindu Women's Rights to Property Act, 1937, may have the effect of extinguishing such rights of a widow but it has left the rights of the wife unaffected. When those rights have been embodied in a decree and a charge has been created in respect of several items of her husband's property, and there is nothing in the decree to indicate that its life is limited to the life of the husband, the executing Court has no other option except to execute the decree as it stands. All that can be reasonably urged on behalf of the appellants is that in view of the improved financial position of the respondent caused by her inheriting her husband's property, the maintenance allowance may be substantially reduced or (if the evidence justifies it) may be cancelled altogether. But I think this can be done only by a separate suit and not by way of an objection in an execution proceeding.

[13] I would, therefore, dismiss the appeal with costs.

[14] **Jagannadhadas J.** — I agree with my learned brother that the appeal is to be dismissed with costs.

[15] The facts out of which this appeal arises have been fully set out in the judgment of my learned brother. The argument for the appellant is that since by the date of the application for execution, the husband of decree-holder had died, the decree is no longer executable as against the appellants. Various grounds are alleged in support of this position. (a) The decree is eo nomine against the deceased husband of the respondent and there is no decree against the appellants. They cannot be said to be the legal representatives of the original judgment-debtor and the decree cannot be executed against them. (b) The decree has become inoperative and is no longer executable because, (i) It is based on the personal obligation of the husband which ceases with his death. (ii) After the husband's death, she has become an heir to her husband's property and has no longer any subsisting right of maintenance.

[16] As regards the contention (a), the appellants who have purchased some items of the property charged, while the decree continues to remain unsatisfied, are clearly persons bound by the decree by virtue of S. 52 of the Transfer of Property Act and are in the position of judgment-debtors under the decree in respect of execution against the said items of property. They may also be considered to be persons in possession of the assets of the original judgment-debtor whose property they have purchased subject to the charge, to the extent required for satisfaction of the decree out of the items so purchased and in that sense his legal representatives. As regards contention (b), learned counsel for appellants has cited authorities to show that where the basis or foundation of a decree vanishes, the decree itself becomes inoperative and inexecutable and that this objection can be raised in execution under S. 47, C. P. C. without a separate suit having to be filed to set aside the decree. *Syam Mandal* v. *Satinath Banerjee*, 44 Cal. 954 : (A. I. R. (4) 1917 Cal. 728) and

Venkayya v. *Raghavamma*, I. L. R. (1942) Mad. 24 : (A. I. R. (29) 1942 Mad. 1) and *Narayan Chitko* v. *Vithal Parshotam*, 12 Bom. 23, and a number of other cases have been brought to our notice. Assuming this proposition to be correct, the question is whether it can be said that the basis of the charge-decree for maintenance obtained by a wife against her husband necessarily vanishes with the death of the husband.

[17] It is no doubt true that the obligation of the husband to maintain his wife is personal. But it does not follow that it does not survive. The right of the wife to get maintenance from her husband is one that can also be enforced against the property of the husband or the share of the husband in the family property. All that is meant when it is said that the husband's obligation in this behalf is personal is merely to emphasize that irrespective of having any property the husband is bound to maintain the wife. When, however, the obligation is charged on the property, it is no longer a mere personal liability, but is also a property liability. That this is so appeared from the fact that the charged property can be proceeded against irrespective of the possession of other property in the hands of the debtor and independent of whether the personal remedy is pursued in the first instance or not, *Sham Lal* v. *Banna*, 4 ALL. 296 (F. B). It is, therefore, erroneous to say, as has been contended, that the obligation is merely personal and that the charge is an accessory liability, which falls to the ground with the death of the husband. The right of the wife to obtain maintenance is prima facie for her life and hence the property charged can be followed during her life time into the hands of every person to whom it passes. This has been recognised in *Subbanna Bhatta* v. *Subbanna*, 30 Mad. 324 : (1) M.L.J. 180) following *Muttia* v. *Virammal*, 10 Mad. 283 (F. B.) which has pointed out the distinction in this respect between a maintenance decree which has been obtained against a person individually and a maintenance decree which has been obtained against a representative of the family or which has been charged on the property. Those were, no doubt, cases of decrees obtained by a widow against another member of the family, but the principle would appear equally to apply to the case of a decree obtained by a wife against her husband. There is nothing in *Sham Devi* v. *Mohan Lal*, 15 Lah. 591: (A. I. R. (21) 1934 Lah. 167) which has been cited to militate against this view.

[18] Prima facie, the object of obtaining the charge for maintenance in respect of certain items of the property is that so long as the decree-holder's right to be maintained out of the property continues, the property charged is to be treated as the husband's assets in the hands of any successor or alienee, for purposes of satisfaction of the liability charged. It appears to me, therefore, that in the case of a charge decree for maintenance, like the one under consideration in the present case, the fact of the death of the husband by itself does not in any way alter the foundation of the decree and does not make the decree inexecutable and that prima facie the decree enures for the lifetime of the decree-holder as against the charged property. Any other view would result in compelling the wife who has become a widow to sue afresh for her maintenance, the heirs or the coparceners of her husband. In a case where the husband has left no property at his death or has not left sufficient property to provide for her reasonable maintenance, she would be without any remedy and the purchaser of the charged property would be getting a release from the liability which he has not bargained for. We have been shown no authority compelling us to accede to any such view.

[19] The only further question that remains is whether the fact of the respondent having succeeded to some property of her husband in this case, makes any difference. It has, no doubt, been held that where a widow succeeds to her husband's property she has no longer any right to maintenance because her right to a share is in lieu of her maintenance and she cannot obviously be a maintenance-holder in respect of the very property which she owns for her life; vide *Misrilal* v. *Mst. Simatra*, 23 Luck. 277. It has been held on the other hand that where the widow succeeds only to some of the properties of her husband as heir, her right to maintenance out of the other properties of the husband does not disappear, though the fact of her being the owner of some properties may be a ground for variation of the quantum of maintenance. *Sarojini Devi* v. *Srikristna*, I. L. R. (1945) Mad. 61 : (A. I. R. (31) 1944 Mad. 401). In a case like the present one, where some of the properties of her husband which have been charged for her maintenance have passed away from the husband's estate by the date of his death, she obviously cannot succeed as an heir to those properties and there can be no question of her being entitled to those items as owner and, at the same time of getting maintenance out of them. There is no scope for the operation of the principle of merger. There is, therefore no reason why her right to maintenance out of those properties should be held to have vanished. Those properties continue to be her husband's assets by virtue of the charge, for purposes of obtaining satisfaction of the decree, but have ceased to be her husband's property for purposes of any succession on account of their having been alienated away. Her right to maintenance out of them may, therefore, be held on principle to have remained intact on the analogy of *Sarojini Devi* v *Srikistna*, I.L.R. (1945) Mad. 61: (A.I.R (31) 1944 Mad. 401) subject, of course, to any

modification on the question of quantum by any separate proceedings.

[20] In the result, therefore, I agree with the order of my learned brother.

K.S. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 312 *[C. N. 76.]*

RAY C. J. & PANIGRAHI J.

Narendra Kishore Das — Applt. v. *Banamali Sahu Dibakar Sahu Firm — Resp.*

A. F. O. O No. 61 of 1948, D/- 25-4-1949.

(a) Civil P. C. (1908), O. 5, Rr. 1 (3), 17, 20 — "In such other manner as Court thinks fit" in R. 20 — Service of summons by registered post — It must however comply with R. 1 (3) of O. 5 & Form 1, App. B — Post card not containing signature of Ct. or any officer appointed by Ct. or seal of Ct. — It is not valid service of summons — Not only there must be seal of Ct. but also signature of Ct.

Anno. C. P. C., O. 5, R. 1, N. 2; O. 5, R. 20. N. 5. [Para 3]

(b) Civil P. C. (1908), O. 9, R. 13 — Setting aside of ex parte decree — Service of summons — Mere knowledge of party of institution of suit is not sufficient — Effective service of summons must be proved — Ex parte decree would be set aside in absence of proof of service. [Para 4]

Anno. C. P. C., O. 9, R. 13. N. 18.

(c) Civil P. C. (1908), O. 5, R. 20 — Service by post is supplementary mode of service — By itself, it will not take place of service of summons, specially when there is no attempt at personal service. [Para 5]

Anno. C. P. C., O. 5, R. 20, N. 4 & 5.

(d) Civil P. C. (1908), O. 5, R. 1 (3) — Seal of Ct. — Date-stamp of office cannot take place of seal of Ct. [Para 3]

Anno. Civil P. C., O. 5, R. 1, N. 2.

R. K. Das — for Applt.; *B. N. Mohanty — for Resp.*

Ray C. J. — This appeal is directed against an order of the Subordinate Judge of Cuttack refusing to set aside an ex parte decree. The suit was a Money Suit by the resp. against more than four defts. of whom deft. 2 is the applt. before us. Deft. 1 is the elder brother & is stated to be the Manager of the joint family of defts. 1, 2 & 3. Deft. 4 is a Muhammadan gentleman who was impleaded on the ground that he was one of the patnrs of the partnership business in relation whereto the liability in favour of the pltf. is said to have arisen. Defts. 5 & 6 were some of the servants of the partnership concern. The suit was contested by deft. 4 & he was released from the liability on the finding that he was not a patnr. of the concern. Deft. 1, while residing at Puri, the place where he ordinarily resides now-a-days away from the family house at Cuttack, was personally served with summons which he acknowledged. Deft. 3 is the son of deft. 1. The two defts. (defts. 2 & 3) could not be personally served with the regular summonses accompanied with copies of plaint addressed to them. The report of the Serving Officer was that the copies of summonses had been tendered to them; but they having understood the purport thereof refused to acknowledge & thereupon they were hung at the *sidr* door of their residence. I could not quite understand how could deft. 3's ordinary residence be at Cuttack when his father deft. 1 was ordinary residing at Puri. Deft. 3 was admittedly at the time a student of Jadavpur Engineering College. Under the circumstances, as is expected, the learned Subordinate Judge did not accept the report as to the mode of service of the Serving Officer & declared the same to be unsatisfactory calling upon the pltf. to take further steps for fresh service. The fresh service that was ordered by the Ct. was a registered Post Card. This Post Card is said to have been tendered to the applt. before us & refused. Thereafter, the suit was set down ex parte against defts. 1, 2 & 3. The suit travelled through a long course on account of contest by deft. 4 & was finally disposed of about a year after. The decree was ex parte as against defts. 1, 2 & 3 & one of dismissal as against defts. 4, 5 & 6. The defts. 1, 2 & 3 by separate applns. filed, sought to have the ex parte decree set aside under O. 9, R. 13 which met with refusal by the Subordinate Judge. Hence this appeal by the deft. 2.

[2] The learned Subordinate Judge, after considering the evidence of the Postal Peon (witness 2 for the opp. party), has come to the finding that the post card was tendered personally to Narendra Kishore Das. I have gone through the evidence of this witness & there is much to be said against his testimony. He is a peon under suspension regarding delivery of an Insured Parcel for about nine months by the time when he deposed. The point, however, that has to be considered in this appeal is whether the post card, in question, is an effectual substitute for the regular service of summons. O. 5, R. 17 lays down the various alternatives that have to be adopted for effecting personal or other service of summons accompanied with copy of plaint on a deft. the validity of which depends upon the Ct's. pronouncement of its genuineness & credibility. As I have said in this case, the Ct. pronounced the Serving Officer's report as unsatisfactory. Then comes R. 20 of the Order into operation which provides:

"Where the Ct. is satisfied that there is reason to believe that the deft. is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Ct. shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house & also upon some conspicuous part of the house (if any) in which the deft. is known to have last resided or carried on business or personally worked for gain, *or in such other manner as the Ct. thinks fit.*"

[3] The last mode of service, namely, "or in such other manner as the Ct. thinks fit", no doubt, gives the Ct. the jurisdiction to have the service of summons through registered post. But the question reduces itself to this what that summons should be? Should it be anything different from what it ought to be within the

meaning of R. 1, O. 5 of the Code & the Form prescribed in App. B (NO. 1)? Sub-r. (3) of R. 1, O. 5, provides:

"Every such summons shall be signed by the Judge or such officer as he appoints, & shall be sealed with the seal of the Ct."

According to App B (NO. 1), the summons besides giving adequate particulars of the suit & the date fixed for either disposal or for settlement of issues, will purport to be one addressed by the Ct. or under the authority of the Ct. The latter requirement is to be fulfilled by insertion of the following words or their equivalent: "Given under my hand & the seal of the Ct., this day of 19 Judge." Until this is done it cannot be a summons within the meaning of law. This post card, though it contains some particulars about the date fixed for the suit & the nature of the suit, including by whom & against whom it is brought, bears nothing to say that it is signed by the Judge or under his authority. In the first summons, which could not be satisfactorily served, but which is on a printed form, the words are "*Ambhar Swakshyar O Adalatar Mohar Krame Sana 1946 Masiha 9 Masar Ta 11 Rikhe Diagala*". Underneath, there is a signature of the Sheristadar indicating that he is the person appointed by the Ct. to sign. Such indication is made by words: "By Order Sheristadar". Besides on the very face of it, it contains a seal, the impression from which reads "Seal of the Ct. of the Subordinate Cuttack". Mr. B. N. Mohanti, appearing for the opp. party, invites our attention to a seal on the reverse of the post card (the side in which the address is written) which is to the effect "Sub-Judge's Ct. Cuttack Filed 19-11-1946". This, however, cannot take the place of the Seal of the Ct. This is only a date-stamp of the Office indicating the date when any particular document or paper is filed in Ct. Besides, this is not a part of the summons too. The entire summons is on the front page of the post card, which as I have said, does not either contain the signature of the Judge or that of any other Officer appointed by him in that behalf nor the seal of the Ct. Even if one is there, namely, the seal of the Ct. if the other is not there, it does not amount to a summons. The rule requires both.

[4] It is well settled in principle that a party's knowledge of the institution of a suit is not sufficient so long as he is not effectively served with summons of the suit. He may from various circumstances or after his own enquiry come to know that a suit has been filed against him, but he is entitled to expect service of summons from Ct. Till that is done, you cannot fix him with the liability of ex parte decree & cannot refuse his appln. to set aside the said decree on the ground that there is good reason to believe that he knew of the suit. Therefore, even if we believe that this post card was tendered to the applt. (Narendra Kishore Das) & he refused it, yet there was nothing in it to show that it was a summons addressed by a Judge of the Ct. commanding him to appear in Ct. & answer to a cause against him.

[5] Under the circumstances, we are of opinion that in this case, it cannot be held that the summons has been served upon him in accordance with law. It should be proper to state here that service by post may be adopted as a supplementary mode of service, but it shall not, by itself, take the place of service of summons, particularly, in a case where there was no attempt to serve the defts. with summons personally as in this case in which the peon's report was not believed by the Ct.

[6] In consideration of what I have said above, I should set aside the ex parte decree in the suit, as a whole, & restore the suit to its file as against defts 1, 2 & 3. The appeal is allowed. The applt. however, in the special circumstances of the case, shall pay costs of this Ct. to the pltf. resp.

[7] **Panigrahi J.**—I agree.

R.G.D. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 313 *[C. N. 77]*

JAGANNADHADAS AND PANIGRAHI JJ.

Pratap Kishore & another — Pltfs.-Applts. v. *Gyanendranath — Deft.-Resp.*

Second Appeal No. 208 of 1947, D/- 26-2-1951.

(a) Bengal, Agra & Assam Civil Courts Act (1887), S. 38 (2)—Appeal against decree on judgment written by predecessor—Civil P. C. (1908), O. 20, Rr. 2, 8.

Panigrahi J.—The judgment read out in open Ct. by a Judge written out by his predecessor does not become his own judgment so as to render him incompetent to hear an appeal against the decree passed on it under S. 38 (2). [Para 13]

Anno. C. P. C., O. 20 R. 2 N. 2; R. 8 N. 1.

(b) Civil P. C. (1908), O. 20, R. 2—Judgment written by Judge on leave.

The use of the word "predecessor" in O. 20, R. 2, is unqualified & would, therefore, apply to any officer who had tried the case. Whether he is still in service, or has been transferred, or has gone on leave. Hence a judgment written by a Judge who has gone on leave is a valid judgment. [Para 15]

Anno. C. P. C., O. 20 R. 2 N. 2.

(c) Civil P. C. (1908), O. 20, R. 2—Scope of.

Panigrahi J.—The language of the rule does not warrant the assumption that the succeeding Judge, who merely pronounces in open Ct. a judgment prepared by his predecessor, necessarily expresses himself as being in agreement with the views contained in that judgment; or that when he does not pronounce that judgment & orders a retrial he necessarily expresses himself as being in doubt as to the correctness of that judgment. [Para 16]

Anno. C. P. C., O. 20 R. 2 N. 2, 3.

(d) Civil P. C. (1908), O. 20, Rr. 2, 8 — Decree by successor — Effect — Bengal, Agra & Assam Civil Courts Act (1887), S. 38 (2).

Panigrahi J.—A decree is passed by the predecessor, who writes the judgment in the ordering portion of his judgment though it is actually drawn up & signed by the successor. [Para 17]

Das J.—The phrase "the Judge who passed the decree" in S. 38, sub-s. (2), Bengal, Agra & Assam Civil Courts Act should be construed as applicable only to the Judge who prepares the judgment & in the normal course pronounces it & thereby passes decree & not to the Judge who merely pronounces the judgment under the provisions of O. 20, R. 2, without having himself prepared it. The successor Judge pronounces the judgment of the predecessor Judge as his statutory proxy, & the judgment so pronounced is

to all intents & purposes the determination of the predecessor Judge. It is, therefore, as though the pronouncing of the judgment, which undoubtedly constitutes the passing of the decree is to be taken in law to be the pronouncement by the predecessor Judge. [Paras 39, 40]

Anno. C. P. C., O. 20 R. 2 N. 2; R. 8 N. 1.

(e) Civil P. C. (1908), S. 9—Contravention of rule of procedure.

A mere deviation from a rule of procedure cannot be more than an irregularity & need not necessarily affect jurisdiction. [Para 18]

Anno. C. P. C., S. 9 N. 3, 4, 5.

(f) Hindu Law — Joint family — Self-acquired property—Use by others—Presumption.

A member of the joint family who acquires property may allow other members of that joint family to manage it & to enjoy the income arising out of it. But this circumstance alone cannot militate against the presumption that such property acquired by a member out of his own earnings, constitutes his self-acquisition. It is not unusual in a joint family, for its members to utilise the income so long as they are joint. The real test in such cases is the intention behind the act. Does that act indicate that the acquirer intended to throw it into the common stock & not to claim separate title thereto ? It certainly cannot be said that the moment a member acquires property with his own earnings he should immediately separate himself from the other members in order that he might treat his acquisition as separate; & that failure to do so should necessarily lead to a presumption that the property would be a part of the joint family property. In the absence of any evidence of a positive character to show that the acquirer intended that his acquisition should be treated as a part of the family stock, the presumption would be that it must remain his self acquisition. [Para 22]

(g) Evidence Act (1872), Ss. 17, 31— Admissions — Value of.

What a party himself admits to be true may reasonably be presumed to be so. The party making the admission may give evidence to rebut this presumption. The express admissions of a party to the suit or admissions implied from his conduct are evidence—indeed strong evidence—against him unless he can prove that such admissions were mistaken or were untrue & he is not estopped or concluded by them unless another person has been induced by them to alter his condition. [Para 26]

Anno. Evidence Act, S. 17 N. 5; S. 31 N. 1, 2.

(h) Civil P. C. (1908), O. 2, R. 1—Frame of suit.

When a pltf. comes to Ct. to set aside an adoption on the foot of which there is a partition, the obligation lies on him to so constitute his suit as to enable the Ct. to deal with the whole subject-matter & dispose of all the rights & interests of the parties to the deed. He cannot seek to set aside the adoption without also repudiating the deed of partition. [Para 26]

Anno. C. P. C., O. 2 R. 1 N. 2, 3.

(i) Evidence Act (1872), Ss. 101 to 103—Adoption.

The onus is heavy against the person setting up an adoption especially when there is no contemporaneous deed of adoption. [Para 29]

Anno. Evidence Act, Ss. 101 to 103 N. 13.

(j) Evidence Act (1872), S. 21—Admission by Hindu father.

Admission made by father would be admissible as against the son, the father being the representative in interest of the son in dealing with ancestral property. [Para 30]

Anno. Evidence Act, S. 21 N. 3.

(k) Evidence Act (1872), S. 64—Document—Proof.

Where certain documents have been marked as exhibits in a case without objection but the contents thereof have not been put to the persons connected with them either in their chief examination or cross-examination it is not possible to make use of the statements made therein for the purpose of drawing inferences one way or the other. [Para 32]

Anno. Evidence Act, S. 64 N. 1.

(l) Interpretation of Statutes—Consideration of object intended.

Words or phrases in a statute, having larger import can, having regard to the purpose & object intended, be understood in a limited sense. [Para 39]

Anno. C. P. C., Pre N 7.

(m) Civil P. C. (1908), O. 20, R. 2 — "May pronounce."

Obiter (Das J.)—The word "may" in O. 20, R. 2 must be construed not as involving a discretion, but as conferring an authority which it is the duty of the successor to exercise, if there is on record a prepared & signed judgment of his predecessor, who heard the suit. [Para 41]

Anno. C. P. C., O. 20 R. 2 N. 3.

D. Mohanty & Muralidhar Mohanty — for Applts.; M. S. Rao—for Resp.

Panigrahi J. — This is a pltf.'s second appeal against the judgemnt of Sri C. C. Coari, Dist. J., Cuttack, affirming the judgment of Sri G. C. De, Addl. Subordinate Judge, Cuttack, in O. S. No. 25 of 1938.

[2] Pltf. 1 is the son of one Bhagat Charan Mohanty who was impleaded as deft. 2 in the suit but was transposed as pltf. 2 on 9-5-40 when the trial was opened. The first pltf. — who was a minor — raised the suit through his next friend, Suriyamoni Dei, said to be his father's sister, for a declaration that deft. 1 Gyanendranath Mohanty, is not the adopted son of Nrusingho Charan Mohanty, the deceased uncle of pltf. 2. He alleged that Nrusingho Charan Mohanty had married Pramila Sundari the sister of Gyanendrana h in 1921; that on account of this relationship pltf. 2 was looking upon Babu Lakshmimdhar Mohanty, the natural father of deft. 1 as 'Murabi' & that Lakshmidhar Babu had a commanding influence over pltf. 2. It was further alleged that pltf. 2, Bhagat Charan, was subject to a sort of sentimental weakness and weakness of mind in the presence of deft. 1's sister the widow of Nrusirgho Charan. It is said that taking advantage of his dominating position, Lakshmidhar Babu induced pltf. 2 to execute certain documents purporting to admit the adoption of deft. 1 by Nrusingho, that there had, in fact, been no such adoption, & that consequently those documents were void. The pltf. accordingly claimed a declaration that the alleged adoption of deft. 1 by Nrusingho Charan is not true. The case of deft. 1, on the other hand, is that there had, in fact, been a regular adoption by Nrusingho Charan on 13 7-1934, followed by the due observance of all the necessary rites & ceremonies, in the presence of pltf. 2 at the house of Babu Lakshmidhar Mohanty & that he (deft. 1) performed the funeral & Sradh ceremonies of Nrusingho Charan, that the documents speaking to the adoption having taken place were genuine & narrated what actually took place & were not brought about, as alleged by the pltf., at the instance of his natural father due to his dominating position. Pltf. 2, Bhagat Charan Mohanty, filed a lengthy statement denying the adoption & alleged that in a weak moment he agreed to set apart some property in the name of deft. 1 Gyanendranath so that his sister, the widow of Nrusingho, may live in comfort with her brother.

[3] The main issue on which the decision of the suit rested was issue 7: "Is deft. the duly adopted son of the late Nrusingho Charan Mohanty?" Another issue of no less importance but which appears to have been raised only incidentally, was issue 6: "Were the pltfs., members of a joint Mitakshara family with the deft. or with the late Nrusingho Charan?"

[4] The case was tried by Mr. Gopal Chandra De, Addl., Subordinate Judge, Cuttack, who held that the adoption of deft. 1 by Nrusingho Charan had been duly proved & directed the dismissal of the pltf's suit. On the issue regarding the jointness or separateness of the family his finding was that there was no separation between Nrusingho Charan & Bhagat Charan & that they were in joint possession of the entire family properties.

[5] On appeal by the pl fs. the Dist. J., Mr. Maher, held that the evidence on the question of adoption was evenly balanced, so much so that "a feather on either scale would tip the balance." As the burden of proof rested on the party alleging the adoption, the learned Dist. J. held that the party on whom this burden rested must be held to have failed to discharge it. He accordingly allowed the appeal & set aside the finding of the Addl. Subordinate Judge.

[6] Against this decision of the Dist J. there was a second appeal by deft. 1 to the H. C. The H. C. held that the learned Dist. J. if he was unable to make up his mind as to which set of witnesses should be preferred against the other set, ought to have affirmed the decision of the Addl. Subordinate Judge. The learned Dist. Judge also did not go into the question of the joint status of the family & disposed of the appeal purely on the question of adoption. Nor was the point raised in second appeal before the H. C. The H. C., however, allowed the second appeal set aside the judgment of the learned Dist. J., & remanded the appeal to his Ct. for a re hearing.

[7] After remand the appeal was re-heard by Mr. Coari who had meanwhile succeeded Mr. Maher as Dist. J. Mr. Coari affirmed the finding of the trial Ct. on the issue of adoption but on the other issue he differed & held that the family of Bhagat & Nrusingho Charan had been divided. He dismissed the appeal & upheld the judgment & decree of the learned Addl. Subordinate Judge. It is against this judgment of Mr. Coari that this second appeal by the pltfs. is directed.

[8] Several points were raised by learned counsel for the applts. & were not only ably but fairly placed before the Ct.

[9] The first point which appeared to me at one time attractively subtle raises the question of the jurisdiction of Mr. Coari to hear the appeal after its remand by the H. C.

[10] To appreciate this point a few facts require to be stated. Mr. Gopal Chandra De the Addl. Subordinate Judge who tried the suit recorded evidence & heard arguments. Hearing was concluded on 17.6 40 & judgment was reserved. On 10.7-40 Mr. De recorded the following order in the order sheet:

"The trial of this suit which involves some complicated questions of law & fact continued for one month & eight days & was closed on 17-6 40. On 21 6-40 I fell seriously ill & remained practically confined to bed till 10.7-40. On account of this illness I became extremely weak & in spite of my best attempts I could not write out the judgment. I will proceed on leave preparatory to retirement with effect from tomorrow."

The next order, numbered as 121 & bearing the same date, reads as follows: "Re-transferred to the file of the Subordinate Judge under orders of the Dist. J." This order was written out by Mr. De & on the very same day Mr. Coari who was then the Subordinate Judge recorded an order in the following terms:

"Received by transfer from the Addl. Subordinate Judge's Ct. Put up on 12-7-40 for hearing arguments. Inform Advocates of both parties."

The advocates of both parties were duly informed on 12-7 40. The case underwent two adjournments for hearing arguments afresh. But in the meanwhile the case was sent back to Mr. De, who had gone on leave, under orders of the Dist J.; & thereafter Mr. De recorded the following orders: 'Received the record under orders of the Dist. J. for writing the judgment." On 9 8 40 Mr. G. C De signed the judgment which he had prepared & sent it to the Subordinate Judge Mr. Coari for pronouncement in Ct. On the very same day Mr. Coari gave notice to the parties that the judgment would be delivered. After delivery of judgment the following order was recorded in the order sheet by Mr. Coari:

"The judgment written by Mr. G. C. De Addl. Subordinate Judge on leave, is delivered by me today. The suit is dismissed with costs."

On 22 8-40 the decree was drawn up in accordance with the judgment delivered on 9-8-40 & was signed by Mr. Coari.

[11] On these facts it is urged by Mr. Mohanty, learned counsel for the applts, that Mr. Coari was not competent to hear the appeal after remand by the H C. inasmuch as he had pronounced the judgment of the trial Ct. on 9-8-40 & signed the decree as Subordinate Judge on 22-8 40. This argument is founded on the language of S. 38 (2) Bengal, Agra & Assam Civil Courts Act (Act XII [12] of 1887) which is in the following terms:

"The Presiding officer of an appellate civil Ct. under this Act shall not try an appeal against *a decree or order passed by himself in another capacity.*"

It is argued that the decree of the trial Ct. was passed by Mr. Coari, as Subordinate Judge, & that the judgment delivered on 9 8-1940 was his judgment. It should be noticed that this point was not taken before Mr. Coari when the appeal was reheard by him as Dist. J. after its remand by the H. C. & the applts. proceeded throughout on the basis that the judgment appealed against was that of Mr. G. C. De, Addl. Subordinate Judge, Cuttack. This is also clear from the fact that the decree drawn up in accordance with the judgment pro-

nounced on 9 8.1940, is specifically mentioned, in the title, as the "decree passed in the Ct. of the Addl. Subordinate Judge" & the decretal portion itself says:

"This suit coming on from 10-5-1940 to 17-6-1940 for final disposal before Sri G. C. De, Addl. Subordinate Judge, in the presence of ...& it is ordered &,decreed that the suit be dismissed with costs."

The decree was, as mentioned already, drawn up later, on 22 8-1940, & was signed by Mr. Coari as Mr. De had gone on leave preparatory to retirement. In the memorandum of appeal filed before the Dist J. in the first instance (Mr. Maher) the applts. described themselves as "being aggrieved by the judgment & decree in O. S. NO 25 of 1938 *by Sri G. C. De Addl. Subordinate Judge, Cuttack,* on 9-8-1940. In the grounds of appeal also "the decree of the learned Addl. Subordinate Judge" is referred to throughout as the judgment against which the appeal had been preferred. But quite independently of these considerations, what is required to be examined is whether S. 38 (2), Bengal, Agra & Assam Civil Courts Act of 1887, would operate as a bar to the hearing of the appeal by Mr. Coari as Dist. J. on the ground that the judgment delivered by him on 9-8-1940 & the decree drawn up later on 22-8-1940 in pursuance of that judgment can be deemed to be a decree or order passed "by himself in another capacity."

[12] The ordering portion of the judgment is as follows:

"ORDER

Hence it is ordered that the suit be dismissed with costs & future interest at 6 per cent. per annum. Pleader's fee 5 per cent.

Sd. Gopal Chandra De,
Addl. Subordinate Judge,
9 8-1940.

Delivered by me,
Sd. C. C. Coari,
Sub-Judge,
9-8-1940."

[13] Section 33, Civil P. C., lays down that the *Court*, after the case has been heard, shall pronounce judgment & on such judgment decree shall follow. Order 20 Rr. 1 to 3 lay down when & in what manner a judgment is to be pronounced. Rule 2 says that a "*Judge* may pronounce a judgment written but **not** pronounced by his predecessor". Rule 8 of O. 20 says:

"Where a Judge has vacated office after pronouncing judgment, but without signing the decree, the decree drawn up in accordance with such judgment may be signed by his successor, or if the Ct. has ceased to exist, by the Judge of any Ct. to which such Ct. was subordinate."

It is significant that in S. 33 & O. 20 R. 1, the word used is "Court" while in Rr. 2 to 8 the word used is "Judge". The use of the different words is deliberate & not accidental. It is the function of the Ct. which tries a case to pronounce judgment on it in open Ct. after notice has been given to the parties or to their pleaders. The actual delivery of the judgment may be done by a Judge who succeeded the Judge who heard the case or wrote the judgment. Such a procedure is absolutely necessary for the convenience of the litigants as, indeed, it frequently happens that a Judge who has heard arguments & written out his judgment is prevented by illness or other cause from attending Ct. to pronounce it. It is doubtless true that in such cases the judgment so prepared, until it is pronounced in open Ct. merely remains a memorandum prepared by the Judge & does not take the effect of a judgment, & that it comes into effect as a judgment only after it has been pronounced in open Ct. in the manner prescribed. It is also clear from the language of R. 2 that the Successor Judge is not bound to pronounce the judgment prepared by his predecessor—it is left to his option either to deliver the judgment prepared by his predecessor Judge who does no more than read in open Ct. a judgment prepared by his predecessor, adopts that judgment as his own, & can it be said by any stretch of language that the judgment so pronounced becomes the judgment of the successor Judge himself? A judgment is defined as "a statement given by the Judge of the grounds of a decree or order". How can a judge, who has not heard the evidence or the arguments in a case, give a statement of the grounds for the decree in that case? The statement of the grounds of the decree is given by the Judge who writes out the judgment after hearing arguments & taking evidence. It is a *judicial act of a Ct.* But the mere reading of that judgment in open Ct. by his successor is an *official act* in his capacity *as Judge*. There is a fundamental distinction between the two acts. It follows, therefore, that the judgment read out in open Ct. on 9-8-1940 by Mr. Coari is the judgment of the Ct. of the Addl. Subordinate Judge, Mr. G. C. De, who wrote it, though it was pronounced by his successor under O. 20, R 2, C. P. C. I am accordingly not disposed to accede to the argument raised at the bar that the judgment read out by Mr Coari on that date became, by a fiction of law, his own judgment so as to render him incompetent to hear an appeal against *(sic)* within the meaning of S. 38 (2) of the Act XII [12] of 1887. The ordering portion of the judgment, quoted above, makes it absolutely clear that the judgment pronounced was that of Sri G. C. De, Addl. Subordinate Judge, & that Mr. Coari did no more than pronounce it in open Ct.

[14] There can also be no dispute that the judgment pronounced by Mr. Coari on 9-8-1940 was that of his "predecessor". It is obvious from the order sheet that the case was transferred to the file of Mr. Goari, who was then the Subordinate Judge, on 10-7-1940 & that he posted it for hearing to 12-7 1940. Thereafter, however, under orders of the Dist. J. the case was re-transferred to Mr. De for writing out the judgment as he had held the trial. It is true that at the time the judgment was pronounced the case was on the file of the Subordinate Judge Mr. Coari. But this does not detract from the fact that, so far as the suit itself is concerned Mr. De was the predecessor as he had recorded the evidence & heard the arguments & that

Mr. Coari was his successor in the sense that the suit was transferred to Mr. Coari's file pending delivery of judgment. It does not appear to me to be correct to say that Mr. Coari intended to adopt the judgment of his predecessor as his own. This is very clear from the order passed by him on 10-7-40—immediately after the transfer of the case from the file of Mr. De—to the effect that it should be put up on 12-7-40 for re-hearing arguments. And but for the fact that the case was once again re-transferred to Mr. De, who had gone on leave, for writing out the judgment, Mr. Coari would have proceeded to hear the case afresh. By 9-8-40 the judgment prepared by Mr. De was ready. It was signed & sent to Mr. Coari on that day, who did nothing more than pronounce it in open Ct. after giving notice to the parties; in other words, Mr. Coari, as Subordinate Judge, delivered the judgment written by the Addl. Subordinate Judge while on leave.

[15] It is also beyond dispute that, a judgment written by a Judge who has gone on leave is a valid judgment though at one time there was some difference of opinion on the point prior to the enactment of Civil P. C. (Act XIV [14] of 1882) which, by S. 199, corresponding to O. 20 R. 2 of the present Code, enabled a Judge to pronounce a judgment written by his predecessor. In *Parbati* v. *Higgin*, 17 W. R. 475, the judgment was written by the Subordinate Judge who had been relieved of his office, but it was held that the judgment could not be impeached on that ground. Jackson, J. observed:

"He heard, & to all intents & purposes determined, the suit & gave judgment; but this tenure of that particular judicial office having expired before judgment could be pronounced, that judgment which was the judgment of the Judge who heard the case was pronounced *as a matter of form* by his successor in open Ct.."

The argument that the judgment should be written by a Judge when he is actually holding the office & before he has gone on leave or left his office otherwise, was negatived in *Sunder Kuer* v. *Chandreshwar*, 34 Cal. 293: (11 C. W. N. 501). Even when a Judge ceases to exercise jurisdiction in the place where the cause of action in that suit arose & goes to another place by transfer, he can write out his judgment & send it to his successor for delivery: *Satyendra* v. *Kashura*, 35 Cal. 756: (12 C. W. N. 682 F. B.). This case was followed in *Basant Bihari* v. *Secretary of State*, 35 ALL. 368: (19 I. C. 785), where the Dist. J. had ceased to hold the office at the time of his writing the judgment. In *Mt. Lilavati* v. *Chhotey Singh*, 42 ALL. 362: (A. I. R. (7) 1920 ALL. 332) an officiating Subordinate Judge had reverted to his substantive appointment of Munsif when he wrote the judgment in the case which he had heard as Officiating Subordinate Judge. The use of the word "predecessor" in O. 20, R. 2, is unqualified & would, therefore, apply to any officer who had tried the case, whether he is still in service, or has been transferred, or has gone on leave: See *Baram Deb* v. *Debi Dutt*, 53 ALL. 133: (A. I. R. (18) 1931 ALL. 90) & *Lakhiama* v. *Loke Nath Das*, 5 Pat, L. J. 147: (A. I. R. (7) 1920 Pat. 578).

[16] Considerable stress was, however, laid on the observations of Page C. J. in *Hargulal* v. *Abdul Gani*, 14 Rang. 136: (A. I. R. (23) 1936 Rang. 147 F. B.) where it has been suggested that if the succeeding Judge is in doubt as to the correctness of the judgment written by his predecessor he ought either to act in accordance with the provisions of O. 18, R. 15, C. P. C. or to hear the case *de novo*. Mr. Mohanty argues that before pronouncing judgment on 9-8-40 Mr. Coari must have used his discretion & agreed with the correctness of his predecessor's judgment & to that extent that judgment should be deemed to be his own. I can find no material to warrant this presumption, nor does the language of the Code necessarily lead to such a presumption. All that O. 20, R. 2 says is that it is optional with the succeeding Judge to pronounce his predecessor's judgment; he may either pronounce that judgment or order a re-trial & hear the case afresh. The language of the rule does not warrant the assumption that the succeeding Judge, who merely pronounces in open Ct. a judgment prepared by his predecessor, necessarily expresses himself as being in agreement with the views contained in that judgment; or that when he does not pronounce that judgment & orders a re trial he necessarily expresses himself as being in doubt as to the correctness of that judgment. Nor does the Code say anywhere that the judgment, prepared by the predecessor & pronounced by the successor should be deemed to be that of the Judge who reads it & not of the Judge who has written it. The observations in the *Rangoon case* relied on by Mr. Mohanty appear to me to be rather loosely worded & in any view were not necessary for the decision of that case.

[17] The foundation of Mr. Mohanty's contention is the language used in S. 38 (2), Bengal, Agra & Assam Civil Courts Act, which prohibits the hearing of an appeal by a presiding officer against "a decree or order passed by himself in another capacity". It is argued that the decree drawn up on 22-8-40 by Mr. Coari amounts to a decree passed by him in his capacity as Subordinate Judge & that as such he had no jurisdiction to hear an appeal against that decree. It is true that Mr. Coari signed the decree, but can it be said that he himself passed it when all that he did was to draw up a decree in accordance with the ordering portion of the judgment of his predecessor that he pronounced? The ordering portion of the judgment which says that "the pltf.'s suit shall be dismissed" was passed by the Addl. Subordinate Judge & only read out by Mr. Coari on 9-8-40; & the decree drawn up by Mr. Coari on 22-8-40 was in pursuance of this order. The expression 'passing the decree' occurs at several places in Civil P. C. Order 20, R. 11 says that

"The Ct. may for sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed etc. etc.".

Rule 12 says that

"The Ct. may pass a decree for possession of the property in a suit for recovery of immovable property."

The use of the expression 'passing a decree" in the several rules of the Code leads me to think that "passing a decree" is a judicial act of the Ct. which tries the suit & that the suit itself terminates with the passing of the decree which according to the definition section

"conclusively determines the rights of the parties with regard to the matters in controversy."

The decree is the formal expression of the final adjudication. The Judge who writes out the judgment makes a formal expression of what the result of his judgment should be. On a plain reading of the Code it is apparent that the Judge who merely signs the decree, as indeed was done in this case by Mr. Coari, cannot be said to have passed it unless he himself had written the judgment after taking evidence & hearing arguments, because the decree must conform to the judgment of the Ct. which delivers it. Mr. Coari who signed the decree in this case did nothing more than see to it that it was drawn up in accordance with the judgment of the Addl. Subordinate Judge which he read out in Ct. The word "pass" has several meanings, but used with reference to processes of law it means "to decide or adjudicate between the parties." Thus a verdict or a sentence, or a judgment is said to be "passed" which means 'given' or 'pronounced.' It has accordingly been held that a Judge who passes a decree or makes an order within the meaning of O. 47, R. 2, Civil P. C., is the Judge who expresses in his judgment what the decree is & is responsible for its substance, while the Judge who signs the decree, if he is a different man, is responsible only for its verbal accuracy. See *Tamijuddi* v. *Satyashanker*, 32 I. C. 101 : (A.I.R. (4) 1917 Cal 673). It is also well settled that a decree comes into existence from the moment the judgment itself that constitutes the decree. As was observed by the Judicial Committee in *Mungni Ram* v. *Guru Sahay*, 16 I. A. 195 at p. 200 : (17 Cal. 347 P. C)

"when a person has the judgment of the Ct. that he shall have a decree in his suit, it may be said that he then obtains his decree. The decree, when it is drawn up afterwards, relates back to the time of the judgment."

The decree is therefore, in existence from the moment the judgment is pronounced. I have, therefore, no hesitation in arriving at the conclusion that the decree against the pltf. was passed by Mr. De, the addl. Subordinate Judge, in the ordering portion of his judgment dated 9 8-40 though it was actually drawn up & signed by Mr. Coari on 22-8-40.

[18] The argument of Mr. Mohanty, based on the language of S. 38 (2), Bengal, Agra & Assam Civil Courts Act, is therefore, untenable. The rule laid down in that section is no doubt based on public policy & affects the jurisdiction of the Judge who hears an appeal but that has no application in this case. If I were convinced that the decree passed by the trial Ct. is the decree of Mr. Coari himself I would hold that the hearing of the appeal by Mr. Coari was without jurisdiction. If the case came within the strict meaning of S. 38 (2) the proceedings would be without foundation & would be of no avail or effect. But I should also like to point out that a mere deviation from a rule of procedure cannot be more than an irregularity & need not necessarily affect jurisdiction. Jurisdiction is the power of a Ct. to hear & determine a cause, to adjudicate or exercise judicial power in relation thereto. A rule of procedure is for the benefit of the litigant public or for the speedy despatch of judicial work. A contravention of a rule of procedure would be curable by consent or waiver but an inherent lack of jurisdiction cannot be cured by consent because consent cannot give jurisdiction. Bearing these principles in mind I have arrived at the conclusion that Mr. Coari at the time he pronounced the judgment of Mr. De, did not apply his judicial mind nor did he decide the case himself & that, accordingly, it cannot be contended that he passed the decree in the suit & thereby made himself ineligible to hear the appeal

[19] It was next argued that Mr. Coari had developed a bias against the pltfs. & was, therefore, incompetent to hear the appeal. This contention is sought to be rested on an order passed by Mr. Coari, while Subordinate Judge, disposing of an appln. filed by the pltfs. to amend the issue regarding the joint or separate status of the two brothers, Bhagat & Nrusingho. The order in question is No. 28 of 15-8-39. On a perusal of the order, however, it appears clear to me that Mr. Coari never went into the merits of this point at all, nor did he record evidence thereon with a view to come to a decision one way or the other. All that appears from the order is that he left it open to the pltfs. to make up their minds as to whether they would lead evidence on the point. The order was entirely non committal in its effect. This argument, therefore, rests on tenuous material. Even if there were any substance in the contention it was open to the pltfs. to raise the point before Mr. Coari when he took up the appeal for hearing. The appeal, it should be remembered, was pending before Mr. Coari for over two years & was argued by no less eminent a counsel than Dr. P. K. Sen. The point—if it had any force in it—was never raised & must be taken to have been waived by the applts. I am, therefore, not impressed by the argument that Mr. Coari had developed any leaning in favour of one party or the other by reason of his one time contact with the suit in disposing of an interlocutory appln.

[21] The two other questions that were raised are issues of fact on which the Ct. below has held against the pltfs. These relate to (1) the jointness or separateness of the two brothers Bhagat Charan

& Nrusingho Charan & (2) the fact whether the adoption had taken place.

[21] It was suggested by Mr. Mohanty that it was not open to the lower appellate Ct to go into the question of the joint status of the pltfs. family as the remand order of the H. C. did not specifically direct the lower appellate Ct. during re-hearing, to record a finding on that issue. I am unable to appreciate this argument. As I have said earlier, the question of jointness was not gone into by Mr. Maher nor was it argued before the H. C. Mr. Maher did not think it necessary to canvass the question of separateness as, in his opinion, that point was not very material for the disposal of the appeal as according to him the appeal could be disposed of solely by recording a finding on the issue whether the party on whom lay the onus of establishing the adoption set up by him, discharged that burden or not. In his opinion, the deft. failed to discharge the onus cast on him & accordingly the pltfs were entitled to a decree. That was the only question on which he recorded a finding & that finding was reversed by the H C. in second appeal. It is clear from the above that the entire matter (including a determination of the question of separateness or jointness of the pltfs.' family on which the trial Ct. had recorded a finding) was at large before Mr. Coari when he took up the appeal for re-hearing & it was perfectly open to him to go into that question & arrive at his own finding. In this Ct. Mr. Mohanty was asked whether this question might be left open by us but he appeared to be in two minds & the parties did not agree that the matter should be left open by us, particularly as evidence had been let in & findings recorded on it by the Cts. of fact below.

[22] The trial Ct. held that in the absence of evidence that Achyutananda, father of Bhagat & Nrusingho, treated the properties said to have been acquired by him as his separate & exclusive properties the presumption would be that those properties were thrown into the ancestral stock & formed a part of the joint family property. It was suggested in evidence that Achyutananda had only about two acres of ancestral property & that the rest of the enormous property that he had acquired were purchased out of his own earnings in the names of different persons. There is, however, no evidence as to what the income from the two acres & odd of family property was & whether the income would have been sufficient to constitute the nucleus for the later acquisitions by Achyutananda. A member of the joint family who acquires property may allow other members of that joint family to manage it or to enjoy the income arising out of it. This may be due to a variety of reasons. But this circumstance alone cannot militate against the presumption that such property acquired by a member out of his own earnings, constitutes his self-acquisition. It is not unusual in joint family, for its members to utilise the income so long as they are joint. The real test in such cases is the intention behind the act. Does that act indicate that the acquirer intended to throw it into the common stock & not to claim separate title thereto ? It certainly cannot be said that the moment a member acquires property with his own earnings he should immediately separate himself from the other members in order that he might treat his acquisition as separate; & that failure to do so should necessarily lead to a presumption that the property would be a part of the joint family property. In the absence of any evidence of a positive character to show that the acquirer intended that his acquisition should be treated as a part of the family stock, the presumption would be that it must remain his self-acquisition. It was neither alleged, nor attempted to be proved, that Achyutananda had manifested any intention to waive his separate rights to his self-acquired property at any time. All the evidence, on the other hand, points to the contrary. The intention to benefit the family by spending the income accruing out of his self acquisition is quite different & distinguishable from an intention to transfer the property itself to the joint family. The trial Ct. presumed, from the absence of evidence pointing to separate dealings in regard to the self-acquired property, that Achyutananda's self acquisitions had been blended with the ancestral properties. In taking this view he appears to have fallen into an error. There is no such presumption in law & it is always a question of fact—to be determined by evidence—whether Achyutananda did, in fact, surrender his self-acquired properties for being merged with the common family stock. In my opinion the learned Dist. J. took the correct view of the position. He found from the recitals in Exs C, D & E followed by mutation of names in accordance with the dispositions made in these documents that Achyutananda did not waive his separate rights to the properties that he had purchased & that they remained, till the very end, his separate properties. Exhibit C is a deed of endowment, executed by Achyutananda & his wife in 1909 dedicating some properties in favour of two deities Radhamohan & Patitapaban, installed by them. The deed recites that on the death of the donors their youngest son, Nrusingho, should be the marfatdar of the said deities. This was followed up by an appln. by Achyutananda for registration of his name in respect of these properties as marfatdar, in the year 1910. Exhibit D is a registered will executed by Achyutananda in 1926 disposing of his separate properties in favour of Bhagat Charan, Nrusingho Charan & Sachchidananda. In 1917 Achyutananda got himself registered as the guardian of Bhagat (who was then a minor) in respect of the properties given to him in accordance with the will. Similarly, he got Nrusingho's name registered in respect of the properties given to him in accordance with the will. Exhibit E is a deed of settlement executed by Indramoni, mother of Bhagat, under which Bhagat

was to receive a share of 8 annas 6 pies while Nrusingho was to receive the remaining 7 annas 6 pies, of the properties settled by the deed. On the death of Achyutananda, Bhagat Charan applied as guardian of Nrusingho for registration of Nrusingho's name as marfatdar in respect of the deities. On the very same day he applied for registration of his own name in respect of some other properties which had devolved on him. These applns. are marked as EXS A to A 10 of the years 1910 to 1921. The learned Dist. J. was, therefore, right in drawing an inference from these documents that the severance of status was effected by Achyutananda himself during his life time & that it was followed up by Bhagat Charan on the death of Achyutananda. The properties were never in fact divided by metes & bounds & the management was all the time in the hands of Bhagat. It is also obvious that though the bulk of the properties had been separately recorded in the names of the two brothers some of the properties had been promiscuously registered at the last settlement. It is, however, clear that the agents who were actually in charge of the management of the properties were appointed by both the brothers by a joint power of attorney, Ex. J, which was executed in the year 1927 jointly by both the brothers. Furthermore, in Ex. K, which is a copy of a deposition made by Bhagat Charan in 1929, when he was examined as a witness in a suit brought by Nrusingho Charan, Bhagat stated as follows: 'I am the uterine brother of the pltf. (Nrusingho Charan). I am separate in mess & property since 1916." It should be noted that both the will & the deed of settlement referred to above were executed in the year 1916. Bhagat also said "I look after the joint property for the pltf. & myself. Plaintiff (Nrusingho) is not Ismali tenant." These facts constitute clear evidence of the separate status of the brothers. Their shares had been defined & were being managed on behalf of Nrusingho by Bhagat. The lower appellate Ct. was, therefore, justified in holding that there was no coparcenary between Bhagat & Nrusingho—a fact which goes against the case set up by the pltfs.

[23] It now remains to consider the only other question of fact, regarding the adoption, on which the Cts. below have recorded concurrent findings. It is necessary to state here that functions of a second appellate Ct. are limited & we would be slow to interfere with a finding of fact, even if we were inclined to take a different view from the Cts. below. But after hearing counsel who have taken considerable pains to place the evidence before us, I am satisfied that if I were to discuss the evidence independently I would have come to the same conclusion as the learned Dist. J. has done.

[24] A curious feature of the case is that every single fact having some bearing on the question of adoption is contested & rival versions are given by the both parties. To improbabilise the adoption pltfs. sought to establish (1) that Nrusingho Charan himself was not present at the time & at the place where the adoption is alleged to have taken place, (2) that Bhagat Charan was not present at that time, (3) that Sri Lakshmidhar Mohanty was away at Puri at that time, (4) that the adoptee himself was not present at the time & that Nrusingho Charan's wife was then *enciente*. Except the second point which was argued before us with some zeal the others were very properly passed over by learned counsel for the applts. The learned Dist. J. has referred to the evidence of P. Ws. 16 & P. W. 40 & agreeing with the trial Ct. declined to place any reliance on their statement that Nrusingho Charan was then at the house of Nabakrushna Choudhury. The evidence of P. Ws. 29 & 39 to the effect that Lakshmidhar Babu was at Puri at the time is far too clumsy & artificial to be believed & the remark of the learned Dist. J. that these two witnesses are unreliable appears to be justified. A few other circumstances suggesting the improbability of the adoption were brought to our attention, such as for instance the suggestion that Nrusingho Charan being an England-returned man would not think of adopting, but these are too trivial in nature to deserve notice. Nor would the disparity in age between the adoptee & his sister Pramila affect a decision on the issue of adoption one way or the other. [After discussing evidence his Lordship proceeded:]

[25] On the whole the evidence appears to show that from 1-8-1934, that is six days after the death of Nrusingho, Gyanendranath had been described as the adopted son of Nrusingho by Bhagat himself & that in numerous documents Gyanendranath's right to succeed to the properties of Nrusingho has been admitted and enforced by Bhagat himself. These admissions may not by themselves be enough to support the allegation of adoption if, in fact, there was no other evidence of such adoption. But, as the learned Dist. J. has rightly pointed out, these admissions, coupled with the subsequent conduct of the parties & the direct evidence of witnesses examined by the deft. undoubtedly support the case of adoption. The learned Judge has made the correct approach to the question in attaching no greater importance to the admissions than as probabilising the statements made by the witnesses on oath & not as creating an estoppel against Bhagat.

[26] It is well established that what a party himself admits to be true may reasonably be presumed to be so, *Slatterie* v. *Pooley*, (1840) 6 M. & W. 664: (10 L. J. Ex. 8). In *Chandra Kunwar* v. *Narput Singh*, 34 I. A. 27. (29 ALL. 184 P. C.), the Judicial Committee had to deal with the admission made by pltfs. in some deeds to which the defendant was not a party. Their Lordships observed that the party making the admission may give evidence to rebut this presumption & that there was no estoppel but unless & until that is done the fact admitted must be taken to be established. It is well settled that the express admissions of a

party to the suit or admissions implied from his conduct are evidence — indeed strong evidence — against him unless he can prove that such admissions were mistaken or were untrue & he is not estopped or concluded by them unless another person has been induced by them to alter his condition. In the written statement filed by Bhagat as deft. 2 he alleged that *the father of deft.* 1 (Gyanendarnath), viz., Lakshidhar Babu, proposed to him two days after Nrusingho's death to set apart a portion of his properties for the maintenance of his widow & the daughter of Nrusingho, to relieve himself of the burden of maintaining & looking after them for all time to come, & that in a very weak moment Bhagat agreed to the same. It is further averred that sometime later Lakshmidhar Babu approached Bhagat *again* with a *further* proposal that deft. 1 should be treated as the adopted son of Nrusingho as he would be of help to Bhagat & a good substitute for Nrusingho. When this second proposal was made is not clear from the evidence. But so far as the first proposal is concerned there is a difference between the version given about it by Bhagat in his written statement & the version given about it by him in the witness box. What Bhagat said in his evidence as P. W. 42 was:

"On the 27th July she was sent to our house. I was sent for by Lakshmidhar Babu. He then enquired what property I would give to the widow. I agreed to give some property for her maintenance. Lakshmidhar's *wife* proposed that I should give some property to Mantu (Gyanendra) as the son of Nrusingho. Lakshmidar Babu said that Gyanendranath would help me in many ways. Ultimately I agreed as Bijayram said that there might be litigation."

This shows that Lakshmidhar Babu's wife proposed on the 27th of July that Gyanendranath should be taken as the adopted son of Nrusingho & that Bhagat agreed to the same. The case as set out in Bhagat's written statement that deft. 1's father

"*again* approached this deft. with a *further* proposal that insted of setting apart a portion of the property for the maintenance of his sister-in-law it could be more to the satisfaction & consolation of his sister-in-law that her brother, deft. 1, should be treated as her adopted son,"

has been altogether abandoned. I am not satisfied that this point which was argued with great vigour has been established. It is difficult to believe that Bhaghat Charan was not depressed by the death of his brother or that he had developed such softness of mind that he readily agreed to part with his property & introduce Gyanedranath as the adopted son of Nrusingho merely on a suggestion from Lakshmidhar Babu to do so. It seems to me that Bhagat Charan had to resort to this plea as no other was conceivable in order to get out of the numerous admissions made by him in the various documents almost from the moment of Nrusingho's death. It was argued that Bhagat executed the partition deed at the instance of Lakshmidhar Babu who was anxious to obtain an admission from Bhagat about the status of deft. 1, & that consequently it must be held void & no reliance would be placed upon it. Even if the partition deed were to be ruled out of the evidence there is a mass of equally reliable document's case. The onus was upon the pltf.-appt. & they have failed to discharge it by showing that the admissions were made either through a mistake or under the influence of fraud practised upon Bhagat. In the absence of such evidence the pltf's. case must fail. When an applt. comes to Ct. to set aside an adoption on the foot of which there is a partition, the obligation lies on him to so constitute his suit as to enable the Ct. to deal with the whole subject-matter & dispose of all the rights & interests of the parties to the deed. But in this case the suit is expressly so constituted that no relief is asked for to get rid of the partition deed under which Gyanendranath is given a share in the family property. That is so because of the fact that Bhagat was anxious to cut off Gyanendranath with only the limited amount of property allotted to him under the deed of partition. His attitude is at least equivocal & I have not been able to make out how he can seek to set aside the adoption without also repudiating the deed of partition.

[27] On the whole I am convinced that the case set up by the deft. has been established & that the findings of the Ct. below have been correctly arrived at. The appeal fails & is dismissed with costs throughout.

[28] **Jagannadhadas J.**—I have had the advantage of reading the judgment of my learned brother with whose conclusions I agree.

[29] The only question in this case on the merits is as to whether the alleged adoption of the deft. Gyanendra by Nrusingho Charan, the brother of pltf. 2 has been satisfactorily established. Both the trial Ct. & the lower appellate Ct. after remand have concurrently found that it has been so established. It would require exceptional reasons for a second appellate Ct not to accept that concurrent finding. It is true that the onus is heavy against the person setting up an adoption especially when there is no contemporaneous deed of adoption, as in this case. But both the Cts. below have considered the case fairly in all its aspects keeping this onus in view & we are unable to find that any material evidence or circumstances have been omitted to be considered or that the Cts. below have come to the conclusion adopting any perverse reasoning. In view, however, of the very strenuous arguments by the learned counsel for the applt. suggesting that there were lacuna in the judgmens which entitled a second appellate Ct. to interfere, we have heard the appeal for a number of days virtually as a first appeal on the evidence. I agree with my learned brother in thinking that even on the footing of this being a first appeal we should have found no reason for coming to any conclusion other than what has been arrived at by the Cts. below. Since my learned brother has dealt with the merits of this question fully it is not necessary that I should

cover the same grounds. I shall content myself with indicating broadly the lines on which we have considered the matter & come to our conclusion. The decision ultimately turns upon the choice between two sets of witnesses & the weight to be attached to certain alleged admissions on either side based on their respective documents. Learned counsel for the applt has very strenuously urged that the decision has to be reached mainly, if not solely, on a consideration of the oral evidence & its intrinsic reliability or otherwise & should not be deflected by a consideration of the alleged admissions in favour of the adoption. I cannot agree with this contention. In a case of this kind, it is legitimate to accept oral evidence, on a consideration of the documentary evidence & the probabilities, unless such oral evidence is intrinsically unreliable & worthless. That is the approach to the assessment of evidence of adoption in a similar case by the P. C in *Arjuno Naiko* v. *Modano Mohono*, A. I. R. (27) 1940 P. C. 153 at pp. 154, 155: (I. L. R. (1940) Kar. P C. 349).

[30] On the pltf's side have been exhibited various applns, Exs. 1, 2 & 3 series in which it does appear that the deft, after the date of the alleged adoption, did not describe himself as the son of his adoptive father, but as the son of his natural father. He has given some reasonable explanation for this which the Cts. below have accepted. As against this the deft. relies upon a whole series of documents to which pltf. 2 or his agents are parties starting from within a week of death of Nrusingho Charan & continuing right up to the date when the suit was filed & also for some short time thereafter. These documents contain unequivocal admissions by pltf 2 relating to the adoption of the deft & furnish also evidence regarding the conduct of himself & his agents during that period on that footing. Of these admissions, the most important are a joint power of attorney Ex. J. executed by Bhagat Charan & Gyanendra on 1-8-1934 (Nrusingho Charan having died on 25-7-1934) & Ex. CC. a partition deed executed on 28-5-1935 jointly by the second pltf. & the deft. The various documents have been noticed by the learned Dist. J. Sri Coari in his judgment at pp. 62 & 63 of the paper book. There can be no doubt that if the admissions of pltf. 2 contained in & his conduct evidenced by, these documents are to be given their full weight, the pltfs. have an extremely up hill task. It has not been suggested that these admissions & conduct of pltf. 2 cannot be used as against pltf. 1 also. It appears likely, that feeling the weight & force of this documentary evidence the suit was filed in the first instance only by pltf. 1 making pltf. 2 a party deft; & it was alleged in the plaint that pltf. 1 was born in April 1935, just prior to the deed of partition Ex. CC in order that an argument may be advanced that the admissions of pltf. 2 in Ex. CC. do not bind pltf. 1 who had an independent right by birth in the family property already by then. But it has been almost conclusively shown by the evidence, as in fact, was found by the Cts. below that pltf. 1 was born in 1936. But even if it were otherwise, the admissions made by the father in the power of attorney Ex. J. & the partition deed Ex. CC. would be clearly admissible as against pltf. 1 the father being the representative in interest of the son in dealing with ancestral property.

[31] In order, therefore, to get over the weight & effect of these admissions & conduct the substantial explanation which has been attempted on behalf of the pltfs. is that these admissions were the result of an arrangement entered into between pltf. 2 & the natural father of deft. 1 Lakshmidhar Mohanty, within two days after the death of Nrusingho Charan whereby it was arranged that in order to give solace to the bereaved widow of Nrusingho Charan deft. 1 was to be treated as her adopted son though not in fact adopted & that he should be given the property which pltf. 2 out of his generosity & consideration for her would probably have given to her by way of a liberal maintenance in any case, & that the sentimental depression of pltf. 2 on the death of his only brother & on the consequent deplorable condition of his brother's widow was exploited to the full by the shrewd & wordly-wise Lakshmidhar Mohanty. (See para 14 of deft's. 2 written statement). Not only is this case somewhat at variance with the case of fraud in execution & registration of Ex. CC. put forward by pltf 2, then deft. 2, in his written statement, para 17, filed on 6-5-39 after he had the advantage of seeing the written statement of deft. 1 filed on 22-1-39, but we are satisfied that there is nothing at all in the evidence & the probabilities to substantiate this explanation. We are satisfied that neither is pltf. 2 so gullible nor is the natural father of deft. 1 proved on the evidence to be of such a scheming nature as to probabilise the truth of any such explanation. Further whatever may be said if the partition deed Ex. CC stood alone, it is almost incomprehensible how the joint power of attorney containing unequivocal admission about adoption came to be executed within a week of Nrusingho Charan's death & how various other steps were taken on the footing of deft. 1's adoption long before the partition deed, Ex. CC was executed & without any written evidence or acknowledgment at that time of the alleged arrangement said to have been partially or fraudulently embodied later in Ex. CC. We have attempted to scrutinise whether there is anything in the manner in which the properties have been divided under the partition deed, Ex. CC, having regard to the probable values of the respective allotments & the pre-existing state of the apparent title indicated by Exs. C, D, & E, as between the two brothers Bhagat Charan & Nrusingho Charan in respect of the various items comprised in the two allotments, to throw any

light as to the probable springs of action of either side when entering into this partition deed, Ex. CC & to see whether the explanation now put forward by pltf. 2 is reasonably likely. Without any elaboration of this aspect, it is sufficient to say that this line of approach gave us nothing which would probabilise the pltf's. explanation, but if any, it would confirm the case as to circumstances under which according to the deft. the partition deed came into existence.

[32] Learned counsel for the applt. has taken us through a good deal of correspondence relating to a period subsequent to the death of Nrusingho Charan to substantiate the probability & truth of the explanation put forward on the pltf's side for the admissions & conduct of pltf. 2 above noticed. He has also referred us to some correspondence at about the time of the alleged adoption to show that the adoption must be untrue as a fact. Learned counsel for the resp. has also in his turn invited our attention to a number of other letters which according to him support his case. All these letters have been merely marked as exhibits without objection. but the contents thereof have in most cases not been put to the persons connected with them when they were in the box, either in their chief examination or cross-examination. It appears to me, therefore, that it is not permissible to use the contents of such letters as proving the statements therein made & to make use of the statements made therein for the purpose of drawing inferences one way or the other with reference to the disputed questions arising in the case. I would, therefore, keep out of consideration the use of those letters on either side for the purposes for which they were sought to be used. But even if we were prepared to attach any value to them, & take them into consideration, one cannot help feeling that there is more in them in favour of the deft's. case. Here again, I need not enter into the details. It is enough to notice Ex. B-25, dated 25-4-37 containing instructions from Bhagat to his clerk Bhajaram to make use of Ex. CC the partition deed for getting his name registered as the sole owner in respect of 4 touzis on the strength of the said Ex. CC quickly & quietly & with special instructions to tear away the letter.

[33] I am, therefore, definitely of the view that the admissions & the conduct of pltf. 2 relating to the adoption remain without any satisfactory explanation & must tell heavily against the case of the pltfs. Of course, it is clear that mere admissions & conduct cannot create the status of adoption, but if the Cts. below, in viewing the positive evidence for & against the adoption, have accepted the evidence of witnesses in favour of the adoption & that is also fully corroborated by the later admissions & conduct of the most interested person pltf. 2, it is obvious that there can be no reason for not accepting the findings of the Cts. below. Learned counsel for the applts. has taken us through the entire oral evidence for both sides & has made his comments on the credibility or otherwise of the witnesses & has attempted to argue that the oral evidence on the pltf's side has been rejected, & on the deft's. side accepted by the Cts. below for untenable reasons. He has also pointed out that almost all the witnesses that speak to the positive case of deft. 1 as regards the *factum* of adoption are either persons who are in some way under the influence of deft. 1's father or persons who may be called chance witnesses, & who are said to have been there casually without any kind of previous intimation or invitation. These circumstances, however, are not by themselves sufficient reasons for rejecting the evidence of the witnesses, especially having regard to the fact that Nrusingho Charan was at the time in a condition of health which resulted in his death a few days thereafter & which may account for absence of publicity or of a formal deed of adoption. Apart from the fact that the evidence of these witnesses has been accepted by the trial Ct. which saw them & also by the appellate Ct. on remand, I have been impressed, speaking for myself, with the evidence of Rai Sahib Gopal Chandra Patnaik & Adasi Somasekharm, D. Ws. 9 & 5 respectively on a perusal of their depositions. The evidence of P. W. 30, the widow of Nrusingho Charan is also particularly impressive & there is no reason suggested why she would have come forward to support the adoption, though of her own brother, depriving herself of the right to succeed to property of her husband & of the right to pass it on to her daughter & later to her prospective daughter's sons. It is necessary to remember in this connection, as has been found by the lower appellate Ct. that her husband Nrusingho Charan was separated from pltf 2. It has been suggested that having regard to the admitted fact of jointness in mess between Bhagat Charan & her husband he may not have been aware of their separation in status. But it is unlikely that neither she nor her father who was a lawyer, were unaware of the legal status of Nrusingho Charan & were altogether unacquainted with the existence of documents like Exs. C, D, E, A series & J series, which show that the properties were held in separate title. I am, therefore, satisfied that the adoption of deft. 1 by the late Nrusingho Charan is amply borne out by the evidence & the probabilities & that the concurrent finding in the Cts. below in this behalf must be confirmed.

[34] A question has also been raised in this suit as to whether pltf. 2 & Nrusingho Charan were separated or joint in status. This question arises only incidentally in this litigation as having a bearing on the maintainability of the suit by pltf. 1 alone, as it was originally constituted, & as having also a bearing on the probability or otherwise of the *factum* of adoption & the truth or otherwise of some aspects of the evidence relating thereto. It is enough to say that I agree with the finding of the lower appellate Ct. after remand

on this point. The finding to the contrary by the trial Ct is clearly vitiated by its wrong assumption that because Achutananda had two acres of ancestral property, all his subsequent earnings must be presumed to have been thrown into the common stock & enjoyed jointly by all the members of the family. The documents, EXS. C, D, & E, A series & J series furnish clear & unequivocal evidence of the fact that the properties were being held by the two brothers Bhagat & Nrusingho as separate. The argument that documents were all nominal has no substance & no merit. I agree, therefore, that Bhagat & Nrusingho were separate in status.

[35] On the merits of the second appeal the judgment of the learned Dist. J. on appeal has therefore to be affirmed.

[36] There remains the point relating to the validity of the hearing of the appeal by Sri Coari as Dist. J.

[37] At the hearing of this appeal, a question was raised, at the outset, on behalf of the applt. based on S. 38 (2), Bengal, Agra & Assam Civil Courts Act of 1887 (which is in force in this province). The point involved does not appear to be covered by any direct authority & requires careful consideration.

[38] The facts giving rise to the point have been set out in the judgment of my learned brother & it is unnecessary to reiterate them. The judgment of the trial Ct. in this case was prepared by the then Addl. subordinate Judge Sri Gopal Chandra De, but was actually pronounced by the principal subordinate Judge Sri C. C. Coari on 9-8 40. The appeal against that judgment lay to the Dist. Ct. & by the time it came up for hearing, on remand by the H. C. the same Sri Coari was the Dist. J. He heard the appeal, without any objection, & disposed of the same by his judgment dated 10-3 47. The present second appeal is against that judgment. The point raised is that Sri Coari was incompetent to hear the appeal & that his judgment is a nullity, by virtue of S. 38, Bengal, Agra & Assam Civil Courts Act of 1887 which is in the following terms:

"The presiding officer of an appellate Civil Ct. under this Act shall not try an appeal against the decree or order passed by himself in another capacity."

It is argued that the decree in the suit was passed by Sri Coari & that therefore he was prohibited from hearing the appeal. In this case not only was the judgment pronounced by Sri Coari on 9-8-40, but the decree that was thereafter prepared was in fact also signed by Sri Coari on 22-8-40. The decision of the point raised depends on the question whether Sri Coari can be said to be "the Judge who passed the decree in the suit" within the meaning of the above provision of the Civil Courts Act. There is no indication in that Act itself as to what is meant by "the Judge who passed the decree". If one turns to the scheme of the Civil P. C. the provisions therein clearly indicate that in an ordinary case where a judgment has been reserved after hearing, there are three stages : (1) the writing of the judgment; (2) the pronouncement of the judgment followed by dating & signing & (3) the preparation & the signing of the decree. It is conceded in argument that the mere preparation & signing of the decree under the provisions of O. 20, Rr. 6, 7, & 8 do not constitute "the passing of the decree". This is also clear from the fact that various provisions of the Code show that the rights & obligations under a decree arise not from the date when the decree is drafted & signed but from the very moment that the judgment is pronounced. This has been pointed out in the judgment in *Ramchandra* v. *Bhalu Patnaik*, I. L. R. 1950 Cut. 253 at pp. 270 & 271 : (A. I. R. (37) 1950 Ori. 125, F. B.). It is also indisputable that the mere writing of the judgment does not constitute the passing of the decree, though in fact it has been later on pronounced. Order 20, R. 3 shows that a judgment becomes final & unalterable only when it is pronounced & not before it, & O. 20, R. 7 shows that the judgment becomes operative only from the date of the pronouncement. There can, therefore, be no doubt that a decree cannot be said to have been passed before the judgment has been pronounced. According to S. 33, C. P. C. the Ct. after the case has been heard, shall pronounce the judgment & on such pronouncement a decree shall follow. This provision as well as the provision under O. 20, R. 7 clearly indicate that the judgment & the decree are simultaneous. Therefore in one sense a decree is passed when the judgment is pronounced, especially where the judgment contains not merely the grounds of the decision, but the formal expression of the adjudication inclusive of the reliefs granted: *See Ramchandra* v. *Bhalu Patnaik*, I. L. R. (1950) Cut. 253 at p. 271: (A. I. R. (37) 1950 Ori 125 F.B.). It appears, therefore, clear that the Judge who pronounced the judgment also "passes the decree" at the same time according to the scheme of the Civil P. C. & in that sense he is the Judge who passes the decree, & especially for purposes of S. 38 (2), Civil Courts Act. Under the Civil P. C., the Judge may pronounce a judgment prepared by himself under O. 20, R. 1 or by a predecessor under O. 20, R. 2. It is not very clear at the outset that even for purposes of Civil P. C., in the latter case, he is to be treated as the Judge who passed the decree for all purposes. For instance, under O. 47, Rr. 1 & 2, an appln. for review of judgment is to be made to the Ct. which passed the decree, but where the appln. is on a ground other than discovery of new & important matter, or an error apparent on the face of the decree, the appln. is to be made only to the Judge who passed the decree & it cannot be heard by any succeeding Judge unless he issues notice on it. It is clear that the object of this provision is that the *prima facie* decision as to whether the judgment requires reconsideration on merits is left to the very Judge who had previously applied his mind & given his decision, just as for instance leave to appeal against the judgment

of a single Judge in the H. C. can be given only by that very Judge. Having regard to the intention & purposes of this provision, the phrase "the Judge who passed the decree" in O. 47, R. 2, has been construed in *Tamijuddin* v. *Satyashanker*, A I R. (4) 1917 Cal. 673: (32 I. C. 101), as referring to the Judge who delivered the judgment & thereby expressed what the decree is & is responsible for its substance & not merely to the Judge who formally signed the decree.

[39] In construing, therefore, what is indicated by the phrase "Judge who passed the decree" in S. 38 (2), Civil Courts Act, it appears to me to be equally permissible to consider what is the intention & object of the provision. That intention & object is one that is unmistakably gathered from S. 38 itself. Sub-s. (1) of S. 38 provides that:

"the presiding officer of a civil Ct. shall not try any suit or other proceeding to which he is a party or in which he is personally interested."

Sub-s. (2) provides that:

"the presiding officer of an appellate civil Ct. shall not try an appeal against a decree or order passed by himself in another capacity."

Sub s. (1) apparently is intended to provide against the judgment of Ct. being perverted by the personal interest of the judicial officer. Sub-s. (2) is meant to provide a safeguard against the bias in favour of his own previous judgment operating to deflect the right decision on appeal. If the phrase 'the Judge who passed the decree' is to be taken to mean 'the Judge who pronounced the judgment' irrespective of whether he prepared the judgment or not, the prohibition would apply to a person who performed the mere mechanical & official act of pronouncing the judgment prepared by another, but would exclude the very person who had prepared the judgment, but not pronounced it, if per chance he happens to have become later the presiding officer of the appellate Ct. before whom the appeal comes up for hearing. It would be unreasonable to construe the phrase the "Judge who passed the decree" so as to produce these anomalous results. The phrase "the Judge who passed the decree" in S. 38, sub s. (2), should, therefore, I think be construed as applicable only to the Judge who prepares the judgment & in the normal course pronounces it & thereby passes decree & not to the Judge who merely pronounces the judgment under the provisions of O. 20, R. 2, without having himself prepared it. That, words or phrases in a Statute having larger import can, having regard to the purpose & object intended, be understood in a limited sense, is a well-known rule of construction. See *Macleod* v. *Attorney-General*, 1891 A. C. 455: (60 L. J. P. C. 55). That this limitation is reasonable is confirmed by a consideration of the history of the provision in the Civil P. C. relating to the power of a successor Judge to pronounce the judgment of a predecessor. That provision was not to be found in the Civil P. C. of 1859, but was first introduced in the Civil Procedure Codes of 1877 & 1882 as S. 199 thereof & repeated in 1909 Civil P. C. as O. 20 R 2. So far as the Civil Courts Act is concerned, it is to be noticed that the provision prohibiting a Judge to hear an appeal against a decree passed by himself in another capacity, was one that was enacted prior to the introduction in the Civil P. C of the provision authorising a successor to pronounce a predecessor's judgment. The present Bengal, Agra & Assam Civil Courts Act of 1887 which is a Central Act, was preceded by the Bengal Civil Courts Act (Act IV [6] of 1871) which was also a Central Act. Corresponding to sub-s. (2) of S. 38 of the present Act, there was in the prior Act, the following provision in S 25 (2) thereof: "No subordinate Judge, Addl. Judge or Dist. J., shall try any appeal against a decree or order passed by himself in another capacity." It is interesting to note that there is a similar provision in S. 17, Madras Civil Courts Act of 1873, which is also a Central Act. It cannot be doubted that the phrase "passing the decree" in these Central Civil Courts Act of that date, must be construed with reference to the procedure authorised by the then Civil P. C. of 1859 & must therefore refer to the Judge who having prepared the judgment pronounced it himself. It appears to me, therefore, permissible to construe the same phrase in the Civil Courts Act of 1887 in the same way, unless it can be said that the Civil P. C. of 1877 & 1882 by enacting S. 199 deliberately intended to bring about or necessarily brought about, a change in the meaning of the phrase "Judge who passed a decree."

[40] The question then is whether the provision in the later Civil Procedure Codes of 1877 & 1882 authorising a successor Judge to pronounce the judgment of a predecessor Judge, renders the judgment & the decree so pronounced that of the pronouncing Judge. The principle underlying this provision has been fully explained in a very (sic) case in *Parbati* v. *Higgin*, 17 W. R. 475, the judgment in which is dated 3 4-1872, before S. 199, C. P. C. of 1877 was enacted. That judgment recognised the validity of the practice which probably had grown up by that time & which received legislative recognition later in 1877. In that judgment Jackson J. says as follows:

"Then as to the other question, it appears to me that there is really nothing in it. Babu Bolak Chand, when he heard the suit, apparently when he made up his mind as to the judgment which he would give, was actually subordinate Judge of the District & the circumstance that he had no time to write out as required by the Code the judgment which has to be delivered in Ct. before he was relieved in his office, does not, I think, affect the validity of that judgment. He heard & to all intents & purposes determined the suit & gave judgment; but his tenure of that particular judicial office having expired before judgment could be pronounced, that judgment which was the judgment of the Judge who heard the case, was pronounced as a matter of form by his successor in open Ct. That judgment therefore appears to me unimpeachable on any such ground."

This passage explains very clearly the theory underlying the provision in S. 199, C. P. C. of 1877 & 1882 & the corresponding provision in O. 20,

R. 2 of the present Civil P. C. That theory, it seems to me, is that the successor Judge pronounces the judgment of the predecessor Judge as his statutory proxy, & the judgment so pronounced is "to all intents & purposes the determination of the predecessor Judge". It is, therefore, as though the pronouncing of the judgment, which undoubtedly constitutes the passing of the decree is to be taken in law to be the pronouncement by the predecessor Judge. If this is the correct view of the legal effect of O. 20, R. 2, the connotation of the phrase "the Judge who passed the decree" in the civil Courts Act, need not be taken to have undergone any change after 1877. But it still continues to mean as it originally did in 1877. The Judge, who having heard the suit & prepared the judgment, pronounces the judgment & thereby passes the decree; pronouncement by the successor in any case where it becomes necessary being tantamount to pronouncement by the predecessor himself. I venture to submit that this construction of the relevant phrase in S. 38 (2) does no violence to the language & avoids the anomaly, already pointed out arising from equating "passing of the decree" to a "mere mechanical pronouncement of the judgment."

[41] The only serious objection to this construction is the view pressed by learned counsel for the applt. relying on certain authorities that under O. 20, R. 2, the successor Judge has the discretion either to pronounce or not to pronounce the judgment of the predecessor Judge. It is argued that if the statutory provision gives the discretion, the judgment pronounced in exercise of the discretion must be taken to be the judgment of the successor Judge by his adopting it It is, therefore, suggested that the theory underlying O 20. R. 2 is to be taken to be not that the pronouncement by the successor is to be treated as the pronouncement by the predecessor; but that the judgment of the predecessor is to be treated as the judgment of the successor, if he chooses to pronounce it. That O. 20, R. 2 gives a discretion is maintained on the authority of the cases in *Lachman Prasad* v *Ram Kishan*, 33 ALL. 236 : (8 I. C. 1096), *Fort Gloster Jute Mfg. Co.* v. *Chandra Kumar*, 46 Cal. 978 : (A. I. R. (7) 1920 Cal. 537) & *Hargulal* v. *Abdul Gani*, A. I. R. (23) 1936 Rang. 147 : (14 Rang. 136 F. B.). Out of these cases it may be noticed that the pronouncements in *Fort Gloster Jute Mfg. Co.* v. *Chandra Kumar*, 46 Cal. 978 : (A. I. R. (7) 1920 Cal. 537) & *Hargulal* v. *Abdul Gani*, A. I. R. (23) 1936 Rang. 147 : (14 Rang. 136 F. B), are *obiter*. The only case which specifically decides that the word "may" in O. 20, R. 2 is to be construed as involving a discretion is the case in *Lachman Prasad* v. *Ram Kishan*, 33 ALL. 236 : (8 I. C. 1096). I venture to doubt the correctness of the view that the word "may" in O. 20, R. 2 is to be construed as involving a discretion. Such a construction fails to take note of the fact that the Code provides no indication to guide the exercise of the discretion, which if it exists, must be judicial discretion & not arbitrary caprice. It is to be noticed that O. 20, R. 2 while it authorises the pronouncement of the judgment, does not authorise the reconsideration thereof by the successor & it would not be reasonable to construe it as giving, by implication, a power to the successor, virtually by way of an appeal or review. It is no doubt true that the word 'may' in a statute does not necessarily mean "must" as pointed out in *Julius* v. *Bishop of Oxford*, (1880) 5 A. C. 214 : (49 L. J. Q. B. 577). But as pointed out in *In re Baker, Nichols* v. *Baker*, (1890) 44 Ch. D. 262 : (59 L. J. Ch. 661), there is always another question also to be decided in construing the word "may" namely, whether there is anything in the Statute which makes it the duty of the person on whom the power is conferred to exercise that power. Cases have held that where a statutory provision confers an authority to do a judicial act in a certain case, it is imperative on those who are authorised to exercise that authority, when the case arises. & the exercise depends not on the discretion of the Cts. or Judges, but on the proof of the particular case out of which the power arises. See *Maxwell on Interpretation of Statutes*, 9th Edn., p. 250; also, *Queen* v. *Tithe Comrs.* (1850) 117 E. R. 179 : (14 Q. B. 459) & *Macdougall* v. *Paterson*, (1851) 138 E. R. 672 : (11 C. B. 755). It appears to me therefore that the word "may" in O. 20, R. 2 must be construed not as involving a discretion, but as conferring an authority which it is the duty of the successor to exercise, if there is on record a prepared & signed judgment of his predecessor, who heard the suit. To say that the successor has the discretion not to pronounce it, is to deprive the parties concerned, of the benefit of the trial itself or at least of the impressions & opinions formed by the Judge, who actually tried the case & saw the witnesses. It appears to me not to be right to imply from a mere authority given to pronounce a predecessor's judgment, a power also to ignore the same or to sit virtually in appeal against that judgment. I venture therefore to submit, with all respect, that as at present advised, I do not agree with the view that O. 20, R. 2, involves a discretion. But I do not wish to express my final opinion on the question since it has not been fully argued on either side before us in all its bearings.

[42] Even, however, if the rulings laying down that the word "may" in O. 20, R. 2 is to be construed as involving a discretion, are to be held as authoritative & laying down the correct law, there is no reason to import into the construction of O. 20, R. 2, a legal fiction in every case that a predecessor's judgment when pronounced by a successor, becomes his judgment. As already pointed out O. 20, R. 2 does not enjoin reconsideration of the judgment by successor & the pronouncement therefore, might well be a mechanical act. Whether therefore a successor by pronouncing a predecessor's judgment adopts it as his own, must

depend on the facts of the situation. There is no reason, on the facts of this case, to import the motion that the judgment of Sri G. C. De which Sri Coari has pronounced, has been adopted by him as his own, & that therefore the decree must be taken to have been passed by him. The order-sheet of the suit clearly shows that the prepared judgment of Sri G. C. De which was of considerable size was received from that Judge on 9-8-40 & on that very day notice was issued to the parties & the judgment was delivered by Sri C. C Coari, *vide* orders 126, 127 & 128. It is impossible that the learned Judge Sri Coari would have perused & considered the judgment of Sri G. C. De & accepted it as his own within so short a time. I am, therefore, clearly of the opinion that Sri Coari cannot be taken to be the Judge who passed the decree within the meaning of S. 38 (2), Bengal, Agra & Assam Civil Courts Act of 1877, having regard to the construction thereof, which I have adopted above, & having regard to the view I take of O. 20, R 2 as operating in law to render the pronouncement by the successor as the pronouncement by the predecessor.

[43] A question might also well arise, whether even if there has been a violation of the prohibition in S. 38 (2), Bengal, Agra & Assam Civil Courts Act, the judgment is thereby rendered a nullity. It is not in every case where a statutory prohibition is disregarded that it results in a nullity. It is well settled that neither mere negative words nor peremptoriness of the language are by themselves conclusive. See *Liverpool Borough Bank* v. *Turner*, (1860) 45 E. R. 715 : (2 De G. F. & J. 502), *Mayor of London* v. *R.* (1848) 13 Q. B. 33, N. (d), Craies on Statute Law, p. 234, footnote (g). That must depend upon a careful consideration of the scope & purpose of the prohibition. The question in this case turns on whether the prohibition relates to the foundation of jurisdiction or relates only to the manner in which jurisdiction is to be exercised & also whether it is in the nature of a personal disqualification of the individual Judge in a particular case for benefit of the concerned litigant or is based on a larger & fundamental public policy. See *Margate Fire Co.* v. *Hannam*, (1819) 106 E. R. 661 : (3 B. & Ald. 266), *Gurdeo Singh* v. *Chandrikah*, 5 C. L. J. 611 : (36 Cal. 193) & *Ashutosh* v. *Beharilal*, 35 Cal. 61 : (6 C. L. J. 320 F. B.). It is relevant to note in this connection that in English law, a distinction is drawn between the pecuniary interest of the Judge & the prejudice or bias of the Judge. While the former is considered as an absolute bar, the latter does not appear to be treated as such & is considered as capable of being waived. See *Venkatapathi* v. *Mahomed Sahib*, 38 Mad. 531 : (A. I. R. (3) 1916 Mad. 187), & Halsbury's Laws of England, II Edn. Vol. XXI, paras 952-953 at pp. 535-536). It is unnecessary, however, to pursue the matter & pronounce any final opinion in this matter also, since in my view, the present case is not hit by the prohibition in S. 38 (2), Civil Courts Act. It is, however, worthwhile noticing that in this case the order-sheet in the appeal before the Dist. Ct shows that Sri Coari received the appeal on his file after remand on 3-8 45. He took up the hearing of the appeal on 28-1-47 more than six years after he pronounced the judgment. During the pendency of the appeal before him for hearing for a period of about a year & half, before it was taken up, not only was no objection taken by the applt. for the hearing of the appeal by him, but the applt. himself had applied by petns. for adjournment of the appeal at least on four occasions. (See O. Nos. 27, 31, 36 & 37).

[44] Learned counsel for the applt. attempted to persuade us that there was likelihood of such bias in this case & to substantiate it has relied on two circumstances. He points out that Sri Coari as Subordinate Judge & when this suit was pending before him, in its early stages, had occasion to pass an order on an appln. to delete a certain issue (*vide* O. No. 28 dated 15-8 39) & also certain orders on an appln. for appointment of receiver which however was ultimately not pressed. (*Vide* orders dated 2 3-40 & 21-3 40). There is nothing, however, in these orders which indicates that he was called upon to apply his mind to the merits of the case & there is no scope for the suggestion of bias. It is only fair to say, having gone carefully through the judgment of Sri Coari now under appeal, & having given full opportunity to the counsel before us, on either side to argue the case almost as if it is a first appeal, that we have absolutely no reason to think that Sri Coari's judgment indicates any bias. Nor is there any reason to think that the applt. has been in any way prejudiced. There is therefore no merit at all in the objection raised on behalf of the applt. based on S. 38 (2), Civil Courts Act.

[45] In the result, therefore, I agree that the second appeal must be dismissed with costs.

D.H. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 327 *[C. N. 78.]*

JAGANNADHADAS AND NABASIMHAM JJ.

Maheswar Naik & others—Defts—Applts. v. *Tikayet Sailendra Narayan Bhanj Deo—Pltf.—Resp.*

A. F. A. D, No. 204 of 1945, D/- 8-3-1949.

(a) Civil P. C. (1908), S. 100—Custom—Question of proof of custom is mixed question of law & fact.

[Para 6]

Anno: C. P. C., S. 100, N. 28.

(b) Evidence Act (1872), S. 90—Scope—Document bearing only seal without signature—No presumption under S. 90.

The presumption available under S. 90 will apply only if the document purports to have been "signed" by somebody or if it purports to be in the handwriting of somebody. The presumption does not apply to the genuineness of a seal. It cannot, therefore, avail a document which purports to bear only a seal without any signature.

[Para 11]

Anno: Evi. Act, S. 90, N. 1.

(c) Evidence Act (1872), S. 35—Reports made in discharge of official duty—Admissibility.

Reports of public officials made in discharge of their official duties are admissible under S. 35 with reference to statements therein of relevant facts or facts in issue. The report of a public official is not inadmissible in evidence, merely because it was made in compliance with the order of the higher authorities & was submitted to them. [Para 14]

Anno: Evid Act S. 35, N. 20.

(d) Evidence Act (1872), S. 35—Distinction between judicial & revenue enquiries pointed out.

Different considerations may apply to a judicial inquiry as distinct from revenue inquiry. While a judicial inquiry is to be based merely on evidence adduced before the officer, a revenue inquiry is not so limited & is to a substantial extent based on personal observation & information. [Para 15]

Anno: Evid. Act, S. 35, N. 11, 20.

(e) Evidence Act (1872), S. 35—Official reports—Probative value—Revenue report—Distinction between statements & opinions as to relevant facts.

Official reports are valuable & in many cases that is the only best evidence of facts stated therein. Hence a report of a revenue enquiry relating to jungle rights definitely recognizing the rights of certain persons to take minor forest produce for certain purposes based on personal information received from competent witnesses, is admissible in evidence in a case where such rights are in question. But a distinction has to be made between the statements contained therein relating to relevant facts & the opinions expressed therein as to such relevant facts. So far as mere opinions are concerned, while they are admissible, the value to be attached is comparatively less. [Para 15]

Anno: Evid. Act S. 35, N. 19, 20.

(f) Evidence Act (1872), S. 35—Village note.

A village note is only a piece of evidence & no presumption of correctness attaches to it. [Para 18]

Anno: Evid. Act, S. 35, N. 19.

(g) Custom—Proof—Antiquity.

Where the evidence adduced is sufficient to make out the exercise of a customary right for the period of living memory of the witnesses it is binding. [Para 21]

(h) Custom—Customary right—Profit a prendre—Customary right in nature of profit a prendre—Acquisition of in India—Easements Act (1882), S. 18.

Profit a prendre is a right to take certain profit or produce arising from the property of another. If the exercise of such a right is acquired for the beneficial enjoyment of another tenement, that amounts to an easement as defined in the Indian law. But where the exercise of such a right is not required for the beneficial enjoyment of another tenement, but is merely for the benefit of certain individuals or well-defined class of individuals, it is a profit a prendre in gross. The evidence required for establishing the acquisition of a profit a prendre which is an easement & of a profit a prendre in gross, is the same. [Para 22]

In India, such customary rights can exist & can be acquired. With reference to customary right of this kind, the principles of English law cannot be strictly applied. [Para 22]

Anno: Easements Act, S. 18, N. 1.

(i) Custom—Proof of — Reasonableness — Profit a prendre in gross—Right to remove forest produce by headloads by aboriginals of particular village for sale in particular village—Custom not invalid on ground of unreasonableness.

The question of reasonableness has to be judged with reference to conditions at the time of the possible inception of the custom. [Para 24]

It cannot be laid down as an absolute proposition of law that wherever a customary right to take forest produce from another man's land with a view to profit by sale of it is claimed, it must necessarily be held to be unreasonable. The decision of the question whether or not it is unreasonable must depend upon the circumstances & facts of each case. [Para 23]

Certain aboriginal residents of a particular village near a forest claimed a customary right to remove minor forest produce from the unreserved portion of the forest for purposes of sale as a means of their livelihood. The right was limited by three considerations, namely, (1) the method of removal was personal & by headloads, (2) the persons to whom it could be sold were only the villagers of particular village & (3) the sale was within the precincts of the village:

Held that it could be said that it was a right exercisable by a large & growing class of persons liable to heavy increase in course of time so as to seriously destroy the right of the proprietor itself in the property. A. I. R. (5) 1918 Mad. 169, *Refd.* [Para 23]

The fact that it might not be possible for the proprietor of the village to check & control whether the sale was made to the *bona fide* residents of the village & was made within the limits of the village could not be held to make out that the custom alleged was unreasonable. [Para 25]

Nor was it unreasonable on the ground that the right was not claimed in respect of the entire inhabitants of the village. [Para 25]

The fact that the proprietor had the right to constitute reserves in the forest was no valid objection in law to the recognition of the customary right. [Para 26]

(j) Custom—Customary right—Right to forest produce—Sahars of Patia & Chandrasekharpur.

Held that the Sahar-residents (the aboriginals) of Patia & Chandrasekharpur had a right to remove the minor forest produce of annual growth, from the unreserved portion of the Patia jungle, without any payment of fees, for their own domestic consumption & for sale, in small quantities, within the limits of Patia & Chandrasekharpur, to the residents thereof, by removal on head-loads. [Para 28]

The rights of the Sahars are without prejudice to the proprietary rights of the pltf. as the proprietors of the suit forest to the forest so long as there is sufficient unreserved forest left for the legitimate exercise of the rights of the Sahars & is also without prejudice to the right of the pltf. to make such reasonable arrangements as may be required to prevent any gross abuse of the rights. [Para 28]

L. N. Das & S. N. Sengupta—for Applts; P. Mohanti K. N. Das & P. Misra—for Resps.

Jagannadhadas J. — Defendants 1 to 15 are the applts. in this second appeal. The pltf. is the Tikayet of Kanika. The defts. are the Sahar residents of the Mouza called Chandrasekharpur. The suit has been brought for an injunction restraining the defts. from entering into a forest belonging to the pltf. which may for convenience be called Patia forest & from cutting & appropriating any of the jungle produce therein. The trial Ct. dismissed the suit, but the lower appellate Ct. reversed it & granted the injunction & damages asked for by the pltf.

[2] Killa Patia in which the suit forest is situated belonged to Raja Dibyasingh Deb. On his death his brother Raghunath Deb succeeded to the Estate & on his death Madan Mohan Deb. There was litigation relating to succession of the property between Madan Mohan & Achyutananda. During the pendency of the litigation Madan Mohan died & Achyutanarda succeeded to the property. The estate was sold in execution of a mtge. decree during Achyutananda's time & was purchased by the Raja of Kanika in ct. auction. Independently of this, Mouzas Patia & Chandrasekharapur comprised within Patia estate were brought to sale by

the Govt to realise certain Govt. dues from the estate in 1932 & the Raja of Kanika purchased these two villages in the certificate sale also & obtained possession. Thus the entire Patia estate as well as the two villages of Patia & Chandrasekharpur therein became the property of the Raja of Kanika who duly obtained possession thereof. He thereupon executed a gift deed in 1935 in respect of the whole of the Patia estate including these villages in favour of his son, the pltf. The estate therefore with the Patia forest therein belongs to the pltf. Though this was questioned at the trial, it is now no longer disputed in the lower appellate Ct. & here.

[3] In this estate there is forest of very considerable extent of about 3,000 acres. The forest adjoining the village Patia goes by the name of Patia forest. The original village Patia has in the revn. settlement been divided into two villages called Patia & Chandrasekharpur. But for all purposes relevant to this litigation the two villages are treated as one & the suit Patia forest as the one connected with these two villages. It would appear from the evidence that the Sahars of this place reside almost entirely in Chandrasekharpur, there being only three or four families of Sabars in Patia (vide evidence of P. W. 10). It may be mentioned that Sahars belong to the primitive aboriginal class.

[4] The case as brought, was against 16 defts of which only defts. 1 to 15 are Sahars. Defendants 1 to 15 claimed rights in the forest on the footing that they belong to the Sahar class & deft. 16 on the footing that he was a villager of Mouza Chandrasekharpur. The trial Ct. which found in favour of defts. 1 to 15, as Sahars of the village, found against the rights claimed by deft. 16 as a villager. There has been no appeal by deft. 16 either in the lower appellate Ct. or here & therefore the appeal is now concerned only with the alleged rights of defts 1 to 15 of the Sahar-residents of Mouza Chandrasekharpur. The pltf. is the proprietor of the suit forest & claims that nobody has got any right to remove forest produce without his permission & without payment of the fees prescribed therefor. The case of the Sahar-defts. as set out in para. 11 of the written statement is as follows :

"These defts. are the aboriginals of Patia & Chandrasekharpur. From time immemorial these defts.' forefathers, their successors & these defts. themselves have been cutting wood from the said jungle & carrying them on head & they have been using the same. From time immemorial also they have been selling the products of that jungle in small quantities in Killa Patia & have been earning their livelihood thereby. These Sahars have the right of selling & using in this manner from time immemorial."

In the said para. 11 as also in para 10, they make it clear that this right is claimed in respect of "ordinary thorns, bamboos & wood that grow in the jungle year after year," that is only the minor jungle produce of annual growth & not for any of the valuable classes of timber or bamboo or the like.

[5] The actual incident which is stated to be the cause of action in the plaint is the alleged removal of twenty bundles of prickly thorns costing Rs. 5 from the disputed forest. It may also be noticed that according to the evidence of usage, one portion of the suit forest is being treated as reserve forest & the rest as unreserved. The pltf's. case is that this alleged removal of prickly thorns was from the reserved forest. The learned trial Ct. under issue 1, found that there is no reliable evidence that the removal was from the reserved forest. The lower appellate Ct. did not give any finding on this matter, but merely contended itself with the statement that there is no denial of the fact that the prickly thorns were removed from the reserved portion. Though the defts. in the written statement do not, in terms recognise the distinction between reserved portion of the forest & unreserved & do not limit their alleged rights to the unreserved portion, it is specifically stated before us that the deft's. claim is confined only to the unreserved portion of the forest & it is on that footing that the Cts. below have dealt with the case. The finding of the trial Ct, that the incident which is alleged to have furnished the cause of action is one that has occurred with reference to the unreserved portion of the forest appears to be correct, in view of the fact that the alleged removal was only of some prickly thorns of annual growth which are more likely to have been found in the unreserved portion of the forest than the reserved. It must be taken therefore that the suit raises the question only of the alleged rights of the defts. in the unreserved portion of the forest & that the absolute right of the pltf. as proprietor in the reserved portion of the forest is undisputed. It is also further necessary to state that though the claim of the defts. as set out in the written statement is asserted for the purpose of sale in Killa Patia, it is now stated that the claim is confined to sell in mouza Patia (including Chandrasekharpur) that is to sell in small quantities within the limits of villages Patia & Chandrasekharpur & to the normal residents of Patia & Chandrasekharpur. This limitation of claim is justified by the evidence of deft. 1 as D. W. 2 wherein he says "The villagers of Patia purchase fuel from us. We sell fuel, prickly thorns & bamboos in Patia." It must be further noticed that the claim of the defts. is to take the forest produce for their own consumption as also for sale as above stated in order to earn their livelihood, but the claim is confined to the taking of small quantities by carrying them on head by themselves. As already stated the claim is also only in respect of minor forest produce of annual growth.

[6] The dispute relating to forest rights in this forest has been going on from about the year 1932 when the Raja of Kanika purchased this Estate. The dispute, however, appears to have been mainly with reference to the alleged rights of the entire villagers of mouza Patia, who claimed that they

had the right to take the minor forest produce without any permit & without any payment. That has been negatived on a number of occasions in the course of the history of this dispute & has now been negatived also by the trial Ct. in this suit. But the dispute now before us is limited to the Sahar residents of mouza Patia & that is the only question with which we are concerned in the present appeal. Both the Cts. below have found as a fact that the Sahars have been accustomed to remove the forest produce from the forest for the purposes above-mentioned, but have come to different conclusions on the question whether the said removal is as of right free of payment or with the permission of the proprietor & on payment of fees. As the question involved, is one regarding the proof of custom which is a mixed question of law & fact, we have gone into the entire evidence while keeping in mind that the question of credibility of the evidence is one for the Cts. below.

[7] There can be no reasonable doubt in this case about the fact that the Sahar residents of mouza Patia including Chandrasekharpur have been habitually removing the minor forest produce as stated above for long time past. The learned Subordinate Judge on appeal has stated that it is common ground that the Sahars & other low class people of Patia take the forest produce from Patia jungle for their own domestic consumption & for small sale within the Killa Patia & that the material point for consideration is whether the removal of the forest produce is without the permission of the proprietor & free of any charge. The only question therefore is whether the removal is as of right & free of payment.

[8] The case for the pltf. is that the removal is on permits which are issued on payment of fees. Since permits & fees go together, the question has therefore further reduced itself virtually to determination as to whether or not the removal is on payment of fees. On this both the Cts. below have held that on the oral evidence the collection of forest fees from the Sahar-residents of mouza Patia (Chandrasekharpur) has not been made out on the evidence on the pltf.'s side. The learned Subordinate Judge says as follows :

"So far as collection of fees from the Sahar defts. of Chandrasekharpur, the oral evidence led on the pltf.'s side cannot but lead to the conclusion arrived at by the learned Munsif (that the Sahars had not been proved to have paid any tax to the proprietor)."

This view of the oral evidence is amply justified. Witness after witness on the side of the pltf. comes forward & admits in cross-examination that the Sahars take the forest produce, but they have not seen them paying any royalty to the proprietor, while some of them admit having seen non-Sahar residents paying fees. P. W. 1 says : "I have seen the Sahars & other tenants of Patia & Chandrasekharpur taking fuel, rough wood, roots etc. since my boyhood" & he admits that he has not seen any of the defts. ever paying royalty to the proprietor. P. W. 2 says :

"The Sahars of Chandrasekharpur go to Patia jungle to get roots & plums. Some-times they also sell plums. Sahars of Chandrasekharpur also get fuel, rough wood, from jungle for their own use & also for sale."

He does not say that he saw the Sahars paying any fees at any time. P. W. 3, who is related to the original Zamindar of Patia estate says :

'Chandrasekharpur Sahars get fuel, roots etc. from Patia Jungle & that is their means of livelihood. They sell the fuel in the village."

He admits that he has not seen Chandrasekharpur Sahars ever paying royalty during the Tikayet's time or Achyutananda's time; though he has seen some others like Raghu Patro, Kuso Moharana etc. paying royalty for removal of forest produce from the forest. P. W. 4 is an important witness aged about 60 years. He served under Raghunath Deb as a Mohurir & under Madan Mohan Deb as his Tahasildar & has also worked under the pltf. He has produced a number of documents to support the pltf.'s case & in particular, counterfoils of permits, Shibas or account books relating to the period subsequent to the acquisition of the estate by the Raja of Kanika in 1932. While he asserts that the Sahars have no right to take the forest produce without permission & without payment of fees & that royalty was being collected during Kanika's regime also from the Sahars, no counterfoil of any permits issued to any Sahar of this village has been produced & he admits that the Shibas (account books) relating to the collection of fees, which show collection of fees from other residents do not show the names of any Sahars of Chandrasekharpur Mouza. He also admits that the collections from forest tax did not find place in the estate account during the time of Raghunath Deb & says that this was so then as the estate was being managed by the receiver.

[9] On his evidence apart from Ex. 1, which will be noticed later, there can be no reasonable doubt that the collection of fees from the Sahars of Patia & Chandrasekharpur at any time is not at all made out. It is significant that even after 1932, the accounts which show collection of fees from others do not show any collections from the Sahars. P. W. 6 in his cross-examination says that he had seen Sahars removing thorns from unreserved portion of the forest, but has not seen any permits with them & had not reported the same to the forest officials though he had reported when the Sahars removed forest produce from the reserved portion of the forest which according to him is demarcated by a line. P. W. 10 is the only Sahar of Mouza Patia who gives evidence on the side of the pltf. & supports him by saying that the Sahars obtained fuel from Patia jungle on payment of forest tax. He says that even in Kanika's time, he has been getting fuel from the forest by taking permits which are returned to the office on his return from the forest. But none of these permits have been produced & filed for the pltf. He admits

in his evidence that he is a tenant under the pltf. & that he returned his settlement Patta to the estate which shows clearly that he is under the control of the pltf. P. W. 11 was a forest guard, 76 years old during Dibyasingh Deb's time & states that the Sahars have no right to bring fuel, bamboo etc. from the Patia forest without permission & without payment of fees, but admits in cross-examination that he cannot say whether the Chandrasekharpur Sahars pay any tax or not. The inability of this witness who was a forest guard & who must have personally known about the payment of fees by Sahars, if true, to assert positively that the Sahars were paying fees is a significant & weighty circumstance P. W. 13 is a forester under the pltf. & was serving under Achyutananda. He is unable to assert that he collected fees from Sahars at any time for removal of forest produce.

[10] On the defence side five witnesses have been examined of whom D. Ws. 2 to 4 are witnesses for the applt. They, of course, support the defts.' case. On the oral evidence adduced on behalf of the pltf. himself, it is clear that there is no proof that the Sahars had ever paid any fees for removal of forest produce. Mere non collection of fees may not by itself be any proof of the right of Sahars but this fact assumes significance & importance in view of the positive proof adduced on the side of the pltf. that fees were being collected from others. As already stated, both the Cts. below have agreed in their estimate of oral evidence to the above effect. In their estimate of documentary evidence, however, relating to this matter they have differed & that must now be considered.

[11] The earliest document put in evidence on behalf of the pltf. is a Hukumnama, Ex. 13 dated 1254 B. S. purporting to have been issued by the Patia Raj to one Muli Patra stating that as the Sahars of Patia & another village had paid the tax, they may be permitted to remove wood from the forest without obstruction. This does not purport to have been signed by anybody nor does it purport to have been written by anybody. It only purports to bear a seal. Though the document appears to be an old one & from the date it bears, must have been more than 30 years old, the presumption available under S. 90, Evidence Act, does not apply to this document. The trial Ct. has not accepted this document on the ground that it was not produced from appropriate custody as it was filed into the Ct., by P. W. 5, the grandson of the said Muli Patra who could not satisfactorily explain why the document was not available at any earlier stage. The appellate Ct. however was not willing to accept this criticism & was inclined to accept it as genuine. But it failed to notice that the presumption under S. 90 cannot apply to this document, because in terms of that section, the presumption will apply only if the document purports to have been "signed" by somebody or if it purports to be in the handwriting of somebody. The presumption does not apply to the genuineness of a seal. It cannot therefore avail a document, like Ex. 13, which purports to bear only a seal without any signature. This is clear from the meaning of the word "sign" as defined in S. 3, sub-s. (52), General Clauses Act, which includes only a mark with reference to a person who is unable to write his name. Even if the seal is to be treated as a mark, there is no presumption that the seal is of a person who is unable to write his name. Therefore this document which purports to bear only a seal cannot be taken to have been proved. This view of S. 90, Evidence Act has also been taken in *Special Manager, Court of Wards, Balrampur* v. *Tribeni Prasad* A.I.R. (22) 1935 Oudh 289 : (11 Luck. 35), *Sri Prasad* v. *Special Manager, Court of Wards, Balrampur*, A.I.R (24) 1937 Oudh 194 : (12 Luck. 400) and *Bhairo Singh* v. *Ambika Baksh Singh*, A. I. R. (29) 1942 Oudh 374 : (17 Luck. 805). From the Ex. list we find that this document is noted as having been marked without objection but since the very Munsif who has marked it has felt himself free to reject it, it must be taken that he has marked it subject to its being held to be proved under S. 90, Evidence Act. Ex. 13 therefore must be ruled out of consideration.

[12] The next document is Ex. 1, an assessment list dated 13.5-1916. P.W. 4 Swapneswar Misra produces it & gives evidence in support of it. He says that it is a list showing the assessment of forest tax against individuals noted therein prepared in 1916 during the time of Madan Mohan Deb. He speaks to its being in his handwriting & bearing the signature of the Dewan at the time, one Dayanidhi Tripathi. This list was apparently also produced before Mr. Datta, Deputy Mag. who held an inquiry relating to forest rights in respect of which he submitted a report, Ex. B, which will be noticed later. There can, therefore, be no doubt about the genuineness of this Ex. 1. The list bears certain cross marks against some names & in his report Ex. B, Mr. Datta seems to have thought that these marks are against the names of Sahars & that they indicate exemption from payment of assessment. P. W. 4 however in his evidence states that it is not so & that numbers 192 to 210 against which there are no cross marks represent the Sahars & that the cross marks indicate the names of persons from whom he actually made collections at the time. According to him, he has not personally collected the taxes as indicated in the assessment list from persons other than those against whose names cross marks are made. Therefore even if his evidence, that numbers 192 to 210 in Ex. 1 refer only to Sahars, is accepted, it is clear that he has not collected any assessment from the Sahars. His statement that the Guard collected from the rest cannot be accepted because he himself admits that there is no record to show it & the Guard has not been called to substantiate it. In any case in the absence of any evidence to show the actual collections from the Sahars, a mere assessment list like Ex. 1 to which the Sahars are not parties is not admissible against them to show their liability to

pay the assessment. It must also be noticed that P. W. 4 says that assessment lists of this kind were being prepared from year to year during the time of Raghunath Deb. No other list of the kind is produced. There is a very significant admission in P. W. 4's evidence that the collections from forest tax did not find place in estate accounts during the time of Raghunath Deb, & that during Madan Mohan's time the total collections from jungle taxes found place in estate accounts. This would mean that those accounts would not prove any collection from the Sahars as such.

[13] The next important document Ex. 26 dated 15-12-23 which is an award by certain arbitrators. It would appear from this award that in connection with the dispute between the then Zamindar Mouza Patia, there were certain proceedings which came up before the Mag. Mr. E. R. Cousins. The dispute related among other things to the right of the tenants to take forest produce. It was referred to arbitrators & the arbitrators passed an award dated 15-12-23 wherein the arbitrators recognise the right of the proprietor to realise royalty on fuel & prickly thorns taken from Patia jungle by the tenants according to rates prevalent in Khurda Khasmahal. The pltf. strongly relies upon this & it is contended on the other side that this was never acted upon. But whether this is so or not, it has no bearing on the present dispute, because the right claimed by the defts. in this case is not in their capacity as tenants of the village, but because they are the aboriginal inhabitants of the place. That may conceivably stand on a different footing.

[14] The next & most important document in the case is Ex. B. It is a report by one Mr. N. N. Datta, Deputy Mag. relating to jungle rights of Killa Patia dated 5-12-32. It definitely recognises the right of the Sahar residents of Mouza Patia including Chandrasekharpur to take the minor forest produce from the unreserved portion of Patia forest for purposes of domestic consumption & for sale in small quantities of headloads. Strong objection has been taken on behalf of the pltf. to the admissibility of this report. This report appears to have arisen on account of a complaint made by the Patia tenant against the Raja of Kanika regarding their forest rights. This complaint was registered as Misc. Case No. 67 of 1932 & was in the nature of revenue proceedings before the Revenue Comr. as appears from the Order Sheets, in the said Misc. Case, Exs. F, F-1 & F-2. By order dated 10-11-32, in Ex. F-1, it would appear that Mr. N. N Datta was directed to hold an inquiry & report & Ex. B dated 5-12-32 is the report thereupon. Mr. Datta himself has not been called & there is nothing to show whether or not he is available. The document has been marked on admission on the side of the defts. & therefore its admissibility or the value to be attached to it cannot be impugned on that account if otherwise it is admissible. There can be no doubt, that reports of public officials made in discharge of their official duties are admissible under S. 35, Evidence Act with reference to statements therein of relevant facts or facts in issue. This is well established by a number of P. C. cases, *Vide Muttu Ramalinga* v. *Perta Nayagam*, 1 I. A. 209: (3 Sar. 341 P. C.), *Martand Rao* v. *Malharao*, 55 Cal. 403 : (A. I. R. (15) 1928 P. C. 10). It has however been argued on the strength of *Mallikarjuna v. Secy. of State*, 35 Mad 21 : (14 I. C. 401) and *Subhaq Singh* v. *Raghunath Singh*, 36 ALL. 282 : (A. I. R. (1) 1914 ALL. 474) that the report of a public official which has been merely submitted to higher authorities for the latter's information or guidance & which itself does not bear the stamp of finality on it, is not admissible in evidence. The cases cited do not lay down any such broad proposition. In *Mallikarjuna* v. *Secy. of State*, 35 Mad. 21: (14 I. C. 401) a report was called for from the Tahasildar who asked the village Munsif to report. The Tahasildar's report was sought to be put in evidence to show that the village Munsif had reported that certain charities were not commenced on a particular date. It was held that the Tahasildar's report was not admissible in evidence of the fact that the charities had not been commenced by that date: *Subhag Singh* v. *Raghunath Singh*, 36 ALL. 282: (A. I. R. (1) 1914 ALL. 474) the Dist. J. asked the Collector to report which of the three persons suggested was the fittest to be appointed as the guardian & the Collector called for a report from the Kanungo. The report of the Kanungo was not admitted in evidence. This is intelligible on the ground that the Dist. J. had to decide the matter judicially & according to law by taking evidence himself & not on the report of the Kanungo. These cases do not help the pltf. in his contention that Ex. B is not admissible. I have been referred to no authority for the position that the report of a public official is inadmissible in evidence, merely because it was made in compliance with the orders of the higher authorities & was submitted to them.

[15] The case in *Ghanaya* v. *Mehtab*, A. I. R. (21) 1934 Lah. 890: (16 Lah. 377) is cited to show that S. 35, Evidence Act, is not intended to apply to the opinions of public officials based on or inferences drawn from the allegations made before them in course of inquiries conducted by them. In particular case the inquiry was one under S. 202, Cr. P. C. & different considerations may apply to judicial inquiry as distinct from revenue inquiry. While a judicial inquiry is to be based merely on evidence adduced before the officer, a revenue inquiry is not so limited & is to a substantial extent based on personal observation & information. The case in *Ghulam Mahomed* v. *Samundar Khan*, A.I.R. (23) 1936 Lah. 37: (165 I.C. 626) is referred to for the position that the statements in mere official correspondences which have no finality are not admissible in evidence. The report Ex. B, however, in this case is not of that category. On the other hand, in 35 ALL. 161 (sic), the ownership of a particular temple was in question & the report of a

Kotwal who made an inquiry into the ownership at the instance of the Political Agent was held admissible. It appears to me therefore that the report Ex. B is admissible in evidence. The P. C. Case reported in *Martand Rao* v. *Malharao*, 55 Cal. 403 at p. 406: (A. I. R. (15) 1928 P C 10) shows that such official reports are valuable & in many cases that is the only best available evidence of facts stated therein, but that the opinions expressed therein should not be treated as conclusive in respect of matters requiring judicial determination, however eminent the authors of such report may be. While therefore a report like Ex. B, is admissible, a distinction has to be made between the statements contained therein relating to relevant facts & the opinions expressed therein as to such relevant facts. So far as mere opinions are concerned, while they are admissible, the value to be attached is comparatively less. Now with reference to these principles the statements in Ex. B may be made use of in the present case. It may be noticed that the Order Sheets, Ex. H, H-1 & H-2 show that the report was accepted by the Revenue Comr. & that on that basis he attempted to bring about an amicable arrangement between the parties. But he does not appear to have succeeded in doing so. It may be mentioned at the outset that the report was concerned only with the question of the forest rights of the Patia tenants as such, as appears from the fact that the report arose out of a complaint by the Patia tenants. The report was not directly concerned with the rights of Sahar-residents of Mouza Patia as such, but the report contains the following valuable statements relating to forest rights of Sahar-residents of Patia:

"The next point of importance is that the Sahars, Bouris & other low class people who render some service by way of preserving the jungles, supplying fuels to the proprietor & his deity & helping the proprietor in shooting etc., not only take the fuel free of charges for their own use, but also for sale in small scale." Later on the report states "While going to other villages for recording evidence I came across some low class men & on inquiry from them, I was satisfied that they had never to pay any fees for taking fuel for their own use & also for sale in small scale." Later in the report he records his view that the inhabitants of the Killa Patia had a right to take fuel & prickly thorns from the Patia jungle & that the proprietor had the right of realising royalty from them, but states that the right to realise royalty was subject to certain exemptions & he proceeds to state "That there were exemptions is now admitted in so far as the Sahars are concerned." These statements extracted from the report, are not mere statements about his opinion, but are statements about the disputed right based on the actual information before him & are clearly admissible in evidence.

[16] It has been argued that the statements relate to certain admissions said to have been made before him & therefore the same cannot be acted upon unless the persons said to have made the statements are called as witnesses & the entire admissions are put on record & the witnesses are examined with reference to it. Cases in *Ram Parkash* v. *Anand Das*, A. I. R. (3) 1916 P. C. 256 : (43 Cal. 707); *Radha Kishan* v. *Hari Singh*, A. I. R, (14) 1927 Lah. 337 : (100 I. C. 800), have been cited in support of it. In *Ram Parkash* v. *Anand Das*, A. I. R. (3) 1916 P. C. 256. (43 Cal. 707) the admission referred to is the statement of a witness before a Mag. in a criminal case & what was rejected as inadmissible was the note relating to that statement as proof thereof. In *Molar* v. *Ram Parshad*, A. I. R. (14) 1927 Lah. 377 : (102 I. C. 198), also the position was similar. The position here is different. What is sought to be used here is not the supposed admission itself, but the statement of the officer about the right of the Sahars based on the personal information he has received from competent persons, who if at all were not interested in supporting the right & which information is therefore characterised by him as an admission. I have no doubt therefore that the above statements in Ex. B, are admissible in evidence & furnish strong proof, taken with the oral evidence, that as a matter of fact the Sahars were at the time of the report enjoying exemption from payment of any forest fees. This is fully in accord with the estimate of the oral evidence above noticed.

[17] It has been argued that this report shows that the taking of forest produce by the Sahars is connected with the services which they were rendering to the proprietor. The report does not show that as a fact that the right was conditioned by the service. The portions of the report relating to the connection of the right with the service are merely his opinion & his proposals for the future. The pltf. has put forward no case that the right of the Sahars if any was one conditioned by service. The question then would have arisen for consideration whether the right was one in lieu of services or burdened with services on the well-known distinction laid down in *Forbes* v. *Meer Mahomed*, 13 M. I. A. 438: (5 Beng. L. R. 529 P. C.) and *Lakhamgonda* v. *Baswantrao*, 35 C. W. N. 721: (A.I.R. (18) 1931 P. C. 157). No such alternative case having been raised in the pleadings, it is enough to say that taking the report Ex. B, as a whole & acting on the admissible portions thereof, it does not appear that the right of the Sahars was either permissible or conditioned by service.

[18] The next document to be considered is the village note relating to Patia village, Ex. (1) dated 8-4-1934, in current settlement relating to village Patia. The village note states that from time immemorial, the ryots used fuel, prickly plants for fencing & thatching material etc. from the estate jungles on payment of royalty the rate of which varied in different types. As pointed out in A. I. R. 1925, Pat. 754, this is only a piece of evidence & no presumption of correctness attaches to it. It would also appear from Dalziel's settlement report that the portion of the work relating to record of forest rights was not carefully done at that settlement. He remarks as follows at p. 45:

"The customs relating to jungle in this estate were only treated in some selected villages. I think that this work would have been of greater value if regular procedure had been adopted with issue of notice to interested parties."

In any case the village note refers only to the rights of tenants of the village & is based upon the award Ex. 26, already mentioned, which also relates only to the tenants. It has no reference to the rights of the Sahar-residents of the village. Of the other documents filed in the case there are a number of which relate to criminal cases between the proprietor & the villagers relating to forest rights. On the side of the pltf., Exs. 22, 22 A, 23 & 23-A, have been filed. In Exs. 22 & 22 A, certain Sahars were convicted for theft on account of having removed some wood on head loads, but it appears from the facts in that case that the removal was from the reserved portion of the forest. Exhibits 23 & 23-A, show that certain villagers were convicted for removal of wood from the forest, but it does not appear that the persons concerned were the Sahars. On the other hand in Ex. J, certain Sahars who were complained against by the Estate for unauthorised removal of forest produce were acquitted. Exhibits D & D.1 show similarly that some other Sahars against whom complaints were lodged for clandestine removal of fuel from Chandrsekharpur forest were finally acquitted, Exhibit K, shows that the Dist. Mag. who was moved to file an appeal against the acquittal, refused to do so on an elaborate consideration of the rights of the parties. These criminal proceedings above noticed, all relate to the period subsequent to the purchase of the estate by the Raja of Kanika & it is noticeable that these show that the Sahar-residents of Patia were acquitted on the few occasions when they were sought to be proceeded against & there is no clear instance in which they were convicted. Most of the other documents filed in this case relating to this question are counter-foils & account books produced by the estate relating to the periods subsequent to 1932. There is practically no documentary evidence relating to the prior period, but this is only to be expected, because the present proprietor was not likely to have had access to the records of the prior proprietor, whose estate he purchased in Ct. auction hostilely to him. None of the documents that have been filed on behalf of the pltf. of the dates subsequent to 1932, from which date, the new proprietor started vigorous steps for asserting his right to collect fees for the whole of forest produce, show any such collection with the Sahar-residents of Patia.

[19] The position therefore on the evidence is that while it is well established that the Sahar-residents of Patia have been accustomed to take the forest produce, there is no proof that any fee has ever been collected from them. No doubt the burden of establishing the customary right to take the forest produce in derogation of the proprietor's right to the forest is upon the defts. but where, as in this case, the practice of removal of forest produce is established & an attempt has been made to prove by evidence that fees have been collected for such removal & that attempt fails & it further appears that such fees were never collected from the Sahars while the evidence shows that the fees were in fact collected from others, it is reasonable to attribute the non collection as due to not mere lack of proof but to the existence of the right. The evidence therefore in my opinion to the extent that it goes clearly establishes that the Sahar-residents of village Patia including Chandrasekharapur were in fact exercising the right of collecting minor forest produce, as above stated, as of right & free of payment of any charges.

[20] It has been argued that even if this be found, this is not enough in law to establish the customary right on account of the following considerations—(1) There is no proof that the exercise of the right is from the time immemorial; (2) Such customary right which amounts to a right of *profit-a prendre* in gross cannot be acquired in law by prescriptive user; (3) The custom alleged being also for removing forest produce for purposes of sale is unreasonable; (4) The custom is claimed in respect of a particular class of residents of a village & not of the entire village & is not recognised in law; (5) The custom as now alleged is with reference to what is now said to be the unreserved portion of the forest & is inconsistent with the proprietor's right to reserve such other portions of the forest as he thinks fit. It is contended on all the above grounds that the custom is not established & cannot be held to be validly made out.

[21] As regards the first objection, the evidence adduced is sufficient to make out the exercise of this customary right for the period of living memory of the witnesses. In the case in *Mt. Sukhani* v. *Nawab*, A. I. R. (28) 1941 P. C. 21 : I. L. R. (1941) Kar P. C. 22) at p 32, their Lordships referring to local customs doubted the applicability of English Rule that a custom in order to be binding should be proved to have been used beyond living memory & stated as follows :

"It is undoubted that a custom observed in a particular district derives its force from the fact that it has from long usage obtained the strict forces of law, which must be ancient. But it is not the essence of the rule that its antiquity in every case be carried back to a period beyond memory of the man, still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period & with such invariability as to show that it has by common consent been submitted to as the established governing rule of a particular district."

Judged in this light, the evidence in this case relating to the length of time of the exercise of the custom is sufficient to make it out. With reference to proof of customs by immemorial user, it has been pointed out in *Mahamaya Debi* v. *Haridas Haldar*, 20 C. L. J. p. 183 : (A. I. R. (2) 1915 Cal. 161) that the proof of existence of the custom can-

not be carried back beyond living memory by direct evidence & it is held that if evidence showing the exercise of a right in accordance with the alleged custom as far back as living memory can go is given, it raises the presumption though only a rebuttable one as to the immemorial existence of the custom. This view is also supported by *Rajendra Narain* v. *Gangananda Singh*, A. I. R. (12) 1925 P. C. 213 at p. 216 : (52 I. A. 279). Therefore even according to this standard there is no difficulty in this case in holding that the custom alleged by the defts is made out on the evidence.

[22] The next point urged is that the customary right alleged is in the nature of a *profit-a-prendre* in gross. That is a right to take certain profit or produce arising from the property of another. If the exercise of such a right is acquired for the beneficial enjoyment of another tenement, that amounts to an easement as defined in the Indian Law. But where the exercise of such a right is not required for the beneficial enjoyment of another tenement, but is merely for the benefit of certain individuals or well-defined class of individuals, it is a *profit a prendre* in gross. It is well-settled that the evidence required for establishing, the acquisition of a *profit-a-prendre* which is an easement, & of a *profit-a-prendre*, in gross, is the same. (See *Chundee Churn* v. *Shib Chunder*, 5 Cal. 945 & *Arjun Kaikanta* v. *Manoranjan De*, A. I. R. (21) 1934 Cal. 461 : (149 I. C. 1213)). But it is urged that a customary right in the nature of *profit-a-prendre* in gross cannot be established by evidence of long user giving rise to the presumption of a lost grant & the case in *Rivers (Lord)* v. *Adams*, (1878) 3 Ex. D. 361 : (48 L. J. Ex. 47) & A. I. R. (17) 1930 ALL. p. 238 and *Brajendra Kishore* v *Iswar Kaibatra*, A. I. R. (20) 1933 Cal. 539 : (146 I. C. 427) and *Arjun* v. *Manoranjan* A. I. R. (21) 1934 Cal. 461 : (61 Cal. 45) are cited in support of this proposition. These cases are distinguishable on facts & it is unnecessary to notice them at length. It will be found on investigation of the facts in each of the Indian cases that the point considered was whether the exercise of the right claimed is reasonable or unreasonable & with that aspect I shall deal presently. But in so far as the principle laid down in the leading English cases *Lord Rivers* v. *Adams*, (1878) 3 Ex. D., p. 361: (48 L. J. Ex. 47) it is enough to say that the decision turns partly on technical considerations peculiar to English Property Law & that in the latter case in (1911) Appeal Cases P. 623, there was considerable difference of opinion in the House of Lords about the applicability of the principles of that case. In *Harries* v. *Earl of Chesterfield*, (1911) A. C. 623: (80 L. J. Ch. 626), the House of Lords decided against the acquisition of such a right by a majority of 4 against 3, Lord Chancellor Loreburn being in the dissenting minority. With reference to the principles relating to customary rights of this kind, the P. C. in *Abdul Hussain* v. *Mt. Bibi Sonadero*, A.I.R. (4) 1917 P. C. 181 : (12 S.L.R. 104) ; & *Mt. Subhani* v. *Nawab*, A. I. R. (28) 1941 P. C. 21 at P. 32 : (I. L. R. (1941) Kar. P. C. 22) have clearly pointed out that the principles of English law cannot be strictly applied. (See also *Bholanath* v. *Midnapore Zamindary Co.*, 31 Cal. 503 at p. 509 : (31 I A. 75 P. C.)) with reference to similar rights, the Madras H. C. in two cases in *Subramanian* v *Raghunatha Pillai*, A. I. R. (5) 1918 Mad. 169 : (44 I. C. 419) ; *K Kudumban* v. *Venkata Subramania*, A. I. R. (14) 1927 Mad 645 : (101 I. C 59) & the former relied on the dissenting view of the Lord Chancellor in *Harris* v. *Chesterfield*, 1911 A. C. 623 : (80 L. J. Ch. 626) in recognising similar customary rights. The provisions of the Forest Act providing for an inquiry into compensation for rights to forest produce when constituting a Govt. reserve forest clearly recognise that in India such customary rights can exist & can be acquired. It may be mentioned that the Forest Manual of Bihar & Orissa shows that such customary rights in respect of protected forests of Khurda Khasmahal which are contiguous to the suit forest are recognised by Govt. Therefore there is no valid ground for this objection.

[23] The next question that has been raised is that since the alleged custom is also for removing forest produce for purposes of sale, it is an unreasonable custom & reliance is placed on the well-known principle in English Law that a right in an undefined number of people to take a *profit-a-prendre* without stint & for sale must lead to the entire destruction of the property & is unreasonable (See (1918) 2 Ex. D. p. 397 at P. 310 (Sic)). The cases in *Brajendra Kishore* v. *Iswar Kaibarta*, A.I.R. (20) 1933 Cal. 539 : (146 I. C. 427) & *Arjun Kaibarta* v. *Monoranjan De*, A. I. R. (21) 1934 Cal. 461 : (61 Cal. 45) appear to some extent to support this contention. But it appears to me that this cannot be laid down as in absolute proposition of law that wherever a customary right to take forest produce from another man's land with a view to profit by sale of it is claimed, it must necessarily be held to be unreasonable. The decision of the question whether or not it is unreasonable must depend upon the circumstances & facts of each case. That is the view taken in *Subramanian* v. *Raghunath Pillai*, A. I. R. (5) 1918 Mad. 169 : (44 I. C. 419). In this case the right claimed though it is a right for purposes of sale, is not a right to take without stint & in unlimited quantities. It is a right to sell not in the open market, but only to the villagers of Patia & Chandrasekharpur. It is also a right to take in small quantities by head-loads by the very persons who are entitled to the right. Thus the right is limited by three considerations, namely, (1) the method of removal is personal & by head-loads, (2) the persons to whom it could be sold are only the villagers of the place, & (3) the sale is within the precincts of the village. It cannot be said that it is a right exercisable by a large & growing class of persons liable to heavy

increase in course of time so as to seriously destroy the right of the proprietor itself in the property. The right is claimed only in favour of the aboriginal residents of the particular village who are themselves not large in number & whose rapid multiplication in numbers is not to be assumed to be a matter of course. With reference to a similar contention in *Subramanian* v. *Raghunath Pillai*, A. I. R. (5) 1918 Mad. 169 at P. 171: (44 I. C. 419). Their Lordships say as follows:

"Such an exercise of the right has not hitherto led to the destruction of the fish in the tank nor apparently even to its diminution in numbers. There is no reason to assume a different result in the future. If there is excessive fishing the zamindar may have a right to restrain it, but that is not the question here."

[24] It must also be remembered that the question of reasonableness has to be judged with reference to conditions at the time of the possible inception of the custom (See *Mahamaya Debi* v. *Haridas Haldar*, 20 C. L. J. 183 at p. 192: (A. I. R. (2) 1915 Cal 161)). In this case the practice of an aboriginal inhabitant near the forest, eking out his livelihood by sale of minor forest produce was not only reasonable but probably inevitable in the olden times. The custom therefore cannot be held to be unreasonable. It is however desirable to observe that the right of the defts. in this behalf must be exercised consistently with the right of the proprietor to make reasonable arrangements to prevent any gross abuse of the right having regard to the limitations above set out.

[25] It has been suggested that it may not be possible for a Zamindar in this case to check & control whether the sale is made to the *bona fide* residents of the village only & is made within the limits of the village. This is a question of making some practicable arrangements, but cannot be held to make out that the custom alleged is unreasonable. The next objection that has been raised is that the custom is claimed not in respect of the entire residents of the village, but in respect of a particular section thereof, namely, the Sahars. It is contended that there can be a local customary right in favour of all the residents of a village or all the tenants of a village, but not in respect of inhabitants of a particular denomination in the village. On the other side the cases in *Kuar Sen* v. *Mammal*, 17 ALL 87: (1895 A. W N. 10) and *Mohidin* v. *Shivlingappa* 23 Bom. 666: (1 Bom. L. R. 170) have been cited to show that the customary rights in favour of a particular class of persons in a village, namely, Muhammadans, have been recognised valid in those cases having regard to the Indian conditions. It would appear that some doubt has been thrown on the correctness of these decisions in the decision of Mukherjee J. in *Gopal Krishna* v. *Abdul Samad*, 34 C. L. J. 319 : (A. I. R. (8) 1921 Cal 569) (See also *Ram Ran Bijaya Prasad Singh* v. *Abdul Ghani* A. I. R. (26) 1939 Pat. 682: (185 I. C. 350)). But the doubt expressed is only with reference to the question whether a right of burial can be acquired as a customary right & not whether a section of the inhabitants of a village can acquire a customary right. In A. I. R. 1927 Mad. 48 (sic) the validity of a customary right in favour of a particular class of villagers has been recognised. Whatever may be the correct view regarding the general question thus raised, it is noteworthy that the Bihar & Orissa Forest Manual, 1917 Edn. Vol. I, Part II, p. 88, R. 6 relating to the neighbouring Khurda Khasmahal protected forest clearly recognises the right of indigenous tribes of Sahars & Bouris to fell, cut, collect & remove certain specified kinds of forest produce, without any payment for sale, provided the sale is not to unprivileged persons under the rules. Therefore it does appear that so far as this customary right claimed in favour of the aboriginal Sahars is concerned, having regard to local conditions it cannot be held to be unrecognisable in law on the ground that the right is not claimed in respect of the entire inhabitants of the village, which has been negatived.

[26] The next objection that has been taken is that since the right claimed is only in respect of the unreserved portion of the forest & that since the right of the proprietor for constituting a reserve in the forest is not challenged the alleged customary right itself can be defeated by the proprietor's power for reservation & that accordingly such an illusory right cannot be claimed as a valid customary right. This appears to me to be no valid objection at all. If the customary right of the defts as claimed is established & upheld, it follows that the right of the proprietor for constituting reserves in the forest must be subject to it & the question resolves itself to one of properly balancing the two rights in an appropriate manner so as to prevent disputes as pointed out in P. C. case in I. L. R. 31 Cal. p. 503 at p. 510.

[27] There is thus no valid objection to the recognition in law of the customary right as now alleged on any of the grounds that have been arised to it. The defts. must therefore be held entitled to the right & the pltf. must be refused the injunction that he has asked for.

[28] In order to avoid any future misapprehension it is desirable to state that the right recognised by this judgment is one exercisable by the Sahar-residents of Patia & Chandrasekharpur to remove the minor forest produce of annual growth, from the unreserved portion of the Patia jungle, without any payment of fees, for their own domestic consumption & for sale, in small quantities, within the limits of Patia & Chandrasekharpur, to the residents thereof, by removal on head-loads. We do not decide in this case what is the exact nature of the minor forest produce of annual growth to which the right extends & what are the present limits of the reserved forest. But when such a question arises, the report of Mr. Datta, Ex. B &

the map & the report of the estate Amin EXS. 15 & 15-A will have a material bearing. The rights of the Sahars are without prejudice to the proprietory rights of the pltf to the forest so long as there is sufficient unreserved forest left for the legitimate exercise of the rights of the Sahars, (See *Bhola Nath* v. *Midnapore Zamindar Co*, 31 Cal. 503 at P. 510: (31 I. A. 75 P. C), for an analogous provision) & is also without prejudice to the right of the pltf. to make such reasonable arrangements as may be required to prevent any gross abuse of the rights having regard to the limitations of the same as above stated.

[29] In the result the appeal must be allowed & the suit dismissed with costs throughout.

[30] **Narasimham J.**—I agree.

V.B.B. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 337 *[C. N. 79.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Subarna Bissoiani—Deft.—Applt. v. *Arjuno Bissoi—Pltf.—Resp.*

Second Appeal No. 207 of 1946, D/- 29-4-1949.

(a) Evidence Act (1872), S. 32 — Unregistered gift deed is admissible with reference to collateral matters —Executant dead—Statement that donee is his legally married wife is admissible under cl (5) of S. 32 — It raises presumption of marriage—Burden to prove contrary is on him who so asserts — Evidence of class or clanproclivity to concubinage is not acceptable in rebuttal of presumption of valid marriage— Registration Act (1908), S. 49, proviso — Evidence Act (1872), Ss. 101 to 103 : A. I. R. (16) 1929 P. C. 135, *Rel. on.* [Para 7]

Anno. Evidence Act, S. 32, N. 26; Ss. 101 to 103, N. 41; Regist. Act, S. 49, N. 7.

(b) Hindu law - Marriage—Proof—Woman alleging her marriage to have taken place long ago—Court will presume valid marriage even in absence of proof of ceremonies of marriage. *Case law referred.* [Para 7]

(c) Hindu Women's Rights to Property Act (1937) —Applicability to agricultural land and in partially excluded areas in Orissa.

The Act as amended in 1938, has been extended to the partially excluded areas by notfn No. 8306-J., dated 14-12-38, published in the Orissa Gazette dated 23-12-38 at p. 897. By virtue of the Orissa Hindu Women's Rights to Property Act (Extension to Agricultural Land in Orissa) of 1944 (Orissa Act V [5] of 1944) the Hindu Women's Rights to Property Act applies retrospectively also to agricultural land. This Orissa Act has been extended to all the partially excluded areas including Koraput District by Notin. No. 3401-J., dated 9-9-44, published in Orissa Gazette dated 15-9-1944, at p. 228. [Para 3]

(d) Evidence Act (1872), S. 50 — Evidence of non-existence of relationship is not admissible under S. 50 —Evidence of concubinage is evidence of non-existence of relationship *(Obiter)* : A. I. R. (30) 1943 Cal. 76, *Ref.* [Para 7]

Anno, Evidence Act, S. 50, N. 1.

P. C. Chatterji—for Applt.; P. V. B. Rao—for Resp.

Jagannadhadas J.—The deft. is the applt. in this second appeal. The appeal arises out of a suit brought by the pltf. for recovery of two plots of lands described in the plaint schedule from the possession of the deft. These two items of land have been purchased in the name of the son of the pltf. under two sale deeds, EXS. B & C, dated 4-10-30 & 4-2-35 respectively. The pltf.'s son died in the year 1942 prior to the suit without leaving any issue. The deft. claims to be in possession as being his married wife. The pltf.'s contention is that the deft. is not the legally married wife of his son & that in any case the suit properties though standing in the name of the son were the joint family properties & that his son died undivided & that therefore the deft. had no title to the property. The Cts. below have found that the pltf. & his deceased son were undivided & that the properties covered in EXS. B & C, though standing in the name of the son, were joint family properties. They also held that the deft. is not proved to be the married wife of the deceased son of the pltf. On these findings both the Cts. below have decreed the pltf.'s suit.

[2] On the state of the law, as it stood on the date of the institution of the suit, namely, 22-12-43, the pltf. was entitled to a decree on the finding that the suit properties were the joint family properties & that the pltf.'s son died undivided from the pltf. There has, however, been a change in the law since, with retrospective operation, which has not been brought to the notice of the Cts. below.

[3] The suit property is situated in Koraput district which is a partially excluded area. The Hindu Women's Rights to Property Act of 1937 (Central Act XVIII [18] of 1937) as amended in 1938 has been extended to the partially excluded areas by notfn. NO. 8306-J, dated 14-12-38. published in the Orissa Gazette dated 23-12 38 at P. 897. After the decision of the F. C. holding that this Act is *ultra vires* of the Central Legislature, in so far as it relates to agricultural land, the Provincial Legislature has enacted the Orissa Hindu Women's Rights to Property Act (Extension to Agricultural Land in Orissa) of 1944 (Orissa Act V [5] of 1944) enacting that the Hindu Women's Rights to Property Act shall apply also to agricultural land & it is further enacted that the extension is to be with retrospective operation. This Orissa Act has been extended to all the partially excluded areas including Koraput Dist. by notfn. NO. 3401 J., dated 9-9-44, published in Orissa Gazette dated 15-9-1944 at P. 228.

[4] There can be no doubt, therefore, that if the deft. is the married wife of the pltf.'s son, she is entitled to her husband's share in the joint family property including the suit property.

[5] In this view as to the change of law, the outstanding crucial question in the case is whether the deft. is the married wife of the pltf.'s son. Though both the Cts. below found against the deft. on this question as a fact, it appears to me that this question has not received proper judicial attention in view of the other findings against her which were in the then state of law sufficient to entitle the pltf. to a decree. Two issues relevant to this point were raised at the trial, viz.,

Issue 3, whether the deft. is the legally married wife or a concubine of late Bhagaban Biswoi (pltf.'s son), Issue 4, whether there is any custom in the caste of the parties enabling a concubine to succeed & if so, is such custom legal and valid.

The trial Ct. found on issue (3) as follows :

"I have therefore no reason to disbelieve the pltf.'s witnesses that she was kept by the pltf.'s son."

On issue (4) he finds :

"Under the circumstances, she (deft. can, in my opinion, be taken to have occupied the same position as a married wife & to have got the same right to the property of her deceased husband in the absence of any custom or authority to the contrary."

[6] The appellate Ct. finds as follows :

"As appears from the evidence of the caste people, she was the concubine of his son & no marriage ceremony was gone through to celebrate the marriage between his son & the deft., even though she was admitted to the caste after purification & caste dinner."

He also finds that

"there was no tangible evidence on record to support the finding of the learned Munsif that the deft. must be taken to have occupied the position of a married wife so as to be entitled to inherit the property left by her husband."

[7] The suggestion that though a concubine, she was, by custom, entitled to inherit to her husband's property on account of her being treated as a married wife needs no serious consideration, because, as held by the learned Subordinate Judge on appeal, there was absolutely no evidence in support of this & counsel for the applt has not attempted to put his case on that footing. As regards the finding of fact about the married status of the deft. the Cts. below have come to halting findings & do not appear to have appraised the evidence from the correct legal standpoint. They have not realised that most of the evidence is inadmissible. The most important circumstance in the case on this matter which the trial Ct. has not noticed & which the appellate Ct. has not properly appraised, though it has noticed it is the fact that in the document, Ex. D dated 15-7-41, executed by the pltf's. son in favour of the deft., he makes a categorical statement that she is his married wife. Ex. D purports to be a deed of gift of the suit plots, but being unregistered is not operative. It is however admissible in evidence with reference to the collateral recitals therein. The pltf's. son, the executant of the document, being dead, his statement that the deft. is his legally married wife, is clearly admissible under S. 32, cl. (5), Evidence Act. It is not suggested that there was any dispute at the time with reference to which the pltf.'s son made a tendentious statement in favour of the deft. This document appears to have been put in evidence after the pltf.'s examination was over, but the pltf. could have been recalled to speak to any circumstance relating to the document which may weaken the value to be attached to these recitals in the document. But that has not been done. All that is suggested on the side of the resp. is that this document is not genuine. But we cannot accept this suggestion. It has been formally proved on the side of the deft. by an attestor thereto O, D. W. 3 & it appears from the exhibit-list that this has been marked without objection. The recital in the document, Ex. D made by the pltf's. son that the deft. is his married wife is, in my opinion, sufficient to throw the burden of proof entirely on the pltf. to show that the deft. is not the married wife of this son. It is true that the deft. has no other evidence to support her case apart from this recital & her own evidence. No doubt she appears to have said as D. W. 1 "Bhagaban kept me as his wife." Too much stress, however, cannot be laid on the use of the word "kept" in the deposition, remembering that she must have given her evidence in Oriya. She has categorically stated in her written statement that she was the married wife & rebutted the pltf's. averment that she was his concubine. It cannot be easily assumed that she totally gave up that case in her evidence. The question, therefore, is whether there is sufficient evidence on the side of the pltf. to rebut the presumption in favour of the deft. The pltf. & his witnesses P. Ws. 2 to 6, in effect, did nothing more than to assert that she was the concubine of Bhagaban, of these only P. Ws. 4 & 5 belong to the same caste as of the parties, namely, Sudhi caste but belong to villages different from the pltf's. village. Neither they, nor any of the other witnesses are shown to have had any special means of knowledge. Evidence of this kind is nothing more than mere opinion which, to be admissible, must be the opinion of persons having special means of knowledge & expressed by conduct according to S. 50, Evidence Act. Further it is doubtful whether under that section, evidence of non-existence of relationship is admissible. (See the instructive judgment in *Chandulal* v. *Bibi Khatemonnessa* A. I. R. (30) 1943 Cal. 76 at p. 80 (col. 2): (I. L. R. (1942) 2 Cal. 299)). Evidence of concubinage is evidence of non-existence of relationship. In any case the opinion must be expressed in conduct. In this case, as found by both the Cts. below, the conduct if any is the other way. The pltf. & his witnesses admit that the deft. who belongs to the Sundhi caste has been admitted to the caste after purification ceremony. The pltf. also admits that she cooks in his family & in the feasts & even in the funeral feast she sat in the same row & ate. The evidence adduced, therefore, is wholly insufficient to displace the presumption which arises in her favour under Ex. D. The pltf's. witness have given evidence that the deft. before she came to live with the pltf's son was living in concubinage with some persons & that she was at one time also the married wife of one Krishno. Her previous immoral character, if any, has no bearing in the case except as improbablising that the husband would not have taken her in marriage. But that cannot rebut the proof of marriage afforded by the husband's statement, Ex. D. If it was positively proved that when she was entertained by the pltf's. son, her relationship with him started in concubinage, the position might have been different as found in the cases in *Mt. Jarintool Butool* v. *Mt. Hoseinee Begum*, 11 M. I. A. 194 : (10 W. R. 10 P. C.) &*Ghazanfar Ali Khan* v. *Mt. Kaniz Fatima*, 32 ALL. 345 : (6 I. C. 674 P. C,) & other cases. The

suggestions that she was at one time the married wife of one Krisbo might also if proved, have gone against the deft. If it appeared that she continued to be the married wife of Krishno by the time when her relationship with Bhagaban started, then her alleged marriage would have been invalid. But it appears from the evidence on the plf's side itself that she was driven away by Krishno within about three months of her marriage with him & also that Krishno had died since (prior to her coming under the protection of Bhagaban, see evidence of P. W. 5). It is not shown that in this caste the remarriage of a divorced woman or of a widow is prohibited. The deft. being admittedly of the same caste no legal bar to the marriage has been made out. The appellate Ct. appears to have assumed that the evidence shows that no ceremony to celebrate the marriage was gone through. There is, however, excepting the vague statements of the witnesses that she was a concubine, which are really inadmissible, no positive evidence of competent persons that no ceremony took place at all or what were the customary ceremonies for marriage in the caste. The marriage itself, if any, has taken place, according to the deft. about 30 years ago. In such cases & in such circumstances there is a strong presumption in favour of a legal & valid marriage & of the performance of the requisite ceremonies, as has been laid down in a number of cases, starting from *Ramamani Ammal* v. *Kulanthai Natchear*, 14 I. A. 346 : (2 Sar. 736). (See also *Manjilal* v. *Chandrabati*, 38 Cal. 700 : (38 I. A. 122 P. C.); *Bipin Behari* v. *Atul Krishna*, 15 I. C. 328 (2) (Cal.); *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*, (1881) 6 A. C. 365: (50 L. J. P. C. 28) & *Inder Singh* v. *Thakar Singh*, 2 Lah. 207: (A. I. R. (8) 1921 Lah. 20)). It is no doubt true as pointed out in *Ma Ween Di* v. *Ma Kin*, 35 Cal. 232 : (4 Beng. L. R. 175), by the P. C. that the presumption in favour of lawful marriage is not to be lightly applied to situations where sex relationships are proved to be loose & the appellation "wife" is indiscriminately used. But it is also equally the law as pointed out by P. C. in *Mohabbat Ali Khan* v. *Mahomed Ibrahim Khan*, A.I.R. (16) 1929 P.C. 135: (10 Lah. 725) that mere evidence of what may be called class or clan proclivity to concubinage is not admissible in evidence & cannot be used to rebut the presumption of marriage. In the present case there is nothing more than some loose evidence that persons of this caste take women as concubines & treat them as wives. This is the sort of evidence which is inadmissible according to the P. C. case in *Mohabbat Ali Khan* v. *Mahomed Ibrahim Khan*, A.I.R. (16) 1929 P.C., p. 135: (10 Lah. 725). There is in this case nothing more than vague evidence that persons of this caste keep concubines & that the deft. lives in concubinage, which is as already pointed out inadmissible or at any rate wholly insufficient to displace the presumption afforded by the recital in her favour in Ex. D. It must, therefore, be found in disagreement with the Cts. below that the deft. is the married wife of the pltf's. deceased son, Bhagaban.

[8] It, therefore, follows that the pltf. cannot treat the deft. as a trespasser & obtain ejectment against her in respect of the suit properties. His remedy, if any, would to be bring a suit for partition of the entire family properties including the suit properties & recover from her such of the properties as may not be allotted to her share. In the result, therefore, the appeal will be allowed with costs & the decrees of the lower Cts. set aside & the suit dismissed. So far as the costs of the Cts. below are concerned, both the parties will bear their respective costs.

[9] **Narasimham J.**—I agree.

R.G.D. *Appeal allowed.*

A. I. R. (38) 1951 Orissa 339 *[C. N. 80.]*

RAY C. J. & PANIGRAHI J.

Gopinath Jiew & others — Petnrs. v. *The Comr. of Hindu Religious Endowments & another—Opposite Party.*

Civil Revn. No. 166 of 1948, D/- 20-4-1949.

(a) Orissa Hindu Religious Endowments (Amendment) Act (XXXI [31] of 1947), S 3 (1) - Applies to suit which has already been instituted & is pending at commencement of Act — Suit instituted after amendment is not considered to be stayed. [Paras 5 & 6]

(b) Orissa Hindu Religious Endowments (Amendments) Act (XXXI [31] of 1947), S. 3 (1) — What is intended to be stayed is the trial of suit challenging validity of Comr's. order & not all proceedings — Ct. can pass interlocutory order of injunction for ends of justice—[Per *Ray C. J.*] There is no distinction between stay under S, 10, Civil P. C. & stay under this section] —Civil P. C., (1908), S. 10: A.I.R. (9) 1922 Bom. 276, *Rel. on.* [Para 7]

Anno. C. P. C., S. 10. N. 12.

(c) Interpretation of Statutes—Intention of Legislature—Ct. is not concerned with nor is it its function to speculate on what intention of Legislature could more probably be -Only when language admits of several constructions, that Ct. may accept one in preference to other. [Para 6]

M. M. Das—for Petnrs.; Advocate-General & N. Das —for Opposite Party.

Ray C. J.—It arises out of an order of the Munsif of Cuttack refusing to grant a temporary injunction to the pltfs.-petnrs. by way of restraining the deft. 1 (O. P. 1), Hindu Religious Endowments Comr. from levying contribution from the pltf. under the provisions of the Orissa Hindu Religious Endowments Act.

[2] The Comr. in exercise of the powers under the Act declared the endowment a public one, & accordingly, is going to levy the usual contribution which, in this case, amounts to Rs. 80 annually, the aggregate of the claim, at the time the petn. was filed, amounting to Rs. 240. The prayer for injunction has been rejected on two grounds, namely, (i) that the suit having been stayed under S. 3, (Orissa Hindu Religious Endowments Amendment Act (Orissa Act (XXXI [31] of 1947), the Ct. has no power to issue injunction; & (ii) that according

to the balance of convenience, the petn. has no merits,

[3] We have to consider two very important questions of law

(i) Whether the suit is one within the purview of s. 3 of the Act, &

(ii) Whether the statutory stay of the suit deprive the Ct. in which a suit of the specified nature is pending of this usual jurisdiction & power to protection to the parties by interlocutory preventive orders, such as, Issue of injunction, appointment of receiver, & attachment of properties before the judgment &c.

[4] The present suit was instituted in the year 1948, that is, after the date of commencement of the Amendment Act. Section 3 reads :

3. (i) Subject to the provisions of sub-s. (2), all suits instituted under the provisions of sub-s. (2) of S. 64 of the said Act & pending on the date of the commencement of this Act shall be stayed for a period of two years from the said date.

(ii) Notwithstanding anything contained in sub-s. (1) the Provincial Govt. may direct that any suit or class of suits stayed under sub-s. (1) shall be proceeded with from the stage which had been reached when the suit was stayed.

[5] The plain grammatical meaning of the language in which the sub-s. (1) has been enacted leads to only one construction, to wit, that the class of suits specified for the purpose of the Act includes those which had been instituted before the commencement of the Act & were pending at the time. It has been very strenuously contended by Mr. Advocate General who represents the Comr. that the section must be so interpreted as to give effect to the intention of the Legislature as gathered from the preamble & the scopes & object of the Act. The part of the preamble material for the purpose is:

"Whereas it is expedient to provide for the stay of certain classes of suits pending further legislation , . . . ," The preamble does not at all indicate that all suits under S. 64 (2), Hindu Religious Endowments Act, & intended to be the target of the legislation for the purpose of stay. The class of suits referred to in the preamble must be those specified in that behalf in S. 3. That the intention of the Legislature was to stay all such suits instituted either before or after the commencement of the Act does not appear from the preamble. It does not proceed to say what further the legislation was going to be nor how the trial of such suits was injurious or harmful to the due administration of the Act. Had there been any such indication that could have been prayed in aid to find out the intention of the Legislature as to what class of suits were intended to be stayed. So the preamble is quite unuseful in this respect. We have, therefore, to confine ourselves to the language in which S. 3 has been enacted. The material words are: "all suits instituted . . . . . & pending on the date of the commencement of this Act. In order to include suits to be instituted after the commencement of the Act in the class of suits specified in the section, one must read "all suits to be instituted "or" all suits whenever instituted". I am unable to introduce these words into the section which would amount to creating a new section or usurping the functions of the Legislature. Besides, the words "all suits instituted" are further controlled by the words "and pending on the date of the commencement of this Act". In order that a suit may come within the purview of the class, it must be one not only instituted but also pending on the date of the commencement of the Act. By any stretch of imagination & without replacing the present section by a new one, it is difficult to conceive that the section, as expressed, can, at all, be construed to include all future suits. Mr. Advocate General referred us to certain passages from Maxwell on Interpretation of Statutes in support of his contention that 'and' can be read as 'or'. That too will not improve the position. That would be reading the section as : "all suits instituted "or" (all suits) pending on the date of the commencement of this Act". The meaning of the section remains as it is, even if 'and' is substituted by 'or' or is deemed equivalent thereto. Unless you introduce certain language to the section which would amount to say "all suits when so instituted under the provisions of S. 64 (2) including those pending on the date of the commencement of this Act", you cannot give effect to the contention raised by the learned Advocate General. Besides, as rightly pointed out by my learned brother, in course of argument, sub s. (2) fortifies our view that the construction we have put upon sub-s. (1) is the only admissible one. Sub-s (2) is an enabling provision empowering the Provincial Govt. to direct that any suit shall be proceeded with from the stage which had been reached when the suit was stayed. This could hardly be translated into action in its application to a suit not instituted on or before the commencement of the Act. Any suit which is instituted, if at all, after the commencement of the Act, should never reach any stage so as to be proceeded with from that stage. It is a still-born suit which never breathed nor moved & it is beyond conception that it should, even notionally, reach any stage. That 'stage' is not intended to refer to merely the 'stage' of filling is clear from the language of sub-s. (2) that is 'the stage which had been reached when the suit was stated'. Can it be predicated of a suit filed after the date of commencement of the Act that a stage had been reached before its filing? Could it be reasonably construed that the Legislature intended that the Govt. should exercise the power contemplated in the sub-section only in pre-amendment cases & not in the post-amendment ones? Sub-Ss. (1) & (2) of the section must be taken as co-extensive as to their respective fields of operation, &, in that contingency, sub-s. (2), which is clear in its expression, must be prayed in aid of construction of sub-s. (1). I shall try to read sub s. (1) as divisible into two mutually exclusive or disjuncted parts divided by disjunctive 'or'. In doing so I shall omit the words 'subject to the provisions of sub-s. (2)', as they are common to each of the parts. One part will read:

"All suits instituted under the provisions of sub-s. (2) of S. 64 of the said Act shall be stayed for a period of two years from the said date."

The other part will read "all suits pending on the date of the commencement of this Act shall be stayed". Looking at the two parts severally, the first part may cover-assuming 'instituted' to mean either 'to be instituted 'or' whenever instituted'-post-amendment suits; but what about the second part? The latter contains no words of limitation so as to specify the class of suits but refers to 'all suits' irrespective of any characteristic features. Did the Legislature intend to paralyse the civil administration of justice till two years from the commencement of the Act (XXXI [31] of 1947)? That could be only in the land of absurdities. Another reading of the second part of the sub-section might be "the section itself as a whole so as to define the suits as are instituted before but pending at the Commencement of the Act". This amounts to not reading 'or' for 'and' by way of complete replacement but reading both as 'or' a disjunctive conjunction & also as a conjunctive one. In grammar, when this is intended, the language used is 'and/or'—a formula allowing readers to take either or both of two expressions (e. g. contributions in money and/or garments).

[6] Besides, there are certain other considerations which also compel us to the view. In S. 64 (2), the time limit for instituting a suit challenging the correctness of the Endowments Comr.'s order is one year. The Amendment Act does not raise it to two years or more. If the bar of limitation is to be avoided, the party must file a suit, this amending Act notwithstanding, within one year of the Comr's order, under challenge. He should file the suit, pay c. f. & then be prevented from proceeding further. This could never have been the intention of the Legislature. If it were so, they could have, in very simple language, expressed the section & could have kept operation of sub-S. (2) of S. 64 in abeyance pending further legislation. Unnecessary & unuseful harassment to the members of the public can never be imagined to have been within the contemplation of the Legislature. One construction would have led to consequential amendment of S. 64 or its abeyance for two years & the other would require neither this nor that. Under the circumstances, it is futile to argue that the intention of the Legislature was to harass the people & to compel them to file suits spending money over them but for no purpose. Besides, we are not concerned with nor it is our function to speculate on what the intention of the Legislature could more probably be. It is only when the language employed admits of several constructions, we may accept one in preference to the other in order to give effect to the Legislature's intention when that appears clearly within the four corners of the piece of the legislation, under consideration. Here, neither the intention is clear nor the language admits of more than one construction, namely, the one which we have been forced to put on the section. In our view, therefore the present suit is not one which shall be considered to have been stayed by the Amendment Act (XXXI [31] of 1947).

[7] The next point, for consideration, is that conceding that the suit is within the class of suits which have been stayed, if the Ct. is deprived of his power of giving protection to an aggrieved party by such interlocutory orders as an injunction. This leads us to think that if the Legislature has not prevented the suits from being instituted, they cannot be said to have deprived the Ct. of the powers of protection by maintaining the *status quo ante*. What has been intended to be stayed must be the trial of the suit challenging the validity of the Comr's order. The matter is not without an authority. In the case of *Senaji Kapurchand* v. *Pannaji Devichand*, 46 Bom. 431 : (A I. R. (9) 1922 Bom. 276), it has been held:

"It is competent to the Ct. to pass interlocutory orders, e. g., orders for a receiver or an injunction or an attachment before judgment, where a suit has been stayed under S. 10 of the Procedure Code, 1908".

I find no distinction between the stay, as enacted in S. 10, & the provision for stay in this Act. Both the stays are as against adjudication of the subject matter of dispute. If the Legislature intended that not only the trial of the suit should be stayed but also that in matter of all interim protections against continuance of injury, violence & ravages to one's property he should be made completely defenceless, they must express themselves clearly. To hold that it did so intend, it would be assigning to it attribute of reacting Czar's regime in this land. They could have kept in abeyance or suspense the operation of S. 64 (2), though that should not have been enough, because as against civil wrong, a citizen has got a right to sue under his fundamental right & under Civil P. C. If they did do so it must be with a purpose, namely, at any rate they did not contemplate that they would make the aggrieved defenceless as against a containing wrong by paralysing the interim machinery of temporary protection. If I assume that the Legislature has paralysed & freezed the said machinery, I shall have to assume that the Hindu Religious Endowments Comr. has been let loose upon the public as a licensed despotic autocrat, like Autocrat of all the Russians (title of the Czar)." I cannot conceive for a moment that the Legislature intended such irresistible harassment to the public in relation to their fundamental rights. Under the circumstances we are unhesitatingly of opinion that, even in all suits, which come within the class specified in S. 3 as interpreted by us in the earlier part of this judgment, the Cts. have got the power of passing interlocutory orders by way of protection to the aggrieved by way of maintaining the *status quo* till the disposal of the suit.

[8] Coming to the merits of this appln. it is contended by the learned Advocate-General that the levy of contribution is not going to be a very

serious affair nor to inflict any irreparable loss & injury to the pltfs. & further urges that it being a stone temple situate beyond the homestead of the pltfs.-sebaits, presumably it is a public temple, or in other words, that, prima facie, the order of the Comr. is correct. It is difficult to pre-judge the issue nor is it possible to say that it is easy for the pltfs. to get back the contribution realised from them in case they succeed in the suit. Besides, as Mr. Das, the learned counsel for the petnrs. has put in, the payments of these contributions should naturally reduce correspondingly the funds available for the upkeep of the worship. Under the circumstances, I consider that the balance of convenience is in favour of the petnrs. I should, therefore, allow this petn & direct that deft. 1 be restrained from levying any contribution payable under the provisions of the Orissa Hindu Religious Endowments Act from the pltfs. including the deity & his properties.

[9] The civil revn. is allowed with costs as against deft. 1. Hearing fee is assessed at three gold mohurs.

[10] **Panigrahi J.**—I agree, but I would like to add a few observations in view of the importance of the matter involved. If the intention of the Legislature was to direct stay of suits to be instituted after the commencement of the Orissa Act No. 31 of 1947, nothing could have been simpler than to say that no suit shall be instituted to challenge the decision of the Endowments Comr. under S. 64 (2) for a period of two years. It would not be legitimate to attribute vagueness to the Legislature when by adopting this simple language it could have brought in all suits instituted before or after the commencement of the Act within its scope. It says that :

"all suits instituted . . . . . & pending on the date of the commencement of this Act shall be stayed for a period of two years from the said date."

'All suits instituted' could only have reference to those that had already been instituted. The words 'and pending' have also to be read conjunctively with the previous clause beginning with 'all suits instituted'. The proper construction should therefore, be that a suit should have been instituted & been also pending on the date of the commencement of the Act if the Act is to apply. Furthermore, the section says that 'a suit shall be stayed for two years from the said date'. How can it be said that a suit shall be stayed for a period of two years from the date of the Act unless it was pending on that date ? To give effect to the words 'for a period of two years from the said date', I am compelled to restrict the operation of S. 3 (1) to suits which were capable of being stayed for two years from the commencement of the Act. This could only apply to a suit which had already been instituted & been pending on the date of the commencement of the Act. Reference to the language of S. 3 (2) also leads to the same result. The Govt. is given the power to direct that a suit shall be proceeded with from the 'stage which had been reached' when the suit was stayed. The suit is stayed under that Act. Therefore, the 'stage' referred to in sub-s. (2) can only be the 'stage' which had already been reached before the commencement of the Act. My third reason for arriving at this conclusion is that the section contemplates stay of 'suits'. Does it mean as was contended by the learned Advocate-General, that the trial of the suit alone is stayed ? That appears to be the meaning of the language used by the Legislature though it could easily have said that 'all proceedings except the trial of suits shall be proceeded with'. Otherwise, we are driven to the position that a suit must be filed under S. 64(2) within one year of the order of the Comr. & must be stayed under the Act XXXI [31] of 1947 as soon as filed. The result would be preposterous because the Ct. cannot check the plaint nor can even order for supply of deficit c.-f. nor can do any thing in the way of progress of the suit. If this were the intention of the Legislature, as strict construction of the language would lead us to hold, we arrive at the same conclusion namely, that the Act would not apply to a suit filed subsequent to the commencement of the Act.

[11] I am also inclined to accept the contention of the learned Advocate-General &, in agreement with my Lord, will hold that no proceeding other than adjudication of the rights involved in the suit was intended to be stayed & that the Ct. is at liberty to pass interim or interlocutory orders as may be necessary from time to time, in the interest of justice. In the present case, I do not see how the balance of convenience can be on the side of the Comr. It is urged for him that the money now paid can, at any time, be recovered from the Comr. &, therefore, no injunction should issue. It is equally that the Comr. can go on with his administration of endowment even without payment of any sum by the petnrs. & administration of religious endowments is not likely to suffer because of the non-payment of the contribution levied on the petnrs. I have, therefore, no hesitation in arriving at the same conclusion, namely, that this is a fit case in which the injunction should issue restraining the Comr. from realising contribution from the petnrs. The petn. should be allowed with costs, as proposed by my Lord the learned Chief Justice.

R.G.D. *Revision allowed.*

A. I. R. (38) 1951 Orissa 342 *[C. N. 81.]*

JAGANNADHADAS AND NARASIMHAM JJ.

The Province of Orissa & another—*Defts.*—*Applts.* v. *Durjodhan Das Gaontia & others*—*Pltfs.*—*Resps.*

Second Appeals Nos. 166 & 157 of 1945, D/- 22-2-1949.

(a) Tenancy Laws—C. P. Tenancy Act (XI [11] of 1898), Ss. 56 & 58— Dismissal of Nariha (village servant) on his failure to perform duties— Held on construction of wajib-ul-arz & Ss. 56, 58, that Lambardar

& Panchas have a right to dismiss—It is not, however, an unfettered right—Actual ejectment of Nariha from holding is done by Revenue Officer after lambardar & panchas have passed dismissal order — Though no appeal lies against dismissal to Revenue Officer & though there is no necessity of confirmation of dismissal, Revenue Officer must see that dismissal is lawful when his jurisdiction is invoked for ejecting the Nariha—When dismissal would be held to be unlawful stated. [Para 6]

(b) Lim. Act (1908), Art. 120— Holder of office in possession thereof—Interference with his performance of duties—Each interference gives fresh cause of action —He may abide his time : A. I. R. (28) 1941 Mad. 81 and A. I. R. (4) 1917 Oudh 168, *Rel. on.* [Para 10]

Anno. Lim. Act, Art. 120 N. 3.

(c) Specific Relief Act (1877), S. 42— Declaratory suit for proper construction of statute is maintainable *Narasimham J.* 22 Mad. 270 (P. C.), *Rel. on.* [Para 9]

Anno. Specific Relief Act, S. 42, N. 1.

(d) Specific Relief Act (1877), S. 42— Suit in Civil Ct. for mere declaration, where giving of consequential relief falls within exclusive jurisdiction of Revenue Ct. is maintainable. [Para 8]

Anno. Specific Relief Act, S. 42, N. 10.

(e) Civil P.C. (1908), O. 1 Rr. 3 & 10—Cause of action arising from orders of Revenue officers — Province though not necessary party, held proper party. [Para 8]

Anno. Civil P. C., O. 1, R. 10, N. 4.

(f) Tenancy Laws—C. P. Tenancy Act (XI [11] of 1898), S. 97—Suit though technically between landlord & tenant, having nothing to do with relationship of landlord & tenant — Suit merely for declaration on question of interpretation of S. 58 & wajib-ul-arz— Suit is maintainable in civil Ct. [Para 9]

Advocate-General & B. Mohapatra—for Applts.; P. C. Chatterji, B. N. Das & B. Dube—for Resps.

Narasimham J.—These two appeals are by the defts. against the judgment of the Subordinate Judge of Sambalpur reversing the judgment of the Munsif of Bargarh & decreeing the pltf's. suit for a declaration that they have the sole and exclusive right to appoint & dismiss a Nariha who is a village servant & that the revenue authorities have no right to interfere in any way with the exercise of that right by the pltfs.

[2] Pltf. 1 is the Lambardar Gaontia of Mouza Gudesira which is a Gaontiahi village in Sambalpur district. Pltfs. 2 to 5 are the Punches of the said village who are elected by the raiyats for the purpose of assisting the Lambardar in the management of the village. In the last settlement deft. 1 was recorded as a Nariha in respect of 9·42 acres of land which were held by him rent-free (Ex. 2 A). In the wazib-ul-arz of the village (Ex. 2) it is recorded that the Nariha may be dismissed & deprived of his service lands by the Lambardar & the Punches for failure to render due service. The duties of a Nariha have not been clearly described in the wazib-ul-arz; but from the Settlement Reports of Dewar (1906) & Hamid (1926) it appears that a Nariha is a village servant whose duties are those of a herdsman & water-carrier of the whole village. Sometime in 1930, the Lambardar & the Punches dismissed deft 1 from his post as Nariha & appointed one Nitai Bhoi in his place. Then they applied to the S. D. O., Bargarh, under S. 58, C. P. Tenancy Act for ejectment of deft. 1 from his holding & for putting the newly appointed Nariha Kasiram Bagar in possession of the said holding. The S. D. O. passed orders for ejecting deft. 1 & putting his successor in his place (Ex. 1). But on appeal the D. C. of Sambalpur (Ex. B 2) held that deft. 1 had been wrongfully dismissed by the Lambardar & the Punches & therefore, set aside the eviction order of the S. D. O. Against this order of the D. C. an appeal was preferred to the Comr. Mr. C. L. Philip who by his order dated 11-7-32 (Ex. B-3) maintained the order of the D. C. & observed that the power of the Lambardar & the Punches to dismiss a Nariha was not arbitrary but that it should be exercised reasonably & that before passing such an order there should be a clear finding as regards his specific neglect of duty & further the reasons for his dismissal should be formally recorded. Soon after the passing of this order by the Ct. the Lambardar & the Punches drew up proceedings & again dismissed deft. 1 on 31-10-32. This second order of dismissal was confirmed by the S. D. O., Bargarh but was set aside by the D. C. Sambalpur. There was a further appeal to the Comr. Mr. E. S. Hoernle who by his order dated 16 9-33 (Ex. B-4) maintained the order of the D. C. reinstating deft. 1. But at the same time he pointed out certain anomalies caused by the absence of clearly defined duties of the Nariha & suggested that if the dispute should recur, a responsible officer should define not merely the theoretical but also the practical limits of his duties. On 15 2-34 the S. D. O, after visiting the village & persuading the parties to agree to settle their differences, passed an order enumerating the various duties to be performed by deft. 1 as Nariha for the village community (Ex. 4). The necessity for enumerating the various duties of a Nariha arose chiefly because there was a serious difference of opinion between the Lambardar & the Punches on the one hand & deft. 1 on the other as to what were his 'due duties'. Against this order of the S. D. O. enumerating the duties of deft. 1 there was an appeal to the D. C. who by his order dated 17-4-34 (Ex. 5) directed the S. D. O. to make furthat enquiries. The S. D. O. then held a further enquiry & passed orders on 23 6 34 (Ex. 6) clarifying the nature of the duties of the Nariha in certain respects. Against this order also there was an appeal to the Comr. who by his order dated 16-12-34 (Ex. B 5) rejected the appeal as being not maintainable; but suggested to the D. C. that some attempt should be made to settle the dispute by compromise. Apparently subsequent attempts at compromise by the revenue authorities proved abortive & then the dispute between the parties was again taken to the Comr. who by his order dated 12-7-35 (Ex. B 6) allowed deft. 1 to continue in the service holding as a Nariha. In this order also he made some observations regarding the anomalies arising out of the existence of these obsolete service holdings. It appears that he intended to visit the spot himself & settle the matter; but subsequently gave

up the idea & the D. C. Sambalpur, by his order dated 30-6-37 (EX. B-7) warned the Lambardar Gaontia (pltf. 1) from creating any trouble. The Gaontia again appealed to the Revenue Comr. Sir John Dain who by his order dated 13-3-38 (EX. B-8) refused to interfere observing as follows :

"I am not prepared to pass any orders in this case. The whole arrangement is an anachronism & no longer workable. The authorities can enforce a custom which is certain & reasonable. They cannot enforce a custom which the passage of time has rendered unreasonable. Nor can they, as one of my predecessors has suggested, modify that custom or attempt to adopt it to present conditions. The whole of the Sambalpur law will come under review shortly, & no doubt provision will be made as has been made in C. P. to resume their service tenures when the service can no longer be rendered. Till then nothing can be done."

[3] I may at this stage further point out that when the revenue authorities refused to evict deft. 1 from his holding or to put one Kasiram Bagar who was appointed by the Lambardar & the Punches in his place, the said Kasiram instituted a civil suit against deft. 1 in the Ct. of the Munsif of Bargarh. But that suit was dismissed by the Munsif (EX. C) on the ground that the civil Ct. had no jurisdiction to try the same.

[4] In the present litigation the Lambardar & the Punches have impleaded the Nariha & the Province of Orissa as defts. & prayed for a declaration to the effect that their right to appoint & dismiss a Nariha who is a village servant was unfettered & that the revenue authorities have no right to interfere in the matter in any way. In support of this right they had relied on the entries in the wazib-ul-arz which under S. 82, C. P. Land Revenue Act, 1881 should be presumed to be correct until the contraty is shown. There is absolutely no evidence on record to show that the entries in the wazib-ul-arz are incorrect. On the other hand, from the orders of the Comr. dated 11-7-32 (EX. 1-A) & 16-9-33 (EX. 1-B) it is clear that the revenue authorities also recognised the right of the Lambardar & the Punches to dismiss a Nariha but they pointed out that this right should be exercised reasonably & that an arbitrary exercise of that right may be subject to interference by the revenue authorities.

[5] The main question for decision, therefore, is whether this view of the revenue authorities is correct or else whether the Lambardar & the Punches have an absolutely unfettered right to appoint & dismiss a Nariha. In considering this question it is necessary to discuss briefly some of the relevant provisions of the C. P. L. R. Act & the C. P. T. Act. In the C. P. L. R. Act there is absolutely no provision regarding the duties of any village servant other than the village watchmen. So far as the village watchman is concerned, express provisions were made in S. 147-A & in the rules framed thereunder. His duties were clearly prescribed & the power of appointing & dismissing him was vested only in the D. C. As regards other class of village servants the Act is entirely silent & it may be reasonably inferred that their duties & other conditions of service were left to be regulated by village customs which were embodied in the wazib ul-arz prepared by the Settlement Officer under S. 79 of that Act which by virtue of S. 82 of that Act should be presumed to be correct. But the Lambardar is not an independent authority. His appointment & dismissal rests with the Revenue Officers & under the rules made under S. 137 of that Act the Lambardar himself may be removed from office by the D. C. for gross misconduct. Oppression of village servants by arbitrary appointment & dismissal may, in some circumstances, constitute sufficient misconduct so as to render the Lambardar liable for dismissal. Therefore the Lambardar cannot legally maintain that in exercise of his powers under the wazib-ul-arz he cannot be subject to any interference by the revenue authorities. Moreover, in the wazib-ul-arz it is clearly stated that the Lambardar shall be responsible for the management of the village. He thus owes a clear responsibility to the Govt. through the revenue authorities for proper management of the village & oppression of any class of village servants would necessarily indicate improper management & as such would bring his action within the scrutiny of the Revenue Officers.

[6] If the relevant provisions of the C. P. T. Act are scrutinised the position becomes much more clear. Chapter V of that Act deals with village service tenants of whom Nariha is clearly one. Section 58 of that Act says that no village service tenant shall be ejected from his holding except in execution of an order for ejectment passed by a Revenue Officer on some specified grounds. This section has obviously been framed with a view to prevent arbitrary ejectment of village service tenants. Only a Revenue Officer has the power to turn him out of the holding for certain well-defined grounds & his order is subject to appeal & revn. before higher Revenue authorities. At first sight this section may appear to conflict with the provisions in the wazib ul-arz which confer on the Lambardar & the Punches the right to appoint & dismiss a Nariha & deprive him of his holding. Even if there be such a conflict the provisions in the statute would obviously override any entry regarding the village customs contained in the wazib ul-arz. But I am not satisfied that there is really any conflict between the two. Both of them have to be construed together & if such a construction is adopted it will be clear that after the Lambardar & the Punches have passed an order dismissing a Nariha the actual ejectment of the Nariha from his holding should be done by the Revenue Officer under S. 58. In fact cl. (d) of sub s. (1) of that Section specifies dismissal from office as one of the grounds for which a Revenue Officer may eject a village service tenant. Therefore, before exercising the powers under S. 58, the Revenue Officer has to be satisfied that the village servant has been dismissed from his office. The question arises as to the nature & extent of the enquiry that he can legally make for the purpose

of so satisfying himself. It was argued that all that law permits him is to examine whether in fact the Lambardar & the Punches have dismissed the Nariha & that he has no jurisdiction to consider whether the dismissal was on proper grounds or not or else whether it was unreasonable. It is doubtless true that neither in the C. P. L. R. Act nor in the C. P. T. Act is there any provision conferring on the revenue authorities appellate jurisdiction over the action of a Lambardar & the Punches in dismissing a Nariha. Therefore, the revenue authorities cannot claim to have the right to enter into the merits of the order of dismissal, analyse the findings on facts or come to an independent finding of their own as regards the propriety or otherwise of such an order; but they have no doubt jurisdiction to enquire whether the dismissal was 'lawful' or not. It is true that in cl. (d) of sub-s. (1) of S. 58 the expression 'lawful' has not been inserted before the word 'dismissed.' But in sub-s (1) of S. 56 it is clearly stated that the right of a village service tenant in his holding is lost only when he is 'lawfully dismissed.' The power of the Revenue Officer to eject a village service tenant arises only when the latter's right in his holding is lost & therefore, if sub-s. (1) of S. 56 is read along with cl. (d) of sub-s. (1) of S. 58 the reasonable construction is that in that clause also the Legislature meant that the dismissal should be lawful though they did not expressly say so. Therefore, there can be no doubt that the Revenue Officer has full jurisdiction to enquire into the lawfulness or otherwise of an order of dismissal passed by the Lambardar & the Punches. It is difficult to lay down exhaustively the various grounds which would render such dismissal 'unlawful.' Obviously substantial defects in procedure such as the failure to frame a specific charge, & the omission to give the village servant reasonable opportunity to show cause against his dismissal or any substantial defect in the constitution of the authority dismissing him such as the failure of the Lambardar to consult the Punches would be clear grounds for holding that the dismissal is unlawful. Similarly any fraud on the exercise of the power such as dismissal for some private grudge though ostensibly acting in exercise of the power may be a good ground. Difficulty, however, arises in deciding whether the Lambardar & the Punches are the final authority to decide what are 'due services' to be rendered by a Nariha to the villagers. The Wazib-ul arz does not specify those due services. Apparently they are of a customary nature & the settlement authorities while allowing the customs to continue did not specify them in detail trusting to the good sense of the Lambardar & the Punches. But as the Lambardar himself is responsible to the Govt. for the proper management of the village & as he is liable to be dismissed for gross misconduct it seems obvious that any attempt by him (with the help of the Punches) to enlarge the 'due services' of a Nariha so as to make him practically a private servant of the Lambardar & his favourites can be questioned by the revenue authorities while considering whether the Nariha should be ejected under S. 58, C. P. T. Act The general control of the revenue authorities over the actions of the Lambardar is clearly implied in the provisions of the C. P. L R. Act & the very fact that while enacting the C. P. T. Act the Legislature thought that the power of evicting a village service tenant from his holding should be retained exclusively by the Revenue Officer indicates that the Legislature did not intend that a village service tenant should be entirely at the mercy of the Lambardar & the Punches. The pltfs.' claim to an unfettered right to dismiss a Nariha must fail though it must also be added that the revenue officers cannot take upon themselves the functions of an appellate authority over the actions of the Lambardar & the Punches in dismissing a Nariha.

[7] An attempt was made to distinguish between a 'village servant' & a 'village service tenant.' This distinction is not material for the purpose of this litigation. In the Wazib-ul-arz the expression 'village service tenant' does not appear but the expresssion used is only 'village servant.' In Chap. V, C. P. T. Act, however, the former expression alone occurs. In Chap. VI of the Hamid Settlement Report (pp. 27-28) no such distinction is maintained between the two expressions. Apparently when the service aspect is emphasised, the expression 'village servant' is used & when the tenancy aspect is emphasised in the C. P. T. Act the expression 'village service tenant' is used. Nothing material, however, turns on this distinction.

[8] I may now consider some other technical points that were urged. Firstly, it was urged that the Province of Orissa was not a proper party. It is doubtless true that the Province of Orissa is not a necessary party in this litigation but as the cause of action arose from the orders of the various Revenue Officers it cannot be said that the Province of Orissa is not a proper party. Secondly, it was urged that a declaratory suit of this type is barred by S. 42, Specific Relief Act, inasmuch as the pltfs. have not prayed for any consequential relief. Strictly speaking, no consequential relief can be validly prayed for in the Civil Ct. The main refief which the pltfs. seek is the ejectment of deft. 1 from his service holding & putting it in the possession of his successor appointed by them. This power is however exclusively vested in the Revenue Officers by S. 58, C. P. T. Act & S. 95 of that Act expressly bars the jurisdiction of the Civil Ct. over such matters. There is no other consequential relief that the pltfs. could pray for & consequently it cannot be said that the pltfs. were able to seek further relief & that they omitted to do so, as required by the proviso to S. 42 of this Specific Relief Act.

[9] The present suit in essence is a suit for the proper construction of S. 58, C. P. T. Act &

relevant entries in the Wazib-ul-arz regarding the rights of the Lambardar & the Punches. The revenue authorities gave an interpretation against which the pltfs. felt aggcieved. The question arises as to whether a pure declaratory suit of this type would be maintainable. But this point seems to have been set at rest by the P. C. decision in *Robert Fisher* v. *Secy. of State*, 22 Mad. 270 : (26 I. A. 16 P. C.), where it was held that :

"A suit to have the true construction of a statute declared & to have an act done in contravention of the statute, rightly understood, pronounced void & of no effect."

was maintainable. This has been followed in *Venkataraghaviah* v. *Subbiah*, A. I. R. (18) 1931 Mad. 502 : (136 I. C. 38) ; *Secretary of State* v. *Subba Rao*, A. I. R. (20) 1933 Mad. 618 : (56 Mad. 749) & *Sri Krishna Chandra* v. *Mahabir Prasad*, A. I. R. (20) 1933 ALL. 488 : (55 ALL. 791 F. B.). I would, therefore, hold that the suit is maintainable.

[9-A] Next it was argued by Mr. Purohit that under S. 97, C. P. T. Act, this suit was cognizable only by a Civil Ct. having revenue jurisdiction & not by an ordinary Civil Ct. I do not think S. 97, C. P. T. Act would apply to a suit of this type. This suit is not between a landlord & a tenant *as such*. Doubtless a Lambardar is a landlord & deft. 1 as Nariha is a village service tenant under that Act but the suit has nothing do to with their relationship as landlord & tenant. Here there is no question of terminating the tenancy by evicting the tenant or determining any other incident of tenancy. As already pointed out, the suit in substance is merely a suit for true construction of S. 58, C. P. T. Act & the Wazil-ul-arz so as to set aside the orders of the revenue authorities maintaining deft. 1 in the holding notwithstanding his dismissal by the Lambardar & the Punches.

[10] Lastly I take up the question of limitation. It was conceded that Art. 120, Limitation Act, applies to the present case. On behalf of the applts. it was urged that the cause of action accrued on 11-7-32 when the Comr. Mr. Philip (EX. 1 A) gave his own view of the powers of the Lambardar & the Punches to dismiss a Nariha & maintained the order of the D. C. declining to give effect to such dismissal. The suit was filed more than six years after that date & it was therefore urged that the suit was not maintainable. On behalf of the resps. however, it was urged that the cause of action did not arise till the final order of the Revenue Comr. Sir John Dain on 19-3-48 refusing to pass any orders in the case & that from 1932 to 1938 the parties were fighting out the dispute before the revenue authorities. From the narrative of facts stated above it would appear that on two distinct dates the resps. dismissed deft. 1. The first order of dismissal was passed sometime in 1931-32. That order was ignored by the D. C. & also by Mr. Philip by his order dated 11-7-32 (EX. 1-A). On receipt of this order of the Comr. the Lambardar & the Punches drew up formal proceedings against deft. 1 & again dismissed him from the post on 31-10-32. They then applied to the S. D. O. to give effect to this order & this was the subject-matter of the dispute between the parties in the Revenue Cts. till the passing of the final order by Sir John Dain on 13-3-38 (EX. B-8). If the first order of Mr. Philip dated 11-7-32 be taken as the starting point the suit is well within time. It should however be noted that in none of the orders did the Comr. deny the pltf's. right to dismiss the Nariha but all that he pointed out was that though they had legal right, that right was to some extent subject to scrutiny by the revenue authorities with a view to satisfy themselves that the right had been exercised reasonably & in good faith. It was urged that the pltfs. were claiming an unfettered right to dismiss a Nariha & since this right was interfered with by the orders of the Comr. the right of the pltfs. to sue arose when there was the first denial of that right in the first order of the Comr. in the year 1932. Even if this argument be accepted, I think limitation would run only from the last order of the Comr. in the year 1938. The pltfs. are lawful holders of offices, namely, the office of a Lambardar & the office of the Punches. They were in possession of those offices & whenever there was an interference with the performance of their duties as such a fresh cause of action arose. As pointed out in *Annaswami Aiyangar* v. *Adivarachari*, A. I. R. (28) 1941 Mad. 81 : (I. L. R. (1941) Mad. 275 F. B.) the interference by the Comrs. did not affect the position of the pltfs. as Lambardar & Punches & therefore they were not bound to institute a suit when there was the first interference. They could bide their time & whenever there was such an interference a fresh cause of action arose. So far as the second order of dismissal dated 31-10-32 is concerned, it is not seriously contended that limitation would only run from the last order of the Comr. in the year 1938. From 1933 to 1938 the dispute was fought out before the revenue authorities &

"Limitation cannot be deemed to run so long as the adverse order is *sub judice* or is being challenged by the persons against whom it was made by an appeal to a higher tribunal & is liable to be set aside or to merge in the decision of the tribunal."

Bans Gopal v. *Basdeo Singh*, A. I. R. (4) 1917 Oudh 168 : (20 O. C. 126).

[11] I would, therefore allow the appeals, set aside the order of the Subordinate Judge & restore the order of the learned Munsif dismissing the suit. Both parties will bear their own costs.

[12] **Jagannadhadas J.**— I agree with my learned brother that the pltf's claim to an unfettered right to dismiss a Nariha must fail on a proper construction of the relevant provisions of the C. P. Tenancy Act. The Wazib-ul-arz of the village EX. 2 no doubt recognises the right of the Lambardar & the Punches to dismiss a Nariha for failure to render due service & S. 56, C. P. Tenancy Act, states that the right of the village service tenant in his holding is lost when he is lawfully dismissed. Though the Wazib-ul-arz states that on dismissal the Nariha may be depri-

ved of his service lands by the Lambardar & the Punches, the actual ejectment can only be done through the intervention of the revenue officer, the power to eject the village service tenants for one or other of the grounds specified under S. 58, C. P. Tenancy Act, being vested only in the revenue officials. Therefore on a proper construction of the Wazib-ul-arz taken with Ss. 56 & 58, C. P. Tenancy Act, it is reasonably clear that while the Lambardar & the Punches have the power to dismiss the Nariha on his failure to perform the service, if they want it to be followed up by deprivation of the service lands that can only be done through the machinery of a decree by the revenue officer. The jurisdiction vested in the revenue officer to decree ejectment on the ground of dismissal is not a power vested in him merely to execute & give effect to the order of dismissal. When a statutory tribunal is vested with the jurisdiction to exercise a specific power in a certain event & on the existence of certain facts, that tribunal has undoubtedly the power to examine the existence & the legal validity of the facts & the events which give rise to the power. The revenue officer has the power to eject on the ground that the Nariha has been dismissed from the service. Before ejecting him therefore he must be satisfied about the dismissal, that is, not only that he was in fact dismissed, but also that he has been lawfully dismissed, for as a matter of substantive right, it is clear from S. 56 that it is only on lawful dismissal that the right of the village service tenant is lost. The question whether he has been lawfully dismissed depends on the further question whether the Nariha has failed to render due service & whether the dismissal has been otherwise proper. It is therefore clear that while the power of dismissal is vested in the Lambardar & the Punches & while that dismissal does not require the confirmation or approval of the revenue officer & is not open to appeal or revn. as such, the revenue officer has the right & the duty to examine the dismissal when his jurisdiction is invoked for the purpose of ejecting the village service tenant from his service land. It has been sought to be argued on behalf of the Govt. that though the Wazib-Ul-urz (Ex. 2) records the custom that the Nariha may be dismissed by the Lambardar & the Punches, it cannot be accepted as a correct record of the then existing customary right. Reference has been made to the settlement reports of Russel, Nethersal, Dewar & Hamid. Russel's settlement report mentions in a general way with reference to village servants other than Jhankar & Ganda that the general control was given to the Gountia. Nethersal's report has nothing specific to say about it. Dewar's settlement report contains the note that such village servants may be dismissed & deprived of their service land by the Gountia & the Punches for failure to render due service. Hamid's settlement report states the same, but with the change that the word "Lambardar" is substituted in the place of "Gountia". It was therefore argued that there was nothing more than the general control at the start & that too was given only to Gountia & that later on the power of dismissal was being exercised by the Gountia & the Punches & at a later date the power was being exercised by the Lambardar & the Punches. It is suggested that this indicates that the practice was varying from time to time & that therefore the wazib-ul-urz (Ex. 2) cannot be taken to be the evidence of a definite & settled customary right which vests in the Lambardar & the Punches. I do not think this argument is permissible in view of the statutory presumption arising in favour of the entries in the Wazib-ul-urz under S. 82, C. P. L. R. Act as pointed out by my learned brother. The weight to be given to the wazib ul-urz cannot be whittled down by reference to the entries in the earlier settlements & by taking them as disproving the correctness of the entry which shows the existence of the right. Indeed the revenue authorities themselves have, throughout the course of the dispute relating to this very Nariha from 1922 to 1938, consistently recognised that the power of dismissal was not vested in themselves, but that it was vested in the Lambardar & the Punches. As early as in 1922, it has been stated in the report (Ex B dated 15-11-1922) that the decision of the Gountia & the Punches relating to dismissal is final & not open to revn. by the revenue Ct. In the order of the Revenue Comr. dated 7-7-1932 (Ex. B-3), the correctness of the note in the wazib-ul-urz vesting the power of dismissal in the Lambardar & the Punches for failure to render due service was recognised & it was stated that while that power did not mean that the dismissal would be arbitrary, unquestionably the power of dismissal did vest in the Lambardar & the Punches. This position has also been recognised in the order of the Revenue Comr. dated 15-9-1933 (Ex. B 4), in which it was specifically stated that in legal theory, the village officials had the right to dismiss the Nariha. Therefore it is impossible to uphold the extreme contention raised on behalf of the Govt. that the ultimate power of dismissal was vested only in the Govt. officials on the ground that the service lands are the lands granted by the Govt. It is equally impossible to uphold the contention urged on behalf of the Lambardar & the Punches that they have the sole & unfettered right to exercise the power of dismissal in such manner as to compel the revenue authorities to eject the village service tenant from his service holding on a bare production of their order of dismissal. The position may be summed up as follows :

[13] The power of dismissal is vested in the village officials. The revenue officials are not in any sense either the confirming or the appellate authority in respect of such dismissal. They are, however, not merely an executing Ct. to give effect to the orders of dismissal passed by the village officials. When approached for ejectment, they have the right & the duty to examine the factum & the legal validity of the dismissal. It is neither

feasible nor possible for this Ct. to lay down the exact scope of the authority of the revenue officials in such circumstances excepting to indicate the above broad limits. Since however the whole history of this litigation at least from 1930-1938 has turned on the question as to whether the Nariha has or has not failed to render due service, it is necessary to state that on the question as to what is due service, the village officials have not the final voice. The revenue officer as part of his jurisdiction, to determine whether there has been lawful dismissal, can also determine whether there has been failure of due service & as incidental to that can also determine whether the view of the village officials as to what is due service is correct. He can therefore determine what all comes within the scope of due service. For that determination he must investigate what the custom is. While he cannot have the power to vary the custom, he has the normal power of a judicial tribunal to interpret it with reference to considerations of practicability under changed circumstances. But it must also be clearly stated that the revenue officials cannot shirk this duty of ascertaining & interpreting the custom & determining what amounts to failure of due service on considerations of difficulty as has been done by the revenue Comr. Sir John Dain in his order dated 13-3-1938 (Ex. B 8), wherein he stated:

"I am not prepared to pass any orders in this case. The whole arrangement is an anachronism & no longer workable."

When the power of dismissal is vested by law in the village officials & the village officials have properly & lawfully dismissed the village servant, the revenue authorities are bound to give effect to it by ejecting the tenants from the lands subject to their jurisdiction as above stated of finding whether the dismissal is lawful. If as Sir John Dain says the arrangement is no longer workable, that can be no ground for their refusal to exercise their power of ejectment. It has been suggested in the course of the arguments that the wording of S. 58, C. P. Tenancy Act, leaves a discretion with the revenue officials to refuse to eject a village service tenant even if any of the grounds mentioned in the section are made out. I am not prepared to construe S. 58 as vesting a mere discretionary power in the revenue officials. The negative working of S. 58, sub-s. (1) is that "a village service tenant shall not be ejected from his holding except in execution of an order of ejectment on one or the other of the grounds specified" cannot be construed as vesting an overriding discretion in the revenue officer to refuse ejectment even when those grounds are made out. It is merely a prohibition against ejectment by any other machinery. If as Sir John Dain says the arrangement is an anachronism & is not workable the remedy probably lies in the hands of the revenue authorities themselves who may terminate the anachronism by enfranchising the land from the service tenure & getting other arrangements made for the service if required.

[14] The learned counsel for the applts. in both the appeals have raised a number of other technical objections to the suit, out of which it is necessary to notice only the plea as to limitation. The history of this dispute from 1922-38 shows that there have been attempts at dismissal of the Nariha on a number of occasions & the revenue officials dealt with the question of ejectment arising from all such dismissals from time to time in different ways. There was first a dismissal in 1922 & the appointment of another person by name Braj Bagar. But the Nariha Baladev Bagar appears to have been reinstated by amicable settlement vide Ex. B. There was again another dismissal in or about 1930 & the appointment of another person by name Nitai Bhoi. On this occasion again the Nariha Baldev Bagar was put back in possession & was found to be doing his duties; *vide* order (Ex. B-1) dated 12-12-30. There was again a fresh dismissal in or about 1931 & the appointment of one Kasiram Bagar. The Revenue Comr. by his order dated 7-7-1932 (Ex. B-4) recognised the right of the Lambardar & the Punches to dismiss a Nariha for failure to render due service, but held that it could not be arbitrary & unreasonable & that the dismissal must be for specific neglect of duty & for reasons to be formally recorded. He, therefore, declined to make an order of ejectment & reinstate the Nariha Baldev Bagar on the above grounds. This was followed up immediately by another dismissal by the village officials & this time they appear to have formally prescribed the duties of the Nariha & formally dismissed him for not performing those duties. The revenue authorities thereupon attempted to consider the question what were the services to be performed by the Nariha. The various attempts to determine the scope of those services have gone on from 1932-1938. The Revenue Comr. by his order dated 16-9-1933 (Ex. B 4) declined to give effect to the order of dismissal of 1932 by making an order of ejectment & directed that the village officials & the Nariha should if possible, be made to agree about the scope of the duties & if they could not agree that a responsible officer should decide the same. His order is a reinstatement of the Nariha Baldev Bagar probably pending a final determination of the scope of the duties with a view to furnish the standard with reference to which the lawfulness & the validity of the dismissal may be judged. At any rate it does not appear very clearly from the subsequent record whether there has been any further dismissal, but it does appear that there have been further attempts by the revenue officials either to bring about an agreement between the parties as to the scope of duties & failing it an attempt to determine the same by themselves. This appears from the various orders, Exs. 4, 5, 6, B 5, B-6 & B-7. These attempts appear ultimately to have been given up & the order of the Revenue Comr. Sir John Dain dated 13-3-38 (Ex. B 8) closed the matter with a refusal to pass any further orders.

[14] The contention of the applts. is that the history of the dispute as above set out shows that at various stages the order of dismissal was not given effect to by the revenue authorities & in that sense the alleged unfettered right of dismissal has been challenged or infringed with, on successive occasions & that, therefore, the present right which is beyond six years from the earliest challenge of that right is time-barred. I agree with my learned brother that this contention is untenable. It appears to me that the real & effective interference with the right of dismissal during the whole course of the dispute from 1922-1938 was only when the Revenue Comr. Sir John Dain by his order dated 13-3-38 totally declined to give effect to the order of dismissal by refusing to go into the questions which were involved in the dispute on the ground that the arrangement was an anachronism & not workable. Until then the revenue authorities did not in terms either challenge the pltfs'. right of dismissal, nor did they refuse arbitrarily to give effect to the dismissal, but were only concerned to examine the grounds of dismissal at each stage. It appears to me that merely because the pltfs. submitted to such examination at the previous stages, they cannot now be considered to be too late in approaching the Ct. for a declaration of their alleged unfettered right if in fact & in law they have got it & have not lost it.

[15] The question of limitation applicable to such class of cases has been the subject-matter of a number of conflicting decisions which it is unnecessary to examine for the purpose of this case. It has been laid down by the P. C. in *Mt. Bolo* v. *Mt. Koklan*, A. I. R (17) 1930 P. C 270 at p. 272 : (11 Lah. 657) as follows :

"There can be no right to sue until there is an accrual of the right asserted in the suit & its infringement or at least a clear & unequivocal threat to infringe the right by the deft. against whom the suit is instituted."

In the case in *Jalandhar Thakur* v. *Jharula Das*, 42 Cal. 244 : (A. I. R. (1) 1914 P. C. 72) each infringement of the right was held to give a fresh cause of action. With reference to mere denials or hostile assertions short of infringement or ouster, some cases have held that it is open to the pltf. concerned to treat each denial as giving a fresh cause of action vide *Appa Rao* v. *Secy. of State*, A. I. R. (25) 1938 Mad. 193 : (181 I. C. 688), but other cases have held that unless the latter denials or infringements are of more serious nature than the earlier ones it is only the earlier denial or infringement that furnishes the only cause of action see *Ponnu Nadar* v. *Kumaru Reddiar*, A. I. R. (22) 1935 Mad. 967 : (59 Mad. 75) This last decision does not appear to have been fully approved in the F. B. case in *Annaswami Ayangar* v. *Adivarahachari*, A. I. R. (28) 1941 Mad. 81 at p. 83: (I. L. R. (1941) Mad. 275 F.B.). It appears to me that in this case even if *Ponnu Nadar* v. *Kumaru Reddiar*, A. I. R. (22) 1935 Mad. 967 : (59 Mad. 75) is accepted as correct, the order of Sir John Dain in 1938 arbitrarily refusing to pass any orders, is a denial of the right of a character totally different from the previous orders of the Revenue Comrs. & clearly furnishes a fresh cause of action. To my mind that is the real & effective cause of action in this case. I might, however, state that, as at present advised, I am inclined to agree with the views of Venkata Subba Rao J. in *Appa Rao* v *Secy., of State*, A. I. R. (25) 1938 Mad. 193 : (181 I. C. 688), to the effect that each successive denial will furnish a fresh cause of action for a suit for declaration, so long as the substantive right itself is not lost, & that the party is not bound on peril of losing his remedy to take every denial or infringement seriously & to rush to Ct. I, therefore, agree that the plea of limitation is not maintainable in this case.

[16] In view of the fact that the pltf. has come to Ct. for a declaration that he has the unfettered right of dismissal & this has been negatived by us, the proper course to adopt is to dismiss the pltf's. suit. It is unnecessary to grant a limited declaration of his right of dismissal formally since the same has been clearly recognised throughout by the revenue authorities & has also been specifically decided by us now in this judgment. The result will be that the appeals will be allowed & the suits will be dismissed. In the circumstances of this case, the proper order as to costs will be that all the parties should bear their respective costs throughout.

R.G.D. *Appeals allowed.*

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*A. I. R. (38) 1951 Orissa 349 [C. N. 82.]

RAY C. J. & NARASIMHAM J.

Anangabhusan — Pltf. — Petnr. v. *Ghanashyam Patro & another — Defts. — Opposite Party.*

Civil Revn. No. 129 of 1948, D/- 5-8-1949.

†(a) Civil P.C. (1908), O. 33, R. 9—"Means"—Meaning of—Civil P. C. (1908), O. 33, R. 7, S. 11.

The word 'means' referred to in cl. (b), of O. 33, R. 9 must be the 'means' that should have been acquired by or otherwise come to the possession of the pltf. after adjudication of the petn. for leave, under O. 33, R. 7. [Para 3]

Any order, either interlocutory or final in its nature, passed in presence of the parties, should be taken as closing the controversy once for all for the purposes of the proceeding or the suit in which it is passed & so far as it goes. The order may or may not be such on which a plea of *res judicata* can be based, but in order to avoid multiplicity of proceedings, some sort of finality, limited within the scope of the suit or the proceedings in which it is passed, has to be attributed to it. [Para 2]

Where the deft. in spite of notice to him. does not appear at the date of hearing of the appln. of pltf. for leave to sue as a pauper, & the Ct. passes an order under O. 33, R. 7, granting such leave, the deft. will not be allowed subsequently to come to Ct. with an appln. under O. 33, R. 9. for dispaupering the pltf. on the ground that the "means" of the pltf. at the commencement of the suit were such as to enable the pltf. to continue the suit. Such an appln. is maintainable only when the pltf. acquires such means subsequent to the order under R. 7. [Para 3]

Anno. Civil P. C., S. 11 N. 22; O. 33 R. 9 N 1, 3.

(b) Civil P. C. (1908), O. 33, R. 9 (a)—Concealment or omission.

Some omission of certain properties from the inventory submitted by the pltf. will not necessarily amount to active concealment & thus to vexatious & improper conduct in the course of the suit. Whether it is a concealment as distinguished from mere omission is a question of fact. [Para 6]

Anno. Civil P. C, O. 33 R. 9 N. 2.

S. Monhanty—for Petnr.; D. Mohanty—for Opposite Party.

Ray C. J.—This is revn. directed against an order passed by the Subordinate Judge of Puri dispaupering the pltf. under O. 33, R. 9, Civil P. C. The pltf. admittedly is a member of a Hindu Mitakshara Joint family & his father is one of the defts. in the suit. The suit is for setting aside certain alienations, made by his father & for recovery of the properties so alienated. The attack on those alienations is based upon immorality & illegality of the transactions. The pltf. applied for leave to sue in forma pauperis. Of his appln. due notices were given to the Crown as well as, to the defts opposite party. They filed their objections challenging the plea of pauperism but none of the contesting parties appeared at the date when the matter was heard by the Ct. The Ct. purporting to act under O. 33, R. 7 granted the pltf leave to sue as a pauper on which his appln. for leave was registered as a suit & was to proceed as such, in the ordinary way except that he should be exempted from paying any further Ct.-f. on his applns. to be filed in course of the suit. At a later stage, the opp. party filed an appln. under R. 9 (b) of the Order alleging that the pltf's means were such that he ought not to be continued to sue as a pauper. The Ct. below, without making any enquiry as to whether the appcts. before him were prevented, by any sufficient cause, from appearing at the date of hearing of the pltf's. appln. for leave to sue as a pauper, & without making any sort of enquiry whatsoever which would as a matter of principle, entitle the appcts. to reopen the order passed under R. 7, entertained the appln. & enquired into its merits. After such enquiry, he has believed the opp. party's case & has come to the conclusion that the pltf. is possessed of means, such as would enable him to pay the requisite C.-f. & that, therefore, he has no right to continue to sue as a pauper.

[2] The pltf. has come up in revn. against this order & his point is that the Ct. had no jurisdiction to entertain the appln. so far as it did not disclose that the means referred to were such means as came into the pltf's possession later than the disposal of his leave appln. under R. 7; in other words, the contention is that the matter could have been urged before the Ct. at the stage when the leave was granted & could not be the subject-matter of discussion at a later stage. This contention is based on the principle that any order, either interlocutory or final in its nature, passed in presence of the parties, should be taken as closing the controversy once for all for the purposes of the proceedings or the suit in which it is passed & so far as it goes. The order may or may not be such on which a plea of res judicata can be based, but in order to avoid multiplicity of proceedings, some sort of finality, limited within the scope of the suit or the proceedings in which it is passed, has to be attributed to it. In the present case, the means that were alleged to have been in pltf's. possession were the family properties which admittedly were not acquired subsequent to either his filing the appln to leave or to the registration of that appln. as a suit. Reliance, in support of the order, is placed upon the terms of R. 9 which, so far as material for purpose of this revn. read:

"The Ct. may, on the appln. of the deft., of which seven days' clear notice in writing has been given to the pltf. order the pltf. to be dispaupered if it appears that his means are such that he ought not to continue to sue as a pauper."

[3] Mr. Mohanty, appearing for the opp. party, says that there are no such words of limitation as will compel the interpretation that "the means", referred to in cl. (b), must be "the means" that should have been acquired by or otherwise come to the possession of the pltf. after adjudication of the petn. for leave. But such limitation inheres in the word 'continue'. If we assign the plain grammatical meaning to the word 'continue', it will appear evident that it assumes the fact that he was an adjudged pauper at the date of commencement of the suit & the question arose if he should be allowed to continue as such. This rule is framed to operate not in derogation of the finality or validity of the order already passed as between the parties but enabling the Ct. to dispauper the pltf. on the basis of events happening subsequently. This view appears to us to be very clear & convincing. When pushed to its logical conclusion, Mr. Mohanty's contention if accepted, would lead to what is absurd on the face of it. That is, throughout the progress of the suit, the deft. may go on without any rest whatsoever agitating & re-agitating the question of pltf.'s pauperism for times without number. This could never be the intention of the framers of the Rules.

[4] Mr. Mohanty contrasts the provisions of R. 9 with the one appearing in the same Order of the Code giving finality to an order disallowing leave to sue as pauper. That is because the pltf.'s liability for c.-f. is a continuing liability & he can be ordered to pay whenever he comes by means to pay. On the other hand, if he had means enough to pay the requisite c.-fs. at the commencement of the suit, he should be liable to pay notwithstanding subsequent change of his financial position reducing him to poverty.

[5] The question can be viewed from another aspect, namely, that R. 9 makes it not obligatory but discretionary on the Ct. to dispauper a pauper pltf. In exercising this discretion, the Ct. certainly will not be indulgent to the party who chose at his own risk not to appear on the

date when he was called upon to appear & contest, if he liked but to come at any moment & compel the Ct. to reopen the matter. The rule, in matters of procedure too, that orders passed or deemed to have been passed in presence of the parties will not ordinarily be reopend for the mere asking of them, is fundamental. The party asking for such indulgence must lay a foundation of sufficient grounds so as to entitle him to ask the Ct. to recall his order. Under the circumstance, we are bound to hold that in the circumstances of the present case as the alleged means have not been acquired later, deft. 1 should not have been heard to say what he ought to have said much earlier at the stage when the order under R. 7 was to be passed. We have no direct authority on the point either way. There are some observations here & there which may, to some extent, lend support to our view. In the case of *Mumtazan* v. *Rasulan*, 23 ALL. 364, it was laid down that the validity or finality of an order granting a petn. for leave to sue as pauper could not be challenged in an appeal from the decree passed in the suit. The learned Judges who decided the case have observed that order pased at that stage is not an order affecting the decision of the suit & is an independent order prior to the suit &, therefore, not challengeable collaterally in the manner in which it was sought to be done in that case. The case of *Agent, B. N. Rly. Co. Ltd.* v. *Venkateswami*, 49 C. W. N. 551, by implication, supports our view. It says that means coming to the possession of the petnr. subsequent to his filing of his appln. for leave can be considered in a proceeding initiated under R. 9. Here, in the present case, it is not said that the means, referred to in the deft.'s petn. were acquired later than the filing of the leave appln. These cases do attribute finality to the order so far as it embraces adjudication of matters that could be urged by the parties at that stage.

[6] Mr. Mohanty, as a last recourse, relies upon the case of *Sanker Bharati* v. *Narasimha Bharati*, 47 Bom. 106 : (A. I. R. (9) 1922 Bom 383), with a view to bringing the case within Cl. (a) of R. 9. He contends that the pltf. is, at any rate, guilty of vexatious & improper conduct in the course of the suit for deliberate concealment of his means from the Ct. The clause, standing by itself, would refer to guilty conduct in course of the suit, that is, after the appln. is registered as a suit. Whether the suit will have the extended meaning so as to include the proceedings based on the leave appln. is a question which is not free from difficulty. Had the Bombay case, referred to, decided the point, we might have taken any other views. But that question has there been left open. That case is no authority for the proposition urged. Over & above, the plea was never advanced in Ct. below. Some omission of certain properties from the inventory submitted by the pltf. will not necessarily amount to active concealment & thus to vexatious & improper conduct in the course of the suit. Whether it is a concealment as distinguished from mere omission is a question of fact. It appears from the facts of the present case that the pltf. is but a junior member of the family & a wireless-operator, his father being alive. We do not know whether the father has any sympathy with his launching of this litigation. Under the circumstances, it is not necessarily probable that he had knowledge of the properties. Besides, it may be consistent with the honesty that as a junior member of the joint Mitakshara family, he did not consider that he had such disposing power over the joint family properties as to constitute 'means' in his hands. For the purpose of a speculative suit involving a protracted course for recovery of properties wrongfully alienated by a Hindu father is hardly a justifiable ground for alienating joint family properties over which a member's power of disposition is very limited. I shall not be understood to say that in my view a member of a joint family shall be always considered a pauper even if he has interest in substantial family property. I am considering whether omission thereof from the inventory attached to an appln. for leave to sue as pauper is necessarily vexatious. In these circumstances, we cannot take notice of this plea as one available to Mr. Mohanty under Cl. (a) of R. 9 of the Order at this stage.

[7] We, therefore, hold that the order of the learned Subordinate Judge was without jurisdiction & should be set aside. In the result the Civil Revn. is allowed with costs. Hearing is assessed at one gold mohur.

[8] **Narasimham J.**—I agree.

R.G.D. *Revision allowed.*

A. I. R. (38) 1951 Orissa 351 *[C. N. 83.]*

JAGANNADHADAS AND NARASIMHAM JJ.

Suresh Chandra Pradhan — Pltf.—Applt. **v.** *Ganesh Chandra De & others—Defts.—Resps.*

A. F. A. D. No. 186 of 1945, D/- 2-9-1949.

Specific Relief Act (1877), Ss. 24, 27 — Contract of sale by guardian on behalf of minor — Effect.

A contract for sale entered into on behalf of a minor by his guardian cannot be specifically enforced, even though it may be for legal necessity or for the benefit of the minor.

In respect of dealings by a guardian on behalf of a minor, the law has recognised for very salutary reasons, the broad distinction between the binding character of a completed alienation by way of a sale or charge & an executory contract which merely imposes an obligation to alienate. In the former, the validity is recognised as much in the interests of the minor as in the interests of the *bona fide* purchaser for value. But in the latter, if for any reason, the guardian declines to complete the transaction by actual transfer there is no interest of a *bona fide* purchaser to be protected, & the fact that the guardian has resiled from the executory arrangement is itself a reason why the Ct. should not enforce it against the minor's estate. [Para 8]

Anno. Specific Relief Act, S. 24, N. 1; S. 27, N. 2, 8.

S. K. Ray & H. Mohapatra — for Applt.; *S. N. Dasgupta & H. Bhagat — for Resps.*

Jagannadhadas J.—The pltf. is the applt. in this second appeal. It arises out of a suit for specific performance of a contract for the sale of 35 decimals of land which belonged to defts. 1 & 2. Defendants 1 & 2 are minors & the suit contract is one entered into on their behalf by their mother as guardian. The contract was for selling the property for a sum of Rs. 75 out of which Rs. 35 was paid as advance & the balance was to be paid later. Defendant 3 who is the sister's husband of defts. 1 & 2 has purchased the suit property on 3-2-1943 subsequent to the agreement in favour of the pltf. The genuineness of the consideration alleged to have been paid thereunder were denied by the defts. & contested in the Cts. below. It has been found by the trial Ct. that the agreement was true & that a sum of Rs. 35 was paid as an advance under it. It was also found that the agreement was executed in order to raise money to repay a decretal debt for Rs. 60 against the minors in respect of which there was an execution pending at the time. It was further found that deft. 3 was fully aware of the agreement & took the sale deed in his favour with notice of the same. These findings of the trial Ct. were not challenged in first appeal before the learned Subordinate Judge. It is not clear from the judgments of the Cts. below whether the decree-debt for the discharge of which money was sought to be raised by the suit agreement was one binding on the minor's estate or not. The Cts. below have been assumed that the agreement was entered into by the guardian for legal necessity & the case must be dealt with on that footing.

[2] The argument that has been advanced on behalf of the defts. is that no specific performance can be decreed against the minors (& against the subsequent purchaser) on the basis of a contract entered into on their behalf by their guardian even though it may be for legal necessity or for the benefit of the minor. This contention has been accepted by both the Cts. below & the suit has been accordingly dismissed. Hence this second appeal.

[3] The same question of law is urged in this second appeal & in view of the conflict on this matter, between the view taken by Das J. in *Abdul Hoq* v. *Md. Yakya Khan*, A.I.R. (11) 1924 Pat. 81 : (78 I. C. 483) that of Wort J. in *Brahamdeo* v. *Haro Singh*, A. I. R. (22) 1935 Pat. 237 : (157 I. C. 327), this appeal has been referred to a Bench. The matter has been fully argued before us. On a consideration of the argument, we have no hesitation in agreeing with the view of Das J. expressed in *Abdul Haq* v. *Md. Yahya Khan*, A. I. R. (11) 1924 Pat. 81:(78 I. C. 483) to the effect that a contract for sale entered into on behalf of a minor by his guardian cannot be specifically enforced.

[4] This view is now almost unanimously held in all the H. Cs., & the reasons, therefor, do not require to be elaborated. The crucial question in such a case is whether a contract entered into by a guardian on behalf of a minor is binding on the minor's estate. It is said that it would be binding if it is for necessity or benefit. It is urged by the learned Advocate for the applts., that just as the sale of a property of the minor by his guardian for legal necessity is valid & binding, so also the antecedent contract to sell the property is eqully binding on minor. It is stated that a contrary view would produce anomalous results & would not be in the interests of the minor himself. The question, however, turns on the powers of a minor's guardian. In *Hanooman Persaud* v. *Mt. Babooee Munraj*, 6 M. I. A. 393 : (18 W. R. 81 P. C.) which is the foundation of judicial decisions relating to the guardian's powers, their Lordships at p. 423 state as follows :

"The power of the Manager for an infant heir to charge ancestral estate by loan or mortgage, is, under the Hindu law, a limited & qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate."

[5] It will be noticed that what is recognised here is the power to charge an estate and not the power to bind the estate by a mere personal covenant. In a later P. C. case in *Waghela Rajsanji* v. *Masludin*, 11 Bom. 551 P. C., their Lordships dealing with the question of the powers of a guardian state at p. 561 as follows :

"Now it was most candidly stated by Mr. Mayne, who argued the case on behalf of the resp., that there is not in Indian law any rule which gives a guardian & manager greater power to bind the infant ward by a personal covenant than exists in English law.

In point of fact, the matter must be decided by equity & good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society & circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward so as to impose a personal liability upon the ward & they hold that in this case the guardian exceeded her powers so far as she purported to bind the ward."

[6] Since that decision, it has been taken as settled law that a mere executory contract entered into by a guardian on behalf of a minor imposing a personal obligation on the minor's estate is not valid & binding & it makes no difference that it is for necessity or benefit. Indeed the P. C. in a later case appear to have recognised this principle even to the extent of saying that not only can such a contract not be enforced against the minor, but that the minor cannot even take advantage of it in his own favour & enforce it against the other party to the contract. That was what was held in *Sarwarjan* v. *Fakhruddin*, 39 Cal. 232: (39 I. A. 16 P. C.). That was a case of a contract for purchase of lands entered into by a guardian on behalf of a minor. It was found as a fact in the case that the contract was intended to bind the minor's estate & that it was for his advantage. All the same, it was held by their Lordships that the minor could not take advantage of the contract & enforce it specifically as against the other party thereto, & they give their reasons for the conclusion as follows:

"Their Lordships are of the opinion that it is not within the competence of the guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property & they are further of the opinion that as the minor in the present case was not bound by the contract, there was no mutuality & that the minor who has now reached his majority cannot obtain specific performance of the contract."

[7] This is an unequivocal recognition by the P. C. of the position that a contract by a guardian on behalf of the minor seeking to bind the minor's estate is invalid. It has been suggested that the unenforceability of the contract in this case was assumed by the P. C. on account of the fact that it was a contract of purchase which *prima facie* cannot be one for the necessity or the benefit of the minor's estate & that therefore this does not militate against the view that a contract for legal necessity is binding. But this suggestion ignores the facts of that case which show clearly that the P. C. recognised the contract to be for the advantage of the minor & therefore for his benefit & yet held it to be unenforceable, obviously on the same principle as has been laid in the prior case of *Waghela Rajsanji* v. *Masluddin*, 11 Bom. 551. The case, therefore, in *Sarwarjan* v. *Fakhruddin*: 39 Cal. 232: (39 I. A. 16 P. C) is clear authority for the position that a contract by a minor's guardian for his benefit (or necessity) is not binding & it is only in that view that the scope for the application of the principle of mutuality arose. The question has been considered by a F. B. of the Madras H. C. in *Ramajogaya* v. *Jagnanadham*, 42 Mad. 185: (A. I. R. (6) 1919 Mad 641 F. B.) & it has been there pointed out that the effect of the P. C. decision in *Waghela Rajsanji* v. *Masluddin*, 11 Bom. 551, is that a decree cannot be passed against the minor or his estate on a covenant entered into by his guardian for his benefit. That F. B. decision deals with the further question as to whether this principle would affect the liability of the minor's estate under S. 68, Contract Act, if it is also secured by a personal bond executed by the guardian on behalf of the minor; but that is a question with which we are not concerned in the present case.

[8] Even on principle, apart from authority, the contention of the applt's advocate that since the sale by the guardian on behalf of the minor for necessity or benefit is binding, the prior contract to sell must also be equally binding, has no force. In respect of dealings by a guardian on behalf of of a minor, the law has recognised for very salutory reasons, the broad distinction between the binding character of a completed alienation by way of a sale or charge & an executory contract which merely imposes an obligation to alienate. In the former, the validity is recognised as much in the interests of the minor as in the interests of the *bona fide* purchaser for value. But in the latter, if for any reason, the guardian declines to complete the transaction by actual tranefer there is no interest of a *bona fide* purchaser to be protected & the fact that the guardian has resiled from the executory arrangement is itself a reason why the Ct. should not enforce it against the minor's estate.

[9] Before the decision of the P. C. in *Mohri Bibi* v. *Dharmadas*, 30 Cal. 539: (30 I. A. 114 P.C.), holding that a minor's contract is absolutely void & not merely voidable, & before the later decision of the P. C. in *Sarwarjan* v. *Fakhruddin*, 39 Cal. 232: (39 I A 16 P. C.), importing the principle of mutuality with reference of contracts, there were undoubtedly a number of decisions in the H. Cts., that a contract for sale by a guardian on behalf of the minor if for necessity or benefit, is valid & binding. But it has been recognised in subsequent decisions that the earlier decisions are no longer good law. Some of the later decisions have, however, attempted to distinguish the case of a contract for sale of minor's property by a guardian for necessity or benefit from the case of a contract for purchase of property by a guardian on behalf of a minor. They have accordingly attempted to distinguish the case in *Sarwarjan* v. *Fakhruddin*, 39 Cal. 232: (39 I. A. 16 P. C.) on that ground. Those cases have however, failed to appreciate that the decision in *Sarwarjan* v. *Fakhruddin*, 39 Cal. 232 (39 I. A. 16 P. C.) is based on the view, firstly, that the contract by the guardian though for the benefit of the minor is not enforceable & secondly, that since it is not enforceable against the minor's estate, it cannot be enforced in his favour for lack of mutuality. Subsequent decisions have therefore recognised that there is no scope for this distinction. It is enough to refer to the cases in *Srinath* v. *Jatindra Mohan*, A.I.R. (13) 1926 Cal. 445: (89 I. C. 892); *Ramkrishna* v. *K. Chidambara*, A. I R. (15) 1928 Mad. 407: (108 I. C. 282); *Venkatachalam* v. *Sethuramrao*, A.I R. (20) 1933 Mad. 322: (56 Mad. 432 F. B.); *Swaathram Ramsaran* v. *Ramballabh*, A. I. R. (13) 1935 All. 595: (47 All. 784) & *Krishnachandra* v. *Rishabha Kumar*, A. I R. (26) 1939 Nag 265: (I. L. R. (1940) Nag. 551. There have been some exceptions recognised to this principle such as in the case of a contract by the manager of a joint Hindu family consisting of some minors & it is unnecessary to notice them in this connection.

[10] We are, therefore, satisfied that the contract in this case which the pltf. seeks to enforce is not specifically enforceable.

[11] Learned counsel for the applt. has further urged that the pltf. would at least be entitled to a decree for the refund of the sum of Rs. 35 advanced by him, since it has been found that it was raised for legal necessity, that is, to discharge the decree debt in respect of which an execution was pending against the minors' estate at the time. But this would depend upon whether as a fact the amount has been utilised for the discharge of the debt. This is a question of fact which has not been raised in the Cts. below. If it were absolutely clear on the evidence that the pltf.'s

money has been in fact utilised for the partial discharge of the decree-debt, we might have inclined to consider this request. The learned advocate has drawn our attention to certain portions of the pltf.'s evidence as P. W. 1 to substantiate that his amount was in fact utilised for partial discharge of the decree debt. But on a perusal of the record, it is found that the defts. who had denied the advance in their defence, have given evidence that the decree debt was satisfied with the money supplied by the third deft. That is what the guardian of the minors, D. W 2, states in her deposition. In this state of conflicting evidence, we do not consider that we will be justified in acceding to the request of the applt's. Advocate that there should be a decree for refund of the amount advanced. The second appeal is accordingly dismissed with costs.

[12] **Narasimham J.**—I agree.

V.B.B. *Appeal dismissed.*

A. I. R (38) 1951 Orissa 354 *[C. N. 84.]*

JAGANNADHADAS & NARASIMHAM JJ. .

Sudhu Kumbhar—*Applt.* v. *The King.*

Cri. Appeal No. 39 of 1918, D/- 18-4-1949.

(a) Penal Code (1860), S. 300—Murder—Terrific blow on head fracturing skull like cocoanut shell resulting in death—Inference is that person who gave blow either intended to cause victim's death or else to cause such bodily injury as would be sufficient in ordinary course of nature to cause death. [Para 4]

Anno. Penal Code, S 300 N. 3 & 4.

(b) Penal Code (1860), Ss. 86, 300, 304—Offence by drunken person—Presumption as to guilty intention—Law discussed—Accused held capable of forming necessary intention to constitute murder. *Case law discussed.* [Paras 10, 12, 13, 14, 19 & 20]

Anno. Penal Code, S. 86 N. 1; S. 300 N. 4; S. 304 N. 1.

(c) Evidence Act (1872), S. 105—Absence of circumstances bringing case within general exception must be presumed — Existence of circumstances not shown — There is no scope for accused being given benefit of doubt as to existence of circumstances. [Para 19]

Anno. Evi. Act S. 105 N. 1.

B. K. Pal—for Applt.; *Advocate-General — for the King.*

Narasimham J.—Applt. Sudhu Kumbhar was convicted for the murder of his own father Pahalu Kumbhar & sentenced to transportation for life by the Ses. J. of Sundergarh, Sambalpur.

[2] The offence was said to have been committed on 31-8-1947 in village Hamirpur P S. Raghunathpali in Gangpur State. That day was a day of of festivity for the villagers being the Rakhi Purnima & it appears that most of the males of the village including the applt. & his father Pahalu took considerable quantities of rice-beer (Handia). At about noon Pahalu after performing the usual worship & taking Khichiri meals lay down for rest on the verandah of one of the rooms of his house. The females went to neighbouring houses for taking their food. Just then the applt. returned from somewhere, went inside the kitchen & finding no rice or Handia came out & asked his father as to why no food or drink was kept for him. Thereupon Pahalu rebuked him for being a glutton (Ranka). This remark was said to have so much enraged the applt. that he ran towards his father, dragged him from the verandah to the courtyard & attempted to throttle him by pressing his neck. His elder brother Budhu (P. W. 1) immediately ran to the spot & separated the two. But the father Pahalu was also so much enraged at this conduct of the applt. that he wanted to assault him & rushed towards him. But Budhu again intervened & separated the two. Then the father returned to the court-yard & the applt. went away & Budhu (P. W. 1) thinking that nothing further would happen returned to the cow-shed in front of the house & lay on his cot. Soon afterwards he heard beating sound & a cry raised by his father. He ran to the court-yard & found his father lying with a bleeding injury on his face & the applt. running away. Immediately an alarm was raised & Pahalu's brother Ajit Kumbhar (P. W. 2) came running there. An attempt was made to give first-aid to Pahalu but it was unsuccessful. In the meantime a search was made for the applt. & he was found in a ditch close to river Koil which flows by the side of the village. He was immediately taken into custody & he admitted the crime before the villagers. He was found to be heavily drunk at the time of his arrest. In due course F. I. R. was lodged in the police station at about 7 p. m. that day & the case was investigated by the S. I. Sri Kheradhar Naik (P. W. 7). Pahalu's corpse was also brought to the thana & the S. I. sent it to the Medical Officer for post mortem examination. A thicken wooden post (Kunchi) (Ex. 1) 4"-10" long & $6\frac{1}{2}$" girth stained with some blood was also produced before the S. I. This post was recovered from a place close to the place where Phalu fell.

[3] The post-mortem examination on the corpse of Pahalu was made by Dr. S. C. Naik (P. W. 8) on the next day. He found a lacerated wound $1\frac{1}{4}" \times \frac{1}{2}"$ bone deep on the middle part of the vault of the scalp. Another lacerated wound $\frac{3}{4}" \times \frac{1}{3}"$ skin deep was found on the right temporal area of the head. The frontal & both the parietal bones were found to be smashed like a cocoanut shell. The membranes of the brain were torn. The brain was also severely lacerated & a portion of the brainmatter protruded through the sites of the fractures. The stomach contained some undigested food with smell of liquor. Death was caused by shock & heart-failure resulting from the injury to the skull & the brain. A log of wood like Ex. 1 might have caused the injury on the head. The second lacerated injury on the head which was skin deep might have been caused by a blow or a fall on the ground.

[4] From the nature of the injuries found on the head of Pahalu Kumbhar there can be no doubt that his assailant gave him a terrific blow on the head in consequence of which the skull got fractu-

red like a cocoanut shell and the unfortunate man died. Ordinarily the only inference that can be made is that the person who gave such a blow on the head either intended to cause Pahalu's death or else intended to cause such bodily injury as would be sufficient in the ordinary course of nature to cause death.

(5) So far as the identity of the assailant is concerned there is undoubtedly no eye-witness. The applt's brother Budhu (P. W. 1) is a witness to the incidents that took place immediately before & immediately after the giving of the blow. (His Lordship reviewed his evidence & proceeded). There seems to be absolutely no reason to disbelieve the evidence of Budhu in its essentials. Though this witness did not actually see the giving of blow on the head of his father, from the facts as deposed to by him the only reasonable inference is that it was the applt. who gave the fatal blow. His conduct in quarrelling with his father & attempting to throttle him & his subsequent conduct in running away from the spot when Budhu came there on hearing the cry leave no room for doubt as to his participation in the attack on his father.

[6] The prosecution led evidence to prove the extra-judicial confession made by the applt. when he was arrested soon afterwards while concealing himself in a ditch close to the river Koil. This confession has been proved by his own father's brother (P. W. 2), & by other villagers, namely, Sana Kumbhar (P. W. 3), Gama Kumbhar (P. W. 4) & Bhuja Kisan (P. W. 6). I would not however attach much importance to the extra judicial confession. But the accused's statement under S. 342, Cr. P. C before the committing Mag. incriminates him beyond any doubt. In that statement which was taken as evidence under S. 287, Cr. P. C. he admitted that he gave one blow on the head of his father with the wooden post (Ex. 1) & that he was drunk at that time. There seems to be absolutely no reason for not believing this statement. Doubtless in the Ses. Ct. he has resiled from it & stated that as he was drunk at that time he did not know what happened. But I see no reason to reject the statement made before the committing Mag.

[7] The next question for consideration is as to wherefrom the applt. seized the wooden post (Ex. 1). It was not in his hand during his first struggle with his father & he must have picked it up during the short interval between Budhu's premature retirement to the cow-shed after separating the two, & his return to the spot on hearing the cry of the father. The log (Ex. 1) was identified by a neighbour named Biswanath Kumbhar (P. W. 5) to be one of the posts of his fence near his gate. He noticed the post missing from his fence when he went to the spot soon after the commission of the crime. From the sketch map (Ex. 5) it appears that the place from where the post was removed was about 32 cubits south-west of the post. From these facts the only reasonable inference that can be drawn is that the applt. pulled out the post from the fencing, ran back to the court-yard & gave the fatal blow on the head of his father.

[8] That the applt. was then in a drunken condition admits of no doubt whatsoever. Apart from his own statement there is the evidence of his brother P.W. 1 & P.W. 5 to show that at about 10 a. m. that day the applt. & other persons of the village had taken Handia after performing their usual Puja to the diety. The applt's uncle P. W. 2 also stated that when the applt. was arrested he was found to be heavily drunk. It is thus well proved that in a drunken condition the applt. picked up a quarrel with his father, pulled out a big wooden post (Ex. 1) from a place about 32 cubits from the place of the quarrel & gave a terrific blow & thereby smashed the skull of his father & killed him.

[9] The main question for consideration in this case is whether drunkenness is a sufficient ground for reducing the offence to one under S. 304, I P. C. On behalf of the applt. Mr. Pal relied on S. 86, I. P. C. & urged that though the necessary guilty knowledge may be inferred against the applt. by virtue of that section, guilty intention cannot be so inferred & that consequently all that can be said in the circumstances of the case is that the applt. knew that his act was likely to cause death. This would reduce the offence to one under S. 304, I. P. C.

[10] Section 86, I. P. C. says :

"Where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicant."

Here there is no question of the intoxicant being administered to the applt. without his knowledge or against his will & consequently it is unnecessary to discuss the remaining part of that section. The omission of any reference to 'intent' in the second part of the section as *quoted above* though it is expressly referred to in the first part, has caused some difficulty & has been the subject of several judicial decisions. I would however, with respect, agree with the observations in *J. M.* v. *Emperor*, 11 Cr. L J. 659 : (8 I. C. 469 U. B.) & *In re Mandru Gadaba*, 38 Mad. 479 : (A. I. R. (3) 1916 Mad. 489 : 16 Cr. L. J. 627) to the effect that the omission was deliberate. The result is that though by virtue of the said section a Ct. may presume guilty knowledge, the Ct. cannot presume guilty intention in judging the nature of the offence committed by a drunken person. But the guilty intention which is the ingredient of several offences in the Penal Code is obviously not capable of direct proof & is generally inferred from the proved facts & circumstances of each case. There is the general presumption that every man intended the natural consequences of his act & as pointed out by Ayling J. *In re Mandru Gadaba*, 38 Mad. 479 : (A. I. R. (3) 1916 Mad. 489 : 16 Cr. L J. 627) :

"If the accused knew what the natural consequences of his act were, he must be presumed to have intended to cause them."

In other words, intention, may ordinarily be inferred from knowledge & if guilty knowledge can be presumed by virtue of S. 86, I. P. C., it necessarily follows that guilty intention may also be reasonably inferred unless there are some other facts & circumstances to repel such an inference.

[11] Section 86, I. P. C. was fully considered by a F. B. of the Chief Ct. of Lower Burma in the case reported in *Nga Tun Baw* v. *Emperor*, 13 Cr. L. J. 864 : (6 L. B. R. 100) which was followed in *Naga Sein Gale* v. *Emperor*, 12 Rang. 445 : (A. I. R. (21) 1934 Rang. 361). There is also a Madras decision reported in *Public Prosecutor* v, *Budipiti Devasikamanni*, 55 M. L. J. 238 : (A.I.R. (15) 1928 Mad. 196 : 29 Cr. L. J. 63) following an earlier Madras decision reported in *re Mandru Gadaba*, 38 Mad. 479 : (A I. R. (3) 1916 Mad. 459 : 16 Cr. L. J. 627). The same question came up for decision before the Calcutta H. C. in *Manindra Lal* v. *Emperor*, 41 C. W. N. 1187 : (A. I. R. (24) 1937 Cal. 432 : 38 Cr. L. J. 868). The Patna H. C. also considered the question in two decisions reported in *Jhiktu Bhogta* v. *Emperor*, 23 P. L. T. 763 : (A. I. R. (29) 1942 Pat. 427 : 43 Cr. L. J. 544) and *Dilmohammad* v. *Emperor*, 23 P.L.T. 725 : (A.I R. (29) 1942 Pat. 420 : 43 Cr. L. J. 883). The English law on the subject has been authoritatively laid down in the decision of the House of Lords in *Director of Public Prosecutions* v. *Beard*, (1920) A. C. 479 : (89 L. J. K. B. 437). According to Lord Birkenhead L. C.:

"The evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with other facts proved in order to determine whether or not he had this intent.

The evidence of drunkenness falling short of proved incapacity in the accused to form the intent necessary to constitute the crime, & merely establishing that his mind was affected by drink so that he more readily gave way to some voilent passion, does not rebut the presumption that a man intends the natural consequences of his acts."

This principle of English law has been applied in construing S. 86, I. P. C. See *Bishan Singh* v. *Emperor*, A. I. R. (16) 1929 Lah 637 : (30 Cr. L. J. 662), *Bishan* v. *Emperor*, 33 Cr. L. J. 378 : (A.I.R. (19) 1932 Lah. 244) and *Nga Sein Gale* v. *Emperor*, 12 Rang. 445 : (A.I.R. (21) 1934 Rang. 361).

[12] It seems to be thus well established that where a drunken person commits an offence, there will be no presumption of guilty intention under S. 86, I. P. C., & such intention must be proved like any other fact in issue. But the Ct. may, after presuming the necessary guilty knowledge from that section on the assumption that he committed the act while in a sober condition, infer the guilty intention also if the other proved facts & circumstances justify the same. There may be different degrees of intoxicantion & if the evidence merely shows that the accused more readily gave way to violent passion because of his drunken condition it may be reasonably inferred that he intended the natural consequences of his acts. If, however, the evidence shows that he was in such a state of intoxication as to be incapable of forming the specific intent, drunkenness may be ground for altering the nature of the offence.

[13] In this case, however, the evidence on record does not justify the conclusion that the applt. was in such a state of intoxication as to be incapable of forming the specific intent essential to constitute the offence of murder. He came home, demanded food & drink, then quarrelled with his father, dragged him down & tried to throttle him. At that time he had no weapon in his hand. When his brother intervened & separated the two his father tried to assault him but his brother again intervened. Then the applt. ran to a place about 32 cubits away, pulled out a heavy wooden post (Ex. I) which had been fixed to a fence & gave a terrific blow on the head of his father & ran away. These acts indicate much deliberation on his part & they are incompatible with the alternative theory that due to his intoxicated condition he was incapable of forming the specific intent necessary for the commission of the crime. On the contrary this case comes within the second proposition of Lord Birkenhead L. C. i. e., the applt's mind was so much affected by drink that he more readily gave way to violent passion in consequence of the taunting word 'glutton' used by his father. When he gave such a blow he intended to cause such an injury as was sufficient in the ordinary course of nature to cause death & his action would come within clause '3rdly' of S. 300, I. P. C.

[14] It also appears, for the reasons fully discussed in *Dilmahmad* v. *Emperor*, 23 P. L. T. 725 : (A. I. R. (29) 1942 Pat. 420 : 43 Cr. L. J. 883), that the applt's act also comes within clause '2ndly' of S. 300, I. P. C. That clause refers both to intention & knowledge & an *intention* to cause bodily injury to a person may be sufficient to constitute murder under that clause if the offender knows that such an injury is likely to cause the death of the person to whom harm is caused. In the present case it cannot be said that the applt was in such a state of intoxication as to be incapable of forming any intent at all. When he gave the blow on the head of his father he intended to cause him an injury. As to his knowledge about the effect of such an injury on his father a presumption may be made by virtue of S. 86, I. P. C. on the assumption that he committed the act as a sober person. Any sober man would surely have known that the giving of such a blow with a thick wooden post on the head of an old man of 55 years was likely to cause his death. Therefore the applt was guilty of murder under clause '2ndly' of S. 300, I. P. C.

[15] None of the Exceptions to S. 300, I. P. C. applies to the facts of the present case & the applt. was rightly convicted under S. 302, I. P. C. His drunkenness & the absence of premeditation were sufficient to justify the imposition of the lesser penalty.

[16] I would therefore affirm the conviction & sentence passed on applt. Sudhu Kumbhar & dismiss his appeal.

[17] **Jagannadhadas J.**—I agree with my learned brother that the conviction & the sentence passed on the applt. should be confirmed.

[18] On the evidence in this case, it is clear that though the applt. was drunk, he deliberately intended causing bodily injury to the deceased. The deceased was assaulted with the wooden post, Ex. 1, which has been identified by P. W. 5 as one of the posts of his fence near his gate. The place wherefrom the post must have been removed was about 32 cubits away from the spot where the deceased fail down. The act of the applt. in running up to the place 32 cubits away, pulling down a post from the fence & beating the deceased with it, cannot but be held to be intentional & the intention must have been at least to inflict bodily injury. The actual injury inflicted was a very severe one as appears from the evidence of the Doctor, P. W. 8, & was one which would necessarily have caused death. It may or may not be that in his state of drunkenness, the accused knew that the injury would result in death. But it is just at this point that the presumption under S. 86, I. P. C. comes in & that knowledge must be imputed to the accused. There is no doubt that if the accused intentionally caused bodily injury & knew that the bodily injury was such as was likely to cause the death of the person injured, the case would be covered by the second clause of S. 300. It is contended that in view of the fact that the instrument used was only a wooden pole & not any weapon like a sharp knife the requisite intent cannot be ascribed to the assailant & that he would be guilty only under S. 304, I. P C., for culpable homicide not amounting to murder. But in this case having regard to the fact that the pole used was a stout & strong one of $6\frac{1}{2}''$ in girth & $10''$ in length, as appears from the seizure list, Ex. 2 & in view of the fact that the bones of the brain were found smashed like a cocoanut shell, the fact that the weapon used was a wooden one, does not negative the requisite intent.

[19] The only hesitation that I felt in this case was due to the fact that there is complete lack of evidence as to what exactly happened at the point of time when the fatal blow was dealt on the deceased. But in the circumstances & on the evidence there can of course be no reasonable doubt that the assailant was the applt. & that the weapon used Ex. 1. It is possible, however, that the blow may have been given on account of grave & sudden provocation offered afresh by the deceased or on account of circumstances which impelled the accused to act in self defence. The evidence of P. W. 1, with reference to the previous stage of the quarrel indicates that after he separated the deceased & the accused the deceased become aggresive & attempted to catch hold of the accused & that he had to intervene a second time to get the accused released from the hold of the deceased. He also says that the accused went out of the courtyard towards the village lane while his father was standing there. It is therefore not altogether unlikely that something else in the nature of fresh provocation or aggression on the part of the deceased happened which gave rise to the second stage of the occurrence leading to the fatal blow. What exactly happened, however, can only be a matter of bare conjecture & there are no sufficient circumstances to enable us to come to any definite conclusion as to what exactly happened. According to the terms of S. 105 Evidence Act, the Ct. must presume the absence of circumstances bringing a case within any of the general exceptions or special exceptions or provisos. There is no scope for the accused being given the benefit of doubt as to the existence of such circumstances.

[20] The case raises the question as to the exact scope of S. 86, I. P. C. It is unnecessary to discuss the matter at length as my learned brother has dealt with the same. I accept the view taken in *Dilmahomed* v. *Emperor*, 21 Pat. 250 : A. I. R. (29) 1942 Pat. 420 : (43 Cr. L. J. 833); *Manindralal* v. *Emperor*, 41 C. W. N. 1187 : (A. I. R. (24) 1937 Cal. 432 : 38 Cr. L. J. 868) & *Ngatun Baw* v. *Emperor*, 13 Cr. L. J. 861 : (6 L. B. R. 100 F. B), that under S. 86, a presumption arises only in respect of knowledge but not in respect of intent. In such cases the usual inference that a person is presumed to intend the natural consequences of his act where he knowingly does an act which normally produces such consequences, does not necessarily follow from this statutorily presumed knowledge. The requisite intent is to be gathered from all the circumstances of the case & not on the basis of the mere presumed knowledge.

[21] We must acknowledge the help given to us in this case by Mr. Pal who has appeared amicus curiae.

R.G.D. *Appeal dismissed.*

A. I. R. (38) 1951 Orissa 357 *[C. N. 85.]*

RAY C. J.

Makar Bhoi & others — Accused-Petnrs. v. *State—O. P.*

Cr. Rev. No. 246 of 1950, D/- 4-4-1951.

Orissa Kendu Leaves (Control & Distribution) Order (1949), Para VII—Essence of offence under — Places in same unit but route passing through another unit.

The essence of the offence under Para VII is carrying from one place in one unit to another place in another unit. If, therefore, stations, *A* and *B* are within the same unit then under the para. it is not an offence to carry kendu leaves from *A* to *B* as both the places are within one unit. It would be reading something into the para. to hold that if the route from *A* to *B* lies within a different unit, the man transporting shall be held to be guilty of an offence in the same manner as if he takes it from a place in one unit to a place in another unit. [Para 3]

V. Pasayat—for Petnrs.; *Advocate-General—for the State.*

Ray C. J.—The petnrs. have been convicted under S. 10 (1) of the Orissa Essential Arti-

cles Control and Requisitioning (Temporary Powers) Act, 1947, & sentenced to pay a fine Rs. 25 each, in default to suffer R. I. for 6 weeks' each. The prosecution case is that on the night of 16-5-49, the petnrs. were carrying loads of Kendu leaves from Bolangir district into Sambalpur district within the limits of Agalpur police outpost under Leisinga P. S. without a permit authorising them to move Kendu leave from one unit to another or from one district to another. This is said to be an offence against R. VII (1) of the Orissa Kendu Leaves (Control & Distribution) Order, 1949. This Order was made by the Govt. of Orissa in exercise of the powers conferred by sub-s. (1) of S. 3, Orissa Essential Articles Control & Requisitioning (Temporary Powers) Act, 1947. Para. VII of the said order runs as follows:

"VII. (1) No person shall move or transport or attempt to move or transport Kendu leaves by rail, road, water or in any other manner from any place in the unit to any place outside the unit within the province except under & in accordance with a permit issued in the behalf by the authority specified hereunder:

(a) outside the unit within the district — Divisional Forest Officer of the Unit.

(b) Outside the district — Dist. Mag. of the district.

(2) The authority specified above may at any time in his discretion cancel a permit granted by him under sub-cl. (1) of this clause."

[2] In the facts of this case, it appears that it is not known from where the kendu leaves were being moved or transported or attempted to be moved or transported. The learned trying Mag. observes:

"In this case it is not known from where the accused persons were carrying the kendu leaves. They were stopped just at the point of crossing the boundary of this district into the limits of Sambalpur district."

It is admitted that the petnrs were moving in a route passing through Bolangir to their destination in Sambalpur; but as already observed by the learned Mag. it has not been established from what place they started. Whether they started from a place inside the unit of Sambalpur or from a place inside the unit of Bolangir is a matter of doubt. The prosecution has adduced no evidence either direct or circumstantial to establish that they were moving kendu leaves or transporting them from a place in the district of Bolangir. The petnrs. belong to the place of Jamutbahal & they were going to Tahilamal. Both these places are within the unit of Sambalpur district. They were arrested at the place Gudimunda which is in the district of Bolangir. The learned trial Mag. says that the fact that they were proceeding at night while the distance of the route that they had to pass over is only five miles is proof presumptive that they must be committing an offence. From that he jumps to the conclusion that the place from where they were bringing the kendu leaves must be one within the unit of Bolangir. I cannot understand his judgment to mean anything other than this. He does not mean to say that even if they brought kendu leaves from a place in Sambalpur district, they shall be held liable for the offence, defined in paragraph VII, simply because they were passing through a route which lies in another unit. The learned Advocate-General, who opposes this petn. on behalf of the State, urges that it was for the defence to establish, in view of the fact that they were caught in a place within the district of Bolangir while their destination was at a place in the district of Sambalpur that they were bringing the kendu leaves either from their native village or from any other place within the unit of Sambalpur within which lies the admitted destination of their movement. This argument, when properly analysed, tantamounts to say that whenever any person is found at a place in course of his journey, he must be in the absence of anything else, presumed to start from that place. As this assumption or the supposition is involved in this contention with which I do not agree, I will reject this contention as completely without any substance. He has again invited my attention to para. III of the Order. This para. 3 is of a comprehensive character. According to this no person other than a licensee shall engage in any undertaking which involves the collection, purchase, sale or storage of kendu leaves for sale, provided that the owner of a private tree or forest may collect himself or through pluckers & store his own kendu leaves but he shall not sell them to anybody except to a licensee. After referring to this para. it is contended that the owner of a private tree is by necessary implication prevented from transporting. The submission is that assuming that the petnrs. were the owners of the kendu trees & the head-loads of kendu leaves which they were carrying were their own, yet they were committing an offence by transporting. This argument is not at all relevant, firstly for the reason that the petnrs. have not been convicted far less charged for an offence against this para. & secondly, that had they been authorised to pluck & store, the authority for transport must be assumed to have been granted. Otherwise, every owner of kendu trees will be required to have a storage-house at the roofs of the trees. This submission, therefore, is without any substance.

[3] The fundamental principle of criminal law is that apart from such presumptions of facts as arise u/s. 114, Evidence Act, all other facts have to be established by the prosecution in order to bring the charge home to the accused. The essence of the offence in this case is carrying from one place in one unit to another place in another unit Suppose, stations, *A* & *B* are within the same unit. Under the para. it is not an offence to carry kendu leaves from *A* to *B* as both the places are within one unit. It would be reading something into the para. to held that if the route from *A* to *B* lies within a different unit, the man transporting shall be held to be guilty of an offence in the same manner as if he takes it from a place in one unit to a place in another unit. I do not think this is the meaning of the para. VII of the

Order. I would, therefore, hold that the prosecution has failed to bring the charge home to the accused petnrs. The order of convictions & sentences is, therefore, quashed. They are acquitted, of the charges & fines, if paid, must be refunded.

V.S.B. *Convictions quashed.*

A. I. R. (38) 1951 Orissa 359 *[C. N. 86.]*

JAGANNADHADAS & PANIGRAHI JJ.

Gour Charan Das—Applt. v. *Atal Behari Ray & another—Resps.*

S. A. No. 350 of 1947, D/- 16-3-1951.

Tenancy Laws—Orissa Tenancy Act (II [2] of 1913), S. 26 (2) — Nature of right or interest under — Purchase at revenue sale.

Under S. 26 (2) the co-sharer purchaser has only a mere possessory right & not any interest in the land by way of tenancy or otherwise. The possessory right ceases when the proprietary right ceases & there is no revival of the occupancy right on the cessation of the proprietary right. The co-sharer continuing in possession would, in the eye of the law, be a trespasser by such continuance.

The purchaser at a revenue sale gets only the defaulter's share in the estate & not the right title & interest of the defaulter. The purchaser is not entitled on account of his revenue purchase to step into the shoes of the defaulter in respect of the land held by him u/s. 26 (2).

The purchaser however, as a co-sharer, though he may not have acquired the right which the defaulter has u/s. 26 (2), would still be entitled to get a decree in ejectment against him, in a properly constituted suit. The pltf. has either to file a suit in ejectment of the defaulter from entirety of the suit lands but for the benefit of the whole body of co-sharers, or in the alternative a suit for ejectment from his own share & for joint possession along with the defaulter. The suit filed on the footing that the pltf. has acquired the right u/s. 26 (2), to khas possession of the suit lands, by his purchase is not such a suit. Case law discussed. [Paras 7, 8, 9]

S. C. Parija—for Applt.; *P. C. Chatterjee—for Resps.*

Cases referred to:—

('14) A. I. R. (1) 1914 P. C. 82: (25 I. C. 309). [Pr. 7]
(24) A. I. R. (11) 1924 P. C. 144 : (51 Cal. 631). [Pr. 8]
('27) A. I. R. (14) 1927 P. C. 135 : (54 Cal. 669). [Pr. 7]
('83) 5 All. 602 : (1883 A. W. N. 155). [Pr. 9]
('27) A. I. R. (14) 1927 Bom. 192: (51 Bom. 149). [Pr. 9]
('81) 7 Cal. 414 : (9 C. L. R. 76). [Pr. 9]
('88) 15 Cal. 40. [Pr. 9]
('03) 30 Cal. 1071. [Pr. 7]
('16) A. I. R. (3) 1916 Cal. 184 : (43 Cal. 46). [Pr. 7]
('30) A. I. R. (17) 1930 Cal. 113 : (57 Cal. 170). [Pr. 9]
('15) A. I. R. (2) 1915 Mad. 1214 : (39 Mad. 501). [Pr. 9]
('50) I. L. R. (1950) Cut. 526 : (A. I. R. (38) 1951 Orissa 233). [Prs. 3, 7, 8]
('25) A. I. R. (12) 1925 Pat. 547: (89 I. C. 232). [Prs. 6, 7, 8]
('27) A. I. R. (14) 1927 Pat. 172 : (102 I. C. 386). [Prs. 6, 8]
('39) A. I. R. (26) 1939 Pat. 522 : (185 I. C. 557). [Prs. 6, 7, 8]
('41) A. I. R. (28) 1941 Pat. 351 : (193 I. C. 253). [Pr. 9]
('50) A. I. R. (37) 1950 Pat. 115 : (27 Pat. 610 F. B.) [Pr. 8]

Jagannadhadas J. — The deft. 2 is the applt. before us, the resps. being the pltf. & deft. 1. During the pendency of these proceedings in the lower appellate Ct. the matter appears to have been compromised between the pltf. & deft. 1 & that is apparently the reason why the present second appeal is only by deft. 2. The appeal arises under the following circumstances.

[2] Defts. 1 & 2 were the proprietors of a residuary Touzi No. 2463/R of the Cuttack Collectorate. This residuary Touzi was put up for sale for arrears of revenue & purchased by the pltf. on 11-9-44. The suit is by the said purchaser for recovery of Khas possession from the defts. of certain lands of the extent of 1.90 acres within the Touzi which have been recorded in the current settlement khatain Ext. 3 as being in the Khas possession of the father of defts. 1 & 2 u/s. 26 (2), Orissa Tenancy Act. The pltf's. case is that as a result of his purchase in Ct. auction, he has obtained also the right to the Khas possession of the suit lands. Admittedly, the suit lands constituted at one time a raiyati holding. They have been purchased by the defts'. father & have been since then in the possession of the family. The contention of the pltf. is that u/s. 26 (2), O. T. Act, these lands were held by the father of the defts. & thereafter by the defts. as mere proprietors & that therefore such interest as they had in it passed on to him on his purchase of their proprietary interest in the revenue sale. This contention has been upheld by both the Courts below & hence this second appeal.

[3] The Bench had occasion to consider recently in *Nilmoni* v. *Govinda Chandra*, I. L. R. 1950 Cut. p. 526 the effect of such a purchase when it was made prior to the Orissa Tenancy Act of 1913 & when the Bengal Tenancy Act was in force in this Province. We held that the result of such a purchase was the creation of an intermediate status for the purchasing proprietor which was neither that of an occupancy tenant or of a tenant-at-will. It was a tenancy right nevertheless which did not merge with the proprietary right. The question that arises for consideration in the present case is what would be the legal position when the purchase of the occupancy holding by the co-sharer proprietor was subsequent to the passing of the Orissa Tenancy Act of 1913. It may be mentioned that the record in the present case did not make it clear as to whether the purchase of the occupancy holding by the father of the defts. in this case was before 1913 or thereafter. We therefore adjourned the case on a previous hearing to enable the advocates on both sides to ascertain what the fact was. We have been informed that the purchase in this case was after 1913.

[4] The question at issue turns upon the proper construction of S. 26 (2), O. T. Act. The argument for the pltf. is that the defts. were in Khas possession of the land only as proprietors & that when he purchased their proprietary interest at the revenue sale, he obtained also the right to such Khas possession as was comprised within the proprietary right which he has purchased. The

argument on behalf of the defts. is that the pltf. by his purchase obtained no more than the right to the defts.,' share in the estate as it originally stood & did not obtain the right to the additional advantage of Khas possession of certain lands which they had purchased, with their own money. They also maintain that S. 26 (2) has not the effect of entirely nullifying the purchase of the occupancy right made by them but that it merely imposes a disqualification on their holding the land as a raiyat, which disqualification continues only so long as they are proprietors. They contend therefore that having now ceased to be proprietors, there is nothing in law to prevent their getting the benefit of their original purchase of the occupancy right. They urged, therefore, that they are in the posision of occupancy raiyat of the land after they ceased to be cosharer-proprietor.

[5] No decided case dealing with this specific question has been brought to our notice. We have been told that the question has not come up for direct decision in this form which is rather surprising in view of the fact that the contingency which has arisen in this case is not at all an uncommon one.

[6] The view taken by the Cts. below relying on *Bambhadur Lal* v. *Mt. Gungra*, A. I. R. (12) 1925 Pat. 547; *Gopi Singh* v. *Jagdeo Singh*, A. I. R. (14) 1927 Pat. 172 and *Sukhdeo Pandey* v. *Rameshwar Prasad*, A. I. R. (23) 1939 Pat. 522, is that the right u/s. 26 (2) of the Orissa Tenancy Act which defts. 1 & 2 had in the suit lands was a right which they had as proprietors of the Touzi & that by the revenue sale they lost the same & that the pltf. as the purchaser got it. The determination of the point at issue involves an answer to two questions (1) What is the nature of the right or interest which cosharer proprietor has u/s. 26 (2)? (2) Does a purchaser at a revenue sale get, by his purchase that right or interest also?

[7] It would be convenient to take the second question first. Under S. 26 (2), it is no doubt true that the purchaser-proprietor has the right to hold the land only as a proprietor & not as a raiyat. But the right or interest so acquired by purchase is not a part of the estate itself which he holds in common with other co-proprietors, but is one outside it & is held by an independent source of title. Such a right is not comprised in, nor is it incidental to the co-proprietary interest. The statutory declaration that his right to hold it is as a proprietor is only a limitation of the rights which he would otherwise have had under the purchase enacted on consideration of public policy. There is therefore prima facie no reason to think that the purchaser at a revenue sale will be entitled to get .the benefit of this additional right of the defaulting proprietor unless his revenue purchase can be said to be a purchase of the right, title & interest of the defaulting proprietor himself. That a revenue sale has not that effect is well settled by the decisions of the P. C. & of the various H. Cs. In *Surja Kanta* v. *Sarat Chandra*, A. I. R. (1) 1914 P. C. 82, it has been laid down that

"On the failure of an owner to pay the Govt. assessment his estate or interest in the land is forfeited or rather determined & under such a sale what is sold is not the interest of the defaulting owner, but the interest of the Crown subject to the payment of the Govt. assessment."

This view has been reiterated by their Lordships in *Narayan Das* v. *Jatindra Nath*, A. I. R. (14) 1927 P. C. 135, In *Khemesh Chandra* v. *Abdul Hamid*, A. I. R. (3) 1916 Cal. 184 it is laid down that :

"What passes at a revenue sale is not the right, title & interest of the defaulting proprietor, but the share as recorded in the Collector's book on which the revenue is assessed."

In *Afzul Hussain* v. *Raj Buno Sahai*, 30 Cal. p.1071, it has been held that the sale of the share of an estate for arrears of revenue under the provisions of Act XI [11] of 1859 does not affect wholly or in part a valid Mokarari lease of the land comprised in the estate notwithstanding the fact that the lease is held by some of the defaulting proprietors of the share sold, having fractional proprietary interest therein. These authorities are clear & decisive & it is the view so well-settled in these cases that has been adopted by my learned brother Panigrahi J. in I. L. R. (1950) Cut. 526, to which I was also a party. The cases in A. I. R. (12) 1925 Pat. 547 : A. I. R. (14) 1927 Pat. 172 & A. I. R. (26) 1939 Pat. 522 reld. on by the Cts. below do not conflict with this view. It has no doubt been stated broadly in these cases that the interest of a cosharer proprietor u/s. 26 (2), O. T. Act which is some what peculiar & anomalous one ceases when his proprietary interest is lost & that it would pass on to the person who acquires the interest of that cosharer. But an examination of the facts of these three cases would show that the sales with which the Ct. was concerned therein were probably either private sales or sales in Ct. auction of a Civil Ct. decree. At any rate, it is not clear that those decisions were concerned with the rights of the purchaser at a revenue sale. There is an obvious & clear distinction between the right obtained under a private sale or a Civil Ct. sale & those under a revenue sale. In the former, the purchase is of the right, title & interest of the vendor or of the J. D., but in the latter, as has been pointed out above, the purchaser gets only the defaulter's share in the estate & not the right, title & interest of the defaulter. This distinction has been overlooked by the Cts. below. I am therefore of the opinion that the pltf. is not entitled on account of his revenue purchase to step into the shoes of defts. 1 & 2 in respect of the lands held by them u/S. 26 (2), O. T. Act, whatever the nature of their right or interest may be in the lands.

[8] This, however, does not conclude the matter. If as has been suggested in some of the cases, the co-sharer proprietor loses his rights

u/S. 26 (2) the moment he ceases to be a proprietor, then it may follow that he has no longer any right to hold the land at all & he may, therefore, be in the position of a trespasser liable to be ejected. In reply it has been contended on behalf of the applt. that the effect of S. 26 (2) is merely to impose a disqualification which subsists only so long as he is a proprietor & that his right under the original purchase of the occupancy right is revived the moment he ceases to be a proprietor. This requires a consideration of the nature of the interest of the purchasing cosharer-proprietor u/S. 26 (2). That interest is a right to hold the land as a proprietor but not as a raiyat. It is clearly, therefore, not a tenancy right at all. The tenancy right must be taken to have become merged in the proprietary right & that is what has been incidentally pointed out in the judgment of my learned brother Panigrahi J. in I. L. R. 1950 Cut. 526 at p. 530. The merger of the tenancy right on such a purchase is in accordance with the law propounded by the P. C. in *Midnapore Zamindari Co.* v. *Naresh Narayan Roy*, A. I. R. (11) 1924 P. C. 144 at p. 146 (2). In spite, however, of the merger, S. 26 (2) gives the purchasing proprietor one individual advantage, viz., the right to hold the land as against the other co-proprietors merely paying to them a fair & equitable sum for use and occupation. That is, he gets the sole benefit of the cultivating possession by his purchase & does not share this benefit with the other co-proprietors. To this extent only the Statute law in S. 26 (2) appears to have modified the law as laid down in A. I. R. (11) 1924 P. C. 144 at p. 146 (2). A consideration of the various legislative changes with reference to the rights of a co-sharer-purchaser who purchases the holding of an occupancy-raiyat is instructive. Sub-s. (2) of S. 22, Bengal Tenancy Act, as it stood before the amendment in 1907 was as follows :

"If the occupancy right in a land is transferred to a person jointly interested in the land as a proprietor or permanent tenure holder, it shall cease to exist, but nothing in this sub-section shall prejudicially affect the rights of any third person."

After the 1907 amendment, the same sub-section in the B. T. Act stood as follows :

"If the occupancy right in the land is transferred to a person jointly interested in the land as proprietor or permanent tenure holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the shares of the rent which may be from time to time payable to them, & if such transferee sublets the land to a third person, such third person shall be deemed to be a tenure-holder or a rayat, as the case may be in respect of the land."

The corresponding present provision in the Orissa Tenancy Act of 1913 which is S. 26 (2) thereof is as follows :

"If the occupancy right in the land is transferred to a person jointly interested in the land, as proprietor or permanent tenure-holder, such person shall have no right to hold the land as a raiyat, but shall hold it as a proprietor or permanent tenure-holder as the case may be, & shall pay to his co sharers a fair & equitable sum for the use & occupation of the same."

The position of the cosharer-proprietor u/S. 26 (2), B. T. Act, both before & after 1907 has been fully dealt with, in the F. B. judgment in *Upendra Pratap* v. *Ishwarwati Koer*, A.I.R. (37) 1950 Pat. 115. In the majority view the right of the co-sharer-proprietor is an intermediate tenancy of some sort (see p. 126, col. II). In the view of Narayan J. in the same F. B. as expressed at p. 134, col. I, this anomalous tenancy right can last only so long as the proprietor continues to possess his proprietary interest, a view for which his Lordship derives support from the decision in A. I. R. (12) 1925 Pat. 547. That is also what is laid down in A. I. R. (14) 1927 Pat. 172 & A. I. R. (26) 1939 Pat. 522. The difference of views reflected in the above F. B. case in A. I. R. (37) 1950 Pat. 115 turned only on whether the right ceased on partition & allotment of the lands to another sharer. But there was no difference in the view that the right to hold ceases when the proprietary right itself ceases. If that is the correct legal position, as regards the right or the interest of the co-sharer proprietor, with reference to the provisions of S. 22 (2), Bengal Tenancy Act, it appears to me that the position of the co-sharer-proprietor is definitely weaker u/s. 26 (2), Orissa Tenancy Act, having regard to the difference in the wording. Under the provisions of the Bengal Tenancy Act, as it stood in 1907, all that is provided, is that the occupancy right ceases to exist. This was held to mean that the holding continued & that the purchasing proprietor has some sort of a tenancy right. This view was recognised by the 1907 amendment by specifically providing that what the co-sharer was to pay was a proportionate share of the rent to other co-proprietor. Therefore, under these provisions, there was definite scope for holding that the purchasing co-proprietor had an interest by way of a tenancy right. But the present provision in the Orissa Tenancy Act makes it quite clear that the purchasing co-proprietor shall have no right to hold the land as a raiyat. Therefore, any tenancy right in the purchase is ruled out & as has been pointed out above it is merged in the proprietary right. He has the right to hold the land only as a proprietor. The sub-section, therefore, recognises nothing more than his right to hold possession, & gives him the right to keep that possession as against the other co-proprietors, who cannot call upon him to share the benefits of the cultivating possession, but are only entitled to a fair & equitable sum for the use & occupation of the land. It appears to me, therefore, quite clear that under the present provision of S. 26 (2), what the co-sharer-purchaser has, is only a mere possessory right & not any interest in the land by way of tenancy or otherwise. It may be that this possessory right is heritable & transferable along with the proprietary right; but the question is whether it continues if the proprietary right ceases. In my view, the only reasonable construction of

the phrase "shall hold it as a proprietor" occurring in S. 26 (2), Orissa Tenancy Act, is that the possessory right given thereby ceases when the proprietary right ceases. There appears to me to be absolutely no justification for reading into the sub-section a revival of the occupancy right on the cessation of the proprietary right. S. 22 (2), Bengal Tenancy Act, as it stood prior to 1907 categorically said that "the occupancy right shall cease to exist" & not merely that it shall be suspended. It is to my mind the same idea, of extinction & not suspension & something more that is conveyed in S. 26 (2), Orissa Tenancy Act, when it says "such person shall have no right to hold the land as a raiyat but shall hold it as a proprietor." It is not possible to read these words with the qualification that the right to hold as a raiyat would be revived on the cessation of the proprietary right & as implying any limitation on the prohibition confined to the period of the subsistence of the proprietary right. In my view, therefore, defts. 1 & 2 have lost the right to continue in cultivating possession of the suit-lands & would, therefore, in the eye of law be trespassers by such continuance.

[9] Learned counsel for the applt. (sic) argues that in this view, he, as a co-sharer, though he may not have acquired the right which defts. 1 & 2 had, u/s. 26 (2), would still be entitled to get a decree in ejectment against them. In support of this position, he relies on the cases in *Ahmad Sahib* v. *Magnesite Syndicate Ltd.*, A. I. R. (2) 1915 Mad. 1214, *Maganlal Dulab Das* v. *Budhar Purshotam*, A. I. R. (14) 1927 Bom. 192, *Currimthoy & Co. Ltd.* v. *L. A. Creet*, A. I. R. (17) 1930 Cal. 113 and *Sambhu Gosain* v. *Piyari Mian*, A. I. R. (28) 1941 Pat. 351. While no doubt these cases show that one co-sharer can maintain ejectment as against a trespasser, without impleading the other co-sharers, they also show that he can do so only, for the benefit of the entire group of co-sharers. This is made clear in A. I. R. (14) 1927 Bom. 192 at p. 195, where their Lordships say as follows:

"It may be pointed out, however, though it should hardly be necessary to do so, that the pltf. could get possession in the suit, not only for himself alone, but really for the benefit of the co-owners."

In such a suit by one co-sharer for ejectment, it would be open to the deft.-trespasser to show that he is in possession with the consent of the other co-owner. If he shows the same, the pltf. co-owner will be entitled to get a decree in ejectment only to the extent of his own share & will be entitled only to joint possession. This was clearly laid down in *Hira Lal* v. *Bhairon*, 5 ALL. 602, *Radha Proshad* v. *Esuf*, 7 Cal. 414 and *Harendra Narain* v. *Moran*, 15 Cal. 40. Such possession, however, to the extent of his own share, he can get only in a properly constituted suit. The pltf. has either to file a suit in ejectment of the defts., from entirety of the suit-lands but for the benefit of the whole body of co-sharers, or in the alternative a suit for ejectment from his own share & for joint possession along with the defaulter defendants. The suit as filed & as appears from the plaint, is on the footing that the pltf. has acquired the right u/s. 26 (2) to khas possession of the suit lands, by his purchase. It is not a suit for possession either for the benefit of the entire body of co-sharers or one for joint possession with defts. 1 & 2 to the extent of his own share. It would, therefore, be unfair to the defts. to give a decree in ejectment in favour of the pltf. on a footing different from what the plaint has asked for & on a title & cause of action which is different depriving the defts. of the defence which they may have in a properly constituted suit.

[10] In the circumstances, therefore, the pltf.'s suit has to be dismissed leaving it open to him to obtain ejectment of the defts. from the suit lands either wholly or partially in a separate & properly constituted suit.

[11] In the result, therefore, the appeal must be allowed with costs throughout.

[12] **Panigrahi J.**—I agree.

D.H. *Appeal allowed.*

A. I. R. (38) 1951 ORISSA 362 (C. N. 87)

(FULL BENCH)

RAY, C. J. JAGANNADHADAS AND NARASIMHAM, JJ.

Sm. Nilamoni Bewa and another, Defts.-Appellants v. Mrutunjaya Pradhan and others, Pltfs.-Respondents.

A. F. A. D. No. 162 of 1946, D/- 30-4-1951.

† (a) *T. P. Act (1882), S. 58 (c), Third condition — Sale or mortgage — Postponement of mutation — Covenant for refund on dispossession — Construction in case of ambiguity — S. A. 41 of 1946 overruled.*

Where the mortgagor ostensibly sells the mortgage property on condition that on such payment being made the buyer shall transfer the property to the seller and the condition is embodied in the document which effects or purports to effect the sale in accordance with the proviso added to S. 58 (c) by the T. P. Amendment Act, 1929, it is to be presumed a mortgage, and the party, who asserts to the contrary, must have to prove it. This proof will consist of the provisions of the document, the necessary legal implications thereof, and such surrounding circumstances as are admissible to prove how the language of the deed is related to the existence of real facts. This rule of admissibility of evidence is subject to the exception that, only in case of fraud, the oral evidence of real intention may be admissible. But in the conditional sales, effected by one or more documents prior to the 1929 amendment with the above condition there is no presumption either way. Their nature and character are to be determined irrespective of the form according as the parties intended. This intention has to be ascertained by construing the provisions of the deed, interpreting the language thereof in the light of the surrounding circumstances bearing upon it and their necessary implications with reference to either forthright conveyance of absolute rights to the buyer or

their postponement by withholding from him, till expiry of the time for fulfilment of the condition, various rights, privileges and interests inherent in the absoluteness of proprietary rights or by imposing timely restrictions upon such privileges and the like. Express provision for postponement of mutation of the grantee's name in the landlord's papers till after the time for repayment expires is decisive of the transaction being a mortgage; but in cases of transfer of occupancy holdings before they were made freely transferable by the Orissa Tenancy Amendment Act, 1938, postponement of mutation is rather inconclusive and the nature of the transaction will have to be decided on construction of the deed in the light of the surrounding circumstances. Covenant for refund of consideration money with interest on dispossession or disturbance of possession of the grantee not attributable to grantor's defective title is indicative of a mortgage rather than a sale, while, on the other hand, such a covenant in case of dispossession due to grantor's defective title is inconclusive. In case of ambiguity or doubt, ex facie import of the tenor of the document affecting the transaction shall prevail. The ambiguity or the doubt must, in each case, be inherent in the provisions of the deed and not dissoluble by reference to the surrounding circumstances. Case law discussed. S. A. 41 of 1946, overruled. (Paras 14, 15, 31, 32, 34, 43)

Anno: T. P. Act. S. 58 N. 32, 33.

(b) T. P. Act (1882), S. 58 (c), conditions one and two — Sale or Mortgage.

(Obiter) Per Ray, C. J.:...A transaction evidenced by a deed which contains either the first or the second condition must be one of mortgage. By its very terms, it is made clear that the sale is not a completed and absolute one from the beginning but has the contingency of either becoming final and absolute or becoming void. (Para 13)

Per Das, J.: A transaction by way of an ex facie sale which contains a stipulation, rendering the sale absolute in default of payment or avoiding the sale on payment, cannot be 'ipso facto' held to be a mortgage without any consideration of the intention to be gathered from the other terms of the document and of the surrounding circumstances. Case law discussed. (Para 42)

Anno: T. P. Act. S. 58 N. 33.

(c) T. P. Act (1882), S. 58 (c) — Sale or Mortgage — Delay in filing suit for redemption.

Per Ray, C. J.: Delay in launching the suit for redemption will not make the transaction a sale which from its very inception was a mortgage, whatever other equitable considerations might arise therefrom. Once a mortgage is always a mortgage. (Para 27)

Per Das, J.: Delay in seeking redemption is a circumstance which must call for scrutiny. Unexplained delay must receive its due weight as one of the relevant circumstances, by way of conduct where such conduct is admissible. (Para 45)

Anno: T. P. Act, S. 58 N. 33.

(d) T. P. Act (1882), S. 58 (c) — Sale or mortgage.

Condition that on repayment within certain time of consideration money buyer to return the land together with the Kabala — On failure of payment buyer to possess and enjoy from generation to generation and after getting his name duly mutated in the Sherista of Zamindar to use the land in any way — Difference in the operative words of conveyance of ownership used in earlier portion and later portion of the document indicating detraction from full ownership prior to the stipulated time — Transaction held to be a mortgage and not a sale. 64 I C 583 (Cal); A I R (4) 1917 Cal 565 and A I R (1) 1914 L B 243', Ref. (Paras 24, 27, 47)

Anno: T. P. Act, S. 58 N. 33.

H. Mohapatro, for Appellants — B. K. Pal, for Respondents.

Cases referred to:

(1851-54) 5 M I A 72 (P C) (Pr 8)
(1863-66) 10 M I A 340: (5 W R 47 P C) (Pr 8)
('70) 13 M I A 560: (7 Beng L R 136 P C) (Prs 8, 33)
('76-78) 2 I A 241: (1 Mad 1 P C) (Prs 8, 13)
('84) 10 Cal 30: (10 I A 129 P C) (Pr 41)
('90) 12 All 387: (17 I A 98 P C) (Prs 2, 10, 34, 41)
(1900) 27 I A 58: (22 All 149 P C) (Prs 10, 11, 13, 25)
('16) 38 All 570: (A I R (3) 1916 P C 49) (Prs 2, 10, 11, 13, 34, 45)
('17) 44 I A 236: (A I R (4) 1917 P C 207) (Prs 10, 14)
('24) 47 Mad 729: (A I R (11) 1924 P C 226) (Prs 10, 37, 39)
('23) A I R (10) 1923 All 586: (45 All 581) (Prs 36, 37)
('23) A I R (10) 1923 All 48: (45 All 72) (Pr 36)
('26) A I R (13) 1926 All 670: (96 I C 780) (Pr 13)
('27) A I R (14) 1927 All 321: (49 All 405) (Prs 36, 37)
('29) A I R (16) 1929 All 619: (119 I C 103) (Pr 36)
('31) A I R (18) 1931 All 548: (53 All 607) (Pr 36)
('37) A I R (24) 1937 All 724: (171 I C 802) (Prs 37, 42)
('39) A I R (26) 1939 All 713: (185 I C 487) (Prs 13, 37)
('40) A I R (27) 1940 All 227: (188 I C 333) (Pr 37)
('50) A I R (37) 1950 All 430 (Pr 37)
('15) A I R (2) 1915 Bom 229: (40 Bom 74) (Pr 37)
('16) A I R (3) 1916 Bom 215: (40 Bom 378) (Prs 13, 37, 38)
('31) A I R (18) 1931 Bom 371: (134 I C 337) (Pr 37)
('86) 12 Cal 583 (F B) (Pr 9)
('07) 6 C L J 208: (11 C W N 400) (Pr 41)
('13) 21 I C 19 (Cal) (Prs 37, 41)
('16) 35 I C 102: (A I R (4) 1917 Cal 565) (Prs 24, 41)
('21) 64 I C 583: (Cal) (Pr 24)
('33) A I R (20) 1933 Cal 381: (60 Cal 167) (Pr 41)
('91) 14 Mad 170 (Prs, 41, 42)
('14) 1 M L W 80: (A I R (1) 1914 Mad 37) (Prs 11, 37)
('15) 26 I C 1: (A I R (2) 1915 Mad 656) (Pr 19)
('17) A I R (4) 1917 Mad 368: (36 I C 393) (Pr 37)
('19) 42 Mad 407: (A I R (6) 1919 Mad 1 F B) (Prs 2, 11, 36, 37)
('41) A I R (28) 1941 Oudh 582: (17 Luck 198) (Prs 13, 42)
('44) A I R (31) 1944 Oudh 305: (1944 O W N 399) (Pr 42)
('44) Second Appeal No. 86 of 1944, (Orissa) (Prs 2, 19, 24)

('46) Second Appeal No. 41 of 1946 (Orissa) (Pr 19)
('46) Second Appeal No. 192 of 1946 (Orissa) (Pr 15)
('48) Second Appeal No. 10 of 1945, D/- 13-9-1948, (Orissa) (Prs 2, 3, 29)
('49) AIR (36) 1949 Pat 508 (Pr 37)
('14) 22 IC 806: (AIR (1) 1914 LB 243) (Pr 24)
(1740) 27 ER 706: (Barn C 428) (Pr 34)
(1749) 1 Ves Sen 402: (27 ER 1106) (Pr 33)
(1850) 44 ER 924: (2 De G & J 97) (Prs 7, 10, 34, 45)
('66) 5 WR 88: (Beng LR Sup Vol 415 FB) (Pr 8)
18 Jowa 504 (Pr 33)

RAY, C. J.: This appeal was heard by Das, J. & Narasimham J. In view of the four unreported decisions of this Court in Second Appeal No. 10 of 1945, Second Appeal No. 192 of 1946, Second Appeal No. 86 of 1944 & Second Appeal No. 41 of 1946 giving rise to conflicting opinions on some vital aspects of the question as to certain distinctive features of a transaction of "mortgage by conditional sale" as distinguished from "a sale out & out", they have referred it to a Full Bench. The divergence of view, that according to them was of a serious character, was regarding the burden of proof, & besides, it also related to the effect of

"(1) the insertion of a penalty clause in such document for return of the consideration money plus interest if the vendee is dispossessed from the lands through defect of title of the vendor or otherwise; & (2) the insertion of an express provision postponing mutation of the name of the vendee in the landlord's sherasta till expiry of the stipulated period."

(2) The conflict of opinion, as to the burden of proof, arose in the following manner: In the unreported decision of a Division Bench of this Court consisting of myself & brother Panigrahi in Second Appeal No. 10 of 1945, it is held that in a case where the distinctive condition of a "mortgage by conditional sale" is embodied in the document, that effects or purports to effect the sale, the transaction is prima facie a mortgage. A contrary view was given in Second Appeal No. 86 of 1944 in their decision by my learned brothers Das & Narasimham, JJ., to the effect that

"inasmuch as the ex facie import of such a document is that of an out & out sale, the burden is upon the person asserting that it is a mortgage, to make it out to be so."

For this, it is said, they relied upon the Privy Council decisions, reported in 'Bhagwan Sahai v. Bhagwan Din', (12 All 387; 'Jhanda Singh v. Wahiduddin', (38 All 570), & the Full Bench decision of the Madras High Court in 'Muthuvelu Mudaliar v. Vythilinga Mudaliar', (42 Mad 407). Similarly, in Second Appeal No. 10 of 1945 it was held that

"(1) postponement of vendee's right to record the sale in the landlord's paper & (2) consequent freedom from obligations to pay rent or other public charges on the holding sold, & (3) the covenant for refund of the consideration money with interest at a stipulated rate in the event of the grantee's dispossession not attributable to defect in grantor's title"

are circumstances that impart to it features decisively distinctive of the transaction as a mortgage rather than a sale. On the other hand, in Second Appeal No. 86 of 1944, Das & Narasimham, JJ., have taken the view that both the aforesaid circumstances are inconclusive.

(3) In this context, the question that arises for consideration is whether the case of 'Gouri Pradhan v. Bhagaban Pradhan', in Second Appeal No. 10 of 1945 has been correctly decided. The propositions for solution may be formulated as follows: Firstly, whether if "the condition is embodied in the document which effects or purports to effect sale" as prescribed in the proviso to S. 58 (c), T. P. Act, it gives rise to a presumption that the transaction is a mortgage; Secondly, whether the express provision for postponement of mutation of the grantee's name in the landlord's papers till after the time for repayment expires is decisive of the transaction being a mortgage; Thirdly, whether the covenant for refund of the consideration money with interest from the date of grantee's dispossession, if any, either attributable to defects of grantor's title or otherwise, is a circumstance decisive of its character as a mortgage; & Fourthly, in view of Das, J's expression of doubt about the correctness of certain observations of Panigrahi, J., in Second Appeal No. 41 of 1946, with which I did not go to the full length of concurring at the time, the further question that arises for solution is whether in case of ambiguity or doubt, the construction should lean in favour of a mortgage & not of a sale, or, whether, on the other hand, ex facie import of the tenor of the document or documents shall prevail.

(4) I have studied carefully a very long catena of decisions, cited at the Bar, bearing on the topic, always bearing in mind to make out, if I could, any general rule of construction out of them. To put it broadly, it will not be far from correct to say that, excepting a few fundamentals that underlie, it is too hazardous to make out any inflexible rule of construction.

(5) It should also be noticed that, in the Indian decisions of the earlier ages, the Judges were confused between the English law of equity & the India law, as it then stood (before the T. P. Act), in the matter of determination of the nature of the transactions which had all the appearance of conditional sales or sales subject to the condition of repurchase. Some of the elements of confusion were also due to the tendency in India to make out a rule of general application of the observations of their Lordships of the Judicial Committee occasioned by the particular facts & circumstances of that case.

(6) I shall first review the relevant decisions of the Privy Council, that have either been cited at the bar, or otherwise come to my notice, from earliest to the later — they cover the period beginning with December, 1849, & ending with June, 1924. The Indian decisions of different High Courts have been based upon either one or the other of such decisions according as the facts of the case bore resemblance to the facts & circumstances appearing in the cases decided by the Board.

(7) I shall, however, allow my review of the Board's decisions on the subject to be preceded by a few introductory remarks collected from the commentaries on mortgage by conditional sale, or sale with a condition of retransfer. In the equity jurisdiction in England, the following tests were applied in distinguishing a mortgage by conditional sale from a sale with a covenant for reconveyance; (i) the existence

of a debt; (ii) the long period for repayment; (iii) the continuance of the grantor in possession; (iv) stipulation for interest on repayment; (v) price below the true value; & (vi) contemporaneous deed stipulating for reconveyance. The characteristic feature of a sale with a condition of retransfer (not amounting to a mortgage) was that it was a transfer of all rights in a property reserving only a personal right of repurchase. This distinction was emphasised in the case of 'Alderson v. White', (1850-44 E R 924) — a decision that afforded the foundation for negativing a mortgage & upholding a sale of transactions in large number of cases, both in India & England, including cases decided by their Lordships' Board in the Privy Council. 'Alderson's case', however, was held in England as not in any way interfering with the trend of decisions in the equity jurisdiction in England which granted relief against time being of the essence of the contract & allowed equity of redemption to be exercised. It has almost been unanimously accepted that the Law of mortgage by conditional sale enacted in the T. P. Act was the statutory recognition of the principles of the equity of redemption that obtained in England. This statutory adoption of the law of equity conferring right of redemption upon the mortgagors gave a quietus to the confusion that prevailed in India. The question since then reduces itself to one of construction of the deed or deeds evidencing a transaction of mortgage by conditional sale.

(8) The earliest Privy Council case on the point is that of 'Muttyloll Seal v. Annundo Chunder', 5 M I A 72. The question which arose in appeal before the Supreme Court at Fort William in Bengal was whether the dealing with certain real estate (a conveyance of which was made in fee by way of Lease & Release) constituted, under the circumstances, an absolute & unconditional sale, or, whether it was not in the nature of a mortgage transaction, & liable to a defeasance. Sir Lawrence Peel, the Chief Justice of the Supreme Court, relying mainly on the circumstances that the grantor continuing in possession of the property demised agreed to pay as rent reserved under the lease a sum of Rs. 425 per month — a sum equal to the interest as stipulated on the principal sum advanced, subject to reduction according as payment towards principal was made from time to time, & secondly, that the sum advanced was a very inadequate price for the whole property, & thirdly, that the seller stipulated to do expensive repairs & to pay all the costs of the covenant & finding that no other explanation except if the transactions were one of security was afforded of these circumstances, held that the transaction was a security & not a sale. This action had been started on the equity side of the Supreme Court, & was decreed declaring that the transaction was a mortgage, & that on payment of the principal money & the interest due on accounting, the defts. be called upon to reassign & reconvey to the pltf. (the seller) the real estate concerned. Lord Langdale, delivering the judgment of the Privy Council, observed:

".....our opinion, if given in detail, might not have been altogether in accordance with the decision of the Court below, yet, giving our best consideration to the whole matter, we do not find any reason which appears to us sufficient to alter that decision."

As it appears very clearly from the report, the consideration of this case was based entirely on the law prevailing in equity jurisdiction in England which evidently was applicable to the circumstances of the case. (b) 1865: The next in point of time is that of 'Forbes v. Ameeroonissa Begum', 10 M I A 340. This was a case from the High Court at Calcutta. Since the case of 'Muttyloll Seal', several Regulations had come into operation in Bengal, namely, Bengal Regulations Nos. I & XV of 1793 & No. XVII of 1806. The case arose from a proceeding for foreclosure of a mortgage by conditional sale (Bye-bilwuffa). The case related to the respective rights of the parties (mortgagor & mortgagee) in relation to right of redemption, foreclosure & completion of mortgagee's title. The difficulty, such as we are concerned with, did not arise in the case. From this, it is, however, clear, as a matter of history, that anterior to the year 1806, the rights of a holder of a Bye-bil-wuffa were enforceable according to the strict terms of the agreement. Time was of the essence of the contract which executed itself on its expiry. The Regulations, however, conferred upon the debtor the equity of redemption by way of relief against the condition of time. (c) 1870: The case of 'Pattabhiramier v. Vencatarow Naikan', 13 M I A 560, was a case from Madras whereto the Bengal Regulation of 1806 had not been extended. Their Lordships said, that this form of security had long been common in India as stated in the preamble to Bengal Reg. No. I of 1798; that such contracts were recognised & enforced 'according to their letter by the ancient Hindu Law as it appears from several passages' in Colebrooke's Digest Vol. I, pp. 183, 187, 188 & 193; that they were equally recognised & enforced by Mohammedan law is shown by Mr. Baillie in his introduction to the Mohammedan law of sale; that in cases to which Beng. Reg. XVII of 1806 (which allowed a mortgagor who had executed such a security as that now in question to redeem at any time before the mortgagee had finally foreclosed the mortgage by taking the proceedings which the Regulation made essential to foreclosure) does not apply, the interest of a mortgagee under a deed of conditional sale becomes absolute, according to the terms of the contract, by the mere failure of the mortgagor to redeem within the stipulated period & it has been so decided by a Full Bench of the High Court of Bengal in the case of 'Sarifunnisa v. Enayet Hossein', 5 W R 88; that the point so decided is also assumed to be the law in the judgment delivered at their Lordships' Board in the case of 'Forbes v. Ammeroonisa Begum'; that in the absence of any positive legislation or established practice modifying ancient law of the country it was erroneous for the Sadar Court of Madras to lay down that the mortgagee was under the obligation of taking any proceeding in law for foreclosure; that the "equity of redemption", owed its existence to the doctrine established by the British Courts of Equity that the time stipulated in a mortgage deed is not of the essence of the contract; & that such a doctrine was unknown to the ancient law of India. (d) 1875: The case of 'Thumbasawmy Mudelly v. Mohomed Hossain', 2 I A 241, laid down most emphatically, approving the decision of the Board in the case of 'Pattabhiramier', that mortgages by conditional sales were to take effect strictly according to the letter in Madras & other parts of India

where Bengal Regulation XVII of 1806 was not in force, that is, that in default of payment within the time fixed, the mortgagee becomes the absolute owner of the property. But that with regard to the transaction in the case, they held that it was a mortgage usufructuary & not a mortgage by conditional sale, & accordingly, the case stood clear of the decision in 'Pattabhiramier's case'. They, however, made a very important observation, namely, that since 1858, in Madras & 1871 in Bombay, the Judges of Sadar Adawlats were in error in administering the law of India in conformity with the established practice of the Court of Equity in England, thereby recognising in the mortgagor a right of redemption notwithstanding the time for foreclosure may have passed by. In applying this principle in India, their Lordships said, the Judges of the Sadar Court took upon themselves, in contravention of the law of India, to apply to this class of security for the first time the principle which the English Courts of Equity have for centuries applied to mortgages in that country. They concluded their judgment with a recommendation that:

"An Act affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, & giving to the mortgagee the means of obtaining such a foreclosure, with a reservation in favour of mortgagees whose titles, the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law, without injustice to any party".

(9) Shortly, after this, the T. P. Act (IV (4) of 1882) was enacted. In conformity with the recommendation of their Lordships of the Privy Council, the Act (S. 2) left undisturbed the previous legal relations constituted before the Act came into force. S. 2(c) provides:

".....But nothing herein contained shall be deemed to affect any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability:....."

The word 'relief', in this clause, like the words "right & liability", denotes "substantive right". There is a clear distinction between "a relief" & "the procedure for obtaining that relief". A mortgagee, coming into Court after the commencement of the Act to enforce a mortgage, must follow the procedure enjoined by the Act, even though the mortgage be before the Act (See 'Bhobo Sundari v. Rakhal Chunder', 12 Cal 583). The same has also been the view in the High Court of Allahabad & Madras.

(10) 1890. (e) The first case that came before the Board after the passing of the T. P. Act was that of 'Bhagwan Sahai v. Bhagawan Din', 12 All 387. The transaction, which gave rise to this case, was effected by two documents, dated, 20-2-1835. The pltfs. in the case, in claiming right of redemption, asserted that the transaction sale (sic.) within Reg. XVII of 1806, which gave the mortgagor a right of redemption. The question, with which their Lordships were concerned, was one of construction. They found that the first document was one of absolute sale. In the second document of the even date, the purchaser asserted that he had purchased the property, but, however, as a matter of favour & mercy, stipulated that if within a period of 10 years, the vendor would pay back in a lump sum & without interest the whole amount, he should accept the same & cancel the valid sale & that during the aforesaid time he should remain in possession, enjoy the profits & 'be liable for the loss & the vendor should have no concern whatsoever'. In case the principal was not paid (according to the terms of the document), the vendor should not be able to cancel the sale by payment of the principal. Their Lordships of the Privy Council, following the case of 'Alderson v. White', held that it was a case of absolute sale with a covenant for reconveyance & not a security. In 'Alderson's case', the Lord Chancellor observed:

"The rule of law on this subject (whether in view of Court of Equity the transaction ought to be treated as a mortgage) is one dictated by commonsense, that prima facie an absolute conveyance containing nothing to show that the relation of debtor & creditor is to exist between the parties does not cease to be an absolute conveyance & become a mortgage merely because the vendor stipulates that he shall have a right to repurchase.....In every such case, the question is, what upon a fair construction is the meaning of the instruments?.....I think that the Court after a lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be; & I see but little evidence to that effect here."

The rule of presumption, that the party, asserting that an instrument is not what it purports to be, has the onus on him, owes its authority to this case, as it will be noticed presently. Their Lordships of the Privy Council, in the premises of the case, made no distinction between the law of India & of England. (f) 1899. The next case, that came before the Board, was that of 'Balkishen Das v. Legge', 27 I A 58. Here too, the transaction was anterior to the T. P. Act. Their Lordships, while noticing that, according to the ancient law in India, a mortgage by conditional sale was enforceable according to the letter under which time was of the essence of the contract, on construction of the two deeds before them, came to the conclusion that it was a security. This, they did, firstly, on account of a provision in the second deed (that if the vendee objects to receive money & relinquish the property, the vendor may deposit the amount in the treasury, by virtue of this agreement, & obtain possession over the 'ilaka'), & this provision, according to their Lordships, at once suggested a reference to Regulation I of 1798 as being in the opinion of the parties applicable to the case, it being assumed that there was no other statutory provision or practice by which such deposit could be made; secondly, on account of the condition that the estate was redeemable not only on payment of the stipulated sum, that is, the price for sale, but also of an amount which should be found due at the time of redemption on account of another loan; & lastly, that the transaction having the character of a mortgage, so far as the loans on the factory accounts were concerned, it may be held to be so entirely. 'Bhagwan Sahai's case' was distinguished as it was decided on the language of the deeds there in question. Accordingly, their Lordships declared that the pltf. was entitled to redemption. Their Lordships, however, laid down certain propositions which made a departure from the decisions of anterior dates of the Indian High Courts. These propositions are: (i) that it may be assumed that the framers of the T. P. Act, in defining in Cl. (c) of S. 58, intended to state the existing law & practice in India; (ii) that

the case in the English Court of Chancery had not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature; (iii) that oral evidence, prohibited as it is by S. 92, Evidence Act, was inadmissible for the purpose of construing the deeds or ascertaining the intention of the parties unless any such evidence could be brought within the exceptions, contained in the several provisos to the section; & (iv) finally that the case must, therefore, be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the documents is related to existing facts. (g) 1916. Then came the case of 'Jhanda Singh v. Wahiud-Din', 38 All 570. The decision, in this case, is seemingly in conflict with the case of 'Balkishen Das & others', inasmuch as, the provision in the deed of covenant for repurchase (that in the event of vendee's refusal to receive the money, the vendor shall have power to deposit it into the treasury) — a provision exactly similar to the one in the 'Balkishen Das & others' case' — could not persuade their Lordships to hold that the transaction, under their consideration, was one of security. But on close examination, their Lordships did not appear to override the legal effect of that sort of provision as will appear from the observation to the effect that the fact that the machinery provided for deposit under the provisions of Reg. I of 1798 & XVII of 1806, is made applicable to the case 'might disclose to some extent the intention of the parties to create a mortgage'; but that the clause having been extremely ill-drawn & its provision being self-contradictory, their Lordships said "the clause so obscure & contradictory cannot furnish any true guide to the intention of the parties". In view of the close resemblance which the case of 'Bhagawan Sahai', 12 All 387, had with the case before their Lordships & relying upon Lord Cranworth's observation in 'Alderson v. White', (that prima facie an absolute covenant containing nothing to show the relation of debtor & creditor does not cease to be an absolute conveyance & become a mortgage merely because the vendor stipulates that he shall have a right to repurchase), they held that the transaction before them was one of security. They also made a reference to the provisions of the deed incorporating covenant for repurchase in 'Bhagawan Sahai's case' in order to show how it was expressly provided that time was of the essence of the contract. Their Lordships laid much stress upon the circumstances that the deed incorporating the covenant for repurchase was not the result of any contemporaneously contemplated or antecedently arrived at agreement of resale or repurchase. On the other hand, they decided that the contract for repurchase was an afterthought. I would quote the passage bearing on it;

"This deed upon its face purports to be an absolute deed of sale. It does not refer to any contemplated or antecedent agreement of resale or repurchase, & does not disclose any intention whatever to treat the disposal of the property mentioned in it as anything other than an absolute transfer on sale for certain definite sum.....The recital in the bond is certainly more consistent with the contract for repurchase being an afterthought than the contrary."

In the result, this case reiterates the proposition laid down in 'Bhagwan Sahai's case', viz., that, in distinguishing security from an absolute sale with a condition of repurchase, the intention of the parties was the real test & the same must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. (h) 1917: The next case is that of 'Maung Kyin v. Ma Shwe La', 44 I A 236. This case is not so much in point for our purpose. It decides that a third party can adduce oral evidence of intention of the parties to a document, S. 92, Evidence Act notwithstanding, as the ban is confined to the parties only. To this extent, Bhagawan Sahai's case' is distinguished. (i) 1924: The last case of the series is that of 'Narasingerji Jyanagerji v. Parathasaradhi Rayanim Garu', 47 Mad 729. This decision is of very far reaching importance. This was a case from Madras. The learned Chief Justice of the Madras High Court had held that though the findings of fact, in the case before him, would support the inference that the covenant was originally intended as a security for money & must be treated as a mortgage, he was not at liberty to hold that it was so on account of certain dicta of the Privy Council, viz., that the equitable decisions of England are inapplicable in India ('Balkishen Das v. Legge', 27 I A 58), that the case must be decided on the consideration of the contents of the documents themselves with such extrinsic & surrounding circumstances as may be required to show in what manner the language of the documents is related to the existing facts & that no evidence is admissible under the proviso (of S. 92, Evidence Act) for the purpose of contradicting the terms of the documents (vide ,27 I A 58, 38 All 570 & 44 I A 236). He regretted that strict application of this rule (that the extrinsic evidence admissible for construction of the document should be of a limited character as laid down by the Privy Council) may have the effect of excluding most of these transactions from the class of mortgages by conditional sale. To such a feeling of disappointment expressed by the learned Chief Justice, their Lordships replied:

"They would only observe before parting with it that, as at present advised, they must not be taken to subscribe to the view that there has been introduced into the law of India such a radical change in the laws of evidence as is suggested by the learned Chief Justice, a change which would have the effect of excluding from the class of mortgages by conditional sale many transactions which before the Evidence Act would have been held to be within that class."

Their Lordships, at the outset, made it clear that in disposing of the case they made no reference to the oral evidence (as to the intention) other than that of surrounding circumstances, such as, in Lord Davey's words '27 I A 58', may be required to show in what manner the language of the document is related to the existing facts. What their Lordships decided may be thus summarised: Notwithstanding that the appearance of an absolute sale & a right of repurchase within the time limit is laboriously maintained in the document, the surrounding circumstances & necessary implication from the provisions of the deed should be closely examined to reveal the real nature of the transactions. Such implications

& circumstances were, according to their Lordships, indicated by (i) inadequacy of price, (ii) absence of any bargaining as to the price, (iii) the vendor indemnifying the vendee against loss for entering into the transaction, (iv) the vendee's right to enforce the covenant for repurchase, & (v) reservation of certain rights in the covenant itself, namely, reserving of minerals & other restrictions on the vendee's usufructuary privileges, inconsistent & almost unintelligible provision as to the time limit for the exercise of the vendor's right of repurchase.

(11) Amongst other cases of the Indian High Courts to be noticed presently, the case of 'Muthuvely Mudaliar v. Vythilinga Mudaliar', 42 Mad 407, is of the greatest practical significance. The question, referred to the Full Bench, was

"whether where in one & the same transaction, land is sold absolutely but with right of repurchase to be exercised before a certain date, the transaction necessarily becomes by virtue of S. 58, T. P. Act, a mortgage by conditional sale, whatever the intention of the parties might have been....."

Occasion for this reference arose from difference of views between Sadasiv Aiyar, J. & Napier J., the former having pronounced in 'Palaniappan v. Subbaraya Goundan', 1 M L W 80, that after the passing of the T. P. Act whatever the intention of the parties was, if there was a single settlement out of which arose either one or two documents both connected & interdependent in which there was a sale with a condition of repurchase, the transaction must be that of a mortgage. The Full Bench overruled this decision & Allis C. J. observed:

"There is, in my opinion, nothing in the definition in S. 58 (c) which favours the view that, wherever the sale deed & the agreement to reconvey from one transaction, it must necessarily be a mortgage & not a sale."

The learned Chief Justice further said, with reference to the decision of the Privy Council,

"It is true that all these cases dealt with transactions before the passing of the T. P. Act, but I do not think that Act made any difference in the law on the subject in the part of India. In 'Balkishen Das v. Legge', 22 All 149, their Lordships observed that it might be assumed that the framers of the T. P. Act intended in S. 58 to state the existing law & practice in India."

Seshagiri Ayyar, J. summarised the position in the following words:

"All that was said in 38 All 570 was that an essential requisite for construing such document as a mortgage is that they should be dependent upon a single arrangement & not that such a test is a conclusive criterion of the transaction being a mortgage."

He further said:

"A party who wishes the document to be understood as being different from what the words suggest should show the form in which the language is clothed does not express the real intention of the parties & that, in substance, the parties intended that there should be a transaction different from what the language imports."

(12) I shall pause here for a moment & try to put in a nut-shell the result of the decisions, already referred to. In my view, they represent, as between themselves, all the various & varied aspects from which the question, at issue, may be approached. Besides, my attention has been drawn to a considerable number of decisions of various High Courts in India, which I have closely examined, & I do not think that I shall be justified in dealing with them all except a very few which bear upon the special features of the present case, or demonstrate the practical application of the general & fundamental rules laid down by the Privy Council from time to time. The ancient law of India, both in the Hindu & Mohammedan jurisprudence, recognised the conditional sale as a kind of mortgage. The transaction of this kind of mortgage passed by various names, viz., Bye-bil-wuffa, Gahan-Lahan, Kut-kabala, Kut-Bandhak, Sarti-Kabala, & Sarti-Bikraya-Kabala. The equitable doctrines prevailing in the equity jurisdiction of England that evolved out of the decisions of the Chancery Courts, in granting relief against forfeiture of penalties or defeasance clauses, in order to relieve the debtors against the oppressing & grasping creditors, had no application to these mortgages prevailing in India where equity of redemption, suits, or proceedings for foreclosure, or the like were unknown. The contracts of mortgage by conditional sale by whatever designation known used to execute themselves by their very letter, or, in other words, time was of the essence of the contract. Before this was quite apparent to the English Judges, they fell into error, both in India as well as in England, to bring the equitable rules of relief against forfeiture of penal clauses to apply to Indian mortgages by conditional sales. Such cases, however, were very few in the jurisdiction of the Supreme Court & its successor, the High Court of Judicature at Calcutta.

(13) The Legislature stepped in & introduced legislation conferring equity of redemption on the mortgagors & setting up machinery for enabling them to enforce it. They thus were relieved against time as of the essence of the contract, & the creditors were required to have to take recourse to foreclosure proceedings for completion of their title by various Regulations commencing with one of the year 1793 & later supplemented by Regulations of 1798 & 1806. The Regulation XVII of 1806 achieved the culmination by full statutory recognition of the rules of equity of the Chancery jurisdiction of England. This Regulation took a long time before its several sections were extended by piecemeal legislation to other parts of British India. In Madras & Bombay jurisdictions, as I have already pointed out, the Judges of the Supreme Courts & the High Courts applied the doctrines obtaining in equity jurisdiction of England to transactions of conditional sales in their respective Presidencies until the decisions were held to be erroneous being, as they were, in violation of the law of the forum in India. In the year 1875, in the case of 'Thumbaswamy Mudely', 2 I A 241, their Lordships' Board suggested legislation to be undertaken for the purpose of affirming the right of mortgagor to redeem until foreclosure & giving to the mortgagee the means of obtaining such foreclosure. The T. P. Act took its place in the statute book of India in this historical background. It was assumed in the case of 'Balkishen Das v. Legge', 27 I A 58. that the framers of the T. P. Act. in S. 58 (c), intended to state the existing law & practice of India. This section gives an exhaustive definition of "mortgage by conditional

sale". According to the definition, the transaction — in reality a mortgage — has to be expressed in terms of a conditional sale. The conditions laid down in the section are: that (i) on default of payment of the mortgage money on a certain date, the sale shall become absolute; (ii) or (in the alternative) on such payment (payment of mortgage money being made) the sale shall become void; (iii) or, on such payment being made the buyer shall trasfer the property to the seller. So far as the third alternative is concerned, its incorporation in one document, or in more contemporaneous documents of sale (ostensible), gives the transaction a close resemblance to a transaction of an absolute sale with a covenant of resale or repurchase, as the case may be. In cases of the latter kind, the difficulty of construction, in order to discriminate a mortgage from a sale, presented itself from time to time. Almost the entire body of decisions, making up the case law on the subject, owe their existence to this difficulty. Various tests, borrowed from the decisions in the equity jurisdiction of England, have been laid down as applicable to cases arising in India involving determination of the question, while a particular transaction, evidenced by a deed which contains either the first or the second condition, presents in my judgment no difficulty whatsoever. Such a transaction, answering strictly to the definition, must be one of mortgage. By its very terms, it is made clear that the sale is not a completed & absolute one from the beginning but has the contingency of either becoming final & absolute or becoming void. Through the courtesy & kindness of my learned brother Narasimham, J., my attention has been drawn to at least two decisions which, it is said, stand out of the general run of the cases & indicate that even in cases where the condition, on which the mortgagor ostensibly sells the mortgage properties, is either

"that on default of payment of the mortgage money on a certain date the sale shall become absolute, or that on such payment being made the sale shall become void,"

the Court should have to apply the same consideration as would apply to transactions of ostensible sales on condition of repurchase by the seller from the buyer. The cases are 'Narayan Ramakrishna v. Vigneswar', A I R (3) 1916 Bom 215 & 'Shambhu Singh v. Jagadish Baksh', A I R (28) 1941 Oudh 582. I have carefully read the two decisions, & in my opinion they do not strictly conflict with my view. The documents in either of the cases are not without the condition of being repurchased. I would quote passages from the judgments of the aforesaid cases to show that one of the conditions, if not sale, was that on payment being made, the buyer shall transfer the property to the seller. In the 'Bombay case', at p. 215, Col. (ii), the passage that makes this position clear reads:

"After referring to the terms providing for the condition to repurchase the property after the lapse of twenty years, the Judge says:",

and at page 217 Col. (i), the concluding portion of the judgment runs

"I am of opinion that in this particular case upon these particular documents it is impossible to avoid the conclusion that the transaction must be accepted as being in reality that which in the plainest language both parties declared it to be, viz., a transaction of sale with 'an option to the plaintiffs to repurchase'."

These two passages make it clear to my mind that the third of the conditions enumerated in S. 58 (c), T. P. Act, was the condition subject to which the ostensible sale had been made. Batchelor, J., however, quotes a passage from the judgment of the lower Court which indicates that the condition that in the eventuality of payment the sale shall become void was also inserted in the sale deed. The passage is:

".....the Judge says:

'But for the addition of these terms the deed (Ex. 25) would have been a sale. But with the addition of the terms the deed becomes a mortgage by conditional sale, because there is a condition in Ex. 25 that the sale should become void on payment of Rs. 13,000 by instalments or in a lump sum within twenty years'."

The document was, therefore, of a heterogeneous character. The conditions of different kinds were mixed up together. If I were asked to follow this decision, I would, with respect, differ from it. This very reasoning will apply 'mutatis mutandis' to the Oudh case. I would place certain passages quoted from the judgment of the Court side by side to illustrate my point. At p. 583, Col. (ii):

"Towards the end of the deed, it was added that it had 'also' been agreed upon between the executant & the vendees that after the expiry of nine years, that is from the beginning of the tenth year up to its end, if he paid the entire consideration money to the vendees the sale would become null & void: otherwise it would take absolute effect as a sale deed."

This may be contrasted with the following passages from p. 584 Col. (ii) & p. 585 Col. (i):

"There is, however, one distinguishing feature of some importance between the Allahabad case & the case we have under consideration. We have referred to the period during which the property might be repurchased as one of the tests laid down in that case. In that case however the period for re-purchase was one year only & with regard to this it was said:

'If the period of time given to the vendor during which he can repurchase is a short one, it does suggest that it is an out & out sale with a right to repurchase, but on the other hand where a long period of time is given to the vendor to repurchase it does suggest that there is no out & out sale at all, but merely a transfer of the property as a security'. In the case under consideration 'the transferor is allowed to repurchase' at any time during the tenth year, while in 'Bishanlal v. Banwarilal', A I R (26) 1939 All 713, the executant could repurchase within a year after the execution of the deed."

The document that was propounded in this case too was of a heterogeneous character in relation to the sale conditions. The above decisions do not, therefore, conflict with the view that I am inclined to take. But however, at present advised, I will leave it as an opinion of mine. This aspect of the question particularly does not pointedly arise for decision within the scope of this reference. I would accordingly confine my answer to the first question proposed to a transaction in which the sale has been subjected to the condition of repurchase within the meaning of the third of the three conditions enumerated in S. 58 (c). It is not necessary that the deed itself will contain the words "mortgagor, mortgagee & mortgage money or security for the loan". If such

words were expressly entered in the deed, the transaction would hardly be an ostensible sale (See 'Jagannath v. Gauri Shankar', A I R (13) 1926 All 670). The case, however, is different where the sale is subjected to a condition of resale on account of the fact, as I have said, that it bears resemblance to a case in which the sale & the condition of resale are otherwise independent of each other. It has been authoritatively laid down by the Privy Council & has never been departed from in any of the decisions bearing on the subject, either in India or in England, that in order to constitute a mortgage, the covenant for sale & repurchase must have been thought of contemporaneously as a single arrangement. Whatever might happen to the applicability or otherwise of various other tests none of which can be said to be conclusive, it is that particular test which is not only fundamental but also implicit & essential in a mortgage as distinguished from a sale. This is sufficiently borne out from the Privy Council decision '38 All 570' already referred to, as has all along been followed in the Courts in India. Whenever a transaction has been accomplished to two deeds, it cannot constitute a mortgage, if the second deed incorporating the condition of repurchase is not interdependent with the first & the terms do not form integral parts of one single contract or arrangement. In order to achieve this clarity & to simplify litigation, the Legislature came forward with an amendment to the S. 58 (c) by insertion of a proviso. After the amendment, wherever & whenever it occurs that the sale is effected or purports to be effected by one document, & the covenant of repurchase or resale, as the case may be, is embodied in another, the relation between the parties can no longer be said to be that of mortgagor or mortgagee. Notwithstanding the amendment, however, the question still remains that though the sale & the condition are both embodied in one document it may be intended to be a sale out & out with an agreement for resale on conditions incorporated therein. But for the very fact that the parties have decided to evidence the transaction by one document rather than by two, they shall be presumed to have done so by way of compliance with the proviso, & thereby may have apparently intended to create a mortgage. The onus, in such cases, should always be on one who wants to prove that it is a sale out & out. In order to be a mortgage, the transaction should have the statutory appearance of being expressed in one document. The general principle of law that one who asserts that the apparent is not the real has to prove it would not apply. No doubt, cases may arise in which the language used in a single document may lend support to the appearance of an out & out sale followed by an agreement for reconveyance; but the statute-enjoined-appearance & the necessary prima facie legal implications attached thereto ought to have more weight than the appearance created otherwise in the deed, particularly so, because this statutory appearance always ensures that the sale & covenant for resale were simultaneously & interdependently agreed upon — a circumstance which is inherent in & inseparable for, the transaction of mortgage. This is basically the reason, why incorporation of all the terms & conditions in one single document gives rise to a presumption.

(14) My answers to the first question are:

(i) Where the mortgagor ostensibly sells the mortgage property on condition that on such payment being made the buyer shall transfer the property to the seller & the condition is embodied in the document which effects or purports to effect the sale in accordance with the proviso added to the section by the T. P. Amendment Act, 1929, it is to be presumed a mortgage, & the party, who asserts to the contrary, must have to prove it. This proof will consist of the provisions of the document, the necessary legal implications thereof, & such surrounding circumstances as are admissible to prove how the language of the deed is related to the existence of real facts. This rule of admissibility of evidence is subject to the exception that, only in case of fraud, the oral evidence of real intention may be admissible — vide '44 I A 236; &

(ii) The conditional sales, effected by one or more documents prior to the 1929 amendment of the T. P. Act in which the condition embodied is condition of transfer by the buyer to the seller may be classified as belonging to another group. In this class of cases, there is no presumption either way. Their nature & character are to be determined irrespective of the form according as the parties intended. This intention has to be ascertained by construing the provisions of the deed, interpreting the language thereof in the light of the surrounding circumstances bearing upon it & their necessary implications with reference to either forthright conveyance of absolute rights to the buyer or their postponement by withholding from him, till expiry of the time for fulfilment of the condition, various rights, privileges & interests inherent in the absoluteness of proprietary rights or by imposing timely restrictions upon such privileges & the like.

(15) The answers to the other questions posed proceed as corollaries from the premises aforesaid. The answer to the second question would be in the affirmative. Postponement of the rights to mutate his name in substitution for that of the seller is denial, for the time being, of a proprietary privilege. This denial carries with it the continuance, in the vendor, of the obligations of payment of rent and public charges of the property. Loss, if any, on account of non-payment is assumed to fall on the vendor. There is implied predication of his subsisting ownership. Failure or omission to mutate attributable to an economical device is one thing, but absence of the right to mutate is another. Different considerations, however, will arise in cases of transfer of occupancy holdings before they were made freely transferable by the Orissa Tenancy Amendment Act, 1938, inasmuch as either the transferee had no right to claim mutation or the same was expensive & uneconomical in view of the fact that on payment of the consideration money the transferee will have to abandon the land & the transferor may unnecessarily have to pay more than the mortgage money by way of compensating the former. In those cases, postponement of mutation is rather inconclusive & the nature of the transaction will have to be decided on construction of the deed in the light of the surrounding circumstances. I answer the question accordingly. The third question — In the case of a mortgage with possession, the mortgagor is bound to guarantee quiet possession during the subsistence of mortgage as it is in lieu of interest, while in the case of sale, the purchaser is to suffer the loss without any

guarantee of indemnification provided he has been delivered possession along with completion of sale & the disturbance of possession is not attributable to the defect of title in the vendor. The vendor contracting for warranty of title undertakes to refund the consideration money with interest if his title is found defective & there is consequent loss of possession. In the case of mortgage, mere disturbance of possession will entail the loss upon the mortgagor (vendor) & the mortgagee is not bound to seek for possession though in certain circumstances he may have the right. My answer, therefore, is that covenant for refund, on dispossession or disturbance of possession of the grantee not attributable to grantor's defective title is inconclusive. My answer to the fourth question is wholly covered by the answer proposed to the first question, that is in case of ambiguity or doubt, ex facie import of the tenor of the document effecing the transaction shall prevail. The ambiguity or the doubt must, in each case, be inherent in the provisions of the deed & not dissoluble by reference to the surrounding circumstances.

(16) Before proceeding to examine the merits of the Second Appeal, placed before us for decision, the trend of the authorities of this Court, which stand unaffected by the decision of the Full Bench, has to be kept in view.

(17) In Second Appeal No. 192 of 1946, my learned brother Narasimham, J., addressing himself to the question whether a transaction was a mortgage by conditional sale or a sale out & out, observes:

"The very definition of a mortgage by conditional sale as given in Cl. (c) of S. 58, T. P. Act shows that the transaction is ostensibly a sale. Therefore, the use in the deed of such expressions as "Kabala", "buyer & seller" & similar expressions usually found in a deed of absolute sale, cannot in itself be a valuable guide. Even a mortgage by conditional sale may have all the appearance of a sale & the Court should not be guided by mere appearance but should scrutinise the terms of the document and ascertain the true intention of the parties."

Two circumstances, appearing in the document, under consideration, in that case, namely, that (i) the document confers on the executant (the vendor) right to deposit, under S. 83, T. P. Act, money in Court if there is a refusal by the deft. (vendee) to accept the sum when tendered; & (ii) the money to be paid was described as 'asule asal" which means "principal" indicating that the parties thought of the sum as a 'loan' & not as a 'price', were held decisive of the transaction being a mortgage. I am a party to this decision by which I am bound & I still adhere to the view expressed therein.

(18) Another decision was that of Second Appeal No. 32 of 1948. Three circumstances appearing in that case were considered decisive of the transaction being one of mortgage. The circumstances were: that (i) there was no mention of reconveyance but of delivering back the lands to the pltfs. (vendors) on payment of the consideration within the stipulated period; (ii) the right of the defts. (vendees) to get their names mutated in the landlord's sherasta & "to possess the lands as they like" were expressly mentioned in the document to arise only on the pltfs' failure to repay the consideration within the stipulated period. Postponement of the right to mutation, according to Narasimham, J., who delivered the leading judgment, was an unmistakable indication that the pltfs' (vendors') liability to pay rent would continue until the end of the stipulated period. This was described by the learned Judge as inconsistent with an out and out sale which should always (sic.) in extinguishment of the pltfs' interests in the property, & (iii) the consideration for the transaction was a sum of Rs. 240 as against its minimum price of Rs. 500 in the year of the transaction. I was a party to this decision too & find no reason to change the view I then took.

(19) The only other decision was one in Second Appeal No. 41 of 1946. The document, in question, in that case, was described as Sarti-Kabala. Panigrahi, J. observed that the term literally translated means "conditional agreement". The learned Judge, relying upon the case of 'Singaram Chettiyar v. Kalyanasundaram Pillai', 26 I C 1 (Mad), laid down a general rule of construction that in case of ambiguity or doubt, the construction would lean in favour of a mortgage & not of a sale. This is directly against ex facie import theory of presuming the apparent until it is proved to be unreal. This has formed the question No. 4 above & will be no longer a good law. The main theme of the decision was that the document was described as a Sarti-Kabala which it was conceded at the Bar meant nothing more nor less than what was popularly known as Kantakabala & on reference to this, the learned Judge observed:

"It may be that in a particular case, a document purporting to be a Kantakabala may really be an absolute sale with a condition of repurchase, but without anything more the description by itself would indicate that the transaction between the parties was intended to be a loan rather than an absolute sale."

Contrary view, expressed in relation to the aforesaid features in the deed in S. A. 88/44 was distinctively dissented from by Panigrahi, J., but myself, as a concurring party to the decision, did so qualifiedly dissented from by Panigrahi, J., but myself, as a concurring party to the decision, did so qualifiedly observing that Second Appeal No. 86 of 1944 had been correctly decided & that it was always some dominating features that determine the real character of the transaction. The two theories thus expressed rather broadly were, however, not decisive as there were two circumstances affording dominating features lending support to the conclusion arrived at, viz., (i) (to put in the language employed by Panigrahi, J.) that the registration of the deft. as an absolute proprietor was to follow the expiry of the period fixed for payment, & that the clause relating to the warranty of title would come into operation only after such registration as proprietor; & (ii) that the document, in question, was by way of renewal of a previous transaction evidenced by the document of 1935 couched in identical terms & the possession had also been with him under the said document & that notwithstanding this the vendees agreed to the recital in the said document to the effect that the title was with the vendor.

(20) Now I shall proceed to deal with the merits of the Second Appeal placed before us for decision in the light of the conclusions reached above.

(21) The appeal arises in a suit for redemption of mortgage by conditional sale executed in

favour of the defts. for a consideration of Rs. 186 said to have been borrowed by the late father of pltfs. 1 & 2 & the late father of pltfs. 3 & 4 from the late husband of deft. 1, on 25-6-1917. The pltfs' claim is contested by the defts. They contend that the transaction, in question, was not a mortgage, but a sale out & out, with a condition of repurchase, a contract of which time was of the essence. On this basis, it is claimed that the condition not having been fulfilled within the appointed time, the right of repurchase has been defeated. The defts. further contend that in case the transaction is held to be a mortgage, the pltfs. will be liable to pay, besides the principal advanced, a sum of Rs. 57/14 as mutation fee, & Rs. 120 being the rent paid by them (the defts.) during their occupation, as condition precedent to redemption.

(22) The learned Munsif dismissed the suit holding that the document was an out & out sale with a condition of repurchase. The learned lower appellate Court reversed the decree of the learned Munsif holding that the document was, in substance & reality, a mortgage. As this is of a date prior to T. P. Amendment Act, 1929, there will be no presumption in favour of its character as a mortgage. As observed before, the question shall not be approached with any leaning to either view.

(23) In the judgment of the learned lower appellate Court, this is a translation of the text of the document. Its correctness has not been challenged at the Bar. The document can be divided into three parts: (i) the first part comprises the terms of ostensible sale; (ii) the second part contains provision relating to condition within the meaning of S. 58 (c), T. P. Act, & (iii) the last part contains the terms & conditions to follow in the eventuality of default of the stipulated condition.

(24) The condition embodied here is not a condition of "transfer by the buyer to the seller" in default of payment, or, in other words, "condition of repurchase". The condition is expressed in the following terms:

".....But upon condition, namely, that in case we repay the consideration money given by you in one instalment, at the end of Magh 1327 next, you will return to us the aforesaid land together with the kabala therefor....."

This tantamounts to, in the language of the section, a condition that on such payment being made, the sale shall become void (vide 'Madhab Charan Das v. Rajani Mohan', 64 I C 583 (Cal). The agreement that the lands & the Kabala therefor will be returned is not consistent with the hypothesis that the title to the lands had absolutely become vested in the buyer; &, in such a case, that the seller will get his property back, it will have to be effected only by an act of transfer required under the law by the buyer to the seller. Mere return without any other formality will not effectuate it. This document does not bear any resemblance to the document incorporating the terms of a sale & a covenant for reconveyance. Therefore, the well known difficulty of construction does not present itself for solution. Even if the question of construction would arise, it is clear from what follows that the transaction accords only with a mortgage & not at all with a sale. The other condition enumerated in S. 58 (c) of the Act, namely, that in default of payment, the sale shall become absolute, has also been embodied in the document. The condition is expressed in the following words:

".....Should we fail to repay the consideration money in one instalment within the time fixed as above, you shall possess & enjoy as before or your sons & heirs shall possess & enjoy from generation to generation till the sun & the moon endure & after making payment of the jama(rent) in the sherista of zamindars of the mouza from year to year & getting your name duly mutated in their sherista on cancellation of Krushna Padhan's name in respect of the property sold, you yourself 'can use the land in any way you like'....."

These provisions expressing the full & absolute character of the proprietary right & enjoyment to accrue to the vendee after & only after default of repayment should bear contrast with their earlier counterpart. The earlier provisions, appropriate to the status anterior to the stipulated time, are expressed as:

".....After having counted & received the full consideration money in cash, we divest ourselves, our heirs & successors of all our rights & interests in the property sold & make you owner & possessor of our rights & interests, but upon the condition....."

It will be noticed that the terms aforesaid are conspicuous by the absence of the following, viz.,

"(i) the right to possess & enjoy till the sun & the moon last; (ii) the devolution of such rights on the sons & heirs of the vendee from generation to generation; (iii) the right to mutate in the landlords' sherista on cancellation of the name of Krushna Padhan (admittedly the predecessor-in-interest of the sellers); (iv) the right to pay rents to the landlords from year to year; & particularly (v) the right to use the land in any such manner as he or his successor likes to do."

These are invitably the attributes of an absolute proprietary right. They have been withheld from the vendee till after the condition fails. The most significant of all the aforesaid conditions is the one that centres round withholding from the vendee the right of using the land in any such manner as he desires to do. These, according to the Privy Council, are restrictions upon the usufructuary & proprietary privileges, &, as such, are decisive of his being a mortgagee. With regard to the postponement of the right of mutation, I will refer to the decision of the Calcutta High Court in the case of 'Ali Sheik v. Imam Ali', 35 I C 102 (Cal). There the vendor's agreement to have the vendee's name mutated on the execution of the deed of Kut-Kabala, & his liability to pay arrears of rent arising immediately thereafter were held conclusive of the transaction being one of sale. In the case of 'Maung Shwe Min v. Mang San Syun', 22 I C 806 (L B), it was found that the buyer did not apply for mutation of names in the Revenue Register till two years after the transaction. It was considered as a compelling circumstance to hold that the intention of the parties was to create a mortgage. The weight of authorities is also in favour of this construction.

(25) It has been strenuously contended by Mr. H. Mohapatra, the learned counsel for the pltfs., that the words

"we divest ourselves, our heirs & successors of all rights & interests in the property sold & make you owner & possessor of our rights &

interests. You do become the owners of the rights & interests"
in the first part of the document are themselves sufficient to effect an absolute sale, & the further provisions, in the latter part of the document, are either mere repetitions or surplusages. This argument overlooks that, according to the definition, the document must be one of ostensible sale, that is, the appearance of a sale shall be maintained. But the contrast between the description of his status before time for fulfilment of the conditions arrives, & after the time expires is distinction to prove that the sale becomes absolute only after the stipulated time. In the case of 'Balkishen Das v. Legge', their Lordships have very expressly pointed out that the appearance of a sale having been laboriously maintained throughout in the document, it does not affect its character as a mortgage in case such an intention is clear from its provisions considered as a whole.

(26) Mr. Mohapatra further argues that in view of its being stated in the document, in its latter part, that ".....from today we or our heirs shall have no right or interest whatever in the aforesaid land sold....." it is not permissible to hold that it was not intended to convey absolute proprietorship immediately on execution of the document. The words "from today" must, in the context, mean "with effect from today", that is to say, in case the condition of repayment is not fulfilled, the absolute proprietary right of the buyer shall be deemed to have accrued not from the date of default but from the date of execution of the document.

(27) For the reason aforesaid, I am definitely of opinion that this is a case of mortgage. No doubt, there has been long delay in the pltfs' coming into Court for enforcement of the equity of redemption. This, it has been argued, is a circumstance indicative of subsequent conduct of the vendors consistent with the transaction being one of sale. This delay, however, has been sufficiently explained by the pltfs in their evidence that they could not afford to come to Court earlier for want of means & having learnt that a new law has been enacted which would absolve them from making any payment whatsoever for redeeming the mortgage, they were encouraged to sue for getting back the property. On the other hand, the conduct of the buyer in not getting his name mutated till long after the transaction indicates the contrary. Delay in launching the suit, will not make the transaction a sale which from its very inception was a mortgage, whatever other equitable considerations might arise therefrom. Once a mortgage is always a mortgage.

(28) I would, therefore, uphold the decree passed by the learned lower appellate Court. The pltfs., however, must, on account of the delay, lose their costs of the suit throughout, that is each party should bear his own costs throughout. The time, fixed for payment of the sum due, according to the decree of the learned lower appellate Court, will be extended to six months from the date of the decree of this Court.

(29) DAS, J.: This reference arose on account of the difference of opinions reflected in the judgment of the two cases of this Court in S. A. No. 10 of 1945 & S. A. No. 86 of 1944. The divergence of views was with reference to certain points usually arising in the determination of the question whether a document by way of conditional sale is a sale or a mortgage. The specific points which are the subject matter of the reference are the following: (1) Whether such a document is to be taken prima facie as a mortgage by conditional sale, the burden of proof lying on the opposite party to show that it represents an out and out sale or whether the ex facie import of such a document which is that of a sale is to be presumed to be true the burden being upon the person asserting it to be a mortgage to make it out to be so. (2) Whether the insertion of an express provision postponing mutation of the name of the vendee in the landlord's sherista till expiry of the stipulated period is an indication of its being a mortgage & not a sale. (3) Whether the insertion of a penalty clause in such a document for the return of the consideration money plus interest, in case the vendee is dispossessed from the lands either through defect of title of the vendor, or otherwise, is an indication of its being a mortgage & not a sale.

(30) I have had the advantage of reading the judgment of my Lord the Chief Justice in this case furnishing answers to the reference.

(31) As regards question No. 3 above, I agree with my Lord in thinking that a covenant for refund, on dispossession or disturbance of possession of the grantee not attributable to grantor's defective title is a fair indication of the transaction being a mortgage rather than a sale. I agree also that such a covenant in case of dispossession due only to grantor's defective title is inconclusive. But it may be some indication of its being intended to be a sale.

(32) As regards question No. 2 above, I agree that a condition postponing the right to mutation is an indication of the transaction being a mortgage & not a sale. This answer is confined to transactions relating to classes of property which were at the date of the transaction freely transferable, such as occupancy holdings of raiyats subsequent to Orissa Act VIII (8) of 1936. In other cases, the postponement of right of mutation is no indication either way, because in such cases there was normally no right to transfer without the landlord's consent & hence no right of mutation. Accordingly the consent of the landlord for mutation was sometimes to be obtained only at exorbitant price. That may itself therefore furnish, in respect of such transaction, a good reason for postponing mutation. Question No. 1 above formulated is the more general & important question that has been raised on this reference & that question, in substance, is whether there is any presumption arising from the ex facie import of a disputed transaction in favour of its being a sale or whether on the contrary there is a presumption in such cases of the transaction being a mortgage when there is a doubt.

(33) As regards the existence of a presumption in favour of a transaction of this kind being a mortgage, there is, no doubt, the authority of Doctor Ghose, the reputed Author of Tagore's Law Lectures on mortgages, in his work, Edn. 5, p. 92. He cites two cases in support of the proposition — an English case 'Longuet v. Scawen', (1749) 1 Ves Sen 402: 27 E R 1106 & an American case 'Trucks v. Lindsey', 18 Iowa p. 504. This is also in consonance with what has been stated in Coote on mortgages, Vol. I, p. 31 citing the same English case above quoted. This rule has been adopted by

my learned brother Justice Panigrahi on the strength of a casual expression of opinion without discussion in '26 I C 1: A I R (2) 1915 Mad 656. But I have been able to find no other Indian authority for this of the High Courts or the Privy Council where this question has been raised & decided & none has been brought to my notice in the course of the argument. It would therefore appear that the only basis for this presumption is the case in '(1749) 27 E R p. 1106. But the facts in that case indicate that it was a case which arose in exercise of the equity jurisdiction of the English Courts. A passage at page 41 of Coote on Mortgages, Vol. I also shows that the actual decision in the case on the facts thereof is rather out of date. It is to be noticed also that it is an old decision of the year 1749-50. The importation of principles of equity with regard to such transactions has been disapproved by the Privy Council as early as in 'Pattabhiramier's case', 13 M I A 560, & it seems to me that it is not open to us now to import any presumption based on equitable considerations into such transactions excepting in so far as they have been definitely embodied into the statutory provisions of the T. P. Act.

(34) On the other hand, the case in 'Alderson v. White', (1850) 44 E R 924, decided in 1850 i.e. about a century later than that in 'Geerish v. Donaccon', (1740) 27 E R 706, clearly lays down the presumption arising from the ex facie import of a transaction as being applicable in such cases & this has been specifically followed by the Privy Council in '12 All 387' & '38 All 570'. It appears to me, therefore, that in all cases of doubt, it is this presumption of the correctness of the ex facie import of the document that must ultimately weigh in favour of a disputed transaction otherwise ambiguous being a sale rather than a mortgage. Some attempt has been made to distinguish the above Privy Council cases & other cases following them on the ground that in those cases the transaction in question was to be gathered from two separate documents & it was urged that the same presumption would not apply if the whole transaction was to be found in a single document. I have examined all the cases bearing on the point that have been cited at the Bar & it is not necessary to notice them at length. It is enough to say that a close examination of those cases does not appear to me to support any such distinction on principle. The only relevant matter that was adverted to in all such cases was whether or not it was a single transaction. If the sale & the condition do not form a single transaction, no question at all would arise because a subsequent & independent condition cannot have effect of converting a sale into a mortgage. It is only when the sale and the condition are found to form one transaction that any doubt arises & any question for construction presents itself. It appears to me to make no difference at all for the application of the principle laid down by the Privy Council in '12 All 387' & '38 All 570', that the transaction is embodied in one document rather than many. I therefore agree with the view expressed by my Lord that in cases of ambiguity or doubt there is no presumption in favour of such a document being a mortgage but that the presumption in favour of the ex facie import of the document by which the transaction is effectuated should arise. The ambiguity or the doubt however must in each case, as stated by my Lord, be inherent in the provisions of the deed & not resolvable by reference to the surrounding circumstances.

(35) This answer, however, may require to be modified to some extent in respect of transactions entered into subsequent to the amendment of S. 58, T. P. Act, in 1929. That amendment has provided that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which affects or purports to affect the sale. From that date therefore whenever the sale & the condition are in two separate documents, such a transaction must necessarily be taken to be an out & out sale with the condition attached, & cannot be treated as mortgage. This is irrespective of the question whether the sale & the condition constitute inter-dependent or independent transactions. Of course, this amendment does not imply the contrary, that is to say, it has not the effect of legislating that wherever the sale & the condition are embodied in one document, it must necessarily be taken to be a mortgage. That is still a matter to be decided—on the determination of the intention of the parties in the light of the contents of the document & the surrounding circumstances. But while this may be so, so far as the legal aspect is concerned, it is reasonable to suppose that after 1929 when parties to a conditional sale intend it to be in fact a sale & not a mortgage, they are much more likely than before to embody the transaction in two separate documents, one for the sale & the other for the condition. The vendee in such circumstances may be expected not to take the risk of the transaction being construed to be a mortgage by agreeing to the condition being incorporated into the same document as the sale. I therefore, entirely agree with my Lord the Chief Justice in his view that in respect of documents executed after the amendment in 1929 containing both a sale & a condition, there is a greater likelihood of the transaction embodied in the single document being a mortgage. Therefore to that extent the presumption in favour of the ex facie import would be weakened & a presumption would arise in favour of its being a mortgage.

(36) The question has been debated before us that in case of conditional sale deeds which contain the first or second conditions in Cl. (c) of S. 58, T. P. Act, i.e., a condition, that on default of payment within stipulated time the sale shall become absolute, or that on such payment the sale shall become void, (sic.) such distinction between the condition for resale & other two conditions, as has been assumed by my Lord the Chief Justice in his answers to the reference in this respect. But that distinction may, for the present, be kept aside in considering the question whether S. 58, sub-s. (c) is in the nature of a definition, in the sense in which it is sought to be used. Having gone through a large catena of cases cited at the Bar, bearing on the matter, I find that only two learned Judges of other High Courts specifically put forward this view & held that a sale subject to a condition falling under one or other of the three categories specified in S. 58, sub-s. (c) is ipso facto a mortgage without any further investigation of the intention of the parties. They are Justice Sulaiman of the Allahabad High Court & Justice Sadasiva Aiyar of the Madras High Court. Justice Sulaiman

gave expression to this view in 'Raja Mohindramansingh v. Maharaj Singh', A I R (10) 1923 All 48; 'Mathura Kurmi v. Jagdeo Singh', A I R (14) 1927 All 321; 'Man Singh v. Guman Singh', A I R (16) 1929 All 619 & 'Ramdhani Ram v. Ram Rikh Singh', A I R (18) 1931 All 548, but the other Judges who were also parties to the above decisions do not appear to have gone the length to which His Lordship was prepared to go. This view of Justice Sulaiman, however, appears to have been throughout contested in that very Court from 1923 itself.. In 'Bishambar Nath v. Md. Ubaidullah Khan', A I R (10) 1923 All 586, a Bench consisting of Ryves & Daniels JJ. specifically criticised the view adumbrated in 'A I R (10) 1923 All 48', in the following terms at page 587.

"Dr. Sen in one portion of his very able argument on behalf of the appellant took the position that any deed which professes to be a sale-deed with a condition allowing the vendor to repurchase, came within the definition of a mortgage by conditional sale contained in S. 58 (c), T. P. Act & must be presumed to be such unless the surrounding circumstances were such as absolutely to exclude the possibility of a mortgage having been intended. This idea is supposed to derive some support from the decision in 'A I R (10) 1923 All 48'. A reference to S. 58 (c) is sufficient to show that this is a misreading of the law.....The repetition of the terms "payment of the mortgage money", or "such payment" in each clause of the definition makes it clear that before a document can be a mortgage by conditional sale it must first be a mortgage, i.e., the property must be transferred as security for a debt. The definition of a mortgage is given in Cl. (a) of the section & the subsequent clauses are merely particular cases of this definition. The neglect to this obvious fact has in some cases led to serious confusion. The view suggested by Dr. Sen was rejected by a Full Bench of the Madras High Court in 'Muthuvelu Mudaliar v. Vythilinga Mudaliar', 42 Mad 407."

(37) Later decisions of the Allahabad High Court, also do not appear to have followed the view of Justice Sulaiman. In 'A I R (24) 1937 All 724', Harries J. referred to the case in 'A I R (14) 1927 All 321', & pointed out that in that case one of the two Judges of the Bench, Justice Lindsay, did not appear to agree with the view taken by Justice Sulaiman & held that the case in 'A I R (14) 1927 All 321', did not compel him to decide that the particular transaction in question before him was a mortgage by conditional sale merely because there was in the same document a sale with a covenant for resale on payment. His Lordship preferred to follow the view of the Bench in 'A I R (10) 1923 All 586', which held that in all such cases the matter has to be determined by ascertaining the intention of the parties as one of construction of a document with the surrounding circumstances. In 'A I R (26) 1939 All 713', it was ruled that whether a deed is a mortgage by conditional sale within the meaning of S. 58 (c), T. P. Act, or an out & out sale is a question which falls to be determined on a consideration of the terms of the deed itself & of the surrounding circumstances. It was pointed out that the amendment of S. 58 (c) in 1929 did not provide that if a transaction is embodied in one document, it must, of necessity, be regarded as a mortgage by conditional sale & not as an out & out sale, & that therefore the Court is thrown back on the principle that the intention of the parties to a document must be decided having regard to the terms of the document & from the surrounding circumstances. Again in 'Thakrasingh v. Sheonath Singh', A I R (27) 1940 All 227, the case in 'A I R (10) 1923 All 586', which expresses a view contrary to that taken by Justice Sulaiman was cited in extenso & approved. As recently as in 'Bidha Ram v. Chhidda', A I R (37) 1950 All 430 the proposition was accepted that the mere language of such a document does not settle the matter & it was in every case a question of intention to be gathered from the document & the surrounding circumstances. So far as the Madras High Court is concerned, Justice Sadasiva Aiyar specifically put forward the same view as that later on propounded by Justice Sulaiman, in a case reported in 'A I R (1) 1914 Mad 37', & again in the referring judgment which gave rise to the Full Bench decision reported in 'A I R (6) 1919 Mad 1'. The learned Judges in the Full Bench case expressly overruled the view taken by Justice Sadasiva Aiyar in 'A I R (1) 1914 Mad 37', & stated it to be bad law. The opposite point of view was clearly & succinctly explained by Justice Napier in his judgment in 'Maruthai Goundan v. Dasappa Goundan', A I R (4) 1917 Mad 368 & in his referring judgment in 'A I R (6) 1919 Mad 1'. The same view has been taken in Bombay in 'Kasturchand Lakhamji v. Jakhia', A I R (2) 1915 Bom 229 and in 'A I R (3) 1916 Bom 215'. In the latter case Justice Batchelor explains the position very succinctly in the following passage.

"It seems to me clear that the question, whether Ex. 25 effects a mortgage or a sale is not to be answered by mere reference to the Cl. (c), S. 58, T. P. Act. And if I am not mistaken, to decide the point upon this view is to assume what is really in dispute. S. 58 T. P. Act, defines what a mortgage is & Cl. (c) of the section describes one method of effecting a mortgage, viz., the method of mortgage by conditional sale, but the words of Cl. (c) are to be read not in an isolated manner, but in reference to para 1 of the section, & when they are so read, it will be manifest that Cl. (c) comes into play only when there is a mortgage, as that term has been defined."

The same is the view adopted in 'Kuppa Krishna v. Mhasti Goli Naik', A I R (18) 1931 Bom 371. The argument that a sale with a covenant to repurchase embodied in one document would be a mortgage by conditional sale within the meaning of S. 58 (c) especially where it is one document after the 1929 amendment has been specifically noticed & negatived. There are similar decisions in the Calcutta High Court. In 'Azizar Rahman v. Rabatannessa', 21 I C 19 (Cal), a document of sale with a condition of repurchase though embodied in the same document was held not necessarily to be a mortgage by conditional sale, but that the question would depend on the construction of the terms of the document taken with the surrounding circumstances & in the particular case on such construction it was held to be not a mortgage but a sale out-right. In a very recent case of 'Mahabir Singh v. Bigan Sabun', A I R (36) 1949 Pat 508, Justice Manoharlal held the particular document before him as being a mortgage on a construction of the terms of the document & the circumstances. His Lordship did not view it as a matter to be settled by treating S. 58, Sub-s. (c), as a mere definition. Justice Mahabir Prasad however was in-

clined to think that the transaction fell within the definition itself. That the matter is one of intention, not of definition was also held in the only Privy Council case dealing with this question with reference to a document of a date subsequent to the T. P. Act in 'A I R (11) 1924 P C 226'. The Privy Council in that case proceeded to determine the question not on the view that the sale subject to a condition was ipso facto a mortgage by conditional sale but proceeded to determine the question on a consideration of the surrounding circumstances. That, no doubt, was a case where the sale & the condition were in two separate documents. But this cannot make any difference on principle since it was definitely found that they constituted one transaction. In fact in that case, though the details of the condition are in a separate document, the sale-deed itself expressly states that the sale was subject to reservation of conditions embodied in another document. The Privy Council refers to this reservation as only one of the relevant circumstances to reinforce the view they were inclined to take on a consideration of the rest of the document & other circumstances. At any rate, the settled view of all the High Courts excepting for some isolated views to the contrary in a few cases, is to the effect that questions relating to transactions covered by S. 58, Sub-s. (c) T. P. Act are to be treated not merely as a matter falling under a definition but as a matter of intention to be gathered from the language & the surrounding circumstances. In 'A I R (6) 1919 Mad 1', Chief Justice Wallis delivering the judgment in a Full Bench went so far as to say:

"It is in my opinion, 'not open to us' to answer the question referred to us in the affirmative consistently with the decisions in the Privy Council"

& refers to a number of Privy Council decisions & concludes that all these decisions lay down that transactions of this kind are to take effect according to their tenor, unless it appears from the terms of the instrument or the surrounding circumstances, excluding oral evidence of intention ad (sic) inadmissible, that the intention was to effect a mortgage.

The very question which was answered in the negative in that Full Bench reference was, whether where in one & the same transaction land is sold absolutely but with a right of repurchase to be exercised before a certain date, the transaction necessarily becomes by virtue of S. 58 T. P. Act, a mortgage by conditional sale, whatever the intention of the parties might have been.

(38) It appears to be, therefore, that the weight of authority is absolutely clear against treating S. 58, Sub-s. (c) as a mere definition clause & as excluding investigation of intention to be gathered from the terms of the document & the surrounding circumstances. Indeed I would venture to say that even treating it as a definition, the result is the same. If Cl. (c) of S. 58 is a definition of a mortgage by conditional sale, it is essential for that definition that the sale indicated by the transaction should be made out to be an 'ostensible' sale, that is, that it is a cloak for what in fact is a mortgage. To say that a document which ex facie is a sale is an 'ostensible' sale in the sense that the form is a cloak & not a reality is with great respect begging the question & in the words of Justice Batchelor in 'A I R (3) 1916 Bom 215 is "to assume what has to be proved". It appears to me, therefore, quite clear that the language of S. 58, Cl. (c) cannot be treated as mere definition dispensing with an independent consideration of the intention of the parties to be gathered on a comprehensive view of the terms of the transaction & of the surrounding circumstances.

(39) It is true that most of the cases that have been noticed above & particularly the Privy Council case in 'A I R (11) 1924 P C 226, are cases where the condition was a condition of repurchase & not any of the other two conditions specified in S. 58, Sub-s. (c). But the discussion in all the cases where the matter has been specifically adverted to is perfectly general & is applicable to the entire Sub-s. (c) of S. 58 & is not restricted to any particular portion thereof & as already stated in some of the cases conditions (1) & (2) in S. 58 (c) are referred to as condition of resale. Nor can I see any reason for the distinction sought to be made between the effect of one kind of condition & another with regard to its constituting a mortgage by conditional sale when incorporated with a transaction of sale. In the course of the arguments at the hearing of this reference, it was suggested that there is a difference on principle. It was said that in a transaction which was by way of a sale subject to a condition of repurchase, there was a completed sale by itself with a personal covenant for resale attaching thereto & that it may, therefore, in fact, be either a mortgage or an out & out sale, but that where the transaction is a sale with a condition that on repayment of the price within a stipulated period the sale must become void or where the transaction is a sale with a stipulation that in default of repayment within a stipulated period the sale must become absolute, there is by the very terms of the transaction a deduction from the quality of the sale itself & that therefore it ceases to be a sale having regard to the definition of a transaction of sale in S. 54, T. P. Act. With great respect, I am unable to appreciate the suggested distinction. "Sale" is defined as "a transfer of ownership in exchange for a price". A sale which becomes defeasible on the happening of a condition or a sale which becomes absolute on the happening of a condition is as much a sale as a sale subject to a covenant for repurchase. In each one of these cases it is the full ownership as distinguished from the mere interest therein (as for instance, in the case of a mortgage or lease) that is transferred. What is required to constitute a sale is not the absolute or unconditional transfer of ownership but only the transfer of 'full' ownership. I am aware of no principle which enables one to think that the fact of a sale being subject to any of the three conditions specified in S. 58, Sub-s. (c) detracts from the concept of full "ownership" whose transfer is required to constitute a sale under S. 54, T. P. Act.

(40) Apart however from any consideration of the question based on the notions of a sale or a mortgage there is abundant authority for saying that even in a case where the condition in a transaction was not a condition for repurchase the question has to be determined on a consideration of the intention to be gathered from the document & the surrounding circumstances.

(41) In '12 All 387', the condition was that on payment within a stipulated period the vendees will 'cancel' the sale. There was no specific stipulation to 'retransfer'. The principle of ex facie import was applied & the transaction was held to be a sale & not a mortgage. The condition was no doubt in a separate document executed on the same day, but it was held to constitute along with the sale a single transaction. In 'Situl Purshad v. Luchmi Purshad', 10 Cal 30, there were two documents executed at the same time, one a mokurari patta in acquittance of a pre-existing debt & at the same time an ekrarnama with the stipulation that if the grantor or his heirs (sic.) the amount of the original debt without interest the patta should be 'returned', the grantor having no claim to mesne profits during the possession of the mokuraridar (See page 35 of the report). There was no stipulation for a re-conveyance or a regrant of the mokorari patta. It was held by the Privy Council that having regard to the terms of the instruments & the circumstances relating thereto, the transaction was not a contract of mortgage but was evidence of a sale in acquittance of a debt. In 'Kinuram Mandal v. Nityechunder', 6 C L J 208, the stipulation was "on your giving me back the sum of Rs. 375/- within seven years, I shall return the holding". There was no stipulation for reconveyance. It was held on construction that it was an out & out sale. In 'A I R (4) 1917 Cal 565', a kot-kabala was construed on its terms & other circumstances to be a sale. Similarly in '21 I C p. 19 (Cal)', there was a stipulation in the same document that if the transferor can pay the consideration money within one year the transferee shall be bound to release the property. It was held on a construction that it was a sale. In 'Altapali Khan v. Uzirali Khan', A I R (20) 1933 Cal 381, (there was?) an ex facie sale with the stipulation in the same document that "if the said principal amount & equal amount of profit be paid to you within the period of 8 years then you shall return back the said lands with the kabala. Under these terms, I execute this absolute sale-deed." It was held on a construction of the terms that it was an out & out sale & not a mortgage. An argument was raised in the case to the effect that since there was no express stipulation for conveyance, the actual condition to which the transaction was subject imported a mortgage. But this was negatived relying on 'Ayyavayyar v. Rahimansa', 14 Mad 170.

(42) In '14 Mad 170', an ex facie sale with a stipulation that if the amount be repaid in cash on 27-5-1875, the vendee shall put the vendor in possession & return the sale deed & that in default the sale deed shall become permanent, was held as a matter of construction to be a sale & not a mortgage. It was expressly ruled therein that the absence of a clause for reconveyance was not material. In 'A I R (28) 1941 Oudh 582', there was an ex facie sale with a stipulation in the same document that after expiry of 9 years & during the 10th year if the vendor paid the entire consideration, the sale deed would become null & void & that otherwise it would take absolute effect as a sale deed. It was held as a matter of construction of the document & on consideration of the circumstances that it was a sale. The proposition that such a transaction was a mortgage by virtue of the definition on the basis of an annotation to that effect in Mukherji's T. P. Act citing 'A I R (24) 1937 All 724', as authority therefor (sic.), was expressly an ex facie sale with the following recital:

"The sale has become absolute & final. The contracting parties have no right to cancel the sale & to demand restitution of the consideration money. The vendor has no right to any share in the property."

But it contained a further stipulation whereby the vendee gave a right to the vendor to take back the property if within the period of 10 years they should pay the amount. The above stipulations taken together meant that the vendee had no right to cancel the sale & call for the payment of money at any time, but that the vendor had the right to pay within 10 years & cancel the sale. There was no express stipulation for reconveyance. The transaction on a consideration of all the circumstances was said to be an out-right sale. In 'Ahmed Hussain v. Azhar Ali', A I R (31) 1944 Oudh 305, there was an ex facie sale with a clause in the same document which gave a right to the executant to take back the sold property from the vendee within five years after paying in the month of October in a lump sum the entire consideration money plus some other incidental items with a further stipulation that if the said money was not so paid within the time fixed & if the executant did not take back the property the deed shall be deemed to be absolute & the right of the executant shall be extinguished. The Court went into the evidence of intention & held that the document was a sale & not a mortgage. In most of the above cases the sale & the condition were embodied in a single document & in some of these cases the conditions which merely stipulated for cancellation of the sale on payment of money or for return of the deed on payment of money have been merely referred to "as a condition of repurchase" treating them to be such though not in terms so. There are a number of other cases of the various High Courts where the transaction or the document contained stipulations of the nature specified in S. 58, Sub-s. (c), conditions (1) & (2) but the question at issue was determined as one of the construction & intention & not of definition & the particular transaction in question was held to be a mortgage. To notice all the cases in detail will unnecessarily lengthen this judgment. It is sufficient to say that my attention has been drawn to no decided case wherein a transaction by way of an ex facie sale which contains also a stipulation, rendering the sale absolute in default of payment or avoiding the sale on payment, has been ipso facto held to be a mortgage without any consideration of the intention to be gathered from the other terms of the document & of the surrounding circumstances.

(43) My answer on this part of the case would be that in the cases of all transactions subsequent to the amendment of 1929 by way of a conditional sale incorporated in a single document, there may arise a presumption in favour of its being a mortgage, but that in the case of transactions prior to 1929 whether by means of one document or more than one document, constituting a single transaction, there is no such presumption but that on the other hand there is a presumption in favour of the ex facie import of the document as a sale.

(44) Before closing I would like to add a word of caution. We have dealt, in this case, with only a few out of the variety of circumstances or stipulations, arising in cases of this

kind. But the judgment is not to be understood as laying down that the particular presumptions or stipulations that we have dealt with, are of over-riding importance, when there are other stipulations & circumstances to enable a Court to come to a fair & reasonable conclusion. The one & the only crucial criterion in all such cases is the intention of the parties. That intention is to be judged from a full consideration of the contents of the document & the surrounding circumstances. Every other rule that has been laid down in the decided cases are (sic.) only aids to such consideration. Even the rulings regarding the presumptions arising in such cases are not to be treated as in the category of rules relating to onus of proof. Rules relating to onus of proof enable the Court to say that a person who has not discharged the burden of proof on a particular issue must fall on that issue. But the presumptions dealt with as regards construction of documents of this kind are only aids to such constructions. The Court may use all available material including the presumptions, but must arrive at a definite conclusion whether in its view the transaction in question is a mortgage or a sale. It cannot merely absolve itself of its function of construction by saying that a particular party must fail because he has not discharged the onus.

(45) I would also add that the delay in seeking redemption is a circumstance which must call for scrutiny in such cases. Unexplained delay must receive its due weight as one of the relevant circumstances, by way of conduct where such conduct is admissible — See 'Alderson v. White' & '38 All 570'.

(46) On the merits of the appeal before us, I am not prepared to differ from the decision of my Lord the Chief Justice that the suit document is a mortgage & not a sale, though at first inclined the other way on account of the long delay.

(47) Apart from the ex facie import of the document, there are no outstanding circumstances showing it to be a sale. There is no clear & positive evidence that the consideration was substantially fair & adequate as price. The finding of the trial Court in this behalf is rather negative & halting. The styling of the document as Sharti Bikraya Kabala is, if any, a weak aid to the construction. There was undoubtedly very considerable delay of about 24 years in the pltf. coming forward with this claim for redemption & that may be indicative of the consciousness of the parties about the absence of the right of redemption & it is this that has caused hesitation in my mind. But there are terms in the document which seem to indicate that the document was meant to be a mortgage. There is the provision for paying back the money with interest on disturbance of possession — not necessarily due to defect in vendor's title. There is the fact that though the vendee could have obtained mutation, even on the terms of the document, in 1920 under S. 31, Orissa Tenancy Act, he did not choose to assert his position as a vendor & obtain mutation till 1927. What however is the significant & turning factor in this case is, as stated by my Lord, the marked difference in the operative words of conveyance of ownership used in the earlier portion & later portion of the document implying thereby that in the consciousness of the parties there was detraction from full ownership prior to the stipulated time. For the above reasons I agree with the order proposed by my Lord, as regards the disposal of the appeal on its merits.

(48) NARASIMHAM J.: I respectfully agree with my Lord the Chief Justice regarding the answers to the four questions, referred for decision to the Full Bench. I also agree with the order which he intends passing in Second Appeal No. 162 of 1946. My learned brother Justice Das also agrees with my Lord the Chief Justice regarding the said answers & the order proposed to be passed in S. A. No. 162 of 1946. It is thus clear that there is complete unanimity on all the points that have arisen for decision before this Full Bench.

(49) My Lord the Chief Justice & my learned brother Justice Das have however differed in respect of the construction of conditions 1 & 2 of Cl. (c) of S. 58, T. P. Act. My Lord has taken the view that if a document contains either the first or the second of the said conditions the transaction evidenced by the document must conclusively be held to be one of mortgage by conditional sale & not a out & out sale. My learned brother Justice Das however seems to think that such a document executed after 1929 may raise a presumption in favour of a mortgage but that to ascertain its true nature the intention of the parties would be found out. Both of them have however recognised that this point does not directly arise for decision in this reference. I would therefore reserve my opinion on that question.

D.H. *Appeal dismissed.*

A. I. R. (38) 1951 ORISSA 378 (C. N. 88)

(Special Bench)

RAY C. J., JAGANNADHADAS AND NARASIMHAM, JJ.

Radhi Bewa and another, Appellants v. Bhagwan Sahu and others; Respondents.

Second Appeal No. 97 of 1946, D/- 9-2-1951.

† (a) *Interpretation of Statutes — Construction harmonising with subject and object of enactment — Preference to.*

The words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained. (Para 4)

Anno: Civil P. C. Pre. N. 7.

(b) *Interpretation of Statutes — Remedial Acts — Beneficial construction.*

'Per Narasimham, J: Even where the usual meaning of the language falls short of the whole object of the Legislature a more extended meaning may be attributed to the words of a remedial Act, if they are fairly susceptible of it. The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words. (Para 4)

'Per Das, J.: Even in the case of a remedial statute it is the language of the statute that must govern and there is no warrant for any construction which cannot reasonably be deduced from a fair construction of the Act. (Para 43)

Anno: A. M. Int. of Statutes, N. 2.

(c) *Interpretation of Statutes — Statute is always speaking.*

'Per Narasimham, J.: It is a well-known rule of statute drafting that a statute is to be regarded as always speaking. (Para 6)

'Per Das, J.: The Rule that a statute is to be regarded as always speaking does not mean that the statute is to be construed as operative with reference to the past as much as with reference to the present and the future: it only means that, with reference to any particular case that falls within the scope of the wording of the statute, the statute must be taken to be speaking with reference thereto — and it is not to be regarded as a rule of guidance as to the retrospective or prospective operation of the statute. (Para 38)

Anno: C. P. C. Pre. N. 7.

(d) Hindu Women's Right to Property Act (1937), Preamble — Act whether remedial.

The Act, as its Preamble shows, is a remedial Act seeking to remove or to mitigate what the Legislature presumably regarded as a mischief; and as such it ought to receive beneficial interpretation. A.I.R. (29) 1941 F. C. 72, Rel. on. (Paras 4, 43, 59)

(e) Hindu Women's Right to Property Act (1937), Ss. 3, 4 — Applicability of S. 3 (2) to widow whose husband has died before the Act.

('Per Narasimham, J., and Ray, C. J.; Das, J., dissenting): Taking into consideration the rule of drafting regarding the use of the tense and mood and the implications arising out of the language used in Sub-sections (1) and (2) of Section 3 read with Section 4 of the Act it seems clear that there is nothing in Sub-section (2) of Section 3 to limit its application to the widow of a Hindu who dies after the commencement of the Act. Even on a fair construction of S. 3 (2), there is no indication barring its application to the widows of those Hindus who have died before the commencement of the Act and hence there is no reason as to why the benefit of Sub-section (2) should be denied to persons who became widows prior to the commencement of the Act, so long as the interest which their husbands had in the joint family property at the time of their death has not vested in any other individual. Such a construction is, strictly speaking, not giving a retrospective effect to the Act; it is applying the Act prospectively though a part of the requisites for its action is drawn from the time antecedent to its passing. (1848) 116 E R 811, Ref. (Paras 6, 8, 15)

'Das', J: The meaning of the relevant provisions of the Act is clear and does not admit of the suggested benevolent construction. Sub-sections (2) and (3) of S. 3 show that the widow's interest accrues by devolution at the moment of husband's death and such devolution adversely affects the rights of each coparcener vested in him from the moment of his birth, defined and determined with reference to fixed Hindu Law Rules and may also have the effect of adversely affecting past transactions. The widow, while introduced as a sharer of the family property, is not made a statutory grantee, but a statutory heir, of the coparcenary interest therein of her husband. It is therefore impossible to extend the benefit of the Act to a pre-Act widow except by giving the Act retrospective operation.

The principle of prospective operation of rights founded partly on past events is inapplicable to the case in view of the nature of the interest created in favour of the widow by the Act. (Para 45)

Anno: H. W. R. P. Act, S. 3, N. 1.

(f) Hindu Women's Right to Property Act (1937), S. 3 (2) — 'Dies' — Whether refers to past.

'Narasimham, J.: The tense and the mood of the verb used in the Act are such that whenever the Act is taken up for consideration it should appear as if the Act is then speaking. Therefore merely because the verb 'dies' in S. 3 (2) is in the present tense it is not correct to say that the Act refers to the present and to the future and not to the past, as such construction would overlook the well-known rule that a statute is to be regarded as always speaking. (1848) 116 E R 811; (1889) 58 L J P C 158 and A I R (37) 1950 Mad 321, Rel. on. (Para 6)

'Per Das, J.': It is not enough that the word 'dies' may be capable of being construed as applicable to the case of death prior to the Act. Every other requirement flowing from the wording of the Sub-sections must also be equally applicable to such a case and nothing which is not in it can be imported into it. One cannot shut his eyes to the inescapable implication of the Act that the right accrues by devolution at the moment of husband's death and no other. (Para 26)

Anno: H. W. R. P. Act, S. 3, N. 1.

(g) Hindu Women's Right to Property Act (1937), S. 3 (12) — 'When' — Whether indicates time factor — Words and Phrases.

'Per Narasimham, J.': It is true that the word 'when' may sometimes be indicative of the time factor, but in S. 3 (2) it has been used as indicating a condition and not the time factor and has the same meaning as 'where' to convey the meaning' in cases in which.' (Para 6)

'Per Ray, C. J.': The word 'when' in Sub-section (2) cannot force the construction of future death. If it were so, the words 'at the time of his death' would be wholly superfluous. The word therefore means "if or in the event of" and does not refer to the 'time' when the Hindu dies. (Para 50)

Anno: H. W. R. P. Act, S. 3, N. 1.

(h) Hindu Women's Right to Property Act (1937), Ss. 3 (2), 4 — Applicability of S. 4 to Hindus referred in S. 3 (2).

'Per Narasimham, J.': As the word "intestate" is inappropriate in Sub-section (2) of S. 3, and is deliberately omitted from that Sub-section but is retained in S. 4, it necessarily follows that S. 4, cannot apply to the Hindus referred to S. 3 (2). (Para 9)

'Per Ray, C. J.': Section 4 is an exception to Section 2 and, in that sense, does not limit the operation of Sub-section (2) of Section 3 to cases of women widowed subsequent to the Act. (Para 50)

Anno. H. W. R. P. S. 3, N. 1.

(i) Hindu Women's Right to Property Act (1937), Ss. 3 (2), 2 — S. 2 does not limit S. 3 (2).

('Per Narasimham, J., and Ray, C. J.; Das, J., contra'): An amending Act ex hypothesi will be contrary to the existing law which it purports to amend and must prevail notwithstanding any provision to the contrary in the then existing law. Section 3 of the Act which purports to amend the existing Hindu Law is a self-contained provision and Sub-sections (1) and (2) of that section prevail over the rule of Hindu Law by their own force. Section 2 is, therefore, apparently inserted by way of abundant caution. Where custom is saved, there is express provision to that effect in Sub-section (4) of Section 3. The word 'intestate' in S. 2 cannot therefore limit the giving of full effect to Sub-s. (2) of S. 3. (Para 11)

Anno: H. W. R. P. Act, S. 3, N. 1.

(j) Hindu Women's Right to Property Act (1937), S. 3 (2) — Applicability — Nature of Widow's interest — Hindu dying before 1937 — Section applies.

('Narasimham, J., and Ray, C. J., Das, J., contra') —The quantum of interest which the widow gets is not fixed with reference to what her husband had at the time of his death. The quantum is liable to fluctuation until partition and hence there is no legal impossibility in applying Section 3 (2) to the case of a widow whose husband died prior to the

Act, when joint family property continues intact after the passing of the Act. If there was any valid alienation by the manager of the family or by a coparcener in States like Madras where such alienations are recognised as valid to the extent of his interest, the quantum of interest available to the widow at the time of partition would have to be worked out as if her husband were alive till the date of partition while at the same time preserving vested rights which had accrued to persons before commencement of the Act. A.I.R. (32) 1945 Mad. 21, Rel. on. (Para 12)

'Per Das, J.': Under S. 3 (2), the Hindu Widow gets her interest from her husband by 'devolution.' By the 'devolution' of the interest on her she intercepts the right of survivorship thereto of the other coparceners, including the direct lineal male descendants of the husband himself. She has the right, under Sub-section (3), to obtain separation of her interest by claiming a partition. Her interest is a present interest capable of enjoyment, as such, even without division, and is not dependent upon her enforcing partition. She can therefore question alienations made or partitions effected, behind her back after the right accrues to her. The interest which she gets from her husband, in her hands being the limited interest of a Hindu women's estate, is subject to alienation and devolution in the same way. It follows that while her interest is an interest in the joint family property, it is not a coparcenary interest — it is only an ex-coparcenary interest. On her death, her interest in the joint family property, or the share therein which she may take on separation, does not, 'prima facie,' revert back to the joint family or coparcenary as such, but goes to the heirs of her husband as the fresh stock of descent. 'Case Law Ref.' (Para 20)

So far as can be gathered with reference to the wording of Sub-section (2) and (3) of S. 3 of the Act, the interest taken by the post-Act Widow is merely an interest in the joint family property and accruing at the very moment of her husband's death. There is absolutely no reason for thinking that the position is different in respect of the pre-Act widow, in case the Act applies to her. (Para 21)

Anno: H. W. R. P. Act, S. 3, N. 1.

(k) Hindu Women's Right to Property Act (1939), S. 3 (2) — Application of, to widows of Hindus dying before Act — Whether affects any vested rights of coparceners — Retrospective operation of Act — Rule as to — Interpretation of Statutes.

(Per Narasimham, J., and Ray, C. J.; Das J., contra'): No statute should be construed retrospectively so as to affect vested rights unless such a construction can be justified either by express words or by necessary implication.

By applying the Act to a widow whose husband died prior to 1937 the effect may undoubtedly be to reduce the quantum of interest which the other coparceners might have obtained, had they partitioned the property at the time of the death of the husband. But as they had no vested right to that quantum at that time it cannot be said that that right was adversely affected by such a construction. Unless it is a well-defined right there can be no question of its being either adversely affected or impaired.

Moreover, by admitting the widows of deceased coparceners also to some interest in the property the Act may be said to have deprived the coparceners of their exclusive privilege of limiting the interest to males alone. But a mere deprivation of privilege cannot be a ground for not giving limited retrospective effect to a statute when the words are capable of such construction. 1896 A. C. 240 Ref. (Para 13)

'Per Das, J.': The argument that the death of the widow's husband does not result in vesting his interest in the other coparceners or the introduction of widow as a sharer on her husband's death does not adversely affect any vested interest of coparceners, lays too much stress on the unpredictable nature of a coparcener's arithmetical share on partition. But that is not the sole criterion of a coparcener's interest. His is a vested interest. It is no doubt fluctuating in one sense. But the fluctuation is not erratic. The interest while it cannot be measured in terms of any arithmetical share before partition is still definite and definable in terms of the class of the membership of the joint family corporation. It is therefore well-nigh impossible to say that the introduction of the widow as a co-sharer does not adversely affect the coparcener's vested right. (Paras 29, 31)

Anno: H. W. R. P. Act, S. 3, N. 1.

(l) Hindu Women's Right to Property Act (1937), Ss. 4, 2 — Object of enacting S. 4.

'Per Ray, C. J.': The only explanation why Section 4 was enacted notwithstanding S. 2, is that Section 2 makes the Act applicable to cases of deaths of Hindus occurring either before or after the Act, and Section 4 emphasises the same by excepting, from the general rule of applicability prescribed in Section 2, the cases specified therein, namely, the cases where a Hindu leaves separate exclusive properties of his own which he could have disposed by valid testamentary disposition, but had failed to do so, and which would descend on his death to his heirs as distinguished from survivors, by rules of inheritance, the Act having introduced some new heirs into the pre-existing list of heirs under Hindu Law, as it then stood. (Para 48)

S. K. Ray and M. Mohanty, for Appellants; A. B. Ray, B. K. Pal; S. C. Palit and M. S. Mohanty, for Respondents.

Cases referred to:

(1846-51) 4 Moo Ind App 179: (6 Moo P C 1) (Pr 46)
(1861-63) 9 Moo Ind App 539: (2 W R P C 31) (Pr 29)
('77-78) 3 Cal 198: (4 Ind App 247 P C) (Pr 29)
('12) 34 All 234: (39 Ind App 121 P C) (Pr 33)
(21) 48 Ind App 195: 43 All 228: (A I R (8) 1921 P C 62) (Pr 47, 51)
('36) A I R (23) 1936 P C 20: (63 Cal 691) (Prs 20, 32, 33)
('37) 64 Ind App 28: (A I R (24) 1937 P C 36) (Pr 49)
('38) 65 Ind App 286: (A I R (25) 1938 P C 191) (Pr 47)
('43) 70 Ind App 232: (A I R (30) 1943 P C 196) (Prs 13, 26, 27, 44)
('41) A I R (28) 1941 F C 72: (I L R (1941) Kar F C 148) (Prs 3, 4, 20, 27, 51)
('45) A I R (32) 1945 F C 25: (I L R (1945) Kar F C 39) (Prs 14, 38, 44, 45, 58)
('43) A I R (30) 1943 All 188: (I L R (1943) All 307) (Pr 20)
('41) A I R (28) 1941 Bom 204: (I L R (1941) Bom 438) (Pr 39)
('95) 22 Cal 767 F B (Pr 37)
('20) A I R (7) 1920 Cal 435: (47 Cal 1108) (Pr 28)
('47) A I R (34) 1947 Lah 388 (Prs 20, 53)
('02) 25 Mad 149: (11 Mad L Jour 353) (Pr 29)
('12) 35 Mad 47: (9 Ind Cas 596 F B) (Pr 34)
('34) 57 Mad 718: (A I R (21) 1934 Mad 138) (Pr 62)
('42) A I R (29) 1942 Mad 212: (I L R (1942) Mad 630) (Prs 20,25, 52)
('45) I L R (1945) Mad 402: (A I R (32) 1945 Mad 21) (Prs 12, 23, 24, 54)
('50) A I R (37) 1950 Mad 192: (1949-2 Mad L Jour 536) (Pr 25)

('50) A I R (37) 1950 Mad 321: (1950-1 Mad L J 63) (Pr 7)
('50) I L R (1950) Mad 1076: (A I R (37) 1950 Mad 785) (Para 20)
('50) 1950-1 Mad L Jour 399: (A I R (37) 1950 Mad 538) (Prs 20, 33)
('44) A I R (31) 1944 Nag 243: (I L R (1944) Nag 832) (Pr 20)
('49) I L R (1949) 1 Cut 483: (A I R (38) 1951 Orissa 35) (Prs 20, 24, 25, 54)
('34) A I R (21) 1934 Pat 427: (153 Ind Cas 520) (Pr 38)
('37) A I R (24) 1937 Pat 113: (16 Pat 202 F B) (Pr 38)
('37) A I R (24) 1937 Pat 117: (16 Pat 215 F B) (Prs 50, 62)
('44) A I R (31) 1944 Pat 298: (23 Pat 599 F B) (Pr 25)
('45) A I R (32) 1945 Pat 116: (23 Pat 760) (Prs 20, 52)
('49) A I R (36) 1949 Pat 405: (27 Pat 143) (Pr 46)
(1848) 116 E R 811: (12 Q B 120) (Prs 7, 8, 37)
(1875) 1 Ch D 182: (45 L J Ch 83) (Pr 4)
(1889) 58 L J M C 158 (Prs 7, 37)
(1894) 1 Q B 725: (63 L J Q B 497) (Prs 28, 38)
(1896) A C 240: (65 L J P C 16) (Prs 13, 32)
(1900) 1 Ch 656: (69 L J Ch 266) (Pr 30)

NARASIMHAM, J: This reference to the special Bench was necessitated in consequence of a difference of opinion between my lord the Chief Justice and my learned brother Justice Das who first heard the appeal as a Division Bench.

(2) The essential facts have been fully set out in the judgment of my learned brother Justice Das and it is unnecessary to repeat them at length. Appellant Radhi Bewa (who was defendant No. 2 in the original suit) is the widow of one Bairagi who died sometime in 1932 or 1934. Respondent Bhagawan (plaintiff no. 1) is the own brother of Bairagi and respondents Brundaban and Hrudanand (plaintiffs 2 and 3) are the sons of another brother of Bhagawan and Bairagi named Natha who is dead. There was another brother of Bhagawan named Bharat who died leaving a widow named Keluni (defendant no. 1) and a daughter (defendant no 3.) They were also parties to the litigation in the early stages and it appears that they eventually compromised with the plaintiffs. The whole case proceeded on the assumption that the Mitakshara coparcenary which originally consisted of Bhagawan and his three brothers Natha, Bharat and Bairagi remained in tact even after the death of Natha, Bharat and Bairagi and that at present the surviving coparceners are Bhagawan on the one hand and Natha's two sons Brundaban and Hrudanand on the other. They, therefore, claimed the suit property (which are agricultural lands) as the surviving members of the coparcenary and urged that appellant Radhi Bewa who is the widow of a deceased coparcener whose death took place prior to 1937 was entitled only to maintenance. Radhi Bewa's main contention however was that though she became a widow prior to 1937 there was nothing in the provisions of the Hindu Women's Rights to Property Act, 1937 to disentitle her from claiming an interest in the property of her deceased husband under Sub-section (2) of Section 3 of that Act in view of the fact that the coparcenary has yet been disrupted. She, therefore, claimed the share of her deceased husband. My lord the Chief Justice took the view that though the Hindu Women's Rights to Property Act, 1937 (Act XVIII of 1937) as amended by the amending Act of 1938 (Act XI of 1938) was not retrospective in the broad sense in which it is ordinarily understood yet there was nothing in that Act to prevent the widow of a deceased coparcener who died prior to 1937 leaving an interest in the joint family from claiming that interest when that interest had not vested in any person either by partition amongst the coparceners or otherwise.

(3) The Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as the Act) as amended by the Act of 1938 was held by the Federal Court in Hindu Women's Rights to Property Act, 1937, In the matter of A. I. R. (28) 1941 F. C 72, to be inapplicable to agricultural lands. Thereupon the Orissa Legislature passed an Act in 1944 (Orissa Act V of 1944), extending the Act to agriculture lands in Orissa and giving retrospective effect to the same. Before the Division Bench it was contended, relying on the word 'always' in Section 2 of the Orissa Act, that the Orissa Act had unlimited retrospective effect. But this contention was rightly given up by Mr. Mohanty on behalf of the appellants at the time of arguing the appeal. The retrospectivity of the Orissa Act extends to the date of the commencement of the Central Act of 1937. It is, therefore, unnecessary to discuss the true meaning of the expression 'always' occurring in the Orissa Act which has been dealt with at some length in the judgments of the learned Judges who constituted the Division Bench. The sole question for consideration by the Special Bench is whether the benefits of Sub-section (2) of Section 3 of the Act are available to a Hindu woman who became a widow prior to the passing of the Act but whose husband's interest in the joint family property had not vested in any other person either by partition of the joint family property or by valid alienation. A decision of this question depends on a construction of Section 3 (2) of the Act along with other provisions of the Act such as Sections 2, 4 and 5. Though the Act is a small one consisting of five sections its construction is by no means easy and as pointed out in Mayne's Hindu Law, 11th Edition, at page 701, the Act even after the amendment of 1938 "remains defective and obscure in some respects." The difficulties in construing that Act have also been fully discussed at pages 4 to 10 of the report of the Hindu Law Committee, 1941. I must, therefore, confess to a feeling of diffidence in approaching the subject especially when my lord the Chief Justice and my learned brother Justice Das for both of whom I have the greatest respect have taken two divergent views.

(4) Before discussing the relevant provisions of the Act I may reiterate some well-known rules of statutory construction which bear repetition.

"The words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained." (Maxwell, 9th edition, page 55).

To these rules must be added the special rules of beneficial construction which are applicable to remedial Acts.

"Even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to the words if they are fairly susceptible of it. The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words," ('ibid', page 71.)

At the Bar it was faintly contended that the Act was not a remedial one. This argument apparently overlooks the following observations of the Chief Justice of India in A. I. R. (28) 1941 F. C. 72 at p. 76:

"The underlying purpose of the Act is plainly stated in its Preamble: "Whereas it is expedient

to amend the Hindu Law to give better rights to women in respect of property." It is, therefore, a remedial Act seeking to remove or to mitigate what the Legislature presumably regarded as a mischief; and as such it ought to receive a beneficial interpretation."

The Chief Justice of India relied on the following passage in 'Gover's case'; In re, Coal Gas Co., (1875) 1 Ch. D. 182:

"The Act must be construed so as to give the most complete remedy which the phraseology will permit."

(5) I may now quote Sections 2 to 5 of the Act.

"Section 2. Notwithstanding any rule of Hindu law or custom to the contrary, the provisions of Section 3 shall apply where a Hindu dies intestate.

"Section 3 (1). When a Hindu governed by the Dayabhaga School of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together shall, subject to the provisions of Sub-section (3) be entitled in respect of property in respect of which he dies intestate to the same share as a son

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son;

Provided further that the same provision shall apply 'mutatis mutandis' to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time or his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of Sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Women's Estate, provided, however, that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends to a single heir or to any property to which the Indian Succession Act, 1925, applies.

"Section 4. Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

Section 5. For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect."

The original Act of 1937 did not contain Section 5 and in Sub-section (2) of Section 3 of that Act the word 'intestate' was found after the word 'dies. By the amending Act of 1938, the word 'intestate' was omitted from Sub-section (2) of Section 3 as 'inept' and Section 5 was newly inserted so as to give the expression 'die intestate' an extended meaning.

(6) Reading Sub-section (2) of Section 3 as it now stands it will be noticed that there is nothing in it to indicate that the death of the person referred to therein must have taken place prior to the commencement of the Act. All that it says is that when a Hindu governed by a particular school of Hindu law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of Sub-section (3), have in the property the same interest as he himself had. The date of widowhood is not referred to at all. It was, however, contended that the expressions 'dies' and 'at the time of his death' indicate that the Legislature was thinking of deaths which might take place after the commencement of the Act. This argument, however, overlooks the well-known rule of statutory drafting.

"A statute is to be regarded as always speaking" ('Halsbury' Vol. 31, 2nd Edition, page 572.)

The tense and the mood of the verb used in the Act are such that whenever the Act is taken up for consideration it should appear as if the Act is then speaking. Therefore merely because the verb 'dies' is in the present tense it is not correct to say that the Act refers to the present and to the future and not to the past. Moreover, the subjunctive mood has been used in a conditional sense and the word 'when' is not used as indicating time factor but as indicating a condition. It is true that the word 'when' may sometimes be indicative of the time factor but here it appears to have the same meaning as 'where.' Thus in Section 2, the words used are

"The provisions of Section 3 shall apply where a Hindu dies intestate."

Thus 'when' and 'where' have been used indiscriminately in the Act to convey the meaning 'in cases in which' (see Sir A. Alison's Legislative Drafting and Forms, 4th Edition, p. 117.) I would paraphrase Sub-section (2) as follows:

"In cases in which a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law leaves an interest in a Hindu joint family property at the time of his death, his widow shall, subject to the provisions of Sub-section (3) have in the property the same interest as he himself had."

The words 'at the time of his death' have been specially insested to restrict the application of this Sub-section to the interest which he then leaves in the Hindu joint family property whatever might have been his interest prior to his death and they have nothing to do with the prospective or retrospective application of the Act. The most decisive argument in favour of the view that the word 'dies' does not necessarily indicate prospectivity is found in Section 4 of the Act itself. That section expressly says that nothing in the Act shall apply to the property of any Hindu dying intestate before the commencement of the Act. It, therefore, expressly bars giving retrospective effect to the property of a Hindu dying intestate before the commencement of the Act. The word 'dies' occurs in Sub-section (1) of Section 3 which deals with the separate property of a Mitakshara Hindu or the property of a Dayabhaga Hindu dying intestate. If the expression 'dies' in Sub-section (2) is itself sufficient to bar retrospective operation, by parity of reasoning the same expression in Sub-section (1) of Section 3 should be a bar to retrospective construction and there would have been absolutely no need for the Legislature to insert a new section like Section 4. It was, however, urged that Section 4 might have been inserted by way of abundant caution and that it should not affect the reasonable inference arising from the tense of the verb 'dies.' I am, however, unable to accept the view that a section like Section 4 which expressly bars retrospective effect in certain cases can be said to have been inserted by way of abundant caution. It seems to have been inserted mainly because the Legislature fully realised that if Section 3 (1) stood by itself it might be reasonably construed as retrospective to a limited extent and with a view to remove all possibility of such a construction it found it necessary to provide a new statutory section. Thus taking into consideration the rule of drafting regarding the use of the tense and mood and the implications arising out of the language used in

Sub-sections (1) and (2) of Section 3 read with Section 4 of the Act it seems clear that there is nothing in Sub-section (2) of Section 3 to limit its application to the widow of a Hindu who died after the commencement of the Act.

(7) There is ample authority for such a construction. As pointed out by my lord the Chief Justice the Privy Council while construing the words 'dying intestate' occurring in the Hindu Law of Inheritance (Amending Act of 1929) pointed out that those words do not necessarily connote the future tense but that they are descriptive of the status of the deceased and have no reference and were not intended to have any reference to the time of the death of a Hindu male. Similarly in 'The Queen v. St. Mary Whitechapel', (1848) 116 E R 811, the following provisions of Section 2 of Stat. 9 & 10 Vict. c. 66 came up for consideration.

"No woman residing in any parish with her husband at the time of his death shall be removed ....."

The argument that the word 'residing' in that section though connected with the words 'shall be removed' is not meant to confine the enactment to future residence but that it is a descriptive word having the effect of adjective and referable to any time was accepted by Lord Denman, C. J., who held that though the Act was prospective in its operation as it related to future removals only there was nothing to prevent a construction by which 'a part of the requisites for its action is drawn from time antecedent to its passing."

In 'The Queen v. Birwistle', (1889) 58 L J M C 158, the decision turned on the construction of the following extract from Section 1 of 49 & 50 of Vict. c. 52.

"From and after the passing of this Act it shall be lawful for any married woman, who shall have been deserted by her husband to summon her husband before any two Justices, etc. etc."

The question for consideration was that section would apply to desertions which took place rior to the commencement of the Act also. Lord Coleridge, C. J., answered this question in the affirmative saying:

"Scores of Acts are retrospective, and may without express words be taken to be retrospective, since they are passed to supply a cure to an existing evil. This Act was intended to afford married women a remedy for desertion, and desertion may have commenced before the Act....."

The recent judgment of Viswantha Sastri, J., in 'Lakshmi Ammal v. Narayanaswami', A I R (37) 1950 Mad 321, while construing the words "if he marries again" in Clause (4) of Section 2 of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 is also very instructive. The learned Judge held that the said expression is not limited to second marriages which might take place after the coming to force of the Act but would apply to such marriages which took place prior to the passing of the Act and the words were

"Merely descriptive of the position of the husband as a twice married man at the date when the wife's claim for separate maintenance is made under the Act....."

(8) It is unnecessary to cite other authorities. Even on a fair construction of Sub-section (2) of Section 3 it cannot be said that there is any indication therein barring its application to the widows of those Hindus who died before the commencement of the Act. When there is no such indication there seems to be no reason as to why the benefit of that Sub-section should be denied to those classes of persons who became widows prior to the commencement of the Act unless such a construction is inconsistent with the other provisions of the Act or offends against other well-known canons of the statutory construction. Such a construction is strictly speaking not giving retrospective effect to the statute as ordinarily understood but to quote the words of Lord Denman, C. J., (1848) 116 E R 811, to apply the Act prospectively though

'a part of the requisites for its action is drawn from time antecedent to its passing.'

(9) It was contended that Section 4 read with Section 5 left no room for doubt that the whole of Section 3 including Sub-section (2) could not apply to the property of a Hindu who died before the commencement of the Act. It will be noticed that Section 4 refers to the property of a Hindu dying intestate. Sub-section (1) of Section 3 expressly refers to the property of such a Hindu and that Sub-section has therefore clearly no retrospective operation. But Sub-section (2) does not refer either to 'property' or to a Hindu who 'dies intestate.' It refers only to the 'interest' of a Hindu in the joint family. The word 'intestate' which was originally inserted in that Sub-section was deliberately omitted by the Legislature in 1938 as 'inept.' That is to say, the Legislature considered that it will not be appropriate to say that a Hindu governed by the Mitakshara who has an interest in the joint family property can be said to 'die intestate' in respect of that interest because he has no right to make a testamentary disposition. If, therefore, it will not be good English to say that such a Hindu died 'intestate' how can it be said that Section 4 applies to him also? In other words, if the word 'intestate' is inappropriate in Sub-section (2) of Section 3 and is deliberately omitted from that Sub-section but retained in Section 4 it necessarily follows that Section 4 cannot apply to those Hindus referred to in Sub-section (2) of Section 3. Moreover, in ordinary language when a person is said to 'die intestate' the reference is to a person who having the capacity to make a will either omits to execute any will at all or executes a will which is found to be invalid due to other causes. It will, therefore, be not good English to say that a 'minor died intestate' or else that a 'congenital idiot died intestate' because neither of them has the capacity to make a will. The position of a coparcener in an undivided Hindu family is of a similar type in respect of his interest in the joint family property and Section 4 cannot be applicable to him in respect of that interest.

(10) It was, however, contended that even though in terms Section 4 may not be applicable to a coparcener of an undivided Hindu joint family, by virtue of the extended definition given in Section 5 it became so applicable. It was urged that the words in Section 5 'he has not made a testamentary disposition which is capable of taking effect' would also include those cases where an undivided Mitakshara Hindu does not make any will at all or makes a will which on account of his incapacity is incapable of taking effect. I would have been inclined to accept this argument but for the deliberate omission of the word 'intestate' from sub-section (2) of section 3 by the Legislature in 1938. If intestacy and the interest of a Mitakshara Hindu joint family property are incongruous in one sub-section of the Act they must be incongruous in all other sections of the Act because it is a well-known rule of statutory construction that words and phrases should be given the same meaning throughout the Act, unless there is any repugnancy in the context. Section 5 should therefore be construed to refer to those cases where a person having the capacity to make a will executes a will which due to other reasons such as failure to comply with the formalities or contravention of the law of transfer of property is rendered invalid in whole or in part in respect of a

portion of the property. The necessity for inserting section 5 was obvious. Ordinarily, the word 'intestate' would mean intestacy in fact; that is to say, the fact that no will was executed by a person capable of executing a will. But legal intestacy goes further and includes those cases where a will though executed in fact is declared to be invalid in whole or in part. If section 5 were not there then difficulties might have arisen in construing section 4 in those cases where there is intestacy in law though not in fact and it was to remove this difficulty that section 5 was inserted adopting the language of section 30 of the Indian Succession Act. If section 5 were meant to include those cases of persons who had no capacity to make a will at all the necessity for omitting the word 'intestate' from section 3(2) would not have arisen.

(11) One important argument against this construction is that it may lead to the anomalous result of section 2 being not applicable to subsection (2) of section 3. This argument appears to have weighed very much with my learned brother Justice Das. Section 2 undoubtedly refers to a Hindu who dies intestate and it says that the devolution of property as described in section 3 shall apply to the property of such a Hindu 'notwithstanding any rule of Hindu law or custom to the contrary'. It is argued that unless this controlling section 2 is made applicable to subsection (2) of section 3 difficulties of construction would arise when there is a conflict between section 3(2) on the one hand and any provision of Hindu Law or custom to the contrary on the other. There are two answers to this argument. The first one is that given by Srinivasa Iyengar in his 10th edition of Mayne's Hindu Law at page 716 and reiterated in the 11th edition of the same book at page 704. There, it has been pointed out that: 'as intestacy cannot by any legal possibility be a condition for the operation of sub-section (2) to section 3 the words 'dies intestate' in section 2 must be treated as a surplusage having no meaning.'

Another reason which I venture to put forward is that section 2 was inserted by way of abundant caution and the full operation of sub-section (2) of section 3 is not in any way affected even if section 2 be completely omitted. The Act purports to be an amendment to the Hindu law. It is well-known that Hindu law consists not only of sacred texts but includes customary law which modifies those texts and the judicial decisions interpreting those texts and recognising such custom. When an Act therefore purports to be an amendment to the existing Hindu law it must, to the extent to which it can be reasonably construed, prevail over any existing provision of Hindu law or custom to the contrary. An amending Act ex-hypothesi will be contrary to the existing law which it purports to amend and must prevail notwithstanding any provision to the contrary in the then existing law. Section 3 is a self-contained provision and sub-sections (1) and (2) of that section would prevail by their own force and section 2 was apparently inserted by way of abundant caution. Where custom is saved, there is express provision to that effect in sub-section (4) of section 3. The word 'intestate' in section 2 cannot therefore limit the giving full effect to sub-section (2) of section 3.

(12) Another reason which also appears to have weighed very much with my learned brother Justice Das will be clear from the following quotation of his Judgment.

"The quantum of the interest which a widow gets is the same as what the husband had during his life-time and therefore does not fluctuate with reference to any further changes in the constitution of the family. It is also clear that that interest is measured by what it was when the husband died, since the interest is referred to in subsection (3) as 'devolving' on her from her husband and in sub-section (2) as being the same which he had when he died."

From this premise he infers that the commencement and the quantum of the widow's interest have reference to the point of time when her husband died and that it is almost impossible to fit in the case of a widow whose husband died prior to the Act, into the framework of section 3 (2). I am however unable to find any clear authority to support the view that the quantum of interest which the widow gets is fixed with reference what her husband had at the time of his death and does not fluctuate. This question is certainly not free from difficulty as pointed out in the 11th edition of Mayne's Hindu Law at pages 710, 711 where the learned editor has observed:

"The anomaly of a widow holding a woman's estate in the undivided property of her husband must necessarily be dealt with as a special case; the interest she takes may well be a fluctuating interest till there is a partition."

To a similar effect are the following observations at page 334 of the same book.

"While she cannot be in strict sense a coparcener with the other members, her position will be analogous to that of a member of an undivided family under the Dayabhaga Law with this possible difference that, as she is only to have the 'same interest' as her husband himself had, the share to which she will be entitled at a partition may be liable to the same fluctuation caused by changes in the family as if she occupied the place of her husband or as the share of any member of an undivided Mitakshara family."

The Madras High Court has also taken the same view in 'Chinniah Chettiar v. Sivagami Achi', I L R (1945) Mad 402. Therefore, even in respect of post—1937 deaths it has been held that the quantum of interest of a Hindu widow is liable to fluctuation until partition. There seems to be thus no legal impossibility in applying section 3(2) to the case of a widow whose husband died prior to the Act, when joint family property continues intact after the passing of the Act. If there was any valid alienation by the manager of the family or by a coparcener in States like Madras where such alienations are recognised as valid to the extent of his interest, the quantum of interest available to the widow at the time of partition would have to be worked out as if her husband were alive till the date of partition while at the same time preserving vested rights which had accrued to persons before the commencement of the Act.

(13) It is true that no statute should be construed retrospectively so as to affect vested rights unless such a construction can be justified either by express words or by necessary implication. But the question is what are the vested rights that are adversely affected by the construction suggested in this judgment. It has been strenuously contended that the rights of the other coparceners in the joint family property are adversely affected. It is unnecessary to elaborate at length the various rights of an individual coparcener in a Hindu joint family until partition. I would content myself with quoting the following observations of the Privy Council in 'Ananta Bhikappa v. Shankar Ramchandra', 70 Ind App 232 at p. 239:

"As Appovier's case made clear, the fraction which is at any time employed to describe the quantum of interest of a male member of the family 'does not represent his rights while the family is joint', but the share which he would take if a partition were then to be made. His interest is never static but increases by survivorship as

others die and lessens as others enter the family as by birth or adoption."

A coparcener has undoubtedly an interest in the joint family. But the quantum of his interest at any particular time being indeterminate and inchoate till actual partition it cannot be said that he has any right — much less a vested right — to such a quantum of interest. By applying the Act to widows whose husbands died prior to 1937 the effect may undoubtedly be to reduce the quantum of interest which the other coparceners might have obtained, had they partitioned the property at the time of the deaths of those husbands. But as they had no vested right to that quantum at that time it cannot be said that right was 'adversely' affected by such a construction. Unless it is a well defined right there can be no question of its being either adversely affected or impaired. The rule against retrospective construction (even in a limited sense) has been thus explained in Halsbury, Vol. 31, 2nd edition, page 516.

"The rule, therefore, strictly stated applies to rights which are at the moment of enactment matters of active assertion, and not to rights which may thereafter be the subject of litigation".

How can it be said that the quantum of interest of a coparcener in the coparcenary property is a matter of active assertion until partition? The learned Counsel for the respondent however contended that the other rights of the coparcener in the joint family property such as his right of joint possession and enjoyment etc. fully described in section 235 at page of Mulla's Hindu Law, 10th edition are also adversely affected. I am however unable to understood how any right of a coparcener except the quantum of his interest is adversely affected when the widow of a deceased coparcener is held to have her husband's interest in the property. She is not a stranger but also a member of the joint family and as such is always entitled to maintenance like coparceners themselves. By giving her the same interest in the property which her husband had the joint possession and enjoyment of the property by the other coparceners is not in any way adversely affected. The Karta continues to manage the property as before and the other coparceners' right to claim partition at any time is not affected at all. The coparceners had the privilege (if I may use that expression) of admitting male issues of coparceners alone to an interest in the coparcenary property. The Act by admitting the widows of deceased coparceners also to some interest in the property may be said to have deprived the coparceners of that exclusive privilege of limiting the interest to males alone. But a mere deprivation of privilege cannot be a ground for not giving limited retrospective effect to a statute when the words are capable of such construction. In 'Reynolds v. Attorney General for Nova Scotia' 1896 A C 240, it was held that a mere privilege was not a vested right so as to prevent a court from giving retrospective effect to a statute.

(14) The judgment of the Federal Court in 'Umayal Achi v. Lakshmi Achi', A. I. R. (32) 1945 F. C. 25 has been cited at the Bar and emphasis has been laid on the following observations of Varadachariar J. at page 33.

"But that is due to the circumstances that her husband died before the passing of the Act..... ..The possibility of such varying consequences cannot be allowed to control the natural and reasonable interpretation of the Act. It is prima facie prospective....."

The use of the word 'prima facie' by Varadachariar J. makes it absolutely clear that there is no decision by the Federal Court of this question. This point was not specifically taken up and moreover in that case it could not be taken up because the entire property had vested in a sole coparcener before the commencement of the Act of 1937.

(15) To conclude: the Act being a remedial Act there seems no justification for not giving full effect to the words of sub-section (2) of section 3 so as to embrace within its scope persons who became widows not only after the commencement of the Act but also those persons who became widows before the commencement of the Act so long as the interest which their husbands had in the joint family property at the time of their death had not vested in any individual. The tense and mood used by the draftsman in sub-section (2) of section 3 are not at all decisive on the question of prospective construction but are consistent with the alternative construction also. If section 4 be made applicable to sub-section (2) of section 3 there would certainly be a definite bar to giving such a limited retrospective construction to section 3(2) but by deliberately omitting the word 'intestate' from sub-section (2) of section 3 and retaining it in section 4 the legislature obviously indicated that section 4 should not in any way control sub-section (2) of section 3. Any such construction which would affect vested rights of any person may be open to other objections based on well-known canons of construction. But so long as such vested rights are not affected there seems no justification for depriving one class of widows from the benefits which the Act intended to confer on them.

(16) I would therefore, with great respect, agree with the view taken by my Lord the Chief Justice.

(17) JAGANNADHADAS, J.: We have heard elaborate arguments on his reference and I have had the advantage of considering carefully the judgment of my Lord the Chief Justice in the Division Bench and all the arguments in support of it from the Bar and the Bench and also of reading with close attention the judgment prepared by my learned brother Justice Narasimham. But after giving the matter my best and anxious consideration I regret, with great respect, my disagreement with their views and I feel unable to come to any different conclusion than that which I had reached when I heard the matter as a member of the Division Bench. I am indeed bound to say that I feel reinforced in the view that I have already expressed.

(18) In view of the importance of the matter and out of respect for the views of my learned brothers and out of regard for the strenuous arguments advanced at the Bar, I am obliged to deal with the question involved, at some length, even at the possible risk of repetition of portions of my previous judgment.

(19) Under Section 3, sub-section (2) of Central Act XVIII of 1937, as amended by Central Act XI of 1938, the widow of a coparcener who dies leaving an interest in joint family property gets his interest therein. The question for decision is whether this applies equally to a widow whose husband died prior to the passing of the Act, as it does indisputably to the case of a widow whose husband died after the passing of the Act. It is common ground that the Act is not to be construed as retrospective in operation. But it is argued that it is possible to give prospective operation to it, also in its application to a widow whose husband died before the commencement of the Act. This depends upon a construction of the relevant provisions of the Act itself and upon the question whether, so construed, it does or does not adversely affect any vested rights which had accrued prior to the commencement of the Act. The feasibility of such a construction depends, largely, on the nature of the interest given to such a widow and the time of the accrual of that interest, generally, under the Act.

(20) The relevant provisions are sub-sections (2) and (3) of section 3 of the Act. These provisions have come in for consideration before the various High Courts during the thirteen years for which the Act has by now been in force. It is now well settled that the Act has not the effect of introducing the widow as a coparcener into the joint family along with the other coparceners, that the widow gets the interest of her husband by succession as his heir and not by survivorship, but that no disruption of the coparcenary is effected thereby, that the widow holds her interest in the property not as the interest of a tenant-in-common with the coparceners, but as an interest in joint family property, subject to all the normal and well understood incidents relating to ownership of joint family property, viz., its liability to common management by the family manager, its liability for family debts, family expenses, and so forth. These propositions are clearly laid down in A. I. R. (28) 1941 F. C. 72 at p. 74 Col. (2), 'Siveshwar Prasad Narain Singh v. Harnarainmal', AIR (32) 1945 Pat 116; 'Sardambal v. Subbarama Ayyar', A I R (29) 1942 Mad 212; 'Kallian Rai v. Kashinath', A I R (30) 1943 All 188; 'Jadaobai v. Purnmal', AIR (31) 1944 Nag 243; 'Vinod Sagar v. Vishnubhai', AIR (34) 1947 Lah 388; and Radha Ammal v. Commr. of I. T., Madras', 1950-1 Mad L Jour 399 and 'Seethamma v. Veerana Chetty', I L R (1950) Mad 1076. They emerge from the wording of the sub-sections above referred to. The widow gets "the same interest in the joint family property which the husband had", but the interest which devolves on her is "the limited interest known as the Hindu Woman's estate". She gets her interest from her husband by "devolution". By the "devolution" of the interest on her she intercepts the right of survivorship thereto of the other coparceners, including the direct lineal male descendants of the husband himself. She has the right, under sub-s. (3) to obtain separation of her interest by claiming a partition. Her interest is a present interest capable of enjoyment, as such, even without division, and is not dependent upon her enforcing partition. Her interest is, in this respect, unlike that of the mother under the pre-existing law who was entitled to a share only on partition, but who had no right to compel partition and whose right to get a share depended on partition. See 'Pratapmull v. Dhanbati Bibi', A I R (23) 1936 P. C. 20. She can therefore question alienations made or partitions effected behind her back after the right accrues to her. The interest which she gets from her husband, in her hands being the limited interest of a Hindu Woman's estate, is subject to alienation and devolution in the same way. It follows that while her interest is an interest in the joint family property, it is not a coparcenary interest — it is only an ex-coparcenary interest. On her death, her interest in the joint family property, or the share therein which she may take on separation, does not prima facie, revert back to the joint family or coparcenary as such, but goes to the heirs of her husband as the fresh stock of descent. These positions are clearly deducible from the wording of the sub-sections and are substantially supported by the decisions cited above, besides being in complete accord with the closely reasoned views expressed by my Lord the Chief Justice in 'Kunja Sahu v. Bhagaban Mohanty', I. L. R. (1949) 1 Cut. 483, with most of which Justice Panigrahi has agreed.

(21) For the purpose of the present discussion, it is of importance to consider at what point of time the right accrues to the widow under the Act. Having regard to the wording of the sub-sections above referred to, there can be no reasonable doubt that the right accrues at the very moment of the husband's death. This is indisputably so with reference to the case of a widow whose husband dies after the commencement of the Act, (and is quite independent of the correctness or otherwise of the suggested construction — which I shall presently refer to — of the word "when" occurring at the beginning of sub-section (2) of section 3 as indicative only of the conditions for the accrual of the right). The only two possible alternatives, on principle for the commencement of the accrual of the right in the case of such a post-Act widow — if I may use the expression — are either her husband's death itself or the actual partition between the remaining coparceners. But, as has been pointed out already, there is nothing in the Act indicating that the rights of the widow, are to arise only on, or remain in abeyance until, partition. The right accrues therefore at the moment the sole condition for the birth of the right is fulfilled, viz., the death of the husband, having at the time an interest in joint family property. This is also clearly brought out by the use of the words and phrases "when", "at the time of his death" and "the same interest as he himself had" in sub-section (2), and the word "devolving" in sub-section (3). So far therefore as can be gathered with reference to the wording of sub-sections (2) and (3) of section 3 of the Act, the interest taken by the post-Act widow is, merely an interest in the joint family property, and accruing at the very moment of her husband's death. There is absolutely no reason for thinking that the position is different in respect of the pre-Act widow., in case the Act applies to her.

(22) In my previous judgment, as a member of the Division Bench, I stated as follows:

"It is reasonably clear that the commencement and quantum of the widow's interest has reference to a point of time when her husband died and it would also appear that her rights are in respect of the family property as it stood at the time when her husband died. If this is the correct view of the amplitude, quantum, and commencement of the widow's interest, it appears to me to be almost impossible to fit in the case of a widow, whose husband died prior to the Act, into the framework of Section 3, sub-section (2)".

(23) It has been argued before us, on this reference, that this assumption is erroneous. My attention has been drawn to a passage in Mayne's Hindu Law, 11th Edition, p. 710 and to a decision reported in I L R (1945) Mad 402 to the effect that the interest which the widow takes by devolution from her husband is the same fluctuating interest as that of her husband. For the purposes of the present discussnon, it may not be necessary to express any final opinion as to whether those views are correct. But I must point out that the core of the reasoning indicated in the above quotation from my previous judgment is that the widow's interest accrues right at the very moment of her husband's death, — quite independently of the question whether or not the interest is fluctuating — and that, therefore, the case of a widow whose husband died prior to the Act but whose rights came into operation after the commencement of the Act, is incompatible with the wording of the sub-sections quoted above. To counter the argument that the wording in these sub-sections indicate also the time-factor relating to accrual of the right of the widow, my learned brother Justice Narasimham has construed the word "when" as meaning "if" and has pointed out the use of "where" in section 2 of the Act as meaning "if". He has also attempted a paraphrase of sub-section (2) of Section 3 in order to support his point of view. But it appears to me, with great respect, that the very use of the word "where" in a different context and in a different section and the necessity felt by my learned

brother to paraphrase in different language what he conceives to be the meaning of sub-section (2) of Section 3 are, to my mind, themselves cogent arguments against the meaning that he would attribute to the sub-section, and demonstrate that it is a forced construction. The construction, so adopted, proceeds on the omission to take note of the use of the important and decisive word "devolving" occurring in sub-section (3) of section 3.

(24) Though as I have already stated the question as to whether the interest that the widow takes, is a fluctuating one, or one defined and determined with reference to a point of time, viz., the date of her husband's death, does not require to be finally decided for the purposes of this case, a consideration of this question helps the discussion and is not out of place. I would, therefore, with very great respect to the learned Editor of Mayne's Hindu Law and the learned Judges in the Madras decision, venture to submit that the view taken as to the fluctuating character of a widow's interest appears to be erroneous. As I have shown above, the interest taken by the widow is not a coparcenary interest but only an interest that had been once a coparcenary interest. The essential characteristics of a coparcenary interest are that it arises by birth and lapses by death, except in so far as such lapse is prevented by the right of representation inhering in the three direct lineal male descendants of the coparcener. The fluctuating nature of a coparcenary interest is merely the result of these characteristics being a common feature of the interest of each and every member of the coparcenary group who between them own the entire family properties. It is obvious from the above that the rights of accrual by survivorship arising therefrom are mutual. In the case of a widow's interest under the Act, her interest arises not on her birth but on her husband's death. Further, on her own death, the interest does not, prima facie, lapse or revert back to the family, but goes to her husband's separated heirs. Her interest, therefore, does not accrue, on her death to the coparceners. It is difficult therefore to see how the benefit of survivorship can accrue to her own interest on the death of the other coparceners, there being no mutuality. It is also equally difficult to see how her share can be diminished by changes in the family. Some stress has been laid on the phrase in S. 3(1) that the widow shall have the same interest as her husband had. But it is not provided that, in her hands, it shall 'continue' to be the "same" interest, but on the other hand it is provided in S. 3(3) that in her hands it is "the interest in Hindu woman's estate". This has the effect — and it has been so judicially construed — of completely changing the character of the interest in her hands. It is in no sense therefore the "same" coparcenary interest in her hands, nor even a modified coparcenary interest. This conclusion is in no way affected by the line of decisions which hold that her interest is an interest in joint family property to the incidents thereof until partition. In my view therefore the interest of the widow does not continue in her hands as the "same" interest of her husband, but was so only at the time of devolution, the word "same" having reference to the measure and amplitude of the interest and not to the continuance of its equality. It appears to me, to follow, that her interest is not liable to fluctuations arising from the changing circumstances of the coparcenary group with whom she holds the joint family property in common. It must also follow that the quantum of her interest in the joint family must be one that is determined with reference to the time of the accrual of such interest, viz., the death of her husband. This view is in complete accord with what my Lord the Chief Justice has said in I.L.R. (1949) 1 Cut. 483, wherein his Lordship has specifically dissented from the view expressed in I.L.R. (1945) Mad. 402. I have since had the opportunity of reading my Lord's draft judgment on this reference and have considered carefully what his Lordship has said about his previous judgment. I take leave to say with respect that I prefer to follow My Lord's earlier reasoning.

(25) At any rate, if the view taken by me above is correct, viz., that the moment of the husband's death is the determining factor at least for the accrual of the widow's interest, if not also for the quantum, etc., thereof (note that this has been assumed to be so in 'Bhagwat Shukul v. Mt. Kaporni', A I R (31) 1944 Pat. 298 at p. 302; A I R (29) 1942 Mad. 212; 'Subba Naicker v. Nallammal', A I R (37) 1950 Mad. 192 at p. 193, and more clearly assumed in I L R (1949) 1 Cut. 483 at pp. 487 to 489), I am unable to see how the case of a widow whose husband died prior to the Act, can be brought within the scope of Sub-s. (2) of S. 3, without giving the Act retrospective operation.

(26) It has been suggested that the rights of a widow in such a case may well be taken to commence from or after the date when the Act comes into force provided there has been no partition of that joint family property between the members of the coparcenary previous thereto. This is the view expressed by my Lord in his referring judgment when he stated:

"Such an interpretation does not give the Subsection any retrospective operation when it applies to a case in which the joint family and the joint family property remain undivided and undisposed of till after the commencement of the Act."

It appears to me with respect that this is a construction wholly unwarranted by the language of the Act and imposes limitations on the accrual of the right not found in the Act itself. It is not enough that the word "dies" may be capable of being construed as applicable to the case of death prior to the Act. Every other requirement flowing from the wording of the Sub-sections must also be equally applicable to such a case and nothing which is not in it can be imported into it. One cannot shut his eyes to the inescapable implication of the Act that the right accrues by devolution at the moment of husband's death and no other. There is nothing in the Sub-section to warrant the accrual of the widow's right at any point of time other than the moment of the death of her husband, or to make the accrual conditional upon the property remaining undivided between the members of the coparcenary until the commencement of the Act. The Sub-section merely refers to the case of the husband dying as an undivided member of the family and the accrual of the widow's right at the moment of the husband's death. Indeed, if, as my Lord the Chief Justice is inclined to think, the widow is introduced as a sharer by giving her a right to represent the husband just like the son, there is no reason why she should not be able to reopen even a partition already made before the Act just as a posthumous, natural or adopted, son would be entitled to do, the more so after the case in 70 I A 232. This shows the untenability of imposing the condition of no partition (or no disposal) before the Act and of the view that the widow is the representative in the same way that the son is.

(27) It is also suggested that there is nothing against such a right, though determined with reference to a point of time prior to the date of the Act, springing up into operation at or after the commencement of the Act. This might have been possible, if the Act purported only to grant to the widow, out of the common pool of the joint family property an interest equal to that of her deceased husband's interest, as indeed was the

case in respect of a mother prior to the Act, and did not provide for 'devolution' of that interest. I have already attempted to show that such devolutions occur at the very moment of death. To say that there can be devolution on death but accrual of the right thereafter, would be opposed to the fundamental principle that there can be no accrual on devolution with a gap and that heritage cannot be in abeyance. A devolution 'by succession' and accrual of right thereon must occur at the very moment when the succession opens. The same is also the case with devolution by survivorship as for instance where a member of an undivided Hindu family dies and his interest devolves on the survivors. The analogy of an adopted son divesting the interest of his deceased adoptive father on such adoption even after it has vested in a separated coparcener as in 70 Ind App 232, and the analogy of a reversioner succeeding to a propositus after the death of his widow, which have been suggested in the course of the arguments, have absolutely no relevance in this context and provide no exceptions to the fundamental rule that devolution by inheritance or survivorship cannot remain in abeyance. Nor does the decision of the Federal Court in AIR (28) 1941 FC 72, indicate that the devolution on the widow under S. 3 (2) is not by heirship (interrupting survivorship), though of course as pointed out therein the word "devolution" in its generic import is wide enough to include both succession and survivorship.

(23) The next point for consideration is whether or not the introduction of the widow as a sharer in the joint family property affects pre-existing rights of the other coparceners. My Lord the Chief Justice, in his referring judgment, has taken the view that the previous death of the widow's husband does not result in vesting any of his rights in the other coparceners and that what the Act does is only to give the widow a right of representation to her husband and that, consequently, there is no question of divesting of vested rights arising, on the construction adopted by him. My learned brother Justice Narasimham has put the matter in a different way and has said that no coparcener has a vested right to a particular share and that he cannot, therefore, complain of any vested right of his being affected by the introduction of an additional sharer in the person of the widow of a deceased coparcener. It appears to me, with great respect, that neither view makes a correct approach to the question at issue. The question is not whether the death of the widow's husband has vested any fresh rights in the other coparceners and if so whether they are taken away by the Act or whether a coparcener has a vested right to a definite arithmetical share. The question is — what are the normal rights of the coparceners 'from their birth' and are they vested rights and if so are they adversely affected by the introduction of the widow as a sharer. If the Legislation, in its general application, affects such vested rights, it can only be construed so as to bring it about either directly or indirectly by retrospective operation and so as not to affect adversely situations resulting from events prior to the Act. It is also pertinent to observe that in order to judge whether the construction of a statute leads to retrospective operation or not, it is not necessary that a pre-existing vested right should be completely divested. It will suffice if the vested right is adversely affected. As pointed out by Justice Mookerjee in 'Promotha Nath v. Soren Dasi', A I R (7) 1920 Cal. 435:

"Every statute which takes away or 'impairs a vested right', under existing laws, or creates a new obligation or imposes any duty, or 'attaches a new disability'..... in respect of transactions or considerations already passed ..... must not be deemed retrospective in its operation."

See also In re 'Pulborough School Board Election; 'Bourke v. Nutt', (1894), 1 Q. B. 725 at p. 737.

(29) The Privy Council has laid down as early as in 'Katama Natchier v. Rajah of Shivagunga', 9 Moo Ind App 539, at p. 611 that:

"According to the principle of Hindu Law, there is coparcenership between the different members of a joint family and survivorship following upon it. There is community of interest and unity of possession between all the members of the family and upon death of any one of them the others take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession."

In 'Sudarsanam v. Narasimhulu', 25 Mad. 149 at p. 154, Justice Bhashyam Iyengar has further amplified the position as follows:

"The Mitakshara doctrine of joint family property is founded on the existence of an undivided family as a corporate body and the possession of property by such a corporate body. The first requisite, therefore, is a family unit and possession of property is the second requisite. For the present purpose, the female members of the family may be left out of consideration. 'The conception of a Hindu family is a common male ancestor with his lineal descendants in the male line' (the underlining (here into inverted commas) (is mine); and so long as that family is in its normal condition; viz., in an undivided state, it forms a corporate body. Such corporate body, with its heritage, is purely a creature of law and cannot be the creation of any act of the parties save in so far that by adoption a stranger may be affiliated as a member of that corporate family." The conception of a Hindu Mitakshara coparcenary is founded on the text of the Mitakshara, which, by elaborate logic, established that in ancestral property the son has a right by birth and that his ownership is equal to that of the father. As pointed out by Mayne at page 317, this itself is founded on the right of representation according to which, son, grandson and great grandson take together. It is the essence, therefore, of the ownership of joint family property that every coparcener has co-ownership in and common possession of the entire property and that the interest of each coparcener arises by birth and lapses on death to his male descendants or male collateral coparceners. The property belongs to the joint family and to each male member thereof in common. Anyone acquiring by birth and retaining the status of being its member has certain rights over and from the family property which are not, in any sense, those of mere maintenance-holders without any ownership in the property, but are proprietary rights. It is true that the individual rights are, in a sense, overshadowed by the family right of which the manager is the representative while the family is undivided. But the coparcenary is a close corporation consisting entirely of the male descendants of a common ancestor whose membership fluctuates by deaths, births, or adoptions 'and in no other way.' The right which a coparcener has, being a right by birth, it is impossible to say that it is not a vested right. It is Apratibandha Daya according to Mitakshara concept. That interest, though fluctuating, — and in some jurisdictions inalienable, — is itself property. It is on that footing that its attachability and saleability in execution has been laid down by the Privy Council in 'Deendayal Lal v. Jugdeep Narain', 3 Cal 198. Though the interest, at any point of time before partition, is not predictable in terms of an arithmetical share, owing to the very constitution of a coparcenary, that very constitution determines and defines the interest. The interest besides being property before parti-

tion is such that it entitles the coparcener to a well-defined share in the family property or the partition according to definite rules based on predetermined facts of which the most important are:

(1) In the distribution the three lineal male descendants have a right of representation.

(2) The distribution is between male members only but per stirpes and not per capita (apart from mother, etc., who get shares in lieu of maintenance.)

(See Mulla's Hindu Law, p. 403, para. 321.)

The interest, therefore, of a coparcener, while it cannot be measured in terms of any arithmetical share before partition, is still one which is definite and definable in terms of the class of membership of the joint family corporation.

(30) The above being the nature of a coparcener's interest in the joint family property, the question for consideration is whether the rights of the surviving coparceners can be said 'not' to be adversely affected by introducing the widow of a predeceased coparcener as a sharer in the joint family property. If, as I have attempted to explain above, the interest of a coparcener is, from the moment of his birth, a vested interest carrying with it the right to a share on partition only between the members of a close corporation determined in accordance with prescribed rules of law, it seems to be ununderstandable to say that the coparcener's rights are not adversely affected by the introduction of a sharer not falling within these rules. The case in 'Allen v. Gold Reefs of West Africa, Ltd., (1900) 1 Ch 656 at p. 673, shows that in the case of a company, existing rights founded and dependant on 'alterable' articles can be affected by their alteration, so as to have retrospective operation. This decision, therefore, clearly implies that if the articles on which the rights are founded are not by the constitution of the company alterable, they can only be so altered by retrospective legislation. If, therefore, the rights of a coparcener in a coparcenary depend on the Mitakshara text of the equal right of the son by birth in the ancestral property of the father, such rights are unalterable in the usual way to affect past situations. They can only be affected by an Act with retrospective operation, if the interference with the rights is to be on account of an event prior to the Act. Of course, if the event is subsequent to the Act, vested rights are necessarily affected thereby, because that is the very purpose and intendment of any such prospective legislation.

(31) The arguments above noticed to the effect that the death of the widow's husband does not result in vesting his interest in the other coparceners or the introduction of widow as a sharer on her husband's death does not adversely affect any vested interest of coparceners, lay too much stress on the unpredictable nature of a coparcener's arithmetical share on partition. But that is not the sole criterion of a coparcener's interest. His is a vested interest. It is no doubt fluctuating in one sense. But the fluctuation is not erratic. It is determined by well-defined rules which flow from the very concept of a Mitakshara coparcenary and constitute the essential criteria of a coparcenary interest. It seems to me therefore, with great respect, well nigh impossible to say that the introduction of the widow as a co-sharer does not adversely affect the coparcener's vested interest. There may have been some plausible argument if the widow was not introduced not as a mere co-sharer but as a coparcener. Then at least in some contingencies, i.e., on death of widow each coparcener may get the benefit of an augmented share. But as already pointed out her death cannot 'prima facie' benefit the other sharers. Hence her introduction as co-sharer must in every case have the inevitable result of reducing the share which each coparcener would otherwise have had.

(32) It has been suggested that the widow of a coparcener is a member of the joint family and is, in any case, entitled to maintenance and that the right of the coparceners to admit only the male descendants of a common ancestor to a share in the property at the time of the partition amounts to no more than a privilege to exclude the female members from any share in the property and that therefore admitting such female members to a share in the family property cannot be said to have an adverse effect on the rights of the coparceners as such and the case in (1896), A. C. 240, has been relied on. My Lord has also said that one coparcener obtaining a benefit by survivorship on the death of another is a privilege. I confess with respect my inability to appreciate these views. The distinction between the alleged right in (1896) A. C., 240, and that in the present case is obvious from the facts in the former. As pointed out already it is of the essence of a coparcenary, as a corporation owning joint family property, that it is confined to the male descendants of a common ancestor and that it lapses on his death. The female members do not come into the picture at all according to that concept excepting for purposes of maintenance. The only exceptions are the mother, grandmother and the like and the unmarried daughter, who get on partition certain specified shares, but it is settled that they get these shares in lieu of maintenance and not by virtue of any pre-existing right in the property. See AIR (23) 1936 P C 20. Even this right of sharing has itself become obsolete in certain jurisdictions such as in Madras. It is to be noticed in this connection that the effect of the Act is not merely to introduce the widowed mother as a sharer but the widows of all other predeceased coparceners, both ascendant and descendant, as co-sharers. This is entirely beyond anything that even the ancient Hindu Law contemplated.

(33) Further, it should be noticed that it is not merely the quantum of the share on a future partition that is adversely affected by the introduction of the widows of predeceased coparceners, but that the interests of the coparceners are affected by the Act in various other ways also. In the first place, the share allotted to the coparcener's widow under the Act is 'prima facie' taken altogether out of the joint property, as such, and does not revert back to the family on her death, unlike for instance, as in the case of a share allotted to a mother under the pre-existing law — See 'Debi Mangal Prosad v. Mahadeo Prasad', 34 All. 234. This follows from the provision that the widow takes her interest as a Hindu Woman's estate which, appear to mean, that on her death, it goes to the heirs of the separate property of her husband. There is no direct decision on this specific point, but it may be noticed that the same view has been expressed by Justice Viswanath Sastri of Madras High Court in A I R (37) 1950 Mad. 538, at p. 540. Secondly, under the pre-existing law relating to the allotment of a share to the mother, the mother was not entitled to demand partition, but could only get a share on partition — See A I R (23) 1936 P C 20. Under the Act, however, the widow is given the right to demand partition by virtue of the interest that she gets. It is clear therefore that she is entitled to compel partition even though all the other coparceners are united in not requiring a partition. Then, again, before partition, the coparceners can, as between themselves jointly, alienate any specific item of joint family property but on the introduction of the widow as a co-sharer they cannot do so unless she also consents to the same. Further, while, according to the law prevailing in jurisdic-

tions other than Madras and Bombay, no coparcener can alienate his interest by private sale for consideration, the widow who gets the deceased coparcener's interest under the Act can alienate her interest without reference to the others introducing thereby complications in the management of the joint family property against the will of the other coparceners. These and other ways in which the interest of the coparceners as a group, and of individual coparceners as comprising that group, are adversely affected, in the sense that new disabilities or fetters are attached to the joint holding of the property by coparceners as a group can be multiplied. It seems to me, therefore, that it is not merely the quantum of the coparceners' share that is affected adversely but also their rights in several other respects; and it is not permissible to whittle down the effect on the coparcenary of the introduction of the widow as a co-sharer of the joint family property by assuming the coparcener's share to be an inchoate and indistinct privilege, and the other rights as having relation to sentimental objections to the deprivation of privileges.

(34) Let us now consider what would be the position, if, after the death of the widow's husband and before the Act, there have been partitions. In the normal case of the post-Act widow she can undoubtedly reopen partitions made behind her back after her husband's death. But it has been suggested that a pre-Act widow cannot so reopen prior partitions because the Act is not retrospective. That, to my mind, is begging the question. To say that the pre-Act widow gets an interest, only to the extent that there has been no previous partition or previous alienation of the family property and cannot therefore reopen them is, as already pointed out, to introduce limitations on the right which are not to be found in the Act itself. Let us also consider the case of an alienation of an individual coparcener's interest, after the husband's death and prior to the Act, the alienation being either of the coparcener's interest in the entire family property or in a specific item thereof. Such alienation can be inter vivos in Madras and Bombay and in invitum elsewhere but the considerations are the same. Suppose the alienee has worked out his interest, before the Act, by a partition, but the coparceners remain joint; the coparceners are put to a double loss, once by the alienation which must have been worked out on the footing that the widow's husband does not count and later by introduction of the widow as a co-sharer treating her husband as continuing for the purpose. Take again the case where the alienee did not happen to work out his rights until the Act. How are the widow's rights to be adjusted? Consonantly to the assumption that the widow gets her husband's interest, if the property remains without partition till the Act it must be taken that the alienee will have to get the share as affected by the emergence of the widow as a co-sharer. This is definitely affecting adversely the vested interest of such an alienee — at least as understood in Madras — See 'Chinnu Pillai v. Kalimuthu', 35 Mad. 47, which I pointed in my earlier judgment. I think the same is the position of execution sale purchasers in other jurisdictions. Again take a case, where the widow herself has entered into some arrangements with her coparceners for her life in lieu of maintenance, before the Act. Does the Act entitle her to repudiate and reopen the arrangement? To these and other complications that must arise in respect of arrangements prior to the Act as a result of the view sought to be urged in favour of the pre-Act widow, I could find no answer in the course of the arguments except the evasive one that those cases do not arise for decision in the present case and may have to be dealt with when they arise and that each such case must be decided on its own facts virtually implying that the Court must arrogate to itself 'ad hoc' legislative function for each case. But in my view a tentative and 'prima facie' consideration of these complications is necessary for arriving at a proper conclusion in this case and without going into further elaboration it is enough to say that I am inclined to think that the view urged will have the effect of adversely affecting rights vested by previous transactions.

(35) I am, therefore, quite clear in my mind that the introduction of a widow of a deceased coparcener as a sharer in the joint family property has the definite result of adversely affecting in general the interests of the coparcenary as a whole, as well as of the individual coparceners in the property and of strangers in certain events and that the Act cannot be construed as comprising within its scope the view of a coparcener who died before the commencement of the Act, unless it can be definitely held to be retrospective in the operation which it is admitted it is not. It appears to me therefore with the greatest respect to my learned colleagues that from the unequivocal wording of sub-section (2) and (3) of Section 3 indicating that the widow's right accrues by devolution at the very moment of her husband's death and from the nature of a coparcener's interest as being a vested right by birth defined and determinable according to the prescribed rules of Mitakshara system which must be affected by the introduction of a widow as a co-sharer. the result inescapably follows that the Act cannot apply to the case of a widow whose husband died prior to the Act.

(36) This without more should be enough for supporting my conclusion. But out of respect, for other arguments advanced, I shall proceed to notice the same.

(37) In the course of the argument, the case in 'Queen v. St. Mary's Whitechapel, (1848) 116 E R 811 and in 'The Queen v. Birwistle', (1889) 58 L J M C 158 (See also 'Jogadanund Singh v. Amritalal', 22 Cal 767 at pp. 779-780) has been relied on in support of the position that a statute is not retrospective merely because a part of the requisites of its action is drawn from a time antecedent to its passing. I am not at all sure that the principle of such cases is not confined to what may be called mere remedial rights and whether they can be extended to statutes relating to substantive property rights. On a careful perusal of these decisions, however, it will be seen that they have no application to the situation of this case. It is necessary to notice that, on the facts of the case in (1848) 116 E R 811, it was pointed out in the report itself, that the statute in its direct operation was prospective since it relates only to future removals and that only 'a part' of the requisites for such action is drawn from a time antecedent to the passing of the Act. In that case the requisites for the operation of the power of removal under the statute consisted of two facts (1) widowhood as indicated therein and (2) continuance of widowhood for 12 months thereafter. The right of removal of pauper widows from the parish by the authorities can, in no sense, be considered a vested right at any rate, it is not a vested property right. It is also necessary to emphasise that the significance of the word "part" in the relevant passage in that report cannot be missed or blurred over. The reason is that, in such cases, the totality of the requisites becomes complete only after the Act, and hence the right itself accrues after the Act. Similarly in (1889) 58 L.J., M.C., 158, the accrual of the right conferred depended on desertion plus continuance thereof until after the Act. In the case 22 Cal. 767, also it will

appear from the facts that the principle in (1848) 116 E R 811, was applied since only a part of the requisites for the operation of the statute was prior to the Act, viz., the passing of the decree in the case — See pp. 779-780. In the case before us the 'only' requisite for the 'accrual of' the right under the Act is the single fact of the death of the husband owning an interest in joint family property. Therefore, if the Act is to be applied to the case of the widow of a husband who died before the Act, both the requisites for the operation, and the operation itself, are antecedent to the Act, and hence retrospective and there is no scope for a prospective operation on such facts. There may have been some possible room for argument — based on the principle of the above cited case — only if it could be deduced from the language of the Act that the accrual of the right — though partly dependent on the death of the husband — is, in some way at least, directly connected with and dependent on the factum of a partition taking place subsequent to the passing of the Act. But, as I have already stated before, there is no room for any such construction, and no such construction has been attempted to be argued. I may add that in this connection the cases under Hindu Law of Inheritance Amendment Act (II (2) of 1929) have been pressed into service in which I can find no analogy.

(38) Another rule of construction has been pressed into service, based on a passage in Halsbury, Second Edition, Vol. 31, page 572, namely, that a statute is to be regarded as "always-speaking." But this, I apprehend, does not mean that the statute is to be construed as operative with reference to the past as much as with reference to the present and the future: it only means that, with reference to any particular case that falls within the scope of the wording of the statute, the statute must be taken to be speaking with reference thereto — and it is not to be regarded as a rule of guidance as to the retrospective or prospective operation of the statute. It seems to mean what Lord Esher has pointed out in (1894) 1 Q B 725 at p. 735, viz.:

"That when the present tense is used, the time to be considered is the time at which the Court has to act."

On the other hand, the principle applicable to such cases has been clearly laid down by Lord Justice Lopes in the same case at p. 737 as follows:

"It is a well-recognised principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes are passed unless a retrospective effect is clearly intended. This principle of construction is specially applicable when the enactment to which retrospective effect is sought to be given would prejudicially affected vested rights."

This very principle has been referred to by Justice Varadachariar in A I R (32) 1945 F C 25 at p. 33, in the following terms:

"The Act is 'prima facie' prospective and its proper construction and operation must be determined with reference to conditions and contingencies likely to arise, after its commencement, because these alone could presumably have been within its contemplation."

The same principle of construction has also been adopted in a Full Bench case of the Patna High Court relating to the Inheritance Amendment Act 1929 — See 'Bhagwat Narain v. Srinavas', A I R (24) 1937 Pat. 113, at p. 121, and also by Chief Justice Sir Courtney Terrell in 'Punyabrata Das v. Monmohan Ray', A I R (21) 1934 Pat. 427 at p. 430, when he construed the words "who marries" occurring in the Special Marriages (Amendment) Act XXX (30) of 1923 as synonymous with "who shall marry hereafter."

(39) I shall now turn to the sections of the Act other than Section 3 and the implications thereof. In my judgment in the Division Bench I came to the conclusion — on a consideration also of Sections 2, 4 and 5 of the Act, 1937, as amended by the Act of 1938 — and having regard to the history of the amendment — that the Legislature had clearly intended that the Act ought not to be applied to the case of a widow of a coparcener who died prior to the passing of the Act. My Lord the Chief Justice and my learned brother Justice Narasimham have however — on a consideration of these very sections — come to a different conclusion. I do not propose to go into the matter any further except to make the following observations My learned brothers point out that, in the view I take of Sections 2, 4 and 5, the use of the phrase "dying intestate" appearing in Section 2, as applied to the case of a coparcener in respect of his joint family interest, will not be in consonance with accepted legal notions of testacy and intestacy and is — to say the least — bad English if not also bad law. They further point out that the word "intestate" occurring in Sub-section (2) of Section 3 of the Act, as it stood in 1837, was omitted in the Amendment of 1938 and that having regard to that circumstance Section 4 would be absolutely redundant if it was not meant to imply and convey that Section 3 (2) is to apply to a death prior to the Act. While I do not deny the force of this criticism, I would with respect point out that, if the contrary view is taken of Sections 2, 4 and 5 as my learned brothers have done, one is obliged to say — as indeed Justice Narasimham has done — that Section 2 is redundant and the word "intestate" therein should in any case be deleted. As between the two views of the construction of Sections 2, 4 and 5, viz., that which renders Section 4 redundant and that which renders Section 2 otiose, I would, with respect, submit that the former is definitely preferable, having regard to the history of the Act which shows that originally Section 4 must have applied to both Sections 3 (1) and 3 (2). I may also add that the redundancy of Section 2 is not so obvious to me as it appears to my learned brother Justice Narasimham. In the absence of Section 2, it may be — as pointed out by him though I am not sure about it, that Section 3 might prevail even as against a relevant rule of Hindu Law or custom to the contrary; but it would prevail only as against such a rule relating to inheritance or devolution, i.e., a rule designating the person who is to take the property of the deceased person as his successor and as against nothing else. It appears to me, however, that Section 2 is intended to provide for — and in fact has — a much larger content than that; it seems to me to be intended to provide, for instance, that the devolution is to take effect notwithstanding that such devolution may bring about certain anomalies in the application of the law relating to coparceneries or interfere with vested rights of coparceners and notwithstanding that it results in the curious position of a coparcener and a non-coparcener sharing together joint family property— a position hitherto unknown. This I have mentioned only to show one of the many possible contingencies to which Section 2 might apply which may require to be specifically provided for statutorily. It may also be pointed out that the section has in fact also been construed to bring about the result that a widow would obtain her rights under the Act, irrespective of the disqualifications imposed under the normal law consequent on the unchastity of the widow at the time when succession opens — See 'Akoba Laxman v. Sai Genu Laxman', A I R (28) 1941 Bom 204. In the absence

of Section 2, as already stated, the rules in Section 3 might prevail as against other competing rules governing devolution of the property in question, but they cannot prevail over the rules which may affect but do not directly relate to devolution or succession such as the rules governing disqualifications on such devolution. I am, therefore, not prepared to agree with a view which involves such an important section as Section 2 being rendered otiose and which in any case requires the deletion of the word "intestate" therefrom.

(40) In the view that I have taken of Sections 2, 4 and 5 there is no doubt some inappropriateness in referring to a coparcener — who dies leaving only an interest in joint family property, as a person "dying intestate." But having regard to the specific definition of the phrase "dying intestate" in Section 5, it appears to me that there is nothing so very incongruous in relying on the literal meaning and in referring to a person — who may not make a will in respect of property over which he has no testamentary capacity — as a person "dying intestate" in respect of that particular property, for the simple reason that even if such a will is made it cannot take effect.

(41) Nor am I impressed by the argument that the use of the word "property" in Section 5 renders it inapplicable to an "interest" because, in terms, the Act itself, as its preamble shows, gives better rights to women in respect not only of property but also interest, — See Sub-section (2) of Sec. 3.

(42) If the matter rested merely on the view that is to be taken of the construction of Sections 2, 4 and 5, I might have hesitated, in view of the admittedly bad drafting of the Act, to differ from the view taken thereof by my learned brothers. But it appears to me that quite irrespective of the construction to be put on these sections the plain meaning of Sub-sections (2) and (3) of Section 3 of the Act is clear and decisive against the construction that has appealed to them. To say the least there is nothing in these sections to override the plain meaning of Sub-sections (2) and (3) of Section 3, except the supposed negative implication of Section 4 which is found to be unwarranted if one has regard to the unamended Act in 1937 and the history of 1938 amendment.

(43) It has been strenuously pressed on us that the Act is a remedial measure and must be construed benevolently and that the test to be applied in construing a remedial Act is not merely whether a particular construction thereof is the normal meaning of the language used, but that the question is whether the language is sufficiently wide to admit of a construction which brings in all members of the class who are intended to be benefited by it. While I have no quarrel with this proposition, I must point out that even in the case of a remedial statute it is the language of the statute that must govern and there is no warrant for any construction which cannot reasonably be deduced from a fair construction of the Act. The Act is merely one "to give better rights to women" as the preamble shows. But it is not clear what particular class of women are intended to be benefited thereby. It cannot even be maintained that at least all widows are intended to be benefited, thereby. Indeed the contrary can be demonstrated, viz., that certain women who were entitled to rights under the pre-existing law are deprived of their rights. For instance, the mother or daughter of a widower (male) having self-acquired property who leaves him surviving no male issue but a widowed daughter-in-law is excluded by the said daughter-in-law by virtue of Section 3, Sub-section (1). Therefore the Act helps only some women who are widows and not all women or all widows. It may, therefore, well be that the Act intended to help only future widows of joint families and was anxious not to disturb the domestic equilibrium of joint families, into which or outside which, widows must have settled themselves under the pre-existing law. It may also well be that the Legislature was more anxious about the fate of future widows of joint families who are an ever-present class in the present conditions of Hindu society rather than about past widows of such families whose number, in any case, must be definite and gradually dwindling and who must disappear altogether by mere lapse of time.

(44) In my previous judgment, I have relied on the judgment of the Federal Court in A I R (32) 1945 F C 25, as amounting to an implied decision that Sub-section (2) of Section 3 does not apply to the case of the widow of a coparcener who died before the Act. My Lord the Chief Justice is inclined to think that in that particular case the widow was not given a share in the interest of the husband who died prior to the Act, not because the Act was not applicable to such a case, but because the death of the widow's husband left the entire family property in the hands of the sole surviving coparcener and the question of the widow's interest arose only on the death of that coparcener after the commencement of the Act. With great respect, I am unable to see how that makes any difference. My Lord has observed as follows in his previous judgment:

"On the facts of that case, the joint family property had become vested in one owner before the Act commenced. It having become the absolute and exclusive property of Arunachala, the last male-holder, to hold her as entitled to inherit would amount to reopening a transaction or consideration already vested."

With great respect, this view of the nature of the interest that Arunachala took ignores the very decision of the Federal Court which, in terms, decided that what Arunachala held as the sole surviving coparcener was not his absolute property but was an interest in joint family property liable to be effected by posthumous adoption to a deceased collateral and that, therefore, Sub-section (1) of Section 3 was not applicable. In the view of the Federal Court

"the difference between the position of a person owning self-acquired property and that a person who happens to be the holder of property as the sole surviving coparcener for the time being, is shown by the fact that in the latter case his right as full owner will be reduced to that of a coparcener the moment adoption is made by a predeceased coparcener's widow" — See A I R (32) 1945 F C 25, at p. 33."

In the words of the Judicial Committee in 70 Ind App 232

"this possibly challenges the character of a surviving coparcener's right as an absolute right' and creates qualifications which impair its completeness."

If, as my Lord is prepared to think, the result of the Act is to clothe the widow with the right of representation to the interest of her husband, there is absolutely no reason why even the sole surviving coparcener's interest in the joint family property cannot be divested in her favour in the same way as it could have been in favour of a son adopted by her. It appears to me that the fact of the matter is that the widow does not represent the husband except in a very loose sense and that the property is not so absolutely vested in the sole surviving coparcener as to furnish the reason for the assumed decision of the Federal Court that the widow in that case was not entitled to succeed to her husband's interest in the joint family property. I must, therefore, respectfully disagree with the view that the decision in A I R

(32) 1945 F C 25, is not a decision on the very question at issue in the case now before us. In my view the earlier passage in the report, viz.,

"It is true that on the above view the plaintiff in the present case will derive no benefit from the Act though she happens to be the widow of a predeceased son, but that is due to the circumstance that her husband died before the passing of the Act.

appears to me to be the expression of the unequivocal opinion of the Federal Court and I can see nothing in the use of the word "prima facie", in the later passage, viz.,

"the possibility of such varying consequences cannot be allowed to control the natural and reasonable interpretation of the Act; it is 'prima facie' prospective etc."

as militating against the view expressed in the earlier passage which is a definite and decisive opinion on the point. The use of the word "prima facie" indicates only that no reason for a contrary interpretation appeared from the Act; and it is only a Judge's cautious way of stating his conclusion on a matter which was taken for granted without argument. The fact that the widow was not given a share in her pre-deceased husband's interest in the joint family in that case is indisputable and the reason for it has been stated by the Federal Court itself in the first passage quoted above. There can, therefore, be no reasonable doubt that there was a clear, though assumed, decision that the Act was inapplicable to her case and 'that it was given effect to in refusing her a share.' All that can be said is that the point of law itself was not specifically raised before the Federal Court and debated. But that must be so because the eminent counsel who appeared for the widow in that case felt the position to be unarguable. I would, therefore, with respect, follow the above implied decision of the Federal Court as I understand it — on the very question as in this case. I can find no reason to think that any of the arguments now relied upon for the contrary view would have escaped notice if found tenable.

(45) To sum up, my view is, that the meaning of the relevant provisions of the Act is clear and does not admit of the suggested benevolent construction. Sub-sections (2) and (3) of S. 3, show that the widow's interest accrues by devolution at the moment of husband's death and such devolution adversely affects the rights of each coparcener vested in him from the moment of his birth, defined and determined with reference to fixed Hindu Law Rules and may also have the effect of adversely affecting past transactions. The machinery in the Act provided for benefiting Mitakshara joint family widows is not by a mere declaration vesting in all such widows the interest of their deceased husband from and after the passing of the Act and therefore in effect, providing for a grant of that interest to them, taking it out of the common pool of the joint family property, but it is by way of devolution of that interest from the husband to the widow. The widow while introduced as a sharer of the family property, is not made a statutory grantee, but a statutory heir, of the coparcenary interest therein of her husband. It is, therefore, impossible to extend the benefit of the Act to a pre-Act widow except by giving the Act retrospective operation. The principle of prospective operation of rights founded partly on past events is inapplicable to the present case in view of the nature of the interest created in favour of the widow by the Act. Such authority as there is in A I R (32) 1945 F C 25, is in support of the conclusion that the Act does not apply to pre-Act widows to give them a right in joint family property.

(46) I cannot help pointing out that the law has been understood in the sense in which I understand it since the date of its passing in 1937. (See also 'Ram Bilas Singh v. Loke Nath', A I R (36) 1949, Pat. 405 at p. 408), and that the opposite view will have the consequence of reopening at least the transactions and partitions between 1937 and 1951, of families who have pre-Act widows, if not transactions prior to the Act, except probably to the limited extent of transactions relating to agricultural lands between 1937 and 1944, vide S. 2 of Orissa Act V of 1944. It will have the unfortunate effect of disturbing the domestic equilibrium of such families and will lead to disastrous and speculative litigation. These considerations can of course have no bearing if the statutory provisions are clear in favour of such widows. But the contrary is the position in this case so far as I can see, and what all is said for the other view, is not that the language is compelling, but is wide enough. I can only close with a passage from Lord Brougham delivering the judgment of the Judicial Committee in 'Crawford v. Spooner', 4 Moo Ind App 179, as follows:

"The construction of the Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the Statute; we cannot add, and mend, and, by construction, make up deficiencies which are left there. If the Legislature did intend that which it has not expressed clearly: much more, if the Legislature intended something very different; if the Legislature intended something pretty nearly the opposite of what is said, it is not for Judges to invent something which they do not meet with in the words of the text (aiding their construction of the text always, of course, by the context); it is not for them so to supply a meaning, for, in reality, it would be supplying it: the true way in these cases is, to take the words as the Legislature has given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning, and supply the defect in the previous Act."

(47) RAY C. J.: I have had the opportunity of reading the judgments prepared by my learned brothers Das and Narasimham, JJ., I am in entire agreement with Narasimham, J., and for the reasons expounded by him. I would hold along with him that there is nothing in the language of the Act which compels one to hold that women widowed prior to the Act are not intended to be benefited by its provisions. The Act is intituled as an Act to amend the Hindu Law governing Hindu Women's Right to Property. The scope and object, except what appear from the preamble, are sought to be succinctly epitomised in Section 2 of the Act. It reads:

"Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of Section 3 (the only operative section) shall apply where a Hindu dies intestate."

In its operation, the section is not intended to repeal the Hindu Law but to amend it to an extent specified in the following section of the Act. The changes thus introduced, either in the rules of inheritance or survivorship are to be understood in the context of Hindu Law of Succession, in general, and the system of coparcenary, in particular, interfering with the pre-existing system as little as cannot be avoided. In the case of 'Secretary of State v. Bank of India, Ltd.', 65 Ind App 286 at p. 298), Lord Wright lays down:

"A statute is 'prima facie' to be construed as changing the law to no greater extent than its words or necessary intendment require."

The learned author (S. Srinivas Iyengar) of Mayne's treatise on Hindu Law and Usage, 10th Edn., observes at p. 716:

"Where the provisions of the Act are clear, effect of course must be given to them. But the legislature may well be presumed to have left Hindu law unaltered in other respects."

Pre-eminently therefore, the words, phrases and their connotations should be interpreted and evolved in conformity with the notions and concepts of Hindu Law. There are many instances occurring in the Hindu Law which, tested in the light of general juristic principles that prevail in the jurisprudence of most of the civilised countries and which constitute the basic spring-board for the various legislations undertaken by the British Government up-to-date, may appear anomalous; but to one conversant with the particular features of social and socio-economical framework of the society of Hindus, their concepts of family properties of various kinds, their modes of holding, devolution, disposal, suspension, re-animation and various other kinds of incidents and rights, privileges, obligation and liabilities incidental thereto, those instances will appear nothing but naturally and justly, though not logically, flowing from such principles of justice as are inextricably inherent in such conditions and features of the social framework of the Hindu society. We, therefore, in interpreting the statute, should not run away from such peculiarities or peculiar concepts inseparable from Hindu Law. Reference may be made to a few such instances. Take the case of an impartible estate. The holder thereof is designated by survivorship and the estate, whenever any occasion for it arises, devolves by rule of survivorship; but almost all the normal rights and privileges of a coparcener remain in suspension all the while, the single holder is alive— 'Baijnath Prashed Singh v. Tej Bali Singh', 48 Ind App 195. Though it appears unjust and, at the same time, illogical in view of its being coparcenary property in which all the coparceners ought to have equal interest, the solitary holder has not only the exclusive dominion but also the full power of disposal except in Madras Presidency (State of Madras) where the Hindu Law has been, in this respect, amended by the statutory law of the Impartible Estates Act. No coparcener of such a family has a right of claiming partition. This is against all logical canons of inductions and deductions applicable to the coparcenary system. Still, the system has been obtaining and working from time immemorial till the modern individualistic age of equality of men and their rights and status. Take the instance of a widow of a coparcener. She has a charge for maintenance against the coparcenary property to the extent of her deceased husband's interest therein though her husband left no such interest behind him. His interest on his death simply became extinct or lapsed. No other coparcener, who survived him, can be said to have derived any interest from him. The said interest is neither identifiable nor definable so as to be proceeded against by his creditors except under an attachment effected while he was alive. This position does not conform to strict logic. Compare, the position of a widow, as a dependant and mere maintenance-holder, is abruptly converted by a process of renovation, as it were, from a sort of suspended animation to that of a sharer when the sons and grandsons, etc., of her late husband effect a partition of the coparcenary estate in which her husband had an interest at the time of his death. Is this justifiable by application of logical deduction or induction? Had it been so, the widow would be entitled to the same right of a share at the partition of the coparcenary properties between the collaterals of her husband who left no issue of his own amongst his survivors — coparceners. This was, in fact, an anomaly of Hindu Law, and it is now removed by the Act. The result is that while a partition of the joint family property shall take place as between the coparceners, be they her husband's lineal descendants or collaterals, she shall be entitled to a share representing that of her husband. This remedies the standing deficiency in Hindu Law. If you hold that the right to maintenance is such an interest in the joint family property that its normal mode of enforcement or realisation is a share at the partition of the property, then the Act does not introduce any change in the law. But it cannot be so held. Right to maintenance is an interest in the family property but is not equivalent to a right to a share. It was just by way of compromise that she was given a share at a partition between her husband's sons, that is, her sons and step-sons and their sons, etc. Search for the logic as to why the same right was not acceded to her as against her husband's collaterals and why she was not given the right to claim partition on her own initiative and you do not find any except that the society's economy stood in need of co-operation and conjoint labour of the members of the family ,and occasioned the setting up of the corporate body of a coparcenary. The body was the personal unit and the properties owned by it were the estate units. The unit character was rigorously maintained under the managership of one head — an autocrat. No female was endowed with the power to disrupt it so long as the males did not desire to do. Minor males also were allowed no right to call for a partition except on special circumstances affecting them prejudicially in relation to their interests. The distinction between the existence of a widow's right to share against her husband's descendants and its negation as against the collaterals, in similar circumstances, is understandable on the hypothesis of the theory that till now obtains that a collateral does not represent another deceased collateral as he derives no interest from him on his demise. He on partition represents his ancestor, however high, who had once an interest in the coparcenary. The strict logical deduction resulted in an unequal treatment to a widow whose husband had left no issue. Here is an instance, where logic would work out an injustice. This is now removed by introducing an exception to this logical deduction by way of compromise. Now under the Act, the widow is given a share, on partition, of the property in which her husband had an interest as a coparcener. This is to be worked out in keeping with the family unit, both in relation to person and property. Naturally, if there is any apparent anomaly, viewed as a compromise, it is not so in reality. After a right to share is conceded, it is but natural that the remedy for the enforcement of such right shall be provided as in Sub-section (3) of Section 3 of the Act. A disqualified heir has no right to succession; but in a joint family if a son is born to him, he becomes a coparcener. An invalidly adopted son acquires a right to maintenance in the adopter's family. Hindu Law is the cumulative result of checks and balances and various compromises. Any patch repair by piecemeal statutory amendments is bound to give rise to various doubts and difficulties. But this repair work is not intended to alter the character of the structure but to maintain it notwithstanding. The interpretation of the Act shall be approached in that background.

(48) With regard to the language of the statute, under review, I do not intend to speak more than

what I have already said in my judgment in the Division Bench, rather the referring judgment, and what has been said by my learned brother Narasimham, J. The key sections of the Act, for the present purpose, are Sections 2 and 4. Section 2 defines the ambit of operation of Section 3, and Section 4 prescribes the exception, or is inserted by way of a proviso to it. If we concede to the view taken by Das, J., both the sections should appear to be conterminous and co-extensive. It would mean as if the Legislature was needlessly redundant in defining the same rule twice over. Section 2 defines that the Act shall apply to the properties of a Hindu dying intestate. Section 4 says that the Act shall not apply to the property of Hindu dying intestate before the commencement of the Act. According to brother Das, J., an equivalent reading of Section 2 should as well be

"Notwithstanding any rule of Hindu law or custom to the contrary, the provisions of Section 3 shall apply where a Hindu dies intestate 'after the commencement of the Act."

The Legislature shall then be deemed to have said that same thing both affirmatively and negatively. Nothing could have simpler for the Legislature than to enact Section 2 as

"Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of Section 3 shall apply where Hindu dies intestate after the commencement of the Act."

This would completely obviate the necessity of enacting Section 4 at all.

The only explanation why Section 4 was there notwithstanding Section 2, is that Section 2 makes the Act applicable to cases of deaths of Hindus occurring either before or after the Act and Section 4 emphasises the same by excepting, from the general rule of applicability prescribed in Section 2, the cases specified therein, namely, the cases where a Hindu leaves separate exclusive properties of his own which he could have disposed of by valid testamentary disposition, but had failed to do so, and which would descend on his death to his heirs as distinguished from survivors, by rules of inheritance, the Act having introduced some new heirs into the pre-existing list of heirs under Hindu Law, as it then stood.

(49) Furthermore, a distinction between the property of a deceased Hindu, and the interest that he had at the time of his death in a Hindu joint family property has been laboriously maintained in the Act, wherever it is relevant to the purpose, particularly in Sub-sections (1) and (2) of Section 3. True, that the word 'interest' is of greater comprehension than 'property.' In some circumstances, notion of property may be expressed by the word 'interest.' The altered rule of succession provided for in Sub-section (1) deals with a deceased intestate Hindu's property. Here 'property' is interest in movables and immovables, corporeal or incorporeal rights and hereditaments in such properties over which he has, 'at all material times, during his life', the complete power of disposition while "the interest" dealt with in Sub-section (2) conveys quite a different conception of property. For the sake of perspicuity and clear visualisation of the differences as to the incidence of the newly introduced rule into the Hindu Law of succession, the Legislature has been particularly careful to maintain the two different phraseologies. In Sub-section (3), the word 'interest' has been used in the more comprehensive sense of including both what is 'interest' within the meaning of Sub-section (2) and what is 'property' within the meaning of Sub-section (1) of the section. A peep into the significance of the word 'interest' in the eyes of a great lawyer like Sir George Rankin may throw some light on the discussion. His Lordship in the case of 'Kalyanji Vithaldas v. Commissioner of Income-tax, Bengal' 64 Ind App 28 at p. 37, observed:

"Does then the existence of a wife, or of a wife and daughter, make it income of a Hindu undivided family rather than income of the individual partner? Their Lordships think not. A man's wife and daughter are entitled to be maintained by him out of his separate property as well as out of property in which he has a coparcenary interest, but the mere existence of a wife or daughter does not make ancestral property joint. 'Interest' is a word of wide and vague significance and no doubt it might be used of a wife's or daughter's right to be maintained, which right accrues in the daughter's case on birth; but if the father's obligations are increased, his ownership is not divested, dived or impaired by marriage or the birth of a daughter. This is equally true of ancestral property belonging to himself alone as of self-acquired property."

No interest of a coparcener in coparcenary property can be said to be such of his property as he can leave behind him to be inherited or otherwise disposed of, except on partition after dissolution of the corporation of a coparcenary and division of the unit of its estate. Until separation in estate, no fragment of it can be called property of an individual in the fullest sense of the term.

(50) Coming to Section 4, we find that the Legislature confined its operation to the property of any Hindu dying intestate. Mark the singularity of the sameness of language in this section with that in Sub-section (1) of Section 3. That Sub-section deals with intestate deceased Hindu's property governed by Dayabhag School and the separate property left by him, on his death, in any other School of Hindu Law or customary law. One cannot shut his eyes to this remarkable identity of expression. It cannot be without a significance and meaning. While dealing with an interest in Sub-section (2), the Legislature gave preference to the words "having at the time of death" rather than 'leaving' used in Sub-section (1). This is because, the Mitakshara coparcener dying leaves nothing behind. Thus, for the purpose of succession or inheritance and various other purposes cognate thereto, and in relation to his testamentary or non-testamentary disposition, no Hindu coparcener can predicate of himself of having such property in the coparcenary estate as he could leave on his death. No doubt, he cannot be said to be propertyless when he is a member of the coparcenary owning coparcenary properties. This conceptual difference between property of a Hindu and his interest in the joint family property having been laboriously maintained by the Legislature in phrasing the Act, all the implications of the Act inconsistent with or repugnant to the said distinction, which is fundamental and basic, must have to be ruled out. In this context, the contention that, for the purpose of attachment and sale by a creditor, a Hindu coparcener has property seems to me to be wholly beside the point. In this background, the language of Section 4 negatives any assumption that "the interest of a Hindu", irrespective of his being testate or intestate or otherwise, in the coparcenary property is included within the words "the property of any Hindu dying intestate before the commencement of this Act." Therefore, it is clear that Section 4 is an exception to Section 2 and, in that sense, does not limit the operation of Sub-section (2) of Section 3 to cases of women widowed subsequent to the Act. The word 'intestate' in Section 2 is no doubt 'extra' as pointed out by the learned author of the 10th Edition of Mayne's Hindu Law. I would quote a passage from the learned author's exposition at p. 716.

"As the Act stands, on a strict construction, Sub-section (2) to Section 3 can apply only when under Section 2 a Hindu dies intestate, especially as those words are not required in connection with Section 3 (1), being already there. If, therefore, he has made a complete and valid disposition of all his separate and self-acquired property, he cannot be said to have died intestate. But as intestacy cannot by any legal possibility be a condition of operation of Sub-section (2) to Section 3, the words 'dies intestate' in Section 2 must be treated as surplusage having no sensible meaning, to avoid an absurd result."

As this aspect has been sufficiently dealt with by brother Narasimham, J., I do not think it is worthwhile to dilate upon it any more. That the words 'dying; or dies', wherever they occur in the Act, do not necessarily convey an idea of futurity is not seriously disputed. Similar words did occur in the Hindu Law of Inheritance Amendment Act (II of 1929.) They received the judicial interpretation including the notions of deaths both before and after the Act. The expression of a contrary view was not favoured by almost all the High Courts and finally the Judicial Committee. I would refer to a passage from 'Pokhan Dusadh v. Mt. Manoa', A I R (24) 1937 Pat. 117, at p. 120.

"The first objection admits of a simple answer. It implies that the words "Hindu male dying intestate" mean a Hindu male who will hereafter die intestate. It appears to me, however, that the words in question were never intended to convey this meaning. The words "dying intestate" which qualify the preceding words "Hindu male" are merely descriptive and limit the operation of the Act to the estate of those Hindu males only who answer the description. It is true that the participle in the expression "dying intestate" is in the present tense; but that is the present tense of logic and the expression connotes the intestacy of the deceased owner without any reference to whether the death occurs before or after the Act comes into force. "The Hindu male dying intestate" simply means the Hindu male who has died or may die intestate."

That legislation is in 'pari materia' with the present one. The Legislature with that knowledge used similar words or the same words or their grammatical variations in phrasing relevant references to the deaths of Hindus. As a settled canons of construction, the Legislature shall be presumed to have employed the self-same words with the self-same meaning. With the utmost respect to brother Das, J., I must say that the word 'when' — the first word — in Sub-section (2) cannot force the construction of future death upon us. If that were so, the words "at the time of his death" would be wholly superfluous. It would do to frame the Sub-section by saying

"When a Hindu governed by any school of Hindu Law other than Dayabhag School or by customary law dies having an interest in a Hindu joint family property his widow shall ....."

As the word 'when' did not connote the time of death, the words "at the time of death" were needed as it would, if the section began with the word 'if' instead of 'when.' I would, therefore, agree entirely with brother Narasimham, J., that the word 'when' means "if or in the event of" and does not refer to 'the time when the Hindu dies.'

(51) By way of reinforcing this interpretation, brother Das, J., relies very much upon the word 'devolving' in Sub-section (3) of the section. I would note that the dictionary meaning of the word 'devolve' is "lapse of an unexercised right to the ultimate owner." According to him, 'devolve' or its grammatical variations, such as, "devolution, devolving, &c." denote descent by succession or inheritance, as distinct from survivorship. The next step, in his logical process, is that if what the widow gets is by succession or inheritanec and not by survivorship, any gap between the time of the death of her husband and the time of her taking is inconceivable. By this process of reasoning, he comes to what he calls "inescapable conclusion" that the time of her husband's death must occur after the Act as she could, in either view of the case, not be deemed to have or not to have taken before the commencement of the Act. Devolution does not necessarily mean descent by succession or inheritance. I would, in this connection, invite attention to the highest authority on the subject, namely, the decision of the Federal Court in the case 'In the matter of Hindu Women's Rights to Property Act, 1937, A I R (28) 1941 F C 72, at p. 78. The passage from the judgment of the Court, delivered by Gwyer, C. J., of India, which I am going to rely upon and to quote below, was spoken by his Lordship while dealing with 'the fourth question.'

"That even if it were permissible to uphold the Act to a limited extent, the provision in S. 3 (2) relating to the interest of the deceased in Hindu joint family property would be 'ultra vires' the Indian Legislature, on the ground that the mention of 'succession' in Entry No. 7 of List 3 of Sch. 7 does not include or authorise legislation in respect of the benefit which accrues to the members of a Mitakshara joint Hindu family under the rule of survivorship."

The question thus arose directly and substantially; and his Lordship, in overruling the contention, proceeds to say, 'inter alia':

"It is equally important to remember that neither in their ordinary grammatical significance nor by a long continued use in a technical sense have the words 'devolution' and 'succession' 'acquired a connotation that would preclude their application to describe the operation of the rule of survivorship as above explained.' Eminent text writers and Judges have used one or the other of these terms to include the accession of right which takes place on the death of one of the members of a Mitakshara joint family. Many enactments of Parliament and of the Indian Legislature have used the words 'inheritance' and 'succession' in juxtaposition, justifying the inference that succession is either another category from or a wider category than 'inheritance' (See some of those enactments referred to in Ilbert's Government of India, Chapter 4, and in Mulla's Hindu Law, p. 4.) If in these enactments 'succession' should be held not to include the principle of survivorship, it would be difficult to say what else that word is meant to refer to and in any other view the continued administration of that part of the Hindu Law by the British Indian Courts could not have been provided for, because there are no other appropriate words in those provisions. Such being the position as to the meaning of the words, it is permissible to add that it is difficult to conceive of any reason why in framing Lists 2 and 3 Parliament should have thought fit 'to take away the law of survivorship' from the jurisdiction of the Indian Legislatures, and there is no justification for attributing oversight either, when, as above explained, the language employed 'may properly be held to comprehend the law of survivorship as well.'

* * * *

"In one or two instances, eminent writers have employed language suggesting that 'devolution' may comprehend cases of survivorship but not the word 'succession' (See Mayne's Hindu Law, para. 270,) but it is difficult to find any basis for this distinction. 'Devolution' may be wider in scope than 'succession' in the sense that the former is not restricted to the result of a 'death'

(See O. 20, R. 10, Civil P C), but that is immaterial for the present purpose; and, as already stated, eminent Judges have used both the terms in a sense that will include the operation of the principle of survivorship."

The point can be further elucidated by referring to an earlier part of his Lordship's judgment, which reads:

"In addition to the constitutional points above summarised, a suggestion was made on the construction of the Act that it does not provide for the devolution of any property by survivorship nor confers on the widow a right by survivorship, though it gives her the same interest in the joint property as the deceased husband had. This does not seem to be tenable. It is true that Section 3 of the Act does not use the word 'survivorship', and it may be that the widow taking a share under the Act does not become a coparcener with the other sharers; but there can be no doubt that in the cases in which, it gives to the widow of a deceased coparcener a right to a share in the joint property which she did not possess under the pre-existing law, it takes away to that extent the benefit of the rule of survivorship which would have accrued to the remaining coparceners. The reference must, therefore, be dealt with on the footing that so far as its effect goes, the Act does legislate 'with respect to' the law of survivorship."

If I may say so with great respect, in the illuminating judgment of Gwyer, C. J., the connotation of 'survivorship' has been rightly commented upon. It is a term which is borrowed from the English Law as what takes place on the death of a coparcener and bears resemblance to the operation of principle of survivorship in the case of joint tenancy on the death of one of the joint tenants according to the English jurisprudence. Lord Dunedin in 'Baijnath Prasad Singh v. Tejbali Singh', 43 All 228, sounded a note of caution about the use of the terms "coparcenary and coparcener" in relation to the Mitakshara joint family. Gwyer, C. J., observes that the note is equally applicable to the use of the terms "joint tenancy and survivorship" for the incidents associated with joint ownership under the Mitakshara Law. 'The only degree of resemblance between the two systems of law is the 'jus rescendi' and the effect of death of one coparcener, namely, an extinction of the deceased person's interest and diminution in the number of sharers whose pre-existing interest extended over the whole property.' This is just the reason why, when a coparcener dies, no property, nor even his interest, devolves upon any person. It remains in the coparcenary to be worked out and separated at the partition in favour of the person who can represent him at the time. That it devolves upon the widow is an exception to the rule.

(52) In order to make the position clear, I would for a moment consider what should happen in the case of the death of a Hindu after the Act leaving a widow and a body of coparceners. It is clear at the moment, the husband's interest will become extinguished and would lapse in the same manner as it would if the Act were not in force with the only difference that the number of persons for whose benefit the effect of extinction will operate will include the widow. The interest thus grows in her and can be not inappropriately described as devolving on her by survivorship. Like all other survivors, she should acquire a right of claiming partition. My learned brother Das, J., relies upon a decision of the Patna High Court in holding that accrual of this right is by way of inheritance. The decision is reported in the case of 'Siveshwar Prasad Narain Singh v. Haranarain Mal', A I R (32) 1945 Pat. 116. What was held in that case by Fazl Ali, C. J., (as he then was) is summed up in the following words:

"Therefore if the interest which she has in the property at present is an asset of the husband, then it can be lawfully attached. As I have already stated if she acquired the interest of her husband as an heir, then it must be deemed to be the latter's asset in her hands."

I have nothing to disagree with this learned judgment. But I do not consider, it supports the theory that the process that takes place at that psychological moment is one of inheritance as distinguished from devolution by survivorship. The law amends the Hindu Law to the effect of adding the widow to the list of survivors as if she would be a member in the corporate body of the coparcenary for the purpose of devolution of his interest. The character or extent of such devolution is to be determined according to the rule implied in the words "she shall have the same interest as her husband had at the time of death." The judgment of Venkataraman Rao, J., of the Madras High Court in the case of 'Sardambal v. Subbarama Ayyar', A I R (29) 1942 Mad. 212, to be presently referred to, would make the position clear as to why the creditor of the husband can lawfully attach the widow's interest in the joint family property accruing to her under the provisions of this Act. A relevant passage occurring in the judgment of Gwyer, C. J., which runs as follows will throw light on the subject:

"Whatever may be the position under the English Law, the theory of extinction does not exactly (in the sense 'completely') describe the position which arises on the death of a member of a Mitakshara joint family. The result of a long course of decisions is that certain legal acts continue to operate on the interest of the deceased even when what is ordinarily spoken of as the rule of survivorship is taking effect." (the bracketed words are mine.)

The following extract from the judgment of Venkataraman, Rao, J., is very illuminating:

"If for instance an undivided member dies leaving a son and also his widow, the property would devolve upon both of them and though, so far as the widow is concerned, her interest is limited, no such limitation can be placed upon the interest taken by the son. It cannot be said that the interest of the son is attached but not that of the widow. 'The fact that a right of partition is conferred upon the widow goes to show that the property is taken by her subject to all the rights and liabilities which the husband would have had because it is the same interest that is conferred upon her.' Therefore, giving the language its plain meaning, the property taken by her must be held to be liable for the payment of her husband's debts and is liable to be attached by the plaintiff." It is abundantly clear from the above that liability to her husband's debts of the interest accruing to her on his death, under the benefits of the Act, arises not on account of the process of accrual being either succession or inheritance rather than survivorship, but because she gets the same interest that her husband had which means she gets it subject to the rights, obligations, liabilities and equities that would have been available to any outsider as against that interest. To use the words of Sir Maurice Gwyer, the legal act of the liability incurred by the loan of the husband is already in operation as against the interest that he had. The other coparceners cannot be said to be getting the "same interest" for the purpose of the liability. The joint family property in the hands of the son is liable for the father's debts. That does not necessarily make out the position that the son gets his father's interest by inherit-

ance. In Madras jurisdiction, a coparcener can sell his interest in family property. That does not mean that he succeeds by inheritance, not by survivorship. If Fazl Ali C. J. used the word 'heir' or 'succession', he did not mean to use it strictly in the technical sense; he meant nothing other than what Venkataraman, J. laid down, on which he relied, it being the admitted position that by that interest accruing to the widow, the coparcenary does not become disrupted, or, in other words, the share accruing to her does not become separated, carved out and held as an asset different from the assets of the joint family property. What his Lordship said was true for the limited purpose of enforcing the liability for the husband's debts against the interest devolving on her. No corrolaries should be drawn to support the proposition that she must get the interest at her husband's death or not at all. In the Hindu law jurisdiction, a coparcener's creditor can follow the joint family property in the hands of his sons but not so if the property is in the hands of his sons living in commensality with others who are collaterals to their father. This does not amount to mean that the sons get by inheritance while others get by survivorship. In a joint family constituted by father and his sons, the father dying after the Act, the entire property comes to the possession of the sons and their mother. The property would be equally liable in their hands even though the sons are surviving coparceners while the mother, as a widow, is assumed to be heir. My conclusion is that the fixation of this liability on the assumption that the deceased husband's interest is an asset in the hands of his widow is not at all a relevant consideration for the purpose. It would have been relevant if it were an infallible proposition that an heir, or, in other words, one who takes by inheritance, must take at the death of the propositus. Various other estates may interpose to postpone the vesting of succession to a later date. This is illustrated by the reversionary succession interrupted by widow's estates or other life estates, such as, that of a daughter, sister and so on. The Hindu law introduces the fiction of death of the last male holder occurring, as it were, after the said estates expire.

(53) I would further point out that I could come across no decision in which it has been held not only that the interest of the husband, that is acquired by the widow, gets disrupted from the joint family property once for all, and never comes back to it even though the family continues to function and exist as a corporate coparcenary body after the widow's death, but also that it goes, on her death, to her husband's heirs as distinguished from coparceners or survivors. On the other hand, one of the decisions cited by my learned brother Das, J. lays down the contrary, I would, in this connexion, invite attention to a decision of the Lahore High Court in the case of 'Vinod Sagar v. Vishnubhai', A I R (34) 1947 Lah. 388. Paragraphs 56 and 57 of the judgment delivered by Abdur Rahman, J. deal with the question. The sum and substance of this judgment is to the effect that accrual or growth of the right of a widow does not amount to disruption of the coparcenary nor separation of any particular interest from the joint family property, until the widow effects a partition by metes and bounds; that even if she divides her interest by metes and bounds the rest of the joint family and joint family property remain completely unaffected; that until a partition is brought about, the Karta of the joint family would be entitled to act as such and the widow shall be bound by his acts in the fullest possible sense in his capacity to represent the entire of the coparcenary. On partition, the Karta's power of management and control would be kept in abeyance in regard to the property which has fallen to a widow, for such time as she remains in its possession. The learned Judge says:

"Whether its character would change even after a partition by metes and bounds does not arise for decision at this stage, although, as at present advised, I seem inclined to the view that it would not."

In my judgment, I see nothing in the nature of interest that devolves upon the widow under the Act which, except temporarily for the purpose of enabling the widow to enjoy widow's estate and that on partition by metes and bounds, would alter the character and the destination of the property for the purpose of its ultimate devolution. Such alteration may occur on change of circumstances, such as, family having broken up in the meantime. If the unit of the joint family and the joint family property, as such, continues till after the widow's death, the estate must return to and merge in the stock of the coparcenary property. I would sum up the position like this that on the death of the husband, his interest in the joint family property would lapse. In the coparcenary estate including her husband's interest, she shall have the same interest as her husband had at the time of his death. That interest will be an unpredicatable and unpredictable one. Under the management of the Karta of the joint family, she shall be bound to sue and to be sued through him, who will represent her and her undivided interest, just in the same manner as he would for the other coparceners and their coparcenary interests. She will have the same right of claiming partition as every other coparcener would have. Till partition her right will be only to maintenance, just in the same manner as that of any male coparcener. I would here quote Gour's Hindu Code, Art. 1069:

"But it is clear that even in this family all persons do not possess equal rights. The property which it owns is called 'joint family property,' but it is a misnomer if it implies possession of any common rights other than the right to maintenance."

When partitioned at her instance, portion carved out she shall be entitled to enjoy separately and during such enjoyment which enures till her death, the dominion of the Karta of the joint family remains in suspension. When she dies the woman's estate goes back to the joint family if it exists. The conception of Hindu law is that after woman's estate terminates, the property goes back to the stock from where it had come. In the present case, the stock is the coparcenary and coparcenary property. It is the same interest that her husband had, that means, a coparcener's interest in the coparcenary property. There is absolutely no guarantee either in the implied conception or connotation underlying the idea of Hindu women's estate or in the language of the Act that would warrant the conclusion that the property should go to her husband's heirs as his separate property, he being considered to be a fresh stock of descent for the purpose of inheritance. I would here quote a few passages from Mayne's Hindu Law at pp. 720-21:

"The Act however does not effect a statutory severance or disruption of the entire family. To interpret the Act as effecting such a severance would cut across the recognised principles of Hindu Law and would not make for a rational and orderly succession. As the wives of coparceners are undoubtedly members of a joint Hindu family, there is nothing incongruous in the widow of a coparcener being viewed as occupying a position more or less analogous to the position of a coparcener in a Dayabhag family. As the other members of the family will remain undivided and as she cannot be regarded as the widow of a divided member, the joint family system and management will continue as before, probably an advantage. Except to the ex-

tent of the widow taking her husband's interest, the Act leaves the rights of the other members of the family untouched. The result is that while the deceased coparcener's interest vests in his widow, his male issue will continue in the strictest sense to be coparceners along with the other male members of the family with mutual rights of survivorship. So also under sub-section (1), in a Mitakshara family, the sons, grandsons and great-grandsons of her husband will be coparceners 'inter se' while the widow will hold her interest in quasi-severalty but along with them. To hold that the widow of a coparcener who takes his interest on his death is strictly a tenant-in-common with the coparcenary body is not to give full effect to the words in S. 3(2), according to which she is to have 'in the property the same interest as he himself had', apart from the grave complications which it will involve. On that view, she will be entitled to an account and for a definite share of the income, while the others will not be; more than that, it will lead to anomalies and hardships in connexion with the allotment of shares; and even before partition there would be separate management and representation and separate incurring of debt. 'But evidently the intention of the Act is only to interrupt survivorship and to protect the right of a widow so that she may have the same interest as if she continued the legal persona of her husband till partition'.

"Though, if she were assumed to be a coparcener in the Mitakshara sense, the working of the Act would be easier, the circumstance that she will hold her interest under the Act in quasi-severalty does not materially alter the position of the joint family in other respects."

(54) Substantially, the devolution by survivorship, while acting on undivided coparcenary property, has, dormantly inherent in it, the principle on which the Hindu law of succession is based, which is for the time being eclipsed by the dominant concept of Hindu coparcenary, and the implications implicit in it for the purpose of its corporate functioning. When the time for disruption of the coparcenary arrives, and the coparcenary property is divided, the right by survivorship manifests itself in the form of a right to succession. The deceased coparcener, whose interest in the coparcenary property lapsed, or extinguished itself at the time of his death, is at the time of division represented by those who would be his male heirs within the coparcenary under the laws of inheritance and they will take that interest which he could have taken had he lived till partition. In this view of the matter, his interest remains undisposed of, and what goes down from time to time by deaths and births is the right to represent him which is not, in the strict sense of the term, the same as the right to property. By the time, if the law could interpose a representative of its own making, its effect would be the same as if representatives could be added or deducted by birth, adoption and death under the Hindu law. For the purpose of determining the time of accrual of the widow's interest under the Act, the test of its fluctuability has been applied by my learned brother Das, J. with some amount of rigour. He himself, however, is not certain about its fluctuability and has reserved his opinion about it. In the circumstances, no certain result could be achieved on admittedly uncertain basis. He, in this connexion, has referred to a decision of this Court, to which I was a party reported in I. L. R. (1949) 1 Cut. 483. The aspect of the question with which we are dealing did never arise then. I am still of opinion that on the facts of that case my decision was correct. I do not fear that in the light of the present decision of mine, the decision reached there should have been anything different. At any rate, I am quite sure that such fluctuations as are inherent in the character of "the same interest as her husband had" would affect the interest before devolution. The question before us in the case of 'Kunja Sahu v. Bhagaban Mohanty', I. L. R. (1949) 1 Cut. 483 was if the widow, on whom the same interest as her husband had had devolved, would be entitled to alienate before partition by metes and bounds. It was argued that "the same interest" should mean "the coparcenary inalienable interest that her husband had'. In support of this argument, the decision of Leach, C. J. in the case of 'Chinniah Chettiar v. Sivagami Achi', A I R (32) 1945 Mad 21 was cited, to show that according to the learned Chief Justice Leach the word "same interest" would compel him to hold that the widow's interest would be subject to such reduction by fluctuation by an adoption as it would in the hands of her husband. To that contention, I observed :"with great respect, I cannot go so far as that because it would be difficult to assume that her interest will be enhanced on the death of coparcener as it would have had her husband been alive". My observation is not tantamount to saying that there will be no fluctuation of whatsoever kind. I did not, in fact, dissent from the learned Chief Justice, but I said I could not go to the fullest extent that all kinds of fluctuations including enhancement by fluctuation would also occur. Reduction by fluctuation is permissible but not enhancement, because evidently, as the trend of authorities so far goes to establish, with which I very respectfully agree, she is not a coparcener in the full sense. The main decision proceeded on the basis that hers was a widow's estate according to sub-section (1) and the meaning of "same interest" in sub-section (2) must be arrived at in that context. As such an estate, it is alienable and its main attribute cannot be cut down by the doctrine of fluctuability being called in aid. At any rate, I must observe once again that the problem of fluctuability creates greater difficulty in the case of post-Act widows than in the case of pre-Act widows. To the question arising in the latter case, there is a very simple answer, namely, that she must take the same interest subject to such variations as might have in any way impaired it by time a right accrues to her. Suppose, the entire joint family property is sold away for joint family debts between the husband's pre-Act death and post-Act devolution upon the widow. The benefit of the Act cannot be said to materialise not because the Act does not apply to pre-Act deceased's widow but because the interest that the Act intends for her was not in existence at the time the Act came into operation. The same is the case with regard to mutilation of the said interest or its impairment within the time by agencies either voluntary or involuntary. Take the simple illustration of a Mitakshara son. He becomes a coparcener on birth, but he cannot in any event challenge an alienation of the joint family property that had taken place before he was legally born. The real difficulty arising out of fluctuability or otherwise would be almost baffling in a case where the interest devolves upon the widow on her husband's death after the Act and she never alienates her interest nor partitions till a number of deaths and births in the coparcenary body had occurred and then she comes out with a suit for partition claiming that she should get the same interest as her husband had at the time of his death. In case the fluctuation takes place from such a cause as operates on the interest that her husband had, that is, a coparcener's interest in coparcenary property from its inherent character the widow's rights thereto must be governed by it, even to its curtailment. There may be cases in which the fluctuation takes place on account of loss of a coparcener's status, such as, accrescence

due to increase in the number of coparceners of the same degree of relationship with the common ancestor. In such cases, the widow may not be entitled to the increase, because she does not inherit her husband's status in the family.

(55) Besides, as I have already expressed myself very clearly, in applying the rule of fluctuability, we shall have to make compromises or exceptions in order to meet the ends of justice, illustrations of which are numerous in the rules of Hindu law or custom in their application to the realities of life. It is too difficult to lay down any inflexible rule. Each case shall to be decided on its own facts. Fluctuations due to natural causes of deaths or births in the coparcenary body are associated with gain or loss of status. A new birth brings in a coparcener. That affects not the status but has the potentiality of affecting the interest of others, while death, resulting in loss of status of the deceased, attracts accrescence in the case of those only who have the requisite status at the moment. Hence the difference. Assuming my casual observation in that case, where, too, I have observed logical deductions would land us in anomalies rather than remove them, to be true, my present conclusion is not in the least affected.

(56) The learned author of Mayne's Hindu Law, 10th Edn., has given an illustration at p. 722 at the end of Art. 592, which I will quote here:

"The anomaly of a widow holding a woman's estate in the undivided property of her husband must necessarily be dealt with as a special case: the interest she takes may well be a fluctuating interest till there is a partition."

It must be remembered, however, that such cases will occur very rarely, if not, not at all. So long as any coparcener dying after the death of the concerned widow's husband leaves surviving him any male issue within the prescribed degree, or even a widow of his, or any of his male descendants, the concerned widow's interest shall not be affected as they or any one of them shall represent the subsequently deceased coparcener at the partition. The ambiguity, if any, being common to the cases of pre-Act and post-Act widows, its determination is not material for testing the correctness of either of the rival contentions.

(57) I would just point out an instance which would testify to the correctness of the view that I have taken. Suppose the Act operates only in cases where a Hindu dies after the Act both within the meaning of sub-sections (1) and (2) of section 3. Take a Hindu dying after the Act who leaves besides his widow, a daughter-in-law and a granddaughter-in-law whose husbands predeceased him before the Act. The rule of devolution of interest on the last two widows will operate differently according as sub-section (1) or (2) of section 3 applies. In the former case, they should each get the share of a son or grandson along with the widow; but in the latter case, they will get nothing while the deceased's widow will get the entire interest. This will happen because their husbands died before the Act. In this connexion, I should note that it is not disputed that the benefit of subsection (1) will accrue to the predeceased son's widow or predeceased grandson's widow even if their husbands died before the Act, provided that the properties to be inherited were those of the Hindu dying intestate after the Act, in which their husbands had no vested interest at the time of their deaths. They shall, however, be deprived of the interest that their husbands had at the time of their deaths in coparcenary estate. It would be difficult to appreciate that this discrimination is within the intendment of the Act. The object of the amendment was obviously to give the right that a Hindu had, or could have had, if alive, at the opening of the succession or dissolution of the coparcenary, to his widow. This object was, however, subordinated to the consideration of leaving undisturbed transactions, or considerations that were lawfully completed under the law in its pre-amended state. If we presume the Legislature to be free from arbitrariness and guided by rules of justice and equality to all, similarly circumstanced, we cannot make the assumption of discrimination that must have to be made in order to justify the opposite view. Sub-section (2), interpreted as I do, would completely obviate the anomaly referred to. If the rival contention is acceded to, their widows get an interest in the property in which they had none, while they are excluded from the coparcenary property in which their husbands had an interest at the time of their respective deaths. That such widows were intended to be given better rights cannot be denied in view of the provisions of sub-section (1) of section 3.

(58) In expounding that to give the benefit of the Act to women widowed prior to the Act would amount to divesting the coparceners of the normal rights vested in them from their births, my learned brother, Das J. has enumerated the various rights and privileges, either in existence or in expectancy, of a coparcener in a Hindu joint family. On the assumption that they are vested rights, their impairment, even to the slightest possible degree, is held out as the determining factor of retrospectivity. Though in my view they are not so, I should, assume for argument's sake that what my learned brother Das, J. enumerates as vested rights are so in reality. At the same time, I would assume with him that the Act cannot be given the meaning so as to affect such rights. The result that would inevitably follow is that, so long as a single coparcener, born prior to the Act, is alive in a joint family, at the time of the post-Act death of a Hindu coparcener, his widow shall not be entitled to the benefit provided for under sub-section (2) of the section. This, in other words, means that in order that the Act shall operate prospectively, the joint family must have been one in which the surviving coparceners would be all born after the Act, or one that is constituted after Act. It is, however, conceded that the Act must operate in all cases of deaths of coparceners after the Act, independently of the fact that the surviving coparceners had acquired their vested rights by births before the Act came into effect. In this contention, no distinction is made as to the impairment of the rights of the surviving coparceners between those born before and those born after the Act. In that event, the Act must be taken to be retrospective in its very nature. The distinction between the effects of the two rival interpretations in this respect, therefore, is without difference. The apparent retrospectivity is thus not real, nor it is sanctioned by the language of the Act. It will apply to the devolution of interest of a Hindu dying before as well as after the Act, with the same effect on the rights of surviving coparceners. It has been accepted by all such eminent Judges and Jurists as had had the occasion to consider it that the operation of the Act is prospective in nature notwithstanding that its operation does deprive all the coparceners born before the Act of what brother Das J. calls vested rights of theirs. These views, for which I am full of respect, cannot be explained except on the hypothesis that the rights of the coparceners before partition are not vested rights. It is too late in the day to flout the views of theirs. So in whatever manner and extent the surviving coparceners' rights are affected, its operation should not be condemned as retrospective. I shall not be understood to advocate the position, nor has it been pointed out to us, that acceptance of my view would amount to reopening the completed transactions, such as, pre-Act alienations

or partitions or the like. The Act operates only on joint family having coparcenary properties that continue to be so at the time it comes into force. This is exactly the view that has been taken by my Lord Varadachariar, J. in the case of 'Umayal Achi v. Lakshmi Achi', A I R (32) 1945 F. C. 25 at p. 33. The paragraph in which this position has been expounded is very much liable to be misconstrued; but on a close reading it is clear that it means exactly what I have just now said above. The passage that can give rise to misconstruction, if and when read stripped off from its context, reads:

"It is true that, on the above view, the plaintiff in the present case will derive no benefit from the Act, though she happens to be the widow of a predeceased son. But that is due to the circumstances that her husband died before the passing of the Act."

The death of "her husband" before the Act was considered to be the circumstance on which depended the result of "derivation of no benefit from the Act" for the plaintiff. That is because on her husband's death, prior to the Act, the joint family, as such, came to an end with the result that at the commencement of the Act there was no joint family nor joint family property. This position is made clear by his Lordship by illustrating it on reference to a hypothetical case. In this case, though not expressly but by necessary implication, it may be understood that B's widow lost her husband before the Act. This is made clear by the learned Judge saying that the adoption by A's widow was after the Act. Last comes the concluding passage which reads:

"The only possibility of calling the Act to her aid is by the application of sub-s. (2) of S. 3 if a double fiction could be imported so as to justify the assumption not only that 'the joint family was being continued by the adopted boy but that B must be deemed to have died after the adoption. On this assumption, B's widow could retain a half of the estate as against the adopted son of A, only if B's ownership could be described as 'interest in joint family property."

An "interest in the joint family property" in the aforesaid passage is quoted from sub-section (2) of Sec. 3. Three things are clear from this passage, viz., that (a) the husband's interest at the time of his death, while he is sole surviving coparcener, is to be distinguished from "his interest in the joint family property". (It can be his separate property which according to the learned Judge is not embraced within the scope, intendment and object of the Act. In order to be "an interest in the joint family property" within the meaning of sub-sec. (2), it must be an interest in such property for the purpose of the sub-section only when at the death of the widow's husband one or more other male coparceners were alive); (b) the joint family must be continuing from before the commencement of the Act till the Act came into force, (c) so that the interest devolving on the widow could be said to be "an interest in the joint family property" that her husband had. Like the case of a completed partition of the family estate accompanying a disruption of the coparcenary prior to the Act the death of the widow's husband as the sole surviving coparcener amounts to a completed transaction or part consideration which, according to my view, is not in the least affected by the operation of the Act. I shall show presently that conceding that my view is one demanding retrospective operation of the Act, it is limited and confined to cases where such past transactions or considerations are not affected. It is well known as a canon of construction of statutes that a statute may be retrospective to certain extent and no further.

(59) I would here refer to a passage from the judgment of Gwyer, C. J. of India, in which his Lordship says that the Hindu Women's Rights to Property Act is a remedial Act seeking to remove or to mitigate, what the Legislature presumably regarded as a mischief; and as such it ought to receive a beneficial interpretation, and even though it be found in a small minority of cases to prejudice rather than to benefit those whom it was intended 'to help, this would be no reason why the Court should not adopt the construction which is on the whole best calculated to give effect to the manifest intention of the Legislature.' Brother Das, J. does not dispute this proposition but says that the beneficial construction must be one admissible under the language of the Act. True, when two reading or two interpretations are equally admissible, this doctrine would give preference to the one which would render a larger measure of benefit to a larger number of people. With reference to this, my learned brother Das, J. in his judgment in paragraph 43 has said

"But it is not clear what particular class of women are intended to be benefited thereby. It cannot even be maintained that at least all widows are intended to be benefited thereby. Indeed the contrary can be demonstrated, viz., that certain widows who were entitled to rights under the pre-existing law are deprived of their rights. For instance, the mother or daughter of a widower (male) having self-acquired property who leaves him surviving no male issue but a widowed daughter-in-law is excluded by the said daughter-in-law by virtue of sec. 3 sub-sec. (1). Therefore the Act helps only some women who are widows and not all women or all widows."

I am sorry to have to say that I do not at all comprehend that the mother or the daughter of a widower has been deprived of her reversionary right to succession by virtue of sub-section (1) of section 3. They do, notwithstanding the Act, retain their places in the list of heirs. Mother is a later heir than son, grandson, great-grandson, widow and daughter of the last male holder. The Act has introduced son's widow, grandson's widow and great-grandson's widow in the places of their husbands. By this process, the chance of succession of either the daughter or the mother is not in the least rendered more remote than what it was before. It has also to be noticed that these widowed daughters-in-law or grand-daughter-in-law take side by side with the living sons and grand-sons in whose presence neither the mother nor the daughter could inherit, even though daughters-in-law and the grand-daughters-in-law were not conferred the right to succeed under the Act. So the apprehended consequence is more imaginary than real. On the contrary, the Act has increased the number of women heirs in the place of their husbands along with the male relations of the same degree without removing other women relations even a step further than the places they have been occupying under the Hindu law. Here, I would point out that the Act pre-eminently intends to benefit predeceased sons' and grandsons' widows. Brother Das's construction would defeat this. Sub-section (2) of section 3 uncontrolled by sec. 4 would achieve this very efficiently. This establishes the correctness of my exposition.

(60) My learned brother Das, J. would ask me to interpret the Judgment of Mr. Varadachariar J. of the Federal Court, already referred to in the way which he has done in order that I may appear to pay due regard to it as a Judgment of a Superior Court by which I am bound. But it is within my right to comprehend the judgment in my own way, and my learned brother should kindly remember that I have followed the judgment of Mr. Justice Varadachariar in the Federal Court in support of

the view that I have taken. If his Lordship Mr. Justice Varadachariar has said that the Act is prospective I have not said anything to the contrary. On the other hands, I have not fallen a prey to the contention that all other considerations being equal, retrospectivity would consist in merely relying on a pre-Act event as attracting its operation. In either of the cases, impairment or divestation of pre-Act acquired coparcenary right being common, there is no logic in distinguishing one as prospective from the other as retrospective. I do not apprehend, as brother Das, J. says, that distortion of domestic equilibrium would occur.

(61) In my judgment, the view that we have taken will restore the equilibrium in the domestic sphere of life, where it has been lost. It will remove the cold indifference with which the Hindu widows are being treated by their husband's coparceners and relations even in cases where their husbands have thrown all their earnings into the family funds and added immensely to the opulence of the coparcenary and have, in substance, built it up. It is apprehended by my learned brother that this pronouncement will adversely affect or otherwise reopen completed transactions and thus unsettle settled rights and obligations created on their basis and should give rise to numberless litigations and liabilities changing the legal relations already established. This apprehension is, to my mind, wholly unfounded. In this connexion, I shall refer to section 3 of the Orissa Act (V of 1944) which reads:

"Notwithstanding anything contained in section 2, where any person, who, but for this Act, would have been entitled to any property, has been in possession thereof or has made a transfer thereof, his possession up to the date of the commencement of this Act shall be deemed to be as lawful, and the transfer so made by him shall be deemed to be as valid, as if this Act had not been passed."

(62) Besides, I shall draw attention to the fact that it is not a case in which we are going against a series of judgments which had founded legal rights and obligations amongst the people. Even so, that there will be a few cases in which completed private transactions will have to be reopened should not stand in our way of interpreting the Act rightly to the best of our judgment. The principle of 'stare decisis' is not called for in the facts of this case. I would conclude, therefore, my judgment with the remark that, with the greatest deference to the views of my learned brother Das, J., I could not persuade myself to hold that by taking the view of giving benefit to the widows, whose husbands died before the Act, we are at all giving it a retrospective operation so long as it does not affect the completed transactions or past considerations that took place before the Act. If anything is affected, it is the presumed chance potentiality of pre-Act born coparceners. A similar argument was advanced in relation to the construction of the Hindu Law of Inheritance Amendment Act and it found favour with the learned Judges in the case of 'Krishna Chettiar v. Manikammal 57 Mad. 718. I would cite a passage from this judgment of Madras Court, which was quoted by Sir Fazl Ali C. J., who delivered the judgment of the court in the Patna Full Bench case of 'Pokhan Desadh v. Mt. Manoa', AIR (24) 1937 Pat. 117.

"At p. 187, the learned author (Maxwell) observes that a testator is presumed to have in view the state of the law when he made his will. If it be so, we can reasonably presume that a person competent to make a will is satisfied with the state of the law regarding the order of succession to his estate among his heirs, if he prefers to die intestate without making a will. If he wishes to prefer a remoter to a nearer heir he will certainly have recourse to the making of a will. If he does not make a will, it may be because he wishes that his property should devolve according to the existing law of succession. The policy of the legislature is not to make a subsequent enactment operative against the estate of such a man and thus frustrate his presumed intentions, unless, for special weighty reasons, such a retrospective operation is bound to be necessary. If Act 2 of 1929 is given such a retrospective operation, it would be frustrating the intentions of the last male owner who preferred to die intestate before the passing of this Act. Such an anomaly will not arise if this Act should be held to apply only prospectively".

In reference to this contention, Fazl Ali, C. J., in that Patna Full Bench case, observed:

"The point to be considered is whether we can legitimately draw any presumption as to the intention of a person who has died intestate.' I venture to point out respectfully that if it is permissible to say that a man did not leave a will, because he was satisfied with the state of the law regarding the order of succession to his estate, it is equally permissible to say that his intention might have been to let the law take its course and that he was not thinking of any particular heir at all. It being impossible to predicate as to who would succeed to the estate until the succession opens, it is difficult to say that a person who dies intestate had contemplated at the time of his death that he would be succeeded by any particular person or persons. There will be still less justification for presuming that if he had known that a change was going to be effected in the existing law, he would have disposed of his property by means of a will. That being so, there is no question of frustrating the presumed intention of a person to whose estate the Act applies, and as already stated, to hold that the Act applies only when succession opens is not to give it a retrospective effect and therefore the principles bearing upon the question as to when a statute shall be construed to have retrospective operation have no relevancy".

The observations of Fazl Ali, C. J. will apply 'mutatis mutandis' to this case with reference to the view of my learned brother Das, J., particularly, as the statutes under consideration are in 'pari materia'.

(63) In the premises aforesaid, I would agree with the order proposed by my learned brother, Narasimham, J.

(64) ORDER: It is therefore ordered that this appeal be allowed and that the widow concerned will have the same interest in the joint family property as her husband had at the time of his death. There will be no order for costs.

D.R.R. *Appeal allowed.*

END

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PATNA HIGH COURT

1951

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NOTE

As most of the Indian Law Reports and other Official Reports have yet to complete their year, it has been decided not to delay issuing of these Indexes but to give the reference Table of 1951 Other Journals = All India Reporter in the next year's Index.

CASES OVERRULED IN A. I. R. (38) 1951 PATNA

('28) A. I. R. (15) 1928 Cudh 10=4 O. W. N. 1069=106 I. C. 392, Mahomed Ali v. Ghao Lal	Held Overruled by A. I. R. (20) 1943 P. C. 142 in A. I. R. (38) 1951 Pat. (C. N. 165) 587.
('28) A. I. R. (15) 1928 Pat. 581=29 Cr. L. J. 942=7 Pat. 561=10 P. L. T. 14=111 I. C. 862, Shukadeva v. Hamind Mian	Held Overruled by A. I. R. (20) 1933 Pat. 242 in A. I. R. (38) 1951 Raj. (C. N. 65) 146.
('37) A. I. R. (24) 1937 Pat. 337=16 Pat. 306=169 I. C. 581=18 P. L. T. 231=1937 P. W. N. 263, Firm Dedhraj Lachminarayan v. Bhagwan Das	Overruled in A. I. R. (38) 1951 Pat. (C. N. 1) 1 (F. B).
('40) A. I. R. (27) 1940 Pat. 663=19 Pat. 343=192 I. C. 170=7 B. R. 322=22 P. L. T. 223, Awadhesh Prasad v. Widow of Tribeni Prasad	Overruled in A. I. R. (38) 1951 S. C. (C. N. 47) 280.
S. A. No. 629 of 1940, D/- 25-11-1941, Mahbub v. Radha Peary Kuer	Overruled in A. I. R. (38) 1951 Pat. (C. N. 150) 532.
F. C. App. No. 71 of 1948	Overruled in A. I. R. (38) 1951 Pat. (C. N. 5) 29 (F. B.).
('48) A. I. R. (35) 1948 Pat. 153=26 Pat. 592, Basdeonarain v. Karu Mahton	Held impliedly Overruled by A. I. R. (36) 1949 Pat. 139 (F. B.) in A. I. R. (38) 1951 Pat. (C. N. 28) 181.

THE
ALL INDIA REPORTER
1951

Patna High Court

A. I. R. (38) 1951 Patna 1 *[C. N. 1.]*
FULL BENCH
SHEARER, RAMASWAMI AND SARJOO PRASAD JJ.

Rameshwar Prasad Sahu — Appellant v. *Parmeshwar Prasad Sahu and others — Respondents.*

A. F. O. O. Nos. 39 and 40 of 1950, D/- 22-9-1950.

Limitation Act (1908), Art. 182 (2) — Appeal — Meaning — Does not include appeal from order declining to set aside ex parte preliminary decree : 16 Pat. 306=A.I.R. (24) 1937 Pat. 337=169 I. C. 581, OVERRULED.

The word 'appeal' in col. 3 of cl. (2) of Art. 182, Limitation Act, does not include an appeal preferred against an order refusing to set aside an *ex parte* preliminary decree in suit for partition in computing the period of limitation for executing the final decree passed in such a suit as the word 'appeal' in the clause means an appeal only from the decree or order sought to be executed : *Case law discussed* : A. I. R. (4) 1917 Pat. 157, *Approved* ; 16 Pat. 306 = A. I. R. (24) 1937 Pat. 337 = 169 I. C. 581, OVERRULED ; A. I. R. (37) 1950 S. C. 6, *Rel. on.* [Para 5]

Anno : Limitation Act, Art. 182, N. 34, Pt. 7.

S. N. Dutta and Prem Lal — for Appellant ; Nandlal Untwallia and Awadh Kishore Pd. — for Respondents.

Shearer J. — The question which has been referred to this Bench for decision has been stated by Sinha and Rai JJ. thus :

"Whether the word 'appeal' in col. 3 of cl. (2) of Art. 182, Limitation Act, includes an appeal preferred against an order refusing to set aside an *ex parte* preliminary decree in a suit for partition in computing the period of limitation for executing the final decree passed in such a suit."

Article 182, Limitation Act, prescribes the period of limitation

"for the execution of a decree or order of any civil Court not provided for by Art. 183 or by S. 48, Civil Procedure Code."

By reason of what is contained in col. 3 of the Article, the starting point for limitation varies, according as there has or has not been an appeal or a review of judgment or an amendment of the decree. Article 182 substantially reproduces the provisions contained in the earlier Limitation Acts of 1871 and 1877. The principles underlying all these provisions were twofold. One principle, to borrow the language used by Sir Dinshah Mulla in *Nagendra Nath Dey* v. *Suresh Chandra Dey*, 59 I. A. 283 at p. 288 : (A. I. R. (19) 1932 P. C. 165) is

"that so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage."

The other is that, when, on appeal, the decree or order of a subordinate Court is affirmed, modified or reversed by the High Court, the period of limitation for an application for execution of the final decree or order is the period of limitation applicable to decrees of the subordinate Court itself, and not to decrees of the High Court. Section 19, Civil P. C. of 1859 prescribed a period of twelve years' limitation for applications for the execution of decrees of a Chartered High Court, while S. 20 prescribed a period of three years' limitation for applications for the execution of decrees passed by other Courts. When, shortly afterwards, the Court of the Sadar Diwani Adalat was abolished and its appellate jurisdiction was transferred to the High Courts, a question arose as to whether a decree of a High Court passed on appeal from a decree of a subordinate Court could be executed within twelve years or had to be executed within three years. There was a conflict of decisions on the point, and, as appears from the observations of Sir James Colvile in *Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy*, 14 M.I.A. 465 at p. 487 : (10 Beng.L.R. 101 P.C.),

one at least of the learned Judges, who came to the conclusion that the longer of the two periods of limitation was the period applicable, admitted that his construction "involved consequences absurd in themselves, and, presumably, contrary to the intention of the Legislature." It is quite clear that it was in order to put an end to this controversy that Art. 167, Limitation Act of 1871, took the form which it did and that, but for the imperative necessity of making the intentions of the Legislature clear, Art. 167 might well have taken a very different form. The reason why in Col. 3 of Art. 167 different starting points for limitation were prescribed was to prevent any argument being put forward that, as the decree of the subordinate Court merged in or was superseded by the decree of the High Court on appeal, the period of limitation applicable was the period applicable to decrees of the High Court and not that applicable to decrees of the subordinate Courts. Whether the decree of the trial Court has been affirmed or has been modified on appeal or on review of judgment is wholly immaterial in ascertaining what the starting point for limitation is. The Court executing the decree has merely to see whether, in point of fact, there has been an appeal or review of judgment. I stress this point as, in some of the decisions in which a forced interpretation has been put on the language used in the article, it has been completely overlooked. The word 'judgment' in Cl. (3) in the third column means, and can only mean, the judgment in the suit in which the decree or order of which execution is sought has been passed, and by a parity of reasoning the word "appeal" in Cl. (2) should be construed as an appeal from that decree or order. The narrow point which has been referred to us for decision is whether the word 'appeal' in Cl. (2) must be so construed or whether it may be construed to include also an appeal against an order declining to set aside an *ex parte* decree. Since 1871 this point has, on a number of occasions, come before the various High Courts, and until 1927, except in one instance, the decisions uniformly were that the word "appeal" there meant, and could only mean, an appeal from the decree or order of which execution was sought. The decision in which a contrary view was taken is a decision of the High Court of Calcutta: *Lutful Huq* v. *Sumbhudin Pattuck*, 8 Cal. 248 : (10 C.L.R. 143). In that case execution was sought of an *ex parte* decree passed on 7-2-1876. The application for execution was not made until 18-12-1880, that is, until more than three years had elapsed since the passing of the decree. In this interval an application had been made to have the *ex parte* decree set aside, and, when that application was rejected, an appeal had been preferred by the judgment-debtor which was ultimately dismissed on 19-12-1877. It appears that, when the application to have the *ex parte* decree set aside was made, the trial Court ordered that execution of the decree should be stayed and that a similar order was made when the appeal against the order of the trial Court dismissing the application was preferred. Under S. 15, Limitation Act of 1908, the decree-holder would have been entitled to exclude the period during which execution of his decree had been stayed. Section 15, Limitation Act of 1877 did not, however, apply to orders of stay made in the course of proceedings for the execution of decrees. It is quite clear from the judgment of Prinsep J. that in his opinion, this was a serious defect in the Act, and that it was largely in order to prevent a palpable injustice resulting from it that he concurred in the view expressed by Morris J. that the decree had been kept open and did not become final until the order of the appellate Court was passed on 19-12-1877. With the greatest respect, it appears to me that, in order to do what they considered to be justice in this particular case, the learned Judges put on the words contained in Cl. 2 of Art. 179 a construction which they were not intended to, and could not, bear. In the same year in which *Lutful Huq* v. *Sumbhudin Pattuck*, (8 Cal. 248:10 C.L.R. 143) was decided a contrary view had been taken by the Allahabad High Court in *Sheo Prasad* v. *Anrudh Singh*, 2 ALL. 273. In 1891 the High Court of Bombay in *Juvaji* v. *Ramchandra*, 16 Bom. 123 followed the Allahabad and dissented from the Calcutta decision. In 1893 a Division Bench of the Calcutta High Court itself, of which Comer-Petheram C. J. was a member, expressed doubts as to the correctness of the earlier decision—*vide Baikanta Nath* v. *Aughore Nath*, (21 Cal. 387) and in 1927 another Division Bench in express terms, dissented from it—*vide Fakir Chand* v. *Daiba Charan*, 54 Cal. 1052 : (A. I. R. (14) 1927 Cal. 904). This latter decision was approved by Rankin C. J., in *Profulla Kumar* v. *Mt. Sarojbala Basu*, 35 C. W. N. 155 : (A. I. R. (18) 1931 Cal. 332). Shortly before this, the point had come before this High Court in *Brijraj* v. *Nauratan Lal*, 3 P. L. J. 119 : (A. I. R. (4) 1917 Pat. 157) and Chamier C. J. had relied on *Baikanta Nath Mittra* v. *Aughore Nath Bose*, 21 Cal. 387 and had dissented from *Lutful Huq* v. *Sumbhudin Pattuck*, 8 Cal. 248 : (10 C.L.R. 143). The diligence of Mr. Nandlal Untwalia, who appears for the respondents, has also brought to our notice similar decisions of the

Judicial Commissioner in the Central Provinces and of the Lahore Court.

[2] The question as to whether a more extended meaning can be given to the word "decree" in Cl. (2) of Art. 182 arose in a more acute form in consequence of the amendments made in 1908 in the Transfer of Property Act and the Code of Civil Procedure. Until 1908 a mortgagee, who had obtained a preliminary decree for sale, was, on the expiry of the period fixed for the payment of the mortgage money, entitled under S. 89, T. P. Act (sic) was repealed and O. 34, R. 5, Civil P. C. was enacted under which a mortgagee was required to obtain a final decree for sale, and, when that decree was passed, to apply in the course to levy execution on it. In 1927 in *Somar Singh* v. *Deonandan Prasad*, 6 Pat. 780 : (A. I. R. (14) 1927 Pat. 215), a Division Bench of this Court was called on to decide whether an application for the execution of a final decree in a mortgage suit was not barred by limitation in spite of the fact that a period of more than three years had elapsed between the passing of the decree and the making of the application. The preliminary decree was passed on 23-8-1921, and the final decree on 28-10-1922. In the interval an appeal against the preliminary decree was preferred and was ultimately dismissed on 29-10-1925. The application for execution of the final decree was made on 2-2-1926, that is, more than three years after the final decree was passed, but within three years after the dismissal of the appeal against the preliminary decree. Kulwant Sahay and Ross JJ., held that, in such circumstances, the application for execution was not barred by limitation, and an application for leave to appeal to the Privy Council against their decision was rejected. This decision was followed by Venkata Ramana Rao J., of Madras High Court in *Koyakutti* v. *Verrankutti*, A. I. R. (24) 1937 Mad. 421 : (171 I. C. 980) and an appeal under the Letters Patent against his decision was dismissed. Prior to this, however, another learned Judge of the Madras High Court sitting singly, Madhavan Nair J. in *Ahammad Kutty* v. *Kottakkat Kuttu*, 56 Mad. 458 : (A. I. R. (20) 1933 Mad. 315) had taken a contrary view. Since then, a contrary view has also been taken by a Division Bench of the Bombay High Court in *Mahadeo Bhimasankar Madhava* v. *Fatumiya Husseinbhai*, I.L.R. (1948) Bom. 521:(A.I.R. (35) 1948 Bom. 337). Kulwant Sahay J., in *Somar Singh* v. *Deonandan Prasad Singh*, 6 Pat. 780 at p. 785 : (A. I. R. (14) 1927 Pat. 215)observed :

"Clause (2) of Art. 182 prescribes (where there has been an appeal) the date of the final decree or order of the appellate Court or withdrawal of the appeal'. There is nothing here to show that the appeal must be against the decree sought to be executed. In my opinion, the intention of the Legislature in making this provision was that, if an appeal in any way imperils the decree sought to be executed, then the date of the final disposal of the appeal should be the date from which the period of limitation ought to be computed."

In dismissing the application for leave to appeal to the Privy Council Dawson-Miller C.J.* observed :

"It is further well established that the test in such cases is whether the decree of the appellate Court imperils the validity of *(sic)* a final decree in a mortgage suit is imperilled by an appeal being preferred from the preliminary decree is tantamount to saying that, in consequence of the preferring of that appeal, questions at issue in the suit are still *sub judice* between the parties. As I have already said, one of the two principles underlying Art. 182, Limitation Act, is that, so long as any question at issue in the suit is still *sub judice* between the parties, a plaintiff who has obtained a decree ought not to be compelled to levy execution on his decree, and that as against him limitation ought not to begin to run until all such questions have been finally decided. If, therefore, the language used in Art. 182 is capable of bearing a construction which would enable the holder of a final decree for the sale of the mortgage property to defer applying for execution of his decree until a period of three years after the decision of an appeal against the preliminary decree is about to expire, such a construction ought to be put on it."

With the greatest respect, however, I entertain much doubt as to whether the construction put by Kulwant Sahay J. is a construction which the words themselves are capable of bearing, and if, as Madhavan Nair J. in *Ahammad Kutty* v. *Kottakkat Kuttu*, 56 Mad. 458 : (A.I.R. (20) 1933 Mad. 315) pointed out, it is open to the decree-holder instead of applying to levy execution on the final decree, which he has already obtained, to apply for a fresh final decree to be passed, there is the less reason to have resort to an unduly forced construction. Dawson-Miller C. J., while endorsing the test applied by Kulwant Sahay J. also observed :

"It seems to follow, therefore, as a matter of course, that the appeal in this case was not only an appeal from the preliminary decree but an appeal from all that naturally followed by the passing of that decree, namely, the final decree for sale which, after all, is merely part of the machinery prescribed for carrying out the direction for sale contained in the preliminary decree."

This suggests that His Lordship was not prepared to give a more extended meaning to the word 'appeal' than was absolutely necessary for the purposes of that particular case.

[3] The decisions of this Court to which I have just referred are of importance only in so far as in them, for the first time, since 1879, a gloss was put on the word 'appeal' as it occurs in Cl. (2) of Art. 182 and, in consequence of them, a further and much more serious gloss was put on that word in certain decisions of

* [Reported in A. I. R. (15) 1928 Pat. 581—*Ed.*]

the Madras High Court. The decisions in question are *Sriramachandra Rao* v. *Venkateshwara Rao*, I.L.R. (1939) Mad. 252 : (A.I.R. (26) 1939 Mad. 157) and *Thandavaroya Gramani* v. *Arumughamudali*, A. I. R. (32) 1945 Mad. 261 : (1945-1 M. L. J. 421). In each of them another decision of this Court, namely, *Firm Dedhraj Lachminarain* v. *Bhagwan Das*, 16 Pat. 306 : (A. I. R. (24) 1937 Pat. 337) was cited and relied on. In that case, as also in two of the three Madras cases, the question that arose was the question which we now have to decide, namely, whether, in the event of an application being made to have an *ex parte* decree set aside and an appeal being preferred against an order rejecting the application, the period of limitation for the execution of the decree is to be computed from the date of the *ex parte* decree or from the date of the order of the appellate Court finally dismissing the application under O. 9, R. 13, Civil P. C. Courtney-Terrell C. J. and James J. held that limitation did not commence to run before the order of the appellate Court affirming the order rejecting the application to have the *ex parte* decree set aside. In doing so, Courtney-Terrell, C. J. expressed the opinion that the long series of decisions to the contrary had been impliedly overruled by the decision of their Lordships of the Judicial Committee in *Nagendra Nath Dey* v. *Suresh Chandra De*, 59 I. A. 283 : (A. I. R. (19) 1932 P. C. 165). I will defer, for the moment, examining this point or dealing with the reasoning contained in the judgment of the learned Chief Justice as Mr. S. K. Dutta, for the appellants, did not support that reasoning in its entirety and relied mainly on the Madras decisions to which I have just referred. The argument put forward by Mr. Dutta was, in short, that an appeal against an order rejecting an application to have an *ex parte* decree set aside is an order made in an appeal in the suit which is likely to affect the decree sought to be executed. It must be conceded that, if the decisions of the Madras High Court are correct, there is much substance in the argument put forward by Mr. Dutta. In *Sriramchandra Rao* v. *Venkateshwara Rao*, I.L.R. (1939) Mad. 252 : (A. I. R. (26) 1939 Mad. 157), King J., expressed the opinion that 'appeal' in Col. 3 of Art. 182 means an appeal in the suit which is likely to affect the decree sought to be executed and not merely an appeal against the actual decree or order sought to be executed. Kulwant Sahay J. had taken the view that the word 'appeal' ought to be construed as meaning an appeal which results in the decree of which execution is sought being imperilled, and, as I have already said, an attempt to so construe the word can be justified by one of the two principles underlying Art. 182. No such justification, however, exists for putting on the word 'appeal' the more extended meaning given to it by King J. It is quite clear that no issue arising in the suit again becomes *sub judice* between the parties when an application is made for an *ex parte* decree to be set aside or when an appeal is preferred against an order rejecting such an application. No such issue can become *sub judice* unless and until the *ex parte* decree is set aside and the suit is ordered to be re-heard.

[4] If the intention of the Legislature was that, when an appeal was preferred against an order declining to set aside *ex parte* decree and was unsuccessful, limitation should begin to run from the date of the order of the appellate Court, it must also have been its intention that, when no appeal was preferred, limitation should begin to run from the date of the order of the trial Court. There are, however, even more serious difficulties in the way of imputing such an intention to it. In *Firm Dedhraj Lachminarayan* v. *Bhagwan Das*, 16 Pat. 306 : (A.I.R. (24) 1937 Pat. 337), Courtney-Terrell C. J. expressed the opinion that an application to have an *ex parte* decree set aside was in essence an application for review of judgment. The law of limitation is part of the law of procedure and the existing Limitation Act and Civil Procedure Code were enacted by the Legislature in one and the same session. The provisions in the one statute must be read along with the provisions in the other. Now, the expression "review of judgment" occurs also in Ss. 5 and 12 and in Arts. 161, 162 and 173, Limitation Act, and, quite clearly, there bears exactly the same meaning as it does in O. 47, Civil P. C. How can it be said that in using it in Art. 182, the Legislature intended it to bear a very different meaning? There is the further difficulty pointed out by Fazl Ali J. in *Mohammad Naqir* v. *Alauddin Ahmad*, 20 Pat. 513 : (A. I. R. (28) 1941 Pat. 213), namely, that the words "where there has been a review of judgment" cannot mean "where there has been an application for review of judgment". Courtney-Terrell C. J. was of opinion that when an application for review of judgment was rejected, Cl. (3) of Art. 182 applied and that, when such an application had been granted and an objection taken by way of appeal was later sustained, Cl. (2) applied. Mr. G. C. Mukharji, who appears for the appellants in the second appeal in which this reference has been made and whom we, therefore, permitted to address us and who took a somewhat different line to that adopted by Mr. Dutta, was unable to support this part of the

judgment of the learned Chief Justice. Mr. Mukharji suggested that in the latter case cl. (3) and not cl. (2) applied, the order of the appellate Court declining to allow a review, being the decision passed on review. In such a case, Mr. Mukharji asked, what was the starting point for limitation if it was not the date of the order allowing the objection taken to the granting of the application for review? I see no difficulty in this. When a trial Court decides to review its judgment, an entry is made in the suit register and its order operates as a stay of execution. If and when an objection to that order is upheld on appeal, the stay is automatically vacated. Limitation runs from the date of the decree but under S. 15 of the Act the decree-holder is entitled to exclude the period during which he has been prevented from executing his decree. The argument put forward by Mr. Mukharji may be more logical but it is, in my opinion, no less unsound.

[5] The judgment of Sir Courtney-Terrell C. J. proceeds on the assumption that the long and uniform series of decisions going back at least to 1878 were impliedly overruled by their Lordships of the Judicial Committee in *Nagendra Nath Dey* v. *Suresh Chandra Dey*, 59 I. A. 283 : (A. I. R. (19) 1932 P. C. 165). With the greatest respect, I should myself have thought it hazardous to make such an assumption when not a single one of the decisions was referred to and when the difficulties of construction in the way of taking a view different to that taken in them are so patent. Apart from this, it is, I think, plain that the point which their Lordships of the Judicial Committee had to consider was not at all the point with which we are concerned now. A final decree in a mortgage suit was obtained by certain co-mortgagees who had impleaded the other co-mortgagees in the suit as defendants. A question arose as between the plaintiffs and these defendants and what purported to be an appeal was preferred by the former against the decision of the trial Court on that question. In this appeal, while the co-mortgagees were made respondents the other defendants, that is, the judgment-debtors under the decree, were not. The appeal was dismissed as incompetent. When the decree was put into execution, it was contended by the judgment-debtors that the application was barred by limitation and the High Court of Calcutta upheld this contention on the ground, mainly, that it could not be said that there had been any appeal as the decree as a whole had never been imperilled. The Judicial Committee reversed the decision on the ground that, although the appeal was incompetent and although the judgment-debtors under it were not made parties, it had nevertheless been entertained and must be regarded as an appeal within the ordinary grammatical meaning of the word which was the meaning that it had in cl. (2) of Art. 182. The exact scope and effect of the judgment of Sir Dinshah Mulla have been the subject of elaborate decisions of the High Courts of Calcutta and Allahabad in *Harish Chandra* v. *Dines Chandra*, A. I. R. (33) 1946 Cal. 375 : (224 I. C. 111) and *Kunwar Bahadur Singh* v. *Sheo Shankar*, A. I. R. (37) 1950 ALL. 327. It will serve no useful purpose for me to repeat what has been said there. It is enough for me to say that I respectfully concur in the reasoning contained in the judgment of B. K. Mukharji J. Mr. Nandlal Untwallia, for the respondents, has drawn our attention to a very recent decision of the Supreme Court which, he suggests, is conclusive on the point before us. In *Bhawanipore Banking Corporation Ltd.* v. *Gouri Shankar Sharma*, A.I.R. (37) 1950 S. C. 6 : (1950 S. C. R. 25), a final decree in a mortgage suit was passed on 22-12-1941. No attempt was made to put the decree into execution until 9-4-1945. The reason was that the judgment-debtors under the decree had made an application under S. 36, Bengal Money-lenders Act. This application was dismissed for default in prosecution and an application under O. 9, R. 9, Civil P. C. to have it restored was dismissed. An appeal was preferred against the latter order and this appeal too was dismissed on 3-7-1944. It was contended on behalf of the decree-holder that limitation did not commence to run until 3-7-1944, and this contention was overruled. Fazl Ali J. expressed the opinion that the application under O. 9, R. 9 did not involve a review of the judgment thereby negativing the argument which commended itself to Courtney-Terrell C. J., and went on to point out that the word "appeal" in cl. (2) of Art. 182 meant an appeal from the decree of which execution was sought, thereby affirming the series of decisions which Courtney-Terrell C. J. had taken to have been impliedly overruled. The plea taken by Mr. Nandlal Untwallia for the respondents was, in my opinion, a sound one. I would answer the question that has been referred to us in the negative and say that *Brijraj* v. *Nauratan Lal*, 3 P. L. J. 119 : (A. I. R. (4) 1917 Pat. 157) was rightly decided and that *Firm Dedhraj Lachminarayan* v. *Bhagwan Das*, 16 Pat. 306 : (A. I. R. (24) 1937 Pat. 337) is not good law.

[6] **Ramaswami J.**—I agree that the question referred to the Full Bench should be answered in the negative, that *Brijraj* v. *Nauratan Lal*, 3 P. L. J. 119 : (A. I. R. (4) 1917 Pat. 157) is still good law and that *Lachmi-*

narayan's case, 16 Pat. 306 : (A. I. R. (24) 1937 Pat. 337) is wrongly decided and should be overruled.

[7] **Sarjoo Prosad J.**—I entirely agree and have nothing further to add.

D.R.R. *Answer in the negative.*

A. I. R. (38) 1951 Patna 6 *[C. N. 2.]*

IMAM AND RAI JJ.

Hitlal Mahton — *Appellant* v. *Kameshwar Singh Bahadur and others*—*Respondents.*

A. F. A. D. No. 685 of 1948, D/- 14-9-1950.

(a) Tenancy Laws — Bihar Tenancy Act (VIII [8] of 1885), Ss. 26A, 148—Transferee not impleaded in rent suit—Effect.

Where in a village there is a custom by which the holding can be transferred without the consent of the landlord and such a transferee is not impleaded as defendant in the suit for rent by the landlord, the decree passed has the effect of a money decree and not a rent decree and the auction sale must be regarded as a money sale and not a rent sale. [Paras 8, 9]

(b) Tenancy Laws — Bihar Tenancy Act (VIII [8] of 1885), Sch, III, Art. 3—Real tenant not impleaded in rent suit—Dispossession.

Where the transferee of the holding, who is a real tenant, is not made a party to the rent suit his dispossession by the landlord auction-purchaser is really a dispossession by the landlord not through the process of Court. In such a case Art. 3 applies to suit brought by the transferee for possession. [Para 11]

B. C. De and M. K. Mukherji — *for Appellant; S. N. Dutta, S. P. Srivastava, Baidyanath Jha and Bhagirathi Rai* — *for Respondents.*

Rai J. — This is an appeal by the plaintiff against the judgment and decree of the Additional District Judge of Purnea confirming those of the Munsif of the same place. The plaintiff filed the suit for a declaration that his title in respect of the holding in suit had remained unaffected by the execution sale and subsequent delivery of possession, and re-settlement of the same by the defendant 1st party. He also prayed for recovery of possession.

[2] The facts leading to the present litigation are the following: There was a holding of 13 bighas, 8 kathas, 2 dhurs bearing a rental of Rs. 21-11-9. It had been mortgaged to the plaintiff and the defendants 3rd party. The mortgagees brought an action on the mortgage, obtained a decree and in execution of that decree they put to sale the said holding and purchased it themselves on 10-4-1929. On 22-2-1930, the sale was confirmed and on 29-3-1930, delivery of possession was given to the mortgagee auction-purchasers. There was subsequently a partition in the family of the plaintiff and the defendants 3rd party in which the holding in question fell to the share of the plaintiff. In the year 1930 the proprietor of the Darbhanga Raj filed Rent Suit No. 1709 of 1930 in respect of the holding in question against the original tenant, Srichand Mahton. In that suit for rent, the mortgagee auction purchasers were not impleaded as party-defendants. The rent suit was decreed, and in execution of that decree the landlord-decree-holder purchased it on 9-2-1934. On 28-10-1934, delivery of possession was given to the landlord auction purchaser. In 1937 the proprietor of the Darbhanga Raj settled it with one Ramjivan Singh who subsequently, in the year 1944, sold it to the defendants 2nd party. The present suit was filed on 17-10-1945.

[3] The plaintiff's case was that the sale in execution of the decree for rent only conveyed the right, title and interest of the judgment-debtor in the holding to the auction-purchaser. According to him, the holding being transferable, the mortgagee auction-purchasers had become really the raiyats of the holding, and, as they had not been impleaded in the rent suit, the execution sale had the effect of a sale in execution of a money decree only. On this basis it was claimed that the right of the plaintiff was not affected by the sale and he was entitled to recovery of possession.

[4] The suit was contested by defendant 1 as well as by the settlee-defendants who contended that the holding was not transferable by custom, that the auction sale dated 9-2-1934, would be deemed to have passed the entire holding to the landlord auction-purchaser and it had not the effect of a sale in execution of a money decree only. The proprietor of the Darbhanga Raj was justified in bringing the rent suit against the original recorded tenant, Srichand Mahton, and the decree passed against him had the effect of a rent decree. The defendants contended that the right of the mortgagee auction-purchasers, if any, had been lost by the auction sale in execution of that rent decree. The defendants further contended that the suit of the plaintiff was barred by general and special law of limitation.

[5] The trial Court dismissed the suit. The decree of the trial Court was affirmed by the lower appellate Court also. Hence this second appeal.

[6] The lower appellate Court, after considering the various evidence on record, has come to the finding that the custom of transferability of occupancy holdings exists in Mohammadpur Sadik where the suit lands are situated. It also held that after the auction-purchase and delivery of possession in execution of the mortgage decree the mortgagee auction-purchasers came in possession of the holding. On the question of the right of the present plaintiff being affected by the auction-sale of 9-2-1934,

the lower appellate Court was of opinion that as the mortgagee auction purchasers had not given notice to the landlord about their having purchased the holding in question the latter had every right to file the rent suit against the recorded tenant and the decree passed in such a suit had the effect of a rent decree. In this view of the matter, the entire holding had passed and the right of the mortgagee auction-purchasers had come to an end by that sale. On the question of limitation, the lower appellate Court held that if the sale in execution of the decree for rent be taken to have the effect of a sale in execution of a money decree, then the plaintiff's suit would be barred by limitation, as held by a Division Bench of this Court in the case of *Mt. Deorati Kuer* v. *Dasarath Dubey*, 21 P. L. T. 374: (A.I.R. (27) 1940 Pat. 476).

[7] Mr. De on behalf of the appellant submitted that once it has been found that there was a custom of transferability of occupancy holding in the village, the right of the mortgagee auction purchasers was complete on 10-4-1929, and non-mutation of their names in the sherista of the landlord would not affect their title. He stressed that the title of a purchaser of a transferable occupancy holding does not depend on the recognition by the landlord. In support of his contention he referred to an unreported decision of a Division Bench of this Court in *Santilal Mahto* v. *Raj Darbhanga*, Second Appeal 558 of 1947. It was a judgment between the family of the plaintiff and the present landlord defendant. In that decision it was held that in case of occupancy holdings transferable by custom the title of the purchaser cannot be affected by his failure to apply for mutation of his name in the landlord's sherista. In this connection, Mr. De also referred to the case of *Ashok Bhuiyan* v. *Karim Bepari*, 9 C.W.N. 843. In that case it was held :

> "There is no law rendering it obligatory on the tenants to get their names recorded in the landlord's sherista for the purpose of perfecting their title."

He also relied upon the case of *Hargouri Prasad* v. *Raghunath Singh*, 16 Pat. 239: (A.I.R. (24) 1937 Pat. 314), a Division Bench case of this Court. In that case, their Lordships, while discussing the rights of the transferees under the various clauses of the new amended S. 26, Bihar Tenancy Act, held as follows :

> "Now, as I have already stated, both these provisions apply to transfers made after the passing of the Bihar Tenancy (Amendment) Act. These sections have obviously no application where the holdings are transferable by custom and have been transferred before the commencement of the Act. In such cases the title of the transferee will be deemed to be perfect, even though the landlord may not have consented to the transfer."

[8] He also relied upon the decision in the case of *Chamatkarini Dasi* v. *Triguna Nath*, 17 C. W. N. 833 : (19 I. C. 989) in support of his contention that in absence of the mortgagee auction-purchasers the decree passed in the rent suit would have the effect of a money decree. In my opinion, there is much force in the contention of the learned counsel for the appellant.

[9] Mr. Dutt, the learned counsel for the respondents, in reply, submitted that the decree obtained by the landlord against the recorded tenants would have the effect of a rent decree. In this connection he referred to the provisions of the old S. 73, Bengal Tenancy Act, as it stood in the years 1930 and 1934. He contended that both transferor and transferee would be jointly and severally liable for the rent in absence of a notice as contemplated by that section. I do not think that this section can help the contention of the respondents. It appears to deal with voluntary transfers and it provides for the liability of the transferor and the transferee. It does not provide that the decree for rent against the transferor only will have the effect of a rent decree or the sale in execution of such decree will extinguish the right of the transferee as well. Mr. Dutt further relied upon the decision in the case of *Azgar Ali* v. *Asaboddin Kazi*, 9 C. W. N. 134. He specifically relied upon the following passage in the judgment of that case :

> "Now it is settled beyond the possibility of dispute that when a landlord obtains a decree for rent against his registered tenant, the defaulting holding may be sold in execution of such a decree, although it may have previously passed into the hands of persons other than the judgment-debtor and such unrecorded transferees would be bound by the sale."

But the facts of that case are distinguishable. It does not appear that the holding under consideration in that case was a holding transferable by custom. Besides in that case the transfer was of a portion of the holding. The learned Judges in that case were considering the right of the transferee to file an objection under S. 244, Civil P. C. as it then stood, and while considering the provisions of that section, they held that the transferee in that case was bound by the decree. Mr. Dutt further relied on the decision in the case of *Rameshwar Singh* v. *Mt. Rajo Chowdhrain*, 7 P. L. T. 625 : (A.I.R. (13) 1926 Pat. 210), but this case also is of no assistance to the respondents. In that case their Lordships were considering the propriety of the order passed by the Court below in an application filed under O. 21, R. 58, Civil P. C. The application had been filed by a transferee of a portion of the holding whose name had not been recorded in the landlord's sherista. Their

Lordships held that the application was not maintainable. They were not considering the right of a transferee of the entire holding transferable by custom. In my judgment, the auction sale in execution of the decree for rent did not extinguish the title of the mortgagee auction-purchasers, which subsequently vested in the plaintiff alone by virtue of a partition in his family.

[10] But this alone will not help the plaintiff-appellant. The Court of appeal below has found and I think justly, that the present suit is barred by limitation. In the plaint, the plaintiff has mentioned his cause of action to have arisen on 28-10-1934, when delivery of possession was given to the landlord auction-purchaser. The lower appellate Court has held that the present plaintiff was dispossessed from this date by the landlord and the present suit having been instituted on 17-10-1945, was barred by limitation under the provisions of Sch. III, Art. 3, Bihar Tenancy Act, which runs as follows :

Description of suit.	Period of Limitation.	Time from which period begins to run.
"3. To recover possession of land claimed by the plaintiff as a *raiyat* or an *under-raiyat*.	Two years.	The date of dispossession."

[11] Mr. De, the learned counsel for the appellant, relied upon the decision of a Special Bench of this Court in the case of *Gajadhar Rai* v. *Ram Charan Gope*, 9 Pat. 788 : (A.I.R. (17) 1930 Pat. 256 S.B.). He contended that when the dispossession is by the landlord auction-purchaser by taking delivery of possession through the help of Court, it is not a dispossession by the landlord. He referred to the following passage from the judgment :

"It follows, therefore, that the weight of authority is clearly in favour of the view that Art. 3 of Sch. III, Bengal Tenancy Act, does not apply if the dispossession is by the landlord as an auction-purchaser of the holding."

But this decision can be of no assistance to the appellant. In this case the sale was in execution of a rent decree and the entire holding had passed by the sale. The judgment-debtor was the real raiyat, and hence it was held there that he was dispossessed through the instrumentality of the Court. In the present case, the plaintiff was not a party to the execution proceedings and he cannot in law be deemed to have been dispossessed by any process of the Court. While dealing with the case of *Mt. Deorati Kuer* v. *Dasrath Dubey*, 21 P. L. T. 374 : (A. I. R. (27) 1940 Pat. 476), which had been relied upon by the Court below, Mr. De submitted that in that case the dispossession was some time after the delivery of possession and hence the decision that Art. 3, Sch. III, Bihar Tenancy Act applies to a case where the landlord auction-purchaser gets possession in execution of a money decree, is really *obiter*. But apart from this decision, on the case of the plaintiff himself it was a case of dispossession by the landlord. The present plaintiff was not a judgment-debtor and his dispossession on 28-10-1934, was really the dispossession by the landlord not through the process of Court because the Court had no jurisdiction to dispossess the present plaintiff who was not a judgment-debtor.

[12] In my opinion, the judgment of the Court of appeal below was correct when it held that the suit of the plaintiff was barred by limitation.

[13] The result is that the decree passed by the Court of appeal below is upheld. The appeal fails and is hereby dismissed with costs.

[14] **Imam J.** — I agree that the appeal be dismissed, but would like to make a few observations of my own. Two principal questions have arisen in this case which require to be decided. The first one is as to whether the decree which the landlord obtained in Rent Suit No. 1709 of 1930 and the auction sale which followed its execution had the effect of a money decree and a money sale, or they had the effect of a rent decree and a rent sale. In the rent suit, the mortgagees of the holding had not been impleaded as defendants. The question for consideration is whether it was necessary to have impleaded them as defendants in the said rent suit in order that the decree in the said rent suit should have the effect of a rent decree and the auction sale which followed should have the effect of a rent sale. It has been found as a fact that there is a custom in the village, where the holding is situated, to the effect that a transfer of an occupancy holding can take place without the consent of the landlord. The custom pleaded and proved, however, does not show that the landlord must have notice of the transfer in order to make it effective and valid. At the time when the decree for rent was obtained by the landlord, there was no provision under the Bihar Tenancy Act which required that notice of the transfer should be given to the landlord in order to make it an effective and a valid transfer. It follows from this that when a transfer of an occupancy holding takes place in the village, where there is a custom of transferability, it is a valid transfer without notice of it to the landlord and it is effective from the moment it takes place. In the present case, the

mortgagees of the holding, who had obtained a decree and in execution of it had auction-purchased the holding, were the real tenants and not the original tenant Srichand Mahto. The mortgagees not having been impleaded as defendants in the suit for rent brought by the landlord, the said suit for rent was brought against a person who was no longer a tenant of the holding. Between that person and the landlord, at the time the rent suit was decreed, there subsisted no relationship of landlord and tenant. The decree obtained in the said suit, therefore, must have the effect of a money decree and not a rent decree, and the auction sale which took place in execution of the said decree must be regarded as a money sale and not a rent sale.

[15] The second question to be decided is as to whether the general law of limitation or the special law of limitation under the Bihar Tenancy Act is applicable to the facts of the present case. There can be, in my opinion, no doubt on the decision of this Court in *Gajadhar Rai* v. *Ram Charan Gope*, 9 Pat. 788 : (A. I. R. (17) 1930 Pat. 256 S. B.), that if the holding had been sold in execution of the decree for rent obtained by the landlord and not merely the right, title and interest of the judgment-debtor, then the special law of limitation under the Bihar Tenancy Act would not be applicable. I am, however, of the opinion that the holding in the present case was not sold in execution of the decree for rent obtained by the landlord, because the tenant to whom the holding belonged at the time had not been impleaded in the rent suit as a defendant and there was no relationship of landlord and tenant between the judgment-debtor of the rent suit and the decree-holder. The dispossession of the mortgagees, which took place after the decree-holder had auction-purchased, was by the landlord as the relationship of landlord and tenant subsisted at the time between them and the decree-holder. The order of the executing Court was to dispossess the judgment-debtor, who was at the time not in possession, and not the tenant of the landlord. When the mortgagees were dispossessed, it could hardly be said that they were dispossessed at the instance of the Court and not by the landlord. In the circumstances, in my opinion, the provisions of Art. 3, Sch. III, Bihar Tenancy Act, apply and the suit was barred.

D.H. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 9 *[C. N. 3.]*

SINHA AND RAI JJ.

The Sasa Musa Sugar Mills Ltd. — *Petitioner* v. *Sugeni Pandey and another* — *Opposite Party.*

Civil Revn. No. 726 of 1949, D/- 9-8-1950.

(a) Stamp Act (1899), Sch. 1, Art. 5, Exemption (a) — Applicability — Agreement incorporating several items.

The word 'exclusively' in Sch. 1, Art. 5, Exemption (a) governs the entire clause and not only the words "goods or merchandise." [Para 8]

Exemption (a) to Sch. 1, Art. 5 is confined to an agreement which deals solely with the sale of goods or marchandise. It cannot be extended to an agreement incorporating several items in addition to an agreement for sale of goods or merchandise : Minority view of Verma and Mulla JJ. in A.I.R. (28) 1941 All. 243, *Rel. on.* [Para 4]

Anno. Stamp Act, Sch. 1, Art. 5, N. 17.

(b) Stamp Act (1899), S. 6, Sch. 1, Art. 5 (c) and Art. 41 — Agreement for sale of sugar-cane crop and its mortgage—Duty payable.

Where the document read as a whole has dual character of being an agreement for sale of sugar-cane and also a mortgage of the sugar-cane crop until the entire dues advanced by way of seed, manure, sanai and plough are satisfied, the document is chargeable with the higher duty under Sch. 1. Art. 5 (c) and not under Art. 41, by virtue of S. 6 of the Article Exemption (a) to Art. 5 has no application to such a case. [Paras 5 and 8]

Anno. Stamp Act, S. 6, N. 6, 7; Sch. 1, Art. 5, N. 17.

Raj Kishore Prasad and Shivanugrah Narain — *for Petitioner; Government Pleader* — *for Opposite Party.*

Rai J.—This is an application by the plaintiff against the order of Mr. A. Rashid, Small Cause Court Judge of Gopalganj, impounding a document filed on behalf of the plaintiff in the suit and asking the office to assess stamp duty and penalty chargeable under the law.

[2] The plaintiff, the Sasa Musa Sugar Mills Ltd., brought a suit in the Small Cause Court, Gopalganj, for recovery of the price of sugarcane seed which the defendant-opposite party 1 had taken from the plaintiff under an agreement executed by him. This agreement was exhibited in the action as Ex. 1. It is unstamped. It has been incorporated in a printed form and is not attested by any witness. The trial Court came to the conclusion that the document is chargeable with stamp duty under Art. 5, cl. (c) of Sch. 1, Stamp Act. The Court below, therefore, ordered that the document be impounded under S. 33 of the Act.

[3] Mr. Raj Kishore Prasad, learned Advocate for the petitioner, contends that the agreement in question would be covered by the Exemption (a) to Art. 5, Sch. 1, Stamp Act.

Article 5 with the relevant Exemption runs as follows :

Description of Instrument.	Proper stamp duty.
5. AGREEMENT OR MEMORANDUM OF AN AGREEMENT.	
(a) If relating to the sale of a bill of exchange.	Two annas.
(b) if relating to the sale of Government security of share in an incorporated company or other body corporate.	Subject to a maximum of ten rupees, one anna for every Rs. 10,000 or part thereof of the value of the security or share.
(c) if not otherwise provided for.	Eight annas.
Exemptions.	
Agreement or memorandum of agreement— (a) for or relating to the sale of goods or merchandise exclusively, not being a Note on Memorandum chargeable under No. 43 :	

He contends that the agreement in question is in substance an agreement for sale of sugarcane crop and the other matters mentioned in the agreement are merely incidental to the agreement for sale and, as such the document, according to him, is admissible without any stamp. In support of his argument, he cited a Special Bench decision of the Allahabad High Court in the case of *L. H. Sugar Factory Pilibhit* v. *Moti*, I. L. R. (1941) ALL. 471, also reported in A. I. R. (28) 1941 ALL. 243 (F. B.). He relied upon the view taken by the learned Judges who were in majority in the Special Bench. The Special Bench had to deal with a local enactment apart from the provisions of the Stamp Act. In that case also the document under consideration was one executed by an agriculturist for supply of sugar-cane to a sugar factory. Though the terms of the document under consideration in that Special Bench case are not exactly the same as those incorporated in the document in question, yet Mr. Rajkishore Prasad emphasised the view taken by the majority of the Judges on the interpretation of Exemption (a) to Art. 5, Sch. 1, Stamp Act. The Special Bench case of *L. H. Sugar Factory Pilibhit* v. *Moti*, I. L. R. (1941) ALL. 471: (A. I. R. (28) 1941 ALL. 243 F. B.), aforesaid refers to some other previous decision of the Allahabad High Court as well as to decisions of the Calcutta, Madras and Bombay High Courts. I have carefully gone through the judgment of the Special Bench of the Allahabad High Court quoted above. But I regret to say that I do not agree with the opinion of the Judges who were in majority so far as the interpretation of Exemption (a) to Art. 5, Sch. 1, Stamp Act, is concerned. I respectfully agree with the opinion of the Judges who were in minority specially that of Verma J. regarding the meaning of the word "exclusively" occurring in the said Exemption (a).

[4] On this point the judgment of Verma J. runs as follows:

"Mr. Pathak contends that the word "exclusively" qualifies "goods" or "merchandise". He, therefore, argues that the agreement in the present case being to sell certain goods alone (namely, the sugar-cane crop), and to sell nothing else, the exemption is applicable. The argument in my opinion is not well founded. The word "exclusively" is an adverb and cannot qualify a noun. In my judgment what it qualifies here is the preposition "for" and the participle "relating", or the phrase "for, or relating to, the sale of", introduced by the preposition and the participle, all of which it can qualify under the rules of grammar."

In my judgment, this Exemption is confined to an agreement which deals solely with the sale of goods or merchandise. It cannot be extended to an agreement incorporating several items in addition to an agreement for sale of goods or merchandise. The heading of the document in question shows that it is satta (agreement) in respect of seed, manure, sanai and plough. The relevant portion of the document in question runs as follows:

"The Sasa Musa Sugar Mills Limited, Sasa, Musa, Saran.

Satta in respect of seed, manure, sanai and plough, circle No. 5, Season 1945-46, Satta No. 121.

Whereas, I, executant No. 1, have to cultivate Sugarcane No. 313 in my kasht land and have to sow good Sugar-cane seeds in order to have good out-turn of produce. When the sugar-cane crop will be ready, I shall have to sell it to the said Mills. Therefore, we, the executants, of our own free will and accord, in a sound state of our body and mind, have taken 14 maunds of manure at the rate of -/15/- per maund amounting to Rs. 13-2 as advance for 1 Katha of land bearing survey No. 252 and as per boundaries specified below in village Rampore Babu which we shall cultivate. Through, and on the security of, executant No. 2, I received manure in one lump sum as peshgi seed and manure. I do hereby declare that when the said Company within the period from 23-2-1946 to 31-5-1947 will demand it from me, the executant No. 1, without any objection I shall carry it on my cart, and take it to the garh or station of Sasa Musa Sugar Mills Limited, Sasa, Musa, Saran, in accordance with the order of the proprietor of the Mill and get it weighed. According to the rate fixed by Government he shall take the price of the sugar-cane from me, executant No. 1, after setting off the price of the seeds and manure he shall take the balance of the price.

If the sugar-cane be dried up, rotten and very ripe or unripe, i. e., if it be damaged in any way, the said mill shall have full right either to take it or not to take it.

If on any account the mill be closed, the said mill neither is nor shall be liable to pay damage to any extent for the loss of the sugarcane. So long as the entire (produce) is not weighed, the field and the entire produce of the field shall remain mortgaged and hypothecated to the said Company.

I shall have no right to dispose of the said produce to any other person in any way. If any action of me or my family or my heirs be contrary to this, the

Company shall be competent to take such civil and criminal proceedings as the said Company may deem proper against me or my family.

I declare that I have executed this satta as a karta of the joint family on behalf of all the members and that neither I nor any member of my family has executed any satta in favour of any other Company, agent and thikadar.

The Company shall realize without objection from the person and movable and immovable properties of us, the executants, by instituting a suit in the Court without damage.

We have, therefore, executed this agreement satta in respect of sugar-cane, seeds, manure, sanai and plough so that it may be of use when required."

[5] So, from the document itself it is clear that it cannot be said to be an agreement or memorandum of agreement for or relating to the sale of goods or merchandise exclusively. In my judgment, therefore, the document is clearly liable to stamp duty under Art. 5, Cl. (c) of Sch. 1, Stamp Act. Though Art. 41, Sch. 1, Stamp Act, provides for the stamp duty in respect of mortgage of a crop, it cannot cover all the agreements as contemplated by the document in question. Article 41, Sch. 1, Stamp Act, runs as follows :

Description of Instrument.	Proper Stamp duty.
41. MORTGAGE OF A CROP, including any instrument evidencing an agreement to secure the repayment of a loan made upon any mortgage of a crop, whether the crop is or is not in existence at the time of the mortgage—	
(a) When the loan is repayable not more than three months from the date of the instrument—	
for every sum secured not exceeding Rs. 200.	one anna.
and for every Rs. 200 or part thereof secured in excess of Rs. 200 ;	one anna.
(b) When the loan is repayable more than three months, but not more than eighteen months, from the date of the instrument—	
for every sum secured not exceeding Rs. 100.	Two annas.
and for every Rs. 100 or part thereof secured in excess of Rs. 100.	Two annas".

Article 41, therefore, cannot be a bar to the applicability of Art. 5, cl. (c) of the Act. The Government Pleader representing the State of Bihar supported the order of the Court below on the ground that the document should be assessed to duty in accordance with the provisions of Art. 5, cl. (c), Sch. I, Stamp Act. He further submitted that, in accordance with the provisions of S. 6, Stamp Act, even though a portion of the document is covered by the provisions of Art. 41, Sch. I, Stamp Act, a higher duty as provided for by Art. 5, cl. (c) would be leviable in the present case. Section 6, Stamp Act, runs as follows :

"Instruments coming within several descriptions in Schedule I : Subject to the provisions of the last preceding section, an instrument so framed as to come within two or more of the descriptions in Schedule I, shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties :

Provided that nothing in this Act contained shall render chargeable with duty exceeding one rupee a counterpart of duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid."

In my view, there is much force in the contention of the learned Government Pleader.

[6] The result is that the order passed by the Court below is upheld and the present rule is discharged. Under the circumstances of the present case there would be no order as to costs.

[7] **Sinha J.**—I agree.

[8] The universally accepted rule of construction of a document, with reference to its character as to under what part of the charging section or rule or article of the taxing statute it comes under, is that the document should be read as a whole. Under S. 6, Stamp Act, an instrument coming within two or more of the descriptions in Sch. I of the Act is chargeable only with the highest duty for one of such descriptions. Read as a whole, there is doubt that the document in question has the dual character of being an agreement for sale of sugar-cane and a mortgage of the sugar-cane produce until the entire dues advanced under the document are satisfied. That being so, it is chargeable with the higher duty under Art. 5 (c), Stamp Act. But it was argued on behalf of the petitioner that this document is one relating to a "document . . . for or relating to the sale of goods or merchandise exclusively". The question whether the word "exclusively" governs only the words "goods or merchandise", as contended for on behalf of the petitioner, or the entire clause beginning with the word "for" has been very exhaustively dealt with by a Special Bench of the Allahabad High Court in the case of *L. H. Sugar Factories, Pilibhit* v *Moti*, I. L. R. (1941) ALL. 471 : (A. I. R. (28) 1941 ALL. 243 F. B.). For the reasons given by Verma and Mulla JJ., who were in a minority, I would hold that the word "exclusively" governs the entire clause, and not only the words "goods or merchandise", though the majority of their Lordships constituting the Special Bench in that case were of the opposite view. The view that we have taken of the construction of the exemption in cl. (a) to cl. (c) Art. 5, Stamp Act, is in accord with the opinion of the Full Bench of the Allahabad High Court in a reference

under the Stamp Act *In re Board of Revenue*, 58 ALL. 1083 : (A. I. R. (23) 1936 ALL. 481 F. B.), though the document before their Lordships in that case was not entirely of the same character. An earlier decision of a Full Bench of five Judges of the Allahabad High Court in *In the matter of Gajraj Singh*, 9 ALL. 585 : (1887 A. W. N. 190) also supports the principle underlying our decision. It must, therefore, be held that the decision of the Court below on the question of stamp duty leviable on the document in question is correct.

[9] The rule is accordingly discharged, but in the circumstances, there will be no order as to costs.

K.S. *Rule discharged.*

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*A. I. R. (38) 1951 Patna 12 [C. N. 4.]

SPECIAL BENCH

SHEARER, RAMASWAMI AND SARJOO PRASAD JJ.

In the matter of the Bharati Press; Sm. Shaila Bala Devi — Petitioner v. *The Chief Secretary to the Government of Bihar — Opposite Party.*

Misc. Judicial Case No. 220 of 1949, D/- 13-10-1950.

(a) Press (Emergency Powers) Act (1931), S. 28 — Service of notice by affixing a copy on press — Copy of offending pamphlet mentioned in schedule to notice not attached to copy of notice — Omission does not affect validity of notice itself — Irregularity, if any, does not vitiate legality of order demanding security when there is no prejudice from such omission. [Para 5]

(b) Press (Emergency Powers) Act (1931), Ss. 4 (1) and 23 — Notice specifying that the offending pamphlet was of the nature described in cl. (a) to S. 4 (1) — Objection in notice referring to entire pamphlet and not to any particular words or passages used — Court has power under S. 23 to enquire whether the offending pamphlet comes under any other clause of S. 4 (1) even though it is not mentioned in the notice — Defect in frame of notice of such character is of no consequence. [Para 7]

Anno. Press (Em. Powers) Act, S. 23 N. 1.

(c) Press (Emergency Powers) Act (1931), S. 4 (1) (a) and (d) — Applicability.

A pamphlet entitled 'Sangram' written in Bengali contained a clear invocation to the readers to join a total and deadly struggle to bring about a revolution by violence resulting in complete annihilation of those whom the writer considered as 'oppressors' or who were directors of wrong and injustice or who took part in parochial national politics or who brought into disgrace the mother tongue. There were no words in the pamphlet which could be said to refer to the State Government. The persons against whom the attack was made were not clearly defined and could not be said to be 'a definite or ascertained class' :

Held, on a consideration of the entire pamphlet that it fell within the mischief of S. 4 (1) (a) and not S. 4 (1) (d). [Paras 7, 8, 24]

Anno. Press (Em. Powers) Act, S. 4. N. 2 and 5.

(d) Press (Emergency Powers) Act (1931), S. 4 (1) (a) and (b) — Validity of — Constitution of India, Arts. 13 and 19.

(Per *Sarjoo Prasad and Ramaswami JJ.*; *Shearer J. dissenting*) : Clauses (a) and (b), Press Act, are worded in general terms and apply both to aggravated forms of offences like political assasinations as also to ordinary murders or congizable offences involving violence. They are not directed *mainly* and *solely* towards crimes of violence and political assasinations which undermine the security of, or tend to overthrow, the State. They are inconsistent with the fundamental right given under Art. 19 (1) (a) of the Constitution and as such void by virtue of Art. 13 (1) and are not saved as permissible legislation under Art. 19 (2) of the Constitution as the language of these clauses is not severable : A. I. R. (37) 1950 S. C. 124 and A.I.R. (37) 1950 S.C. 129, *Rel. on.* [Paras 11, 12, 30, 32, 35]

The provisions of S. 4 (1) (a) and (b) cannot be justified under Art. 19 (2) of the Constitution on the ground that they relate to matters which offend 'against decency and morality' as these expressions have been given a narrower connotation in the Penal Code and may be deemed to have been used in the same sense in Art. 19 (2) of the Constitution as well. [Para 12a]

Consequently, an order demanding security under S. 3 (3), Press Act, for violation of S. 4 (1) (a) of that Act is void and must be quashed. [Paras 12, 35]

Per *Shearer J.* — The provisions of S. 4 (1) (a) and (b) which enable security to be demanded from the keeper of a printing press, are not inconsistent with the fundamental right of freedom of speech and expression conferred by Art. 19 (1) (a) of the Constitution. The taking of security is not something alien and repugnant to the concept of the freedom of the press. The word 'expression' in Art. 19 (1) (a) does not give an implied right to the writers and authors to obtain the services of printers to enable them to reach the widest possible public. Even if it be assumed that these clauses impose a restriction on the fundamental right possessed by the printer they are part of the law relating to seditious libel and therefore are saved by Art. 19 (2) of the Constitution. [Paras 17, 18, and 19]

Anno. Press (Em. Powers) Act, S. 4 N. 2 and 3.

B. C. Ghosh — for Petitioner. Advocate-General, Government Advocate and S. C. Chakravarty — for Opposite Party.

Sarjoo Prasad J. — In this case the petitioner, who is the keeper of the Bharati Press, Purulia, has moved under S. 23, Press (Emergency Powers) Act (XXIII [23] of 1931) (hereinafter called the Press Act) for setting aside an order calling upon him to deposit security under sub-s. (3) of S. 3 of the said Act.

[2] On 9-9-1949, a notice was served by affixing a copy thereof on the premises of the said Bharati Press. The notice is dated Ranchi 8-9-1949, and is addressed to the keeper of the Bharati Press, Purulia. It has been signed by one B. K. Dutt, described as Under Secretary to Government and "by order of the Governor of Bihar" requiring the said keeper to deposit with the Deputy Commissioner, Manbhum, on or before 19-9-1949, security to the amount of Rs. 2,000 in money or in Government securities. This demand for security, as appears from the

notice, has been made under sub-s. (3) of S. 3, Press Act, and the notice further recites that the demand for security has been made inasmuch as

"it appears to the Governor of Bihar that the Bharati Press, Purulia, is used for the purpose of printing and publishing matters specified in the schedule annexed hereto which are of the nature described in cl. (a) of sub-s. (1) of S. 4, Press (Emergency Powers) Act, 1931, (XXIII [23] of 1931)."

In the schedule to the notice is mentioned "The Bengalee leaflet entitled 'Sangram'."

[3] The petitioner in his application challenges the validity of the demand of security mainly on two grounds : Firstly that the said notice demanding security from the petitioner is illegal because it does not state the "words, signs or visible representations" of the nature described in sub-s. (1) of S. 4, Press Act; and secondly that the Bengali leaflet entitled 'Sangram' does not contain any "words, signs or visible representations" of the nature described in sub-s. (1) of S. 4, Press Act. There was a further ground taken in the petition itself which was to the effect that the press of the petitioner did not print or publish any leaflet entitled 'Sangram' that is of the nature described in cl. (a) of sub-s. (1) of S. 4, Press Act. But it has been conceded in argument before the Court that the leaflet in question had been printed and published by the press of the petitioner. Therefore, so far as the factum of printing and publication of the offending document is concerned, there seems to be no dispute. The arguments have thus been confined to the two points stated above as also to a further point which was subsequently raised by the learned counsel for the petitioner for the first time in arguments before the Court. The point is one of constitutional importance. It is to the effect that S. 4 (1), Press Act, is inconsistent with Art. 19 (1) (a) of the Constitution of India, and, as such, is void; and, therefore, the State Government or the Provincial Government had no jurisdiction to take any action against the petitioner on account of any violation of the said provision of the Press Act.

[4] The learned Government Advocate on behalf of the State objected to the last question being raised at a late stage of the hearing. The point being one of constitutional importance, the learned Government Advocate claimed that he should have been given sufficient notice of the matter and the petitioner, therefore, should not be allowed to raise this question. It is true that this constitutional point has been raised at a very late stage of the proceedings and ordinarily the Court would have been disinclined to entertain it, but as the question is one of importance and affects the very jurisdiction of the State Government to take action under the specified provisions of the Press Act, the petitioner could not be shut out from raising the question even though at a late stage of the proceedings.

[5] The records disclose that a copy of the offending leaflet 'Sangram' was not attached to the notice which was served on the petitioner; nor does it appear that the notice in question specified any "words, signs or visible representations" contained in the document which in the opinion of the State Government constituted an incitement to or encouraged, or tended to incite or encourage the commission of any offence of murder or any cognizable offence involving violence as contemplated by S. 4 (1) (a), Press Act. On behalf of the petitioner it has been contended that it was very material that a copy of the offending pamphlet should have formed a part of the notice, and the objectionable passages contained in the pamphlet should have been specified in the body of the notice. It is argued that the failure to specify those passages affected the validity of the notice and the legality of the demand for security. Now, under S. 28, Press Act, a notice which is directed to keeper of a press could be served by affixing a copy thereof to some conspicuous part of the place where the press is situate, provided the service could not, in spite of due diligence, be effected in the manner provided for the service of summonses under the Code of Criminal Procedure. I have already stated that the service in this case was effected by affixing a copy of the notice on the premises of the Bharati Press. It would have been certainly desirable to attach to the notice a copy of the pamphlet mentioned in the schedule thereof; but it does not, in my opinion, affect the validity of the notice itself. At least it amounts to some irregularity. On behalf of the State an affidavit has been filed which has been sworn to by one Rajeshwar Prasad, an assistant in the office of the Political Department, Special Section, Government of Bihar. To the affidavit has been attached a copy of the pamphlet 'Sangram,' which has been marked EX. A, with an English translation thereof. Since it has not been disputed that this document was actually printed by the press in question and that this was the document mentioned in the schedule to the notice, there does not appear to have been any prejudice to the petitioner, and, therefore, the irregularity in not attaching a copy of the pamphlet mentioned in the schedule at the time of the service of notice did not vitiate the legality of the order demanding security from the petitioner. The other question, namely, that the offending passages in the document were

not specified in the notice is also not very material in this case. Where the objection is not only to any particular passage or passages in the document but to the document as a whole, then no passage or passages can possibly be specified as the objection does not relate to any particular passage but to the whole tenor of the document which has the undesirable effect as contemplated by S. 4 (1) (a), Press Act.

[6] The question then arises whether the document in question is of such a character as is described in S. 4 (1) (a) of the Act. If we are not satisfied that it is of such a nature, then it is open to this Court under S. 25, Press Act, to set aside the order demanding security from the petitioner. As the English translation of the document which formed a part of the affidavit filed on behalf of Government was objected to as not being an accurate translation of the original so as to give a correct impression of the tenor and contents of the document, we have had the document translated by a translator of this Court. I have read the document both in original as also from a Romanised copy thereof and I have also read the aforesaid translations. The document is written in high-flown Bengali language and contains a good deal of demagogic claptrap with some pretence to poetic flourish. The first few paragraphs indicate that the writer of the document finds wrong and tyranny pervading all over, from the past to the future. It says that history records the names of those who struggled against this tyranny in the past, and so shall history record the names of those who struggle against it in the future. The writer says he is starving and begging for a fight and his revolt is against oppression, fascism and wrongful harassment. He, therefore, calls upon everyone to join the struggle and to build a new world order by bringing about a complete revolution. So far there could not be anything objectionable in the pamphlet because revolution can be both by constitutional or non-violent methods and it can also be by a bloody and violent struggle resulting in death and carnage on a mass scale. As the subsequent paras of the document indicate, the revolution contemplated by the writer is not a non-violent or constitutional revolution but a revolution of the last category, namely, a revolution brought about by bloodshed and destruction. He wants revolution and wants destruction; through struggle and revolution the world is to be built anew after the oppressors have perished. He says that this struggle has to be brought about by courting death and suffering and the struggle is directed personally against those who are directors of the wrong and the injustice. The writer thinks that there is no protection against the oppressor except by standing up to fight in a body and destroy the oppressor. In one of the paragraphs the writer says :

"Ore nirboth atyachari-chokh rangiye gala mota kore jujurbhoy dekhata chas-dekhas. Bhoy kari na. . . . . tao sankirna rastra niti birudhe amar pratibad" which freely translated means : "Oh thou foolish oppressor, you want to cause abject terror in me with your red eyes and full throated voice—do that, I am not afraid. . . . My protest is against parochial national politics."

In another passage the writer says :

"Mrityu amar gopal priya; bish amar paniy, dabanal shikha snigdha batas, Shata putrahin jananir krandan amar Bansharir ekti sur, priyahara priyar (bindhabar) krandan amar ganer ekti koli" which means "death is my secret love; poison is my drink; the flames of fire are my sweet breeze; the wailing of a hundred bereaved childless mothers is just a tune in my flute; the weeping of widows at their widowhood is just a rhythm of my song."

In other words, the passage suggests that even if hundreds of persons die in the struggle, it should not make any difference at all and in fact the dire consequences should be welcomed without caring for the wails and tears of bereaved mothers and widows. In another passage the writer further says :

"Ami Amashan; ami amashan bashini mashan charini, rakta lolup Kali. Mahamari durbhikhra amar ullas . . . trisnarta ami chai rakta . . . ami chai biplab . . . ami chai sangram. Rakte ami chai satya; biplabe ami chai nyay, sangrame sangrame ami chai biswas, chhinr chhinr re anyay shikal. Bhang bhangre—atyachair garba shir."

This passage may be rendered into English as follows :

"I am the cremation ground, I am the blood thirsty goddess Kali who lives and moves about in the cremation ground. Plague or Famine is my great joy. . . . I am thirsty, I want blood, I want revolution, I want faith in the struggle. Tear, tear the chain of wrongs. Break, break thou the proud head of the oppressor;"

and further on the writer says that he personifies total destruction and that he is the venomous fangs of the snake. These passages, to my mind, indicate beyond any shadow of doubt that the revolution contemplated by the writer is a revolution built on blood and carnage by the destruction of those who are in the opposite camp; in other words, persons who are regarded as oppressors. The writer wants a total destruction of those oppressors, and he appears to enjoin upon the readers of the pamphlet that they should break and break the proud head of the oppressor. The writer desires that his cries should be heard by people far and near, that his call should be hearkened far far away across the hills, the jungles, across the rivers and rivulets and all those who hear should come forward to join the ranks in destroying the oppressor. He says that he is the

messenger of death. He says that his revolutionary song signals at the door of each of the listners and signals to them to come out if they have life, if they have health, if they have courage to come and dash to pieces those who commit oppression on the *mother*; and he says with his blood and with the blood of those followers let the revolution grow in volume. About this symbolic *mother*, in a later passage, the writer observes that if mother-tongue be equal to mother, then the said language is the most revered goddess and disgrace should not be allowed to spread in her name. The pamphlet then winds up with an invocation to the readers which translated reads as follows :

"If you are true, if you are the gift of God, if you are not a bastard, then come forward with a fearless heart to struggle against the oppressor's improper conduct, oppression and injustice. We should not tolerate wrongful oppression. Oh, thou the people, with the burning pain of thine heart burn the heart of oppressive, highhanded oppressor. Let all wrongs, all highhandedness, all oppressions all tyrannies be burnt in the flame."

These passages I have only quoted to show that the document as a whole is a clear invocation to the readers to join a total and a deadly struggle to bring about a revolution by violence resulting in complete annihilation of those whom the writer considers as oppressors. There is a clear implication in the pamphlet that in the opinion of the writer the present order of society is totally oppressive and must be destroyed at all costs in which people should combine to lend a helping hand and fight to the finish. The "oppressor", it is true, is not very clearly defined in the body of the pamphlet. At one place the writer suggests that his protest is against parochial national politics. At another place the writer suggests to his readers to take up courage and dash to pieces those who commit oppression on the mother. At yet another place the writer suggests that the mother-tongue is equal to the mother, and that the said language is his most revered goddess: therefore no disgrace should be permitted to spread in her name. These expressions are undoubtedly vague. They may have reference to some language controversy which perhaps might have been going on at the time of the publication in Purulia; and the publication of the pamphlet under those circumstances must have clearly conveyed to the readers what the intention of the writer was and against whom the pamphlet was directed in particular; but the innuendoes contained in the publication have not been explained on behalf of the State. In the absence of any such material we cannot assume to whom the writer actually refers in those passages as being the perpetrators of the tyranny or the oppression against which he is raving.

[7] In the affidavit filed before us the State Government only say in para. 4 that the matter contained in "Sangram" may have the effect of inciting or encouraging violence or bringing into hatred or contempt the Government of Bihar established by law or of exciting disaffection towards the said Government. The affidavit in other words, suggests that the offending pamphlet falls under S. 4 (1) (d), Press Act. This was also the line adopted in argument by the learned Government-Advocate appearing on behalf of the State. There are, however, two serious difficulties in accepting this argument advanced on behalf of Government. The first difficulty is that in the notice served on the petitioner it is alleged that the matters specified in the schedule to the notice were of the nature described in cl. (a) to sub-s. (1) of S. 4, Press Act. There is no mention there that the published matter was of the nature described in cl. (d) to sub-s. (1) of the said section. It has been, therefore, argued on behalf of the petitioner that it is not open to Government now to alter their position and to urge that the offending pamphlet comes under S. 4 (1) (d) of the Act. In support of the argument reliance is placed on the observations of Divatia J. in the Special Bench case of *Vishnu Gangadhar* v. *Government of Bombay*, A.I.R, (32) 1945 Bom. 207 : (46 Cr. L. J. 643 S. B.) where it was contended in argument by the learned Advocate-General appearing on behalf of the Government of Bombay that the Court had to see whether the passages in question fell under any of the cls. (a) to (i) of sub-s. (1) of S. 4, and not merely cl. (a) or (b) of the said section; because the object of the notice given to the petitioner mentioned in general words of the nature described in sub-s. (1) of S. 4. In the case in question it was admitted that in the statement of objected words attached to the notice it had been expressly mentioned that the said statement fell under cl. (a) or (b) of S. 4 (1), Press Act; it was nonetheless contended by the learned Advocate-General that the Court was not bound by any such limitation mentioned in the notice, and the Court was entitled to see whether the statements fell within any one of the clauses mentioned in S. 4 (1) of the Act. This argument did not find favour with their Lordships who observed as follows :

"The statement is a part of the notice itself under S. 3 (3) which requires a 'notice in writing to the keeper of the press stating or describing such words, etc.' The statement is, therefore, a statutory provision and he is in the nature of a charge which gives particular about the specific clauses of the sub-section that are alleged to have been infringed. The petitioner has

come to this Court to set aside an order which purports to be based on that charge. We do not think, therefore, that Government can now go behind or enlarge those particulars which are an integral part of the notice. The material clauses in the notice would be (a) and/or (b), but as the book falls under Expln. (1) to sub-s. (1), the only question before us is whether the book has a tendency to incite to or encourage the commission of any offence involving murder or violence as stated in cl. (a)."

These observations undoubtedly support the petitioner. Here also the notice specifies that the published matter mentioned in the schedule to the notice was of the nature described in cl. (a) to sub-s. (1) of s. 4 and not in cl. (d) of the said sub-section. There is, however, one difference that in the Bombay case there was a statement of objected words attached to the notice and in respect of those particular words it had been mentioned that they came either under cl. (a) or under cl. (b) of S. 4 (1), Press Act. Here the objection in the notice refers to the entire pamphlet and not to any particular words or phrases used therein. Under S. 23 of the Act the Court has to decide whether the document complained of was of the nature described in sub-s. (1) of S. 4. In construing the document or the offending passages if the Court comes to the conclusion that it falls under any particular clause of sub-s. (1) of S. 4, then the Court, in my opinion, can hold that the order made under sub-s. (3) of S. 3 was a valid order. The mere defect in the frame of a charge so long as it does not prejudice the accused has been held to be curable under the Code of Criminal Procedure; and similarly, in my opinion, the defect in the frame of a notice of this character cannot have any more serious consequences. It is true that if the objection in the notice is confined only to particular passages in the document, then it would not be open to Government to enlarge the discussion by reference to many other offending passages and to invite the Court to come to a decision that those other passages fell within one or the other of the various clauses of S. 4 (1) of the Act. That would be asking the Court to enter into a roving enquiry as to passages or words in the document to which exception had not been taken originally in the notice itself, and such a procedure may well be deprecated as their Lordships appear to have done in the Bombay case, the procedure being evidently prejudicial to the accused. In the present case it does not appear to me to be necessary to go to the length of holding that merely because a particular clause of sub-s. (1) of S. 4 is specified in the notice, therefore, the Court must be confined merely to see whether the offending publication did come within that clause, even if on a perusal of the document as a whole the interpretation of the Court is that it comes under some other clause of S. 4 (1) of the Act. Here the Government are not asking the Court to broaden the enquiry and thereby prejudice the case of the petitioner. The objection in the present case relates to the entire pamphlet. I think, however, that the more serious difficulty is that on a construction of the document itself I cannot hold that it comes under cl. (1) (d) of S. 4 of the Act. I propose to reproduce here the two relevant clauses of sub-s. (1) of S. 4 of the Act, namely, cls. (a) and (d). They are as follows :

"4 (1) Whenever it appears to the Provincial Government that any printing-press in respect of which any security has been ordered to be deposited under S. 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which —

(a) incite to or encourage, or tend to incite to or to encourage, the commission of any offence of murder or any cognizable offence involving violence, or

* * * *

(d) to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India, or to excite disaffection towards his Majesty or the said Government."

Now, there are no words in the document which can be said to bring into hatred or contempt the Government established by law or the administration of justice in the province or to excite disaffection towards the said Government. The words "oppressor" or the words which refer to those who encourage parochial national politics or those who bring disgrace to the mother-tongue cannot be regarded as having any reference to the Government established by law and nothing has been brought before us on behalf of Government to explain that in the circumstances or the conditions prevailing in the district of Purulia or amongst persons for whom the circulation was intended the words or phrases conveyed a veiled reference to Government established by law and intended thereby to create or excite disaffection against that Government. That may or may not be so. It is, therefore, not possible to hold that the publication was necessarily meant to bring into hatred or contempt or excite disaffection towards the State Government or the authorities of the State Government. The question then arises whether they refer to any class or section of the people and tend to bring into hatred or contempt such class or section of people. It appears to be well established that the "class or section" of people referred to in the clause must be a determinate and an ascertainable class. There is no such thing here. The references are completely vague at least to the mind of a person who has nothing else before him except the offending pamphlet. In this

context I may refer to a decision of the Special Bench of this Court in *Badri Narain Singh* v. *Chief Secretary to Government of Bihar*, A. I. R. (28) 1941 Pat. 132 : 22 P. L. T. 260 : (42 Cr. L. J. 548 S. B.) where their Lordships relying upon a decision in *Maniben Liladhar* v. *Emperor*, 57 Bom. 253 : (A. I. R. (20) 1933 Bom. 65: 34 Cr. L. J. 231) held that cl. (d) contemplates "definite or ascertainable class." I cannot, therefore, hold on a consideration of the entire document that it comes under cl. (d) of S. 4 (1) of the Act.

[8] I shall now turn to see whether it does fall under cl. (a) of S. 4 (1). I have already analysed in detail the various paragraphs of the pamphlet and the effect which it produces upon the mind of the reader. The general effect of the document unmistakably is to produce an impression that it excites and encourages a bloody revolution in which the revolutionaries are to fight to the bitter and fight to death even if it resulted in the loss of hundreds of sons and husbands. To put it in the language of Harries C. J., in the case of *Badri Narain* v. *Chief Secretary, Bihar Government*, (A.I.R. (28) 1941 Pat. 132 : 22 P. L. T. 260 : 42 Cr. L. J. 548 S.B.) aforesaid :

"In my judgment, words tending to, incite to or to encourage bloody revolution and the destruction of the present social order by bloodshed and force clearly come within S. 4 (1) (a) of the Act. Bloody revolution and forcible and violent destruction of the present social order involve all kinds of cognizable offences involving violence and would in all probability involve murder. In my view it is unnecessary to show that the words tend to incite to, or to encourage the commission of a particular offence or offences. It is sufficient if they tend to incite to or to encourage the commission of cognizable offences of violence in general."

I respectfully agree with these observations of his Lordship (though not without some irony to myself). It is true that the pamphlet in the present case does not encourage any particular kind of violence or murder but in general it talks of violence and destruction and of bloodshed in order to bring about a revolution in the country after destruction of the oppressors, under whose tyranny the writer of the pamphlet appears to be smarting and groaning. For the petitioner it has been very strenuously urged by Mr. Ghosh that the language of the pamphlet should not be too literally construed, and that the expressions used are merely figures of speech in order to make the appeal of the writer effective. The learned counsel urges that even if they refer to bloodshed and violence the reference is only to the persons engaged in the struggle who have to die struggling and court death and destruction. It does not talk of violence or destruction of anybody else, and, therefore, it cannot be said that it encourages the commission of any offence of murder or cognizable offence involving violence. In my opinion, this cannot be the correct reading of the pamphlet in question. Expressions like the following which have been so often used in the document, namely, "Let all oppressors perish;" "death is my darling;" "I am blood-thirsty goddess Kali who lives and moves in the cremation ground;" "I am thirsty, I want blood, I want revolution;—break, break the proud head of the oppressor;" "I am total destruction;" "I am the messenger of death:" "if you have got courage come and dash to pieces those who commit oppression on the mother" unquestionably connote that the writer of the pamphlet does not merely want that he and his followers should alone spill their own blood but that they should also spill the blood of others. Total destruction of those against whom they are struggling, namely, persons who in the opinion of the writer are the oppressors or who are directors of wrong and injustice or who take part in parochial national politics or who bring into disgrace the mother-tongue is the chief object of the publication. I, therefore, cannot but hold that the pamphlet to which exception has been taken by Government does fall under S. 4 (1) (a) of the Act, and I cannot agree with the contention of Mr. Ghosh that it contains mere empty slogans carrying no particular meaning except some amount of figurative expression or language borrowed at random from various authors with a touch of poetic flourish about it. The central meaning of the writer of the document is absolutely clear. The central theme which runs through the whole gamut of the offending pamphlet is that the author is anxious to bring about a bloody revolution and challenge completely the present order of things by causing a total annihilation of the persons and the policies of those who, according to him, are in the opposite camp. Such a pamphlet, therefore, does come within the mischief of the clause referred to in the notice and the demand for security would be justified under the Act unless we were to hold that the said provision of the Act was repugnant to the Constitution of India and infringed the fundamental right of freedom of speech and expression as provided in Art. 19 (1) (a), Constitution Act.

[9] I shall, therefore, now address myself to an examination of this constitutional problem. Of course it goes without saying that a demand of security from the press for publishing a certain material is a restriction put upon the freedom of speech and expression. The writer has endeavoured to express himself through the

press and under the Constitution of India, he should be free to do so except within the bounds of limitation put by the Constitution Act itself. The only limitation to this freedom of speech and expression is provided by Art. 19 (2), Constitution Act. Article 19 (2) runs as follows:

"Nothing in sub-cl. (a) of Cl. (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State."

That the Press Act is an existing law must also be conceded. Now, in so far as the provisions of the Press Act relate to matters specified in cl. (2) of Art. 19, its operation cannot be affected by cl. (1) (a) of that Article. These, therefore, are the only exceptions and it will have to be examined whether S. 4 (1) (a), Press Act, falls under any of these exceptions mentioned in cl. (2) of Art. 19 of the Constitution of India.

[10] The point undoubtedly is one of far-reaching importance, and as the learned Government Advocate stated that he had not had sufficient time to meet the point, it having been raised for the first time in arguments, we heard the parties again in the matter at a later stage. On behalf of the State it is contended that S. 4 (1) (a), Press Act, relates to matter which "undermines the security of or tends to overthrow the State." As such, it is stated, it is saved under Art. 19 (2). It is contended that this clause must be read in conjunction with the various other clauses contained in the section, and in the context it must be assumed that the clause in question refers to political assassination or violence subversive of the security of the State. It must be observed in this connection that several of the clauses mentioned in S. 4 (1) refer to matters which unmistakably relate to the security of the State e. g. cl. (c) refers to seduction of any officer of the army, the navy or the air force or any police officer from his allegiance to the State; cl. (f) deals with interference with the administration of the law or with the maintenance of law and order; while cl. (g) deals with attempts to induce a public servant to forbear or delay the exercise of his public functions; and cl. (i) with attempts to prejudice recruiting to the armed forces. On the strength of these clauses it may be urged with great plausibility that the intention of the law was to prevent bringing about a general insurrection in the land by persons or parties who wanted to effect a *coup-de-tate* and usurp by force the reigns of the Government. Indeed the statement of objects and reasons, at the time when the Act was put on the legislative anvil, leads to the same conclusion. It says :

"it was the policy of many newspapers consistently... to foster conditions of disorder and that a section of the press was giving direct or indirect incitement to violent and revolutionary crime."

It must, however, be noted that cls. (c) to (i) were introduced at a later stage in the Act by Act XXIII [23] of 1932. In that view it seems difficult to accept the contention that all the various clauses of sub-s. (1) of S. 4 must be read together so as to form a component and an integral part of the legislation intended to prevent actions which may have the effect of undermining the security of the State or that of overthrowing it. Now let us examine whether cls. (a) and (b) of S. 4 (1) of the Act taken conjointly lead to the inference that they were directed *mainly and solely* towards crimes of violence and political assassination subversive of the State. Clause (a) deals with a publication that incites or encourages the commission of any offence of murder or any cognizable offence involving violence, whereas cl. (b) refers to direct or indirect approval or admiration of any such offence, or of any person, real or fictitious who has committed or is alleged to have committed any such offence. It may be argued that the two clauses must refer to political assassinations or murders or subversive crimes of that character, because otherwise it was not possible to expect that any person would approve or admire the commission of any such offence by any person real or fictitious. The plain grammatical meaning of the two clauses does not necessarily lead to any such inference, and where the language of the Statute is perfectly clear and unambiguous reference to statement of objects and reasons is irrelevant and unwarranted. Cases may be conceived where the publication may relate to murders or offences involving acts of violence without any political motives and yet publications relating to such murders may come within the mischief of S. 4 (1) (a) of the Act. Cases may also be conceived where directly or indirectly murders or acts of violence of that kind may be approved or admired. Let us, for instance, take the case of an individual who is a terror in a particular locality because of his being the head of a gang of dacoits and robbers. The man may have been clever enough to escape the clutches of the law, yet the people in the locality are so tired of him that pamphlets or leaflets are published inciting his murder or assassination. It may also be that even after the man is murdered, the people of the locality or some of them may publish documents approving the conduct of the murderer. Evidently, these acts have been done

not with any political motive, yet these publications come as much within the mischief of S. 4 (1) (a) and (b) as any other publication relating to crime of a political character. As I said, according to the plain language of the two clauses, there would be nothing to differentiate between the two kinds of publications, and Government would be justified in demanding security from the press for printing and publishing any such matter. It cannot be said that in such a case the High Court would be justified in setting aside the order demanding security because it would not be a case of misapplication of the law. On the contrary, the conduct of the authorities in making the demand would be perfectly justified within the meaning of the law.

[11] Article 19 (2) of the Constitution Act came in for consideration in two very recent decisions of the Supreme Court : *Romesh Thappar* v. *State of Madras*, A.I.R. (37) 1950 S.C. 124 : (51 Cr.L.J. 1514) and *Brij Bhushan* v. *State of Delhi*, A.I.R. (37) 1950 S.C. 129 : (51 Cr.L.J. 1525). *Romesh Thappar's case*, (A. I. R. (37) 1950 S.C. 124 : 51 Cr. L. J. 1514) was a case which arose under the Madras Maintenance of Public Order Act, 1949. This Act, as the preamble shows, was for the purpose of preventing "disorders involving menace to the peace and tranquillity of the Province" and affecting "public safety". The Government of Madras acting within the provisions of the said law had prohibited the entry and circulation of a certain journal called 'Cross Roads' (printed and published in Bombay) in the Province of Madras. The printer, publisher and editor of the journal then moved the Supreme Court under Art. 32 of the Constitution for a writ of *mandamus* and *certiorari* on the ground that the order of the Madras Government contravened the fundamental right of the petitioner to freedom of speech and expression conferred upon him by Art. 19 (1) (a) of the Constitution, and was, as such, a void order being inconsistent with the fundamental right aforesaid. The majority of the Judges constituting the Bench held that "public safety" or "public order" were matters of wide connotation and could not necessarily be confined to matters which undermine the security of the State or tend to overthrow the same. A legislation, therefore, which put limitation upon the right of freedom of speech and expression on these grounds was illegal and void. The language of Patanjali Sastri, J. who delivered the judgment of the Supreme Court is quite explicit. He says :

"whatever aims its framers may have had in view, its application and scope cannot, in the absence of limiting words in the statute itself, be restricted to those aggravated forms of prejudicial activity which are calculated to endanger the security of the State."

In this case even if it is held that S. 4 (1) (a), Press Act, was intended to apply mainly to political assassinations or cognizable offences involving violence subversive of the State, yet there are no words of limitation in the language of the section itself which would restrict their operation only to such cases and not to ordinary murders and cognizable offences involving violence. Their Lordships further observed as follows :

"Thus, very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression and this was doubtless due to the realisation that freedom of speech and the press lay at the foundation of all democratic organisations, for without free political discussion no public education so essential for the proper functioning of the processes of popular Government is possible.

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We are therefore of opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under cl. (2) of Art. 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order."

Similarly, here also it may be observed that although the impugned provision of the Press Act may have been conceived generally for the purpose of safeguarding the security of the State, yet it could not be said that the provision was solely directed to that purpose. It was further contended before the Supreme Court that if the provision fulfils two purposes, namely, that it is intended to safeguard against matters which undermine the security of the State or tend to overthrow it and may at the same time be applicable to offences of minor character, the provision should not be declared wholly void ; it should be upheld so far as it is within the bounds of permissible legislation as required by Art. 19 (2), Constitution Act. This argument was naturally thrown out by their Lordships because in their view the language of the provision was not severable. In doing so, their Lordships made the following pertinent observations :

"Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable."

These observations apply with equal force to the present case. It cannot be argued that the language of cl. (a) of S. 4 (1) or that of cl. (b) are severable in their effect so as to be consistent with the Constitution for one purpose and inconsistent for another purpose. Both these provisions are worded in general terms and they may apply both to aggravated forms of offences

like political assassinations as also to ordinary murders or cognizable offences involving violence. I cannot, therefore, hold that to any extent these clauses of S. 4 (1) can be saved as permissible legislation under Art. 19 (2), Constitution Act. I make no pronouncement so far as the other clauses of S. 4 (1), Press Act, are concerned, because, in my opinion, those later provisions of the Act are clearly severable from the provisions aforesaid.

[12] The other case before the Supreme Court, namely, *Brij Bhusan's case*, (A. I. R. (37) 1950 S. C. 129 : 51 Cr. L. J. 1525) related to the validity of S. 7 (1) (c), East Punjab Safety Act, which provided that

"the Provincial Government or any authority authorised by it in this behalf if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order may, by order in writing addressed to a printer, publisher or editor

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(c) require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny."

The printer and publisher as also the editor of a certain weekly of Delhi called 'Organiser', to which Province also the Act in question had been extended, moved the Supreme Court for writs of certiorari and prohibition under Art. 32, Constitution Act, impugning an order passed by the Chief Commissioner of Delhi under the said Act. In this case again their Lordships observed that the imposition of pre-censorship on a journal was a restriction on the liberty of the press which was an essential part of the right of freedom of speech and expression under Art. 19 (1) (a) of the Constitution; and they held that inasmuch as the order in question was not saved under cl. (2) of the said article, as decided by them in *Romesh Thappar's case*, A. I. R. (37) 1950 S. C. 124 : (51 Cr. L. J. 1514) they directed the order of the Chief Commissioner to be quashed. There can be no doubt that having regard to the seriously disturbed condition of the Punjab at the time when the Act in question was passed, the Act was primarily intended to safeguard the security of the State and to prevent acts which tended to its overthrow; yet, as the provision in question was directed against publishing an objectionable matter constituting a threat to public law and order, their Lordships having already held that the words "public law and order" being far too general in their application, could not necessarily be confined to matters affecting the security of the State, they, therefore, found the provision in the Act could not come within the bounds of permissive legislation as required by Art. 19 (2). These two decisions, in my opinion, sufficiently conclude the matter, and in the circumstances I feel constrained to hold that cls. (a) and (b) of S. 4 (1), Press Act, are void being inconsistent with the fundamental right given under Art. 19 (1) of the Constitution, and that these provisions are not saved under cl. (2) of the said Article. As the demand for security in this case has been made for violation of S. 4 (1) (a) of the Act, the order demanding security is void and must be quashed. The learned Advocate-General who appeared for the State of Bihar at one stage of the hearing also conceded that in view of the aforesaid decisions of the Supreme Court, it was difficult to hold that the said provisions of the Press Act were not inconsistent with the fundamental right of freedom of speech and expression guaranteed under the Constitution Act and were saved under the saving clause of the Constitution.

[12a] The question may again arise whether the impugned provisions of the Press Act refer to matters which offend against *decency* or *morality* and are thus saved under the Constitution Act. I must observe in this connection that the learned Government-Advocate has not relied upon these phrases in Art. 19 (2) in support of his contention. *Prima facie* it may appear that a publication which incites or encourages murder or cognizable offences involving violence must be opposed to all sense of decency or morality, as we understand these expressions in common parlance. Ordinarily one may be inclined to think that the Constitution Act does not limit the meaning of those expressions to some peculiar kind of offence. Here again the trend of the Supreme Court judgments, above referred to, stand in the way of our giving such a wide meaning to the expression "offends against decency or morality." The classification of offences in the Penal Code places these various kinds of offences under distinct categories; for instance, offences against the State are dealt with in Chap. VI, offences against public tranquillity in Chap. VIII, offences against public health, safety, convenience *decency* and *morals* in Chap. XIV, whereas offences affecting the human body are in Chap. XVI of the Code. These offences against decency and morality are put in a class altogether distinct from offences of murder and cognizable offences involving violence. Therefore the offences must be deemed to be such offences as are mentioned in those classifications. This purports to be their Lordships' view. The framers of the Constitution must have been conscious of these provisions in the Penal Code when the Constitution came to be drafted, and the expressions used in the Act may be deemed to have been used in the same sense in which they were used in the Penal

Code. From that point of view, it is impossible to hold that the provisions of S. 4 (1) (a) and (b) of the Act can be justified on the ground that they relate to matters which offend "against decency and morality" as these expressions have been given a narrower connotation in the Penal Code and may be deemed to have been used in the same sense in the Constitution Act as well.

[13] I am compelled to observe that from the above discussions of the Supreme Court judgments, it follows logically that if a person were to go on inciting murder or other cognizable offences either through the press or by word of mouth, he would be free to do so with impunity inasmuch as he would claim the privilege of exercising his fundamental right of freedom of speech and expression. Any legislation which seeks or would seek to curb this right of the person concerned would not be saved under Art. 19 (2) of the Constitution and would have to be declared void. This would be so, because such speech or expression on the part of the individual would fall neither under libel nor slander nor defamation nor contempt of Court nor any matter which offends against decency or morality or which undermines the security of or tends to overthrow the State. I cannot with equanimity contemplate such an anomalous situation but the conclusion appears to be unavoidable on the authority of the Supreme Court judgments with which we are bound. I, therefore, wish that my decision on the point would sooner than ever come to be tested by the Supreme Court itself and the position re-examined in the light of the anomalous situation pointed out above. It seems to me that the words used in the Constitution Act should be assigned a wide and liberal connotation even though they occur in a clause which provides an exception to the fundamental right vouchsafed under Art. 19 (1) (a) of the Constitution Act: (*vide* 1930 A. C. 124 at p. 136.)

[14] It may well be observed that the Press Act which was an emergency legislation was not intended to be a part of the permanent statute of the land. Indeed, it must be so; but if the circumstances which necessitated the enactment of a statute of that character do operate, it cannot be said that the emergency has completely vanished.

[15] It is not without much hesitation that I have come to the decision given above. In forming my conclusion I have not been unmindful of the fact that in a country like England a pre-censorship of this character on the press does not exist. It must be, however, borne in mind that in England the traditions of democracy are so firmly established that it would be generally unthinkable for any press to indulge in inciting acts of political violence and murder; and if it does, which of course would be rare, it is proceeded against under the general law of the land and punished accordingly. In a country like India where the roots of democracy have not yet taken a firm hold on the soil and where already dangerous and disruptive forces are working to destroy the sapling of freedom and democracy, a legislation of this character could not be said to be altogether ill-advised. I have no doubt that the saner section of the press will always utilise its freedom of speech and expression to the furtherance of the cause of democracy but a press which is brought into being with the specific purpose of creating discord and disaffection and preaching violence and disorder on a mass scale cannot be expected to upset its freedom of expression. These are, however, matters with which this Court is not concerned and may better be left to the wisdom of the legislators.

[16] The result is that the application must be allowed and the order complained against demanding security from the petitioner must be quashed.

[17] **Shearer J.**—The Constitution of India contains no express declaration in favour of the freedom or liberty of the press, and the reason or one of the reasons for this omission may, I imagine, be that in no period in history and in no country in the world has the press been free, in the sense that the keeper of a press may print and publish any matter he chooses without thereby incurring any risk of punishment. The invention of printing led to the propagation and dissemination, on a far wider scale than had hitherto been possible, of ideas which were subversive of the existing order in Church and State. In 1501 Pope Alexanter VI published a bill against unlicensed printing. After the Reformation and the break up of the Holy Roman Empire, the sovereigns of the national states which came into existence, took similar steps to control the press. In England until 1695 no book or pamphlet could be printed without the imprimatur of the Crown licensor, and the printers and authors of books or pamphlets, which had been issued without it, were liable to be brought before special Court such as the Star Chamber, and most severely punished. Although in 1695, when the House of Commons declined to continue the Licensing Act, the press in England was emancipated from direct state control, in other countries on the Continent of Europe a system of pre-censorship continued until long afterwards. In 20th century Europe, in more than one country, the press, on its political side at least, has

again been subjected to strict Government control. In Facist Italy the responsible editor of every newspaper had to be approved by the prefect of the province. A prefect might warn a newspaper editor who published matter or news to which he took exception and might revoke his recognition of an editor who had been so warned twice in a year. In Soviet Russia there is no independent press, and any person venturing to propagate ideas, which are, in any way, inconsistent with the communist creed, are liable to the most severe punishment. When we speak of the freedom or liberty of the press, we mean that freedom—no doubt a very substantial freedom but nevertheless, a freedom which is definitely limited and circumscribed which is enjoyed by the press in the English speaking world. In 1784 in the celebrated case of *Rex* v. *Dean of St. Asaph*, (1784) 3 T. R. 431 Lord Mansfield said :

"The liberty of the press consists in printing without any previous license subject to the consequences of the law."

Now, in England and in America, it is a crime to print and publish matter of certain kinds. It is obvious that the existence of such laws and the consequent dread of punishment must act as a deterrent on persons, who hold certain ideas or opinions, seeking to propagate and disseminate them. Moreover under the law of libel, including the law of seditious libel, not merely is the author of the libel responsible. Responsibility also extends to the publisher and printer and, indeed to every vendor of the publication. As ordinarily, a writer must find a publisher, the publisher must employ a printer, and the printer, in his turn must rely on booksellers to sell the book or pamphlet which he prints, it is clear that the possibility of a writer succeeding in communicating to any large body of the public ideas or opinions the dissemination of which the law regards as culpable is small. In India until 1910 the press was in very much the same position as it was in Great Britain and the Dominions and in America. In 1910 the Press Act, however, empowered the executive to demand security from the keeper of a press and the publisher of a newspaper, and in certain circumstances, to declare such security forfeited. The Press Act of 1910 was repealed in 1922, but in 1931 was re-enacted in a modified form. The statute of 1931 was described as "an Act to provide against the publication of matter exciting to or encouraging murder or violence". In the following year it was amended in certain particulars by the Criminal Law Amendment Act, 1932, one such amendment being in the title which was altered to "an act to provide for the better control of the press". The question that arises in this case is whether, in consequence of Art. 19 (1) (a) in the Constitution, it is still open to the executive to require the keeper of a press, which has published matter of the kind referred to in cls. (a) and (b) of S. 4 (1), Press (Emergency Powers) Act, 1931, to deposit security. The boject of requiring security is, it is clear to ensure that the keeper of a press, who prints matter of a certain kind, may not evade liability or escape punishment. Such also, it may be observed, is the object of the law which requires the printer of every book or pamphlet to exhibit his name and address on the first or the last page of the book or pamphlet. In England, until the law so provided persons, who were libelled, very often found it a matter of the greatest difficulty to ascertain who was responsible, and in order to enable them to do so, general search warrants had to be issued. There can, of course, be no doubt that a system under which the keeper of a printing press can be required to deposit security is a system of control over the press, but the control so exercised is substantially the same kind of control as is exercised by making it a crime to publish matter of a certain kind. The author of the book or pamphlet, which contains or may appear to contain a libel on an individual or a seditious libel, will ordinarily find it difficult to get it printed which is what the law intends, and he may find it more difficult to get it printed by a printer who has been required to furnish security than by a printer who has not yet been required to to do so, which again is what the law intends. Is there, however, in principle any objection to the exercise of this further measure of control by the State? Professor Dicey in his Law of Constitution, 8th Edn., p. 244, observes:

"No sensible person will argue that to demand a deposit from the owner of a news-paper or to impose other limitations upon the right of publishing periodicals is of necessity inexpedient or unjust."

A fortiori this observation applies to the keeper of a printing press, such as the appellant is, who publishes leaflets or pamphlets of the kind we are now concerned with. It is, and always has been, well settled both in England and in India that security may be taken from a person who has committed certain crimes or who, having committed a certain crime, is thought to be likely to commit that crime again. As will appear later, a person who publishes matter of the kind referred to in cls. (a) and (b) of S. 4 (1), Press (Emergency Powers) Act, 1931, commits a crime. It is true that security is, in the first instance, demanded by the executive but against its

order there is a right of appeal, and the appeal must be heard by a Bench of three High Court Judges. There is, in substance, in such a case at least no serious departure from what Professor Dicey calls the rule of law. It is also true that, in recent times, so far as I can ascertain, security has never in England been demanded from a printer. But security has, on occasion, been demanded from persons proposing to address public meetings, *Wise* v. *Dunning*, (1902) 1 K. B. 167 : (71 L. J. K. B. 165). In other words, the taking of security has sometimes been used to fetter the expression of opinion. I am unable to subscribe to the sweeping generalisation of my brother Ramaswami, on which his whole judgment appears to me to be based, that the taking of security is something alien and repugnant to the concept of the freedom of the press. Article 21 of the Constitution is so drawn as to preserve to the Courts the power to demand security under Chap. VIII, Criminal P. C. Why should it be supposed that the Constituent Assembly intended that the practice of requiring the keeper of a printing press to deposit security in order to prevent the publication of seditious libels should cease? In construing the relevant provisions of the constitution, it is, in my opinion, necessary to keep any such *a priori* assumption out of one's mind. Indeed if any assumption at all is to be made, it ought, I think, to be an assumption the other way.

[18] Article 19 (1) (a) of the Constitution provides that all citizens shall have the right to freedom of speech and expression. It is clear that the word "expression" is used by way of amplification of the word "speech" which immediately precedes it. Subject to what is contained in Art. 19 (2), Art. 19 (1) (a) renders immune from punishment not merely the individual citizen who gives expression to his opinions in conversation or at a public meeting, but also to the journalist, the writer, the printer, the sculptor, the dramatist, and, in short, every kind of creative artist. The editor of a newspaper, who moulds or is in a position to mould public opinion, may perhaps come within the purview of the article, but in my opinion, the keeper of a printing press, quite certainly, does not. Printing may sometimes be an art, but the generality of printers do not give expression to ideas and opinions of their own. They are merely engaged or employed by other persons to give a wider publicity, than could otherwise be achieved, to ideas and opinions of theirs. Indirectly, no doubt, the article may operate in such a way as to prevent certain restrictions being imposed on printers. It is, for instance, not open to Parliament to enact a law that, before printing any book or pamphlet, which he may have been employed to print, the printer shall submit it for pre-censorship. The reason, however, why such a law would now be an unconstitutional law is not that it imposes a restriction on the printer, but that, in substance, it is a restriction imposed on the writer or author. It is well known that the Constituent Assembly examined the constitutions of other countries. Now, there are constitutions in which not merely the right to speak, write and publish, but also the right to print is conferred on all citizens. An instance in point is Art. 18 of the Belgium Constitution of 1832 which is reproduced in Dicey's law of the Constitution, Edn. 8, p. 234, and the constitutions of some of the competent States in the United States of America (*vide* Cooley's Constitutional Limitations, Vol. 2, p. 876). I refer particularly to the Belgium Constitution of 1832 as, not only does it confer on every citizen the right to print, but also prohibits, the taking of security from the keeper of a printing press. It will be observed that, under it, the keeper of a printing press is immune from punishment if the author of the book or pamphlet, which he has printed, is a person who is known and who is domiciled in Belgium. So long as the keeper of a printing press takes the precaution of ascertaining who the author is and that he is domiciled in Belgium and can, in consequence be made liable for the publication of matter which offends against the law, the printer is no more responsible than is the colourman who supplies the canvas and paints with which an artist paints an obscene picture. The article appears to have been drawn in such a way as to enable writers and authors to obtain without any difficulty the services of a printer and so disseminate to the widest possible extent their opinions and ideas. In other words, the right conferred on printers was, in substance, a right conferred on writers and authors. As, however, I have already pointed out it is an integral part of the system of control, albeit indirect control over the press which obtains in the English speaking world that the printer shall be as much responsible at law as is the writer or author, I am unable to read into the word "expression" in Art. 19 (1) (a) any implied right in writers and authors to obtain the services of printers to enable them to reach the widest possible public. In other words, I can find nothing in the five words contained in this article which leads me inevitably to the conclusion that the power to demand security

from the keeper of a printing press is a power which the executive may no longer exercise.

[19] If this is the correct interpretation of Art. 19 (1), there is an end of the matter. But I will assume, for the sake of argument, that the article does, in fact, confer on the keeper of a printing press a right to print whatever he may choose, and proceed to consider whether the taking of a deposit is not one of the restrictions which may be imposed on the exercise of this fundamental right under Art. 19 (2). It is clear that the principle object of the Constituent Assembly in enacting this article was to define the limits within which Parliament might, and beyond which Parliament might not, make the dissemination and propagation of ideas and opinions a crime. More particularly, the Constituent Assembly would seem to have restricted within narrower limits the crime, which is ordinarily known as the crime of seditious libel, and given to the citizens of India a right to criticise the Government, which is at least as ample as that enjoyed by the citizens of the United States of America and more ample than has ever been enjoyed by the citizens of Great Britain and the Dominions of the British Commonwealth. If, however, this had been the sole object of the Constituent Assembly, it would not have used the language which it did. The expression "law relating to libel" cannot possibly be construed as connoting nothing more than a law which makes libel punishable. If that were so the provisions of law which requires the name and address of the printer to appear on every book and pamphlet and requires the name of every editors, pinter and publisher of a newspaper to appear on every copy of a newspaper would have ceased to be a valid law. For the reasons which I have already indicated, these provisions are part of the law relating to libel. By a parity of reasoning it must, I think, be concluded that the provisions contained in S. 4 (1) (a) and (b), Press (Emergency Powers) Act, 1931, which enable security to be demanded from the keeper of a printing press, are part of the law relating to seditious libel. In order to prevent any misunderstanding I wish at this stage to point out that cls. (c) to (i) in S. 4 (1) of the Act enable security to be demanded in a wide variety of circumstances. If the construction which I am myself disposed to put on Art. 19 (1) is wrong and if printers have a fundamental right to print any matter they may choose, it may well be that, in certain of these circumstances the demand for security can no longer be supported. But the narrow point which I have to decide here is whether security may be demanded from the keeper of a printing press who has published matter of the kind referred to in cls. (a) and (b) which are severable from the other clauses. In construing these clauses, it is permissible and indeed necessary to employ the method of historical investigation. The Press Act of 1910 was enacted in order to combat terrorist or revolutionary crime. It was repealed in 1922, because such crime had become far less common. It was re-enacted in 1931, because there had been a recrudescence of such crime, and in the following year it was enlarged and modified in consequence of the non-co-operation movement. Although the promoters of this movement desired it to be peaceful and non-voilent movement, certain persons took advantage of it to commit violent crime in order to effect a revolution and overthrow the existing system of Government. Bearing this in mind, it seems to me quite clear that cl. (a) of S. 4 (1) was aimed at political assassination and the commission of violent crimes intended to overthrow or weaken the State and that cl. (b) was aimed at those who glorified such crime and, more particularly preached the doctrine that in certain cricumstances and in order to achieve certain ends, murder was no crime at all. Mr. Basanta Chandra Ghosh, for the appellant, conceded that the language used in cl. (a) of S. 4 (1) might justify a demand for security from the keeper of a press who had published a seditious libel, but contended that it might also justify a demand for security from the keeper of a press who had published a document which was not a seditious libel. In this connection the learned advocate, for the appellant, put forward a very extraordinary argument. Mr. Ghosh asked us to suppose that some individual had made himself a terror to the locality in which he lived and that eventually certain persons in that locality decided to print and circulate a leaflet suggesting that he should be killed. I agree with Mr. Ghosh that, if security was demanded from the keeper of a press at which such a document was printed, this Court would have to set the order aside as such a document is not a seditious libel, and quite possibly, not a libel at all. But in doing so, it would be incumbent on this Court to point out to the authorities that other and more appropriate action might be taken. In the *Queen* v. *Most*, (1881) 7 Q. B. D. 244 : (50 L. J. M. C. 113) one Johann Most was indicted for having published an article in a newspaper extolling the assassination of the Empress of Russia and holding it up as an example to revolutionaries throughout the world. Johann Most was tried and convicted for having published a seditious libel, but was also tried and convicted under 24 and 25 vict. Caput 4, which

made it an offence for persons to "conspire, confiderate and agree to murder any person" the reason being that the punishment provided for that crime was a more severe punishment than could be inflicted for the crime of seditious libel. It was contended that Johann Most could not be convicted as it was not shown that he had come into direct contact with any of the persons who read the newspaper and could not, therefore, be said to have incited them. This argument was overruled. I am inclined to think that if ever a case of this kind suggested by Mr. Ghosh arises, it will not be impossible for the persons responsible to be prosecuted under the Penal Code. Much reliance was placed by Mr. Ghosh on two recent decisions of the Supreme Court : *Romesh Thappar* v. *State of Madras*, 1950 S. C. R. 594 : (A. I. R. (37) 1950 S. C. 124 : 51 Cr. L. J. 1514) and *Brij Bhushan* v. *State of Delhi*, 1950 S. C. R. 605 : (A. I. R. (37) 1950 S. C. 129 : 51 Cr. L. J. 1525). The orders complained of in these cases were orders prohibiting the entry into or the circulation, sale or distribution in the State of Madras in the one case and in the State of Delhi in the other of two newspapers. In Ireland, from time to time power has been conferred on the executive to seize and destroy newspapers or their publications containing seditious libels. A power of that kind is in effect a power of pre-censorship, and, under the Indian Constitution, cannot be conferred on the executive except in periods of emergency. The power conferred by the State of Madras and the State of Delhi, namely, a power to seize a certain newspaper, whether it contained matter amounting to a seditious libel or not was a still wider power and one which is clearly prohibited by the Constitution. Pre-censorship and still more what done or authorised to be done in Madras and Delhi is a direct invasion of the fundamental right of the editor and journalist who used the columns of these newspapers to give expression to their opinions. What has been done here does not amount to an invasion of the fundamental right of the author of this pamphlet or leaflet. It is true that the press itself has been subjected to a further measure of control, but a control of exactly the same kind as is already imposed by the existence of a law which makes seditious libel a crime. If it is a restriction on any fundamental right possessed by the printer—and I do not myself think he has any—it is a restriction permitted by Art. 19 (2). I have read and re-read the judgments of the Supreme Court, and I can find nothing in them myself which bears directly on the point at issue and leads me to think that, in their opinion, a restriction of this kind is no longer permissible. I do not think it necessary to refer to any of the observations of their Lordships except one which occurs towards the end of the judgment and on which Mr. Ghosh greatly relies. Sastri J., there said :

> "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable."

Now, it is clearly possible to sever cls. (a) and (b) from the clauses which follow them in S. 4 (1), Press (Emergency Powers) Act. There can be no doubt that a person who publishes a pamphlet or leaflet, such as has been published by the appellant, in which assasination and violence are advocated as a means of bringing about a change in the existing order in the State, is guilty of publishing a seditious libel. That is so even within the narrower definition of "seditious libel" contained in Art. 19 (2) of the Constitution. The language used by Sastri J. cannot, in my opinion, possibly support the argument of Mr. Ghosh that, as security may be demanded from the publisher of a leaflet advocating, for personal reasons, the murder of a private individual, security cannot be demanded from the keeper of a press which has published a seditious libel. As I have just pointed out, the action appropriate in such a case, if it ever arises, would be not to demand a security from the press but to prosecute the keeper of the press and other persons concerned for conspiracy to murder. The mere circumstance that a wholly wrong and unjustified use may conceivably be made of a power conferred on the executive is no reason whatever for supposing that that power is one which cannot be conferred under the Constitution. At the present time in this country, as in other countries, subversive ideas are abroad, and there is reason to believe that some of those who propagate and disseminate such ideas have already been guilty of great and atrocious crimes such as the derailment of passenger trains attended with great loss of life and suffering as well as material loss and damage to the State. It is notorious that the leaders of such subversive movements make use of small printing presses to put into circulation leaflets and pamphlets which they hope, may win converts to their cause. It is also notorious that the keepers of such printing presses are frequently, as is this appellant, *pardanashin* women or persons whom it would be useless to prosecute for seditious libel. In other words, by having resort to such printing presses, the promoters of such movements are seeking to evade the law which makes seditious

libel a crime, and, in requiring the keepers of such printing presses to deposit security, the State is taking counter measures. The Constitution of India has peculiarity that, instead, of leaving it to Parliament to examine the statute book and repeal any law which infringes on a fundamental right, it imposes on the Judiciary the duty of declaring that law void. In discharging this onerous duty, the Judiciary in my opinion, ought to proceed with caution and circumspection. It ought not to declare an existing law to be void unless it is ineluctably driven to the conclusion that it is, and it ought also to hesitate to come to that conclusion when the consequences of it will be to deprvie the executive of a weapon which it may need to combat subversive movements and preserve the safety of the infant State. I do not feel myself driven to any such conclusion in the present case. It ought to be, and indeed, under the Constitution, must be, left to Parliament in its own good time and wisdom to repeal such provisions as are contained in the Press (Emergency Powers) Act, 1931, as it thinks fit. I would, therefore, myself dismiss this application, but, as my learned brothers are both of opinion that S. 4 (1) (a) and (b), Press (Emergency Powers) Act has ceased to be a constitutional law, the order of the Court must be that the application is allowed, and the order complained of is set aside.

[20] **Ramaswami J.**—The important question raised in this case is whether S. 4 (1) (a), Press (Emergency Powers) Act of 1931 (which will be referred to as the Press Act) is constitutionally valid.

[21] The petitioner, Sm. Shaila Bala Devi, is the keeper of a printing press, known as "Bharati Press" in Purulia town. On 8-9-1949, the Governor of Bihar in exercise of the powers conferred under sub-s. (3) of S. 3 of the said Act, ordered the petitioner to make a deposit of Rs. 2000 with the Deputy Commissioner of Manbhum. It was alleged in the notice that the "Bharati Press" was used for the purpose of printing and publishing matters in a Bengali leaflet entitled "Sangram" which was of the nature described in cl. (a) of sub-s. (1) of S. 4, Press Act.

[22] The order of the Government states:

"Whereas it appears to the Governor of Bihar that the Bharati Press, Purulia, is used for the purpose of printing and publishing matters specified in the schedule annexed hereto which are of the nature described in cl. (a) of sub-s. (1) of S. 4, Press (Emergency Powers) Act 1931 (XXIII [23] of 1931);

Now, therefore, the Governor of Bihar, in exercise of the powers conferred by sub-s. (3) of S. 3 of the said Act, is pleased to order the keeper of the said Press to deposit with the Deputy Commissioner Manbhum on or before 19-9-1949, security to the amount of Rs. 2000 (Rupees two thousand) in money or in Government securities."

[23] The petitioner asserts that this order violates the fundamental right to freedom of speech and expression guaranteed by Art. 19 (1) (a) of the Constitution. She impeaches the validity of S. 4 (1) (a) as being void under Art. 13 (1) of the Constitution by reason of its being inconsistent with the fundamental right.

[24] At this stage I should state that upon the construction of the pamphlet I agree with my learned brother Sarjoo Prasad that it encourages violent revolution and overthrow of the existing social and political order by bloodshed and destruction, and falls within the mischief of S. 4 (1) (a), Press Act. Even so, the order of the State Government demanding security should be set aside; if we hold that S. 4 (1) (a), Press Act is not constitutionally valid.

[25] It cannot be doubted that the freedom of press is included in the concept of "freedom of speech and expression," and connotes in the main exemption from previous restraints upon publication. The principle is inconsistent with any scheme of licence or censorship, or a regulation requiring the keeper of a press to make a deposit of cash which would be liable in specified circumstances to forfeit. In *Rex* v. *Dean of St. Asaph*, (1784) 3 T. R. 431, note) Lord Mansfield states:

"To be free is to live under Government by law. The liberty of the press consists in printing without any previous license, subject to the consequences of law."

" 'The law of England,' says Lord Ellenborough, 'is a law of liberty and consistently with this liberty we have not what is called an *imprimatur*; there is no such preliminary license necessary; but if a man publishes a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal'" (*Rex* v. *Cobbett*, (1804) 29 St. Tr. 1 at p. 49).

[26] It is, therefore, manifest that the order of the Governor of Bihar would be a violation of the petitioner's fundamental right under Art. 19 (1) (a) unless S. 4 (1) (a) of Act XXIII [23] of 1931 is saved by the reservation mentioned in cl. (2) of Art. 19 which (omitting immaterial portión) saves the operation of any "existing law in so far as it relates to any matter which undermines the security of, or tends to overthrow the State."

[27] Section 3 (3) of Act XXIII [23] of 1931 states:

"Whenever it appears to the Provincial Government that any printing press . . . . is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations of the nature described in S. 4, sub-s. (1), the Provincial Government may, by notice in writing . . , . order the keeper to deposit with the Magistrate within whose jurisdiction the press is situated security to such an amount, not being less than five hundred or more than three thousand rupees as the Provincial Government may think fit to require. . . . ."

Section 4 (1) (a) empowers the Provincial Government to forfeit the security if—

"any printing press in respect of which any security has been ordered to be deposited under S. 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which—

(a) incite to or encourage, or tend to incite to or encourage, the commission of any offence of murder or any cognizable offence involving violence. . . . ."

The question, therefore, arises whether the impugned section of the Act so far as it authorises the State Government to order the keeper of the press to make a deposit on the ground that such a press is used for the purpose of printing and publishing a document which "tends to incite the commission of any offence of murder or any cognizable offence involving violence" is a law which relates to any matter which undermines the security of or tends to overthrow the State.

[28] In criminal law, offences are classified into broad categories: (1) offences against the external and internal order and security of the State, (2) offences against administration of justice and public authority, (3) acts injurious to the public in general, (4) offences against the person and (5) offences against property. In the Penal Code, chap. VI enumerates "offences against the State" which include waging war against the Queen (S. 121), sedition (S. 124A) etc., because they are calculated to overthrow or undermine the security of the State. Chapter VIII enumerates "offences against the public tranquillity" which include unlawful assembly (S. 141), rioting (S. 146), promoting enmity between classes (S. 153A), etc. Chapter XVI contains "offences affecting the human body" which include murder, hurt, criminal force and assault, etc. It is inevitable that the categories should overlap to a certain extent—riot, insurrection, rebellion and levying are offences which run into each other and boundaries are not clear cut. But it is plain that the offences of murder and of violence form a distinct category from offences which tend to overthrow or undermine the security of the State. To illustrate the distinction reference may be made to the summing up of the Lord President in the trial of *Andrew Hardie*, (1820 State Trials New Series, Vol. I, 610 at 623):

"The distinction seems to consist in this, although they may often run very nearly into each other: where the rising or tumult is merely to accomplish some private purpose interesting only to those engaged in it, and not resisting or calling in question the King's authority or prerogative, then the tumult, however numerous or outrageous the mob may be, is held only to be a riot. For example, suppose a mob to rise, and even by force of arms to break into a particular prison and rescue certain persons therein confined; or to oblige the Magistrate to set them at liberty; or to lower the price of provisions in a certain market; or to tear down certain inclosures, which they conceive to encroach on the town's commons. All such acts, though severely punishable, and though they may be resisted by force, do not amount to treason."

[29] In the present case the question to be determined is whether S. 4 (1) (a), Press Act which refers to commission "of any offence of murder or any cognizable offence of violence" is a law "which concerns or relates to any matter which undermines the security of or tends to overthrow the State". It was argued by the learned Government Advocate that S. 4 (1) (a) should be construed to refer only to offences of political assassination or insurrection or mass violence which would undermine the security of the State. Learned counsel urged that the object of the Act was to combat the Civil Disobedience Movement which had taken a subversive form at the time of the passing of the Act. Reference was made to the Statement of Objects and Reasons in which it is said that

"it was the policy of newspapers consistently . . . . . to foster conditions of disorder and that a section of the press was giving direct or indirect incitement to violence and revolutionary crime."

In my opinion this argument is unwarranted and cannot be sustained. For the principle is settled that when the language of the Act is clear and explicit it is not permissible to speculate as to what the Legislature probably meant. In *Administrator-General of Bengal* v. *Prem Lal Mullick*, 22 I. A. 107 : (22 Cal. 788 P.C.), Lord Watson pointed out that in construing an Act proceedings of the legislature cannot be legitimately referred to but must be excluded from consideration. In a subsequent case *Krishna Ayyangar* v. *Nallaperummal Pillai*, 47 I. A. 33 : (A.I.R. (7) 1920 P. C. 56), the Judicial Committee reiterated the rule that

"No statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words."

Reference should also be made to *Queen* v. *Capel*, (1840) 12 Ad. & E. 382 : (2 L. J. (N. S.) M. C. 65) in which Denman C. J. said :

"We are pressed with a history of the introduction of this proviso into the Act in its passage through Parliament. Of such facts, if capable of being ascertained, we are not permitted judicially to take notice. The law must ever be interpreted by the general rules of construction and we cannot travel out of its language in search of any supposed intention."

The function of a judicial tribunal is, therefore, limited to construing words employed in the Act. It is not justified in forcing into them a meaning which they cannot reasonably bear. The question is not what may be supposed to have been intended by the Legislature but what has been said. The duty of the Court is to interpret and not to enact.

[30] In the present case it is manifest that S. 4 (1) (a) which plainly refers to "the commission of any offence of murder or any cognizable offence of violence" cannot without strain upon the language be restricted in its scope and connotation to such aggravated forms of murder, insurrection or violence which tend to overthrow or undermine the security of the State. In my opinion, S. 4 (1) (a) of the Act cannot be construed as directly concerning or *relating to* any matter "which undermines the security of the State or tends to overthrow the State". It follows that S. 4 (1) (a) is an infringement of the constitutional right of freedom of speech and expression guaranteed by Art. 19 (1) and is in consequence void.

[31] This conclusion is supported by the recent decision of the Supreme Court in *Brij Bhushan* v. *State of Delhi*, (1950) 13 S.C.J. 425 : (A.I.R. (37) 1950 S.C. 129 : 51 Cr.L.J. 1525) in which a question was raised as to the validity of S. 7 (1) (c), East Punjab Safety Act which enacted :

"The Provincial Government or any authority authorised by it in this behalf if satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order may, by order in writing addressed to a printer, publisher or editor—

* * * * *

(c) require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny."

The petitioners before the Supreme Court were the printer and editor of an English weekly of Delhi called "Organizer" and they prayed for issue of writs of *certiorari* and prohibition to the Chief Commissioner, Delhi, with a view to quash an order made on 2-3-1950 under the impugned section of the East Punjab Safety Act 1949 directing them

"to submit for scrutiny, in duplicate, before publication, till further orders, all communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources or supplied by the news agencies . . . ."

The order recited that the Chief Commissioner was satisfied that the "Organizer" had been publishing highly objectionable matter constituting a threat to public law and order and that action was necessary for the purpose of preventing or combating activities prejudicial to public safety and maintenance of public order. The Supreme Court held by majority that Art. 19 (2) of the Constitution only reserves a law which is directed solely against the undermining of the security of the State or overthrow of it and that S. 7 (i) (c), East Punjab Public Safety Act, 1949, which authorised imposition or restrictions for the wider purposes of securing public safety or the maintenance of public order fell outside the scope of authorised restrictions under cl. (2) of Art. 19 and was therefore void and unconstitutional.

[32] On behalf of the State, the argument was stressed that S. 4 (1) (a) of the Act could not be considered wholly void as under Art. 13 (1) an existing law inconsistent with fundamental right was void only to the extent of inconsistency and no more. It was contended that in so far as the matter encouraging the offence of murder or any cognizable offence involving violence would affect the security of the State, the impugned provision was covered by cl. (2) of Art. 19 and must, it was urged, be held to be valid. Learned counsel pointed out that S. 4 (1) (a) of the Act would include in its connotation and scope cases of political murder, insurrection and rebellion which doubtless undermine the security of the State and the application of the section to such cases cannot be held to be unconstitutional. But the argument must be rejected in view of the principle laid down in *Romesh Thappar* v. *State of Madras*, 1950 S. C. J. 418:(A.I.R. (37) 1950 S. C.124:51 Cr.L.J. 1514) in which the Supreme Court held that where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restriction both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits as it is not severable. In other words cl. (2) of Art. 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is involved an enactment which is capable of being applied to cases where no such danger could arise cannot be held to be constitutional and valid to any extent.

[33] On behalf of the State Government, the argument was stressed that there is a presumption in favour of the constitutional validity of the impugned Act—that such a meaning should be given to the statute as to uphold its validity for the legislative body must be held to intend to keep within its powers. But no such presumption can be invoked in the present case. In the first place, the presumption does not apply to an Act, the language of which is unambiguous and the effect clearly beyond the competence of the Legislature by which the Act was passed. Only in case of doubt will "every possible presumption and intendment be made in favour of the constitutionality of the Act." The second and more important reason is that in the present case the presumption supporting legislation is balanced by the priority given in the scheme of the constitution to the fundamental liberties. When a statute

appears on its face to invade the basic guarantee in the constitution the presumption is against the validity of the law and the burden of proof will rest upon those who defend it to show that the invasion of civil liberty is justified by the exceptions enacted. The doctrine has been stated by Rutledge J. in the American case *Thomas* v. *Collins*, 323 U. S. 516:

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice."

[34] It is manifest that the Constitution has set stringent limits to permissible legislation abridging the right of freedom of speech. The preamble solemnly proclaims that the framers of the Constitution have resolved that "liberty of thought and expression" shall be secured to all the citizens of the Republic. In the scheme of the Constitution, freedom of speech and expression has been designated as a "fundamental right." The phrase is not an empty one and so not lightly used. It reflects the belief of the framers of the Constitution that exercise of these rights lies at the foundation of free Government, and that without freedom of speech the appeal to reason which is the basis of democracy cannot be made. To adopt the language of Murphy J. in *Thornhill* v. *State of Alabama*, 310 U. S. 88 :

"The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."

[35] Upon all these grounds I hold that S. 4 (1) (a) of the Press Act is unconstitutional and void and the order of the State Government dated 8-9-1949 made against the petitioner should be set aside.

K.S. *Application allowed.*

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*A. I. R. (38) 1951 Patna 29 [C. N. 5.]

FULL BENCH

SHEARER, SARJOO PRASAD & RAI JJ.

Tobacco Manufacturers (India) Ltd. — *Petnr.* v. *The State.*

Supreme Court Appeal No. 37 of 1950, D/- 21-12-1950.

(a) Civil P. C. (1908), Ss. 109, 110 — "Decree or final order" — Letters Patent (Patna), Cl. 31 — Sales Tax — Bihar Sales Tax Act (VI [6] of 1944), S. 21 (5).

(Per *Sarjoo Prasad and Rai JJ.*) — A decision given by the H. Ct. under S. 21 (5), Bihar Sales Tax Act is neither a decree nor a final order coming under S. 109 or S 110. There is no right of appeal under Cl. 31, Letters Patent also. [Para 23]

Anno. C. P. C., S. 109, N. 3, 4, L. P. (Cal.), Cl. 39, N. 3.

†(b) Constitution of India, Art. 133 — "Judgment" — Meaning of — Civil P. C. (1908), Ss. 109, 110 — Letters Patent (Patna), Cl. 31 — Sales Tax — Bihar Sales Tax Act (VI [6] of 1944), S. 21.

(Per *Sarjoo Prasad and Rai JJ; Shearer J. Contra)* — The use of the term 'judgment' or 'final judgment' in the eye of law does not bear any different significance, & the use of the word 'final' as qualifying 'judgment' is merely *ex cautela*. It is in this orthodox & juristic sense that the term 'judgment' appears to have been used. The term 'judgment' in Art. 133 has been used in the same sense as it was used in S. 205, Government of India Act, 1935 & the dropping of the word 'final' before the word 'judgment' did not make any difference whatsoever. Any judgment which the H. Ct. pronounces under S. 21 (5), Bihar Sales Tax Act in regard to the questions of law referred to it by the Revenue authorities is not a judgment in the technical sense of the term but merely a sort of opinion or advice. The fact that under S. 21 (3), Bihar Sales Tax Act, the H. Ct. calls for a reference from the Revenue-authorities does not lend any additional finality to the judgment which the H. Ct. comes to pronounce on the hearing of the reference. [Paras 30, 32, 38, 45]

Anno. C. P. C., S. 109, N. 2, 3, 4, L. P. (Cal.), Cl. 39, N. 3.

(c) Constitution of India, Art. 133 — "Civil proceeding" : F. C. App. No. 71 of 1948, OVERD.

(Per *Sarjoo Prasad and Rai JJ.; Shearer J. Contra*) —The decision given by the H. Ct. under S. 21 (5), Bihar Sales Tax Act does not arise out of a 'civil proceeding' : F. C. App. No. 71 of 1948, OVERD. [Para 48]

(d) Civil P. C. (1908), S. 98 — Reference under S. 21 (3), Bihar Sales Tax Act (VI [6] of 1944) — Difference of opinion — Reference to third Judge — Letters Patent (Patna), Cl. 28 — Sales Tax — Bihar Sales Tax Act (VI [6] of 1944), S. 21 (3).

(Per *Ruben J. in the Order of Reference*) — Reference to a third Judge of the H. Ct. on a difference of opinion between two Judges in a reference under S. 21 (3), Bihar Sales Tax Act (VI [6] of 1944) is not competent either under S. 98, Civil P. C. or under Cl. 28, Letters Patent, it being a case of jurisdiction under a special statute. But there being no procedure provided by law in such a case, it is open to the Chief Justice of the H. C. to mould a convenient form of procedure & refer the case to the third Judge. [Para 6]

Anno. C. P. C., S. 98, N. 3; Letters Patent (Cal.), Cl. 36, N. 3.

(e) Constitution of India, Art. 133 (1) (c)—Certificate of fitness — Difference of opinion on inter-

pretation of S. 5 (2) (a) (v), Bihar Sales Tax Act — Civil P. C. (1908), S. 109 — Sales Tax — Bihar Sales Tax Act (VI [6] of 1944), Ss. 5 (2) (a) (v) and 21 (3).

(*Reuben and Das JJ., in the Order of Reference*) —If Art. 133 can be applied to an opinion given by the H. C. on a reference under S. 21 (3), Bihar Sales Tax Act (VI [6] of 1944), leave to appeal to the S. Ct. under Cl. (1) (c) should be given when three Judges of the H. Ct, have expressed differing views regarding the interpretation of S. 5 (2) (a) (v) of the Act & the amount of Rs. 2,93,15,000 is involved. [Para 20]

Anno. C. P. C., S. 109, N. 10.

P. R. Das & S. N. Bhattacharya — for Petnr.; Govt. Pleader for Govt. Advocate & Rajeshwari Prasad — for the State.

ORDER OF REFERENCE.

Reuben J. — This is an appln. for leave to appeal to the S. C. from a decision of this Ct. on a reference under S. 21 (3), Bihar Sales Tax Act, 1944 (Bihar Act VI [6] of 1944), hereafter referred to as the taxing Act.

[2] The period of assessment is 1-10-1944, to 31-3-1945. The accepted gross turnover of the assessee company petnr. during this period is Rs. 3,41,98,000. Deduction is claimed under S. 5, sub-s. (2), cl. (a) (v) of the taxing Act in respect of a turnover of Rs. 2,93,15,000. Under this clause, the turnover of the assessee is exempted from liability to pay tax to the extent that it is derived from

"sales of goods which are shown to the satisfaction of the Comr. to have been despatched by, or on behalf of, the dealer to an address outside Bihar."

The exemption is claimed in respect of goods despatched by the assessee company to addresses outside Bihar in pursuance of an agreement between it & the Imperial Tobacco Company of India, Ltd. By this agreement, the assessee Company contracted to despatch the goods manufactured by it, on behalf of the Imperial Tobacco Company of India, Ltd. & in the name of that company, to destinations inside Bihar or out of Bihar according to the directions of that company, which on its side, agreed to pay to the assessee company by way of remuneration the full cost of manufacture plus 25 per cent. of such cost.

[3] The reference was first heard by my learned brother, Das & Sarjoo Prasad JJ. On a difference between them, it was referred to B. P. Sinha J., who while agreeing with Das J. & disagreeing with Sarjoo Prasad J. as to the correct interpretation of the relevant clause of the taxing Act, has on another line of reasoning arrived at the same conclusion as Sarjoo Prasad J. On the facts, all their Lordships are agreed that the transactions between the two companies amount to sales, & that the sales were completed & the property in the goods had passed to the Imperial Tobacco Company of India, Ltd., before the despatch of the goods. Das J. considered that the taxing Act, in accordance with the accepted principle of construing such Acts, must be interpreted strictly in favour of the subject & therefore, the physical despatch of the goods by the assessee was "despatch" by him within the meaning of the relevant clause of the taxing Act. In the opinion of Sarjoo Prasad J., S. 5, sub-s. (2), cl. (a) (v) has no application where the sale is complete before the despatch of the goods, & the title is no longer in the vendor. B. P. Sinha J. pointed out that S. 5, sub-s. (2), cl. (a) (v) lays stress on the Comr. being satisfied as to the despatch being by the dealer or otherwise. He held that the H. C. is bound to accept the finding of the Comr. that the goods were physically despatched by the assessee but the despatch was made by him on behalf of the vendee; in other words, the despatch must be held to be despatch by the vendee & therefore, not entitled to exemption from sales tax.

[4] A preliminary point has been raised as to whether the reference to B. P. Sinha J. was competent & whether there is a lawful decision of this Ct. disposing of the reference under S. 21, sub-s. (3) of the taxing Act, in respect of which decision leave to appeal can be asked for. The provision for a reference to a third Judge is contained in Cl. 28, Letters Patent of this H. C. & S. 98, Civil P. C. Clause 28 relates to a difference of opinion arising in the exercise of the H. C.'s "original or appellate jurisdiction". Section 98 relates to a difference arising in appeal; under sub-s. (3) this section is subject to the provisions in the Letters Patent. In *Birendra Kishor* v. *Secretary of State*, 48 Cal. 766 : (A.I.R. (8) 1921 Cal. 262) for the purpose of deciding whether counsel should be instructed by Vakil or by Attorney, a reference made under a similar provision in S. 51, Income-tax Act, 1918 (VII [7] of 1918) was treated as relating to the civil appellate jurisdiction of the H. C. This view was not accepted by Rankin & Page JJ. in *Emperor* v. *Probhat Chandra Barua*, 51 Cal. 504 : (A. I. R. (11) 1924 Cal. 668), which related to a difference of opinion in a similar reference under the Income-tax Act, 1922 (XI [11] of 1922). Relying on *Tata Iron & Steel Co., Ltd.* v. *Chief Revenue Authority, Bombay*, 50 I. A. 212 : (A. I. R. (10) 1923 P. C. 148), their Lordships held that this was a case of special jurisdiction to which the Code of Civil Procedure is not applicable, an opinion with which I respectfully agree. They held, however, that it was covered by Cl. 36, Letters Patent (corresponding to Cl. 28, Letters Patent of this Ct.) & disposed of the reference accordingly. The attention of their Lordships

does not appear to have been drawn to the words "hereby directed" in the opening sentence of Cl. 36. With respect, I would observe that the provisions in this clause relate to a difference of opinion arising in the exercise of a function which is directed by the Letters Patent to be performed by the H. C. in the exercise of its original or appellate jurisdiction. There is nothing in the Letters Patent providing for the exercise of the jurisdiction in question, it being a jurisdiction that is vested in the H. C. by a special statute. These observations apply also to the present case & Cl. 28, Letters Patent of this Ct.

[5] Recognition to the view which I have just expressed has been given by an amendment of the Income-tax Act, 1922, which was made in 1926. By this amendment, S. 66A was inserted providing, *inter alia*, for the procedure to be followed in the event of a difference of opinion between the Judges in the hearing of a reference under the Act.

[6] In my opinion, neither Cl. 28, Letters Patent nor S. 98, Civil P. C., has any application. There is no provision in the taxing Act similar to S. 66A, Income-tax Act, 1922. This, however, creates no difficulty. There being no procedure provided by law, it was open to my Lord the Chief Justice to mould a convenient form of procedure, *vide Smith* v. *Williams*, (1922) 1 K. B. 158: (91 L. J. K. B. 156), which was followed in *Maharajadhiraja of Darbhanga* v. *Commissioner of Income-tax*, 9 Pat. 240 at p. 277: (A. I. R. (17) 1930 Pat. 81 S. B.). The preliminary objection, therefore, fails.

[7] There is more substance in the further objection, also of a preliminary nature, that the appln. is not maintainable. In reply to the objection, it has been stressed by Mr. P. R. Das that the appln. is under Art. 133, Const. Ind. which is wider in terms than the provision for appeal to the P. C. contained in the Letters Patent. It is pointed out that under Cl. 31, Letters Patent an appeal lay from "any *final* judgment, decree or order of the High Court at Patna made on appeal, and from any *final* judgment, decree or order made in the exercise of original jurisdiction, etc.,"

whereas, under Art. 133 an appeal lies from "any judgment, decree or *final* order in a civil proceeding of a High Court". (The italics are mine). Sub-section (5) of S. 21 of the taxing Act provides that the H. C., on the hearing of a reference, shall "decide" the question of law referred & shall deliver its "judgment", which it shall send to the Board of Revenue & the Board shall dispose of the case accordingly. It is contended, the decision of the H. C. in this case is, therefore, a judgment & since under Art. 133 it is not necessary that the judgment in question must be final, *Tata Iron & Steel Co. Ltd.* v. *Chief Revenue Authority, Bombay*, (50 I. A. 212: A. I. R. (10) 1923 P. C. 148 *supra*), which was decided under the earlier law, has no application. In my opinion, that decision does not proceed merely on the fact that the "judgment" sought to be appealed against was not final. That case related to an appeal from a decision of the Bombay H. C. upon a case stated by the Chief Revenue Authority under S. 51, Income-tax Act, 1918, the provisions of which were substantially the same as the provisions of the taxing Act. There, as here, it was provided that, on the hearing of the reference, the H. C. shall "decide" the question raised & shall deliver "judgment" thereon containing the grounds on which the decision is founded, & shall send the Revenue Authority a copy of this "judgment" under the seal of the Ct. & the signature of the Registrar, & the Revenue Authority shall dispose of the case accordingly. For an appeal to lie under Cl. 36 (39?) (corresponding to Cl. 31, Letters Patent of this Ct.) it was necessary that the decision of the H. C. should be either a "final judgment", or "final decree", or a "final order". Their Lordships first considered whether it was a "final judgment" & answered the question in the negative. They commenced with the definition of "final judgment" given by Lord Selborne in *Ex parte Moore*, 1885-14 Q. B. D. 627, that nothing more is necessary than a proper *litis contestatio* & a final adjudication between the parties to it on the merits —a definition applicable to the decision before their Lordships. Apparently, however, they preferred the definition given by Lord Esher, (Lord Lindley & Bowen L. J. concurring), in *Onslow* v. *Commissioners of Inland Revenue*, (1890) 25 Q. B. D. 465 : (59 L. J. Q. B. 556). That case concerned a decision of the Ct. of Exchequer on a reference under S. 19, Stamp Act, 1870 (34 & 35 Vict. C. 7). Under that Act the Ct. was empowered to assess any duty it might decide to be chargeable on the instrument in question, and to order a refund if it found an excess charge to have been made; in the event of decision confirming the assessment, the costs of the Comrs. were payable by the opposite party. The Ct. decided in favour of Comrs. & the question arose whether the decision of the Ct. was a "judgment" or an "order" for the purposes of appeal. Lord Esher came to the conclusion that it was not a "judgment," observing :

> "A 'judgment,' therefore, is a decision obtained in an action, & every other decision is an order."

Their Lordships of the Judicial Committee showed their acceptance of this definition by observing :

"This decision clearly establishes that the decision & an order made by Ct. under S. 51 of the jurisdiction *(sci)* cannot be held to be a 'final judgment' within the meaning of Cl. 39, Letters Patent, since there is nothing to show an intention in the year 1862 to use those words in a sense more extended than their legal sense."

They marked their acceptance of Lord Esher's definition by adding :

"It is evident from this case of *Onslow* v *Commissioners of Inland Revenue*, 1890-25 Q. B. D. 465 : (59 L. J. Q. B. 556), that the use of the words 'determine' & 'decide,' or the direction that money paid in excess is to be refunded or the awarding of costs against the unsuccessful party, are not things which distinguish a judgment from an order where questions are referred to the Cts. by case stated.

The word 'judgment' is indeed popularly used in many different senses, as when one says a certain man is a man of sound judgment, meaning that he is possessed of the intellectul faculty of deciding rightly on facts or circumstances, or where even in legal matters the expression of the opinion formed in a case by a judge who dissents from his colleagues is commonly called his judgment, though it can have no effect whatever on the determination of the suit or action in which it is delivered."

[8] It is true that their Lordships concluded by deciding that the decision was not a "final judgment," but this was because they were considering whether the decision was covered by Cl. 36, Letters Patent, & that clause speaks of a "final judgment."

[9] My view of what their Lordships found is supported by their discussion of the provision in S. 51, Income-tax Act, that the H. C. shall "decide" & shall "deliver judgment" &c., at the end of which discussion they remark:

"It would appear clear to their Lordships that the word 'judgment' is not here used in its strict legal & proper sense.

It is not an executive document directing something to be done or not to be done, but is merely the expression of the opinions of the majority of the judges who heard the case, together with a statement of the grounds upon which those opinions are based. It amounts only to a ruling that a certain deduction claimed by a tax payer to be allowed from the sum for which he has been already assessed to income-tax is not permissible."

If the decision is only an expression of opinion it cannot be a judgment.

[10] In the course of considering whether the decision of the H. C. was a "final order" their Lordships referred to *In re Knight and the Tabernacle Permanent Building Society*, (1892) 2 Q. B. 613 : (62 L. J. Q. B. 33) and *Peter Johnson* v. *Glassgow Corporation*, 1912 S. C. 300 & pointed out that in spite of the use of terms "decision" & "determination" the function of the Ct. may be merely advisory, even though the opinion of the Ct. be binding on the functionary who states the case for decision & they ended up with a relevant citation from the judgment of Lord Esher in the former case :

" 'In the case of *Ex parte County Council of Kent*, 1891-1 Q. B. 725, where a statute provided that a case might be stated for the decision of the Ct. it was held that though the language might *prima facie* import that there has to be the equivalent of a judgment or order, yet when the context was looked at it appeared that the jurisdiction of the Ct. appealed to was only consultative, & that there was nothing which amounted to a judgment or order."

[11] Again, because of the terms of Cl. 36, Letters Patent, their Lordships concluded that the decision of the H. C. was not "final order" but it appears from their judgment that in their opinion the decision was neither a "judgment" nor an "order". To exclude the application of Art. 133, however, it is sufficient that the decision is not a "final order".

[12] The words which their Lordships were interpreting were "final judgment, decree or order" occurring in the Letters Patent of the H. C. We are concerned here with the same words in the same juxtaposition: "judgment, decree or final order", & I would interpret them similarly. The "judgment" & the "decree" are no longer required to be "final" but that does not indicate that they are to be otherwise different in kind from the "judgment" & the "decree" contemplated by the previous law. I am strengthened in my opinion by Art. 136, Const. Ind. providing for special leave to appeal from "any judgment, decree, determination, sentence or order". The opinion expressed by the H. Cs. on a reference of the kind with which we are concerned would appear to be a "determination" within the meaning of this clause.

[13] On the view I have taken, Art. 133 has no application & it is not necessary to consider whether the proceeding in which that decision was given was a "civil proceeding" within the meaning of Art. 133. It has been suggested that this term has been used in contradistinction to the term "criminal proceeding" in Art. 134 which is not criminal. But Art. 132 of the Constitution seems to contemplate that the H. C. may exercise jurisdiction in "other proceedings" besides "civil proceedings" & "criminal proceedings," & the special jurisdiction of the H. C. under the taxing Act may be one instance of such "other proceedings." In this respect Art. 133 would not appear to be as wide as Cl. 31, Letters Patent, which provides for appeals in regard to matters "not being of criminal jurisdiction."

[14] Our attention has been drawn to the order of Agarwala C. J. & Nageshwar Prasad J. dated 9-3-1949, in granting leave to appeal in F. C. A. No. 71 of 1948. That was a case of an

appeal against an order of this Ct. refusing to call upon the Board of Revenue to state a case under the Bihar Sales Tax Act, 1944. Their Lordships granted leave under Cl. 31, Letters Patent, following a decision of a Full Bench of the Lahore H. C., the appeal in which case was dismissed on the merits by the Judicial Committee without deciding the "serious" question whether cl. 29, Letters Patent of the Lahore H. C. (corresponding to Cl. 31, Letters Patent of this H.C.) had any application. *Feroze Shah* v. *The Commissioner of Income tax*, 12 Lah. 166: (A. I. R. (18) 1931 Lah. 138 F. B.), *Feroze Shah* v. *Commissioner of Income-tax, Punjab*, 14 Lah. 682: (A.I.R. (20) 1933 P. C. 198). There is a considerable difference between an order refusing to call for a reference & a decision on a reference made, & the case of *Tata Iron & Steel Co., Ltd.* v. *Chief Revenue Authority, Bombay*, 50 I. A. 212: (A. I. R. (10) 1923 P. C. 148) is an authority that Cl. 31, Letters Patent has no application to the latter. The decision in F. C. A. No. 71 of 1948 is clearly distinguishable & Mr. P. R. Das has not pressed this appln. as one under the Letters Patent.

[15] In view of the opinion I have expressed, it is unnecessary to consider the final contention of the learned Advocate General that, on the merits, the petn. should be dismissed. *Prima facie*, a certificate would appear to be justified where three Honourable Judges of this Ct. have expressed differing views & such a larger sum of money is involved.

[16] *Das J.*—I regret I am unable to agree with my learned brother as to the effect of the decision of their Lordships of the Judicial Committee in *Tata Iron & Steel Co., Ltd.* v. *Chief Revenue Authority, Bombay*, 50 I.A. 212: (A. I. R. (10) 1923 P. C. 148). No doubt, there are observations in the said judgment, with particular reference to an English decision relating to the Stamp Act, 1870 (34 & 35 Vict. c. 7), which seem to show that a judgment is a decision obtained in an action, & every other decision is an order. But the decision itself was on the question whether the judgment delivered by the H. C. on 28-2-1921, on a reference by case stated under S. 51, Income-tax Act, 1918, was a final judgment within the meaning of Cl. 39, Letters Patent of the Bombay H. C., corresponding to Cl. 31, Letters Patent of the Patna H. C. Lord Atkinson, who delivered the judgment of their Lordships, thus propounded the question for decision of their Lordships :

"In order, therefore, that the appeal in this case should be held to be competent, the decision & order of the H. C. under S. 51, Income-tax Act, must come within Cl. 39, Letters Patent. It must be either a final judgment or a final decree or a final order."

His Lordship then referred to *Ex parte Moore*, (1885) 14 Q. B. D. 627 at p. 632, where Lord Selborne laid down that to constitute an order a final judgment, nothing more is necessary than that there should be a proper *litis contestatio* & a final adjudication between the parties to it on the merits. His Lordship then referred to *Onslow* v. *Commissioner of Inland Revenue*, (1890) 25 Q. B. D. 465 : (59 L. J. Q. B. 556), which was a case under the Stamp Act, 1870. After referring to the observations of Cotton L. J., in *Ex parte Chinery*, (1884) 12 Q. B. D. 342 at p. 345 : (53 L. J. Ch. 662) with which Bowen & Kay L. JJ., concurred, his Lordship quoted Lord Esher as saying that a judgment is a decision obtained in an action, & every other decision is an order. But the decision which their Lordships of the Judicial Committee gave was thus expressed :

"This decision clearly establishes that the decision & an order made by the Ct. under S. 51 of the jurisdiction (*sic*) cannot be held to be a 'final judgment' within the meaning of Cl. 39, Letters Patent, since there is nothing to show an intention in the year 1862 to use those words in a sense more extended than their legal sense."

The words "final judgment" were put in quotation marks. Having decided that the decision was not a final judgment within the meaning of Cl. 39, Letters Patent, their Lordships went on to consider whether it was a final order within the meaning of that clause. The final decision of their Lordships was thus expressed :

"It would appear to their Lordships that having regard to the authorities cited, & for the reasons already stated, the decision, judgment or order made by the Ct. under S. 51, Income-tax Act in this case, was merely advisory, & not in the proper & legal sense of the term final, & thus so far as these considerations are concerned that the appeal is incompetent."

It is significant to note the use of the word 'judgment' in respect of the decision or order of the Ct. under S. 51, Income-tax Act. I think that it would be wrong to take the P. C. decision in a more extended sense than what their Lordships in express terms, stated the decision to be. The observations in *Onslow* v. *The Commissioner of Inland Revenue*, (1890) 25 Q. B. D. 465 : (59 L. J. Q. B. 556) which dealt with a different statute, were referred to in order to fortify the decision of their Lordships that the order of the H. C. was merely advisory & not in the proper & legal sense of the term 'final.' It is to be observed that the statute under which the decision of the H. C. was given in this case itself speaks of the decision as a 'judgment.' In *Onslow* v. *The Commissioner of Inland Revenue*, (1890) 25 Q. B. D. 465 : (59 L. J. Q. B. 556), the question whether the order of the Comrs. was a judgment arose, not because the Stamp Act of 1870 used the word 'judgment' in connection with the order

of the Comrs., but because of R. 15 of O. 58 of the Rules of the Supreme Court, 1883.

[17] Article 133, Const. Ind. uses the word 'final' before the word 'order' only, & does not use the adjective 'final' in connection with 'judgment' & 'decree.' The word 'judgment' did not occur in S. 109 or S. 110, Civil P. C. The words used there were

"any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction," "any decree or final order passed by a High Court in the exercise of original civil jurisdiction" and "any decree or order when the case is certified to be a fit one for appeal to His Majesty in Council."

In Cl. 31, Letters Patent of the Patna H. C. the expression used is

"any final judgment, decree or order of the High Court of Judicature at Patna made on appeal, and any final judgment, decree or order made in the exercise of original jurisdiction by the Judges of the said High Court, etc."

In my opinion, the scope of Art. 133 of the Constitution is wider than the scope of Ss. 109 & 110, Civil P. C., & Cl. 31, Letters Patent; because it must be taken that the Constituent Assembly which made the Constitution, were aware of the previous state of the law, & advisedly dropped the word 'final' before the word 'judgment.'

[18] There is, however, a still further question which arises in this connection, & that question is if the judgment of the H. C. in a sales-tax matter is a judgment in *a civil proceeding* (I have underlined (here italicised) the important words). It has been contended before us that the expression "civil proceeding" has been used in Art. 133 in contra-distinction to the expression "criminal proceeding" used in Art. 134. Our attention has not been drawn to any direct decision on this question. After we had heard arguments in this case, I find that there are certain general observations in a judgment of the S. C. which have some bearing on the question. The decision is reported in the September issue of the All India Reporter, *Pritam Singh* v. *The State*, A. I. R. (37) 1950 S. C. 169 : (51 Cr. L. J. 1270). Their Lordships were dealing with the case of an appeal by one Pritam Singh against the decision of the H. C. of Punjab at Simla, upholding his conviction on the charge of murder of one Buta Singh. His Lordship Fazl Ali J., who delivered the judgment of the Ct. referred to the relevant articles of the Constitution dealing with the appellate jurisdiction of the S. C. in the following words :

"The relevant articles of the Constitution dealing with the appellate jurisdiction of the S. Ct. are Arts. 132 to 136. Article 132 applies both to civil & criminal cases & under it an appeal shall lie to the S. Ct. from any judgment, decree or final order of a H. Ct. whether in a civil, criminal or other proceeding, if the H. Ct. certifies that the case involves a substantial question of law as to the interpretation of the Constitution. Article 133 deals with the appellate jurisdiction of this Ct. in Civil matters only, & it has been drafted on the lines of Ss. 109 & 110, Civil P. C., 1908. Article 134 constitutes the S. Ct. as a Ct. of criminal appeal in a limited class of cases only, & clearly implies that no appeal lies to it as a matter of course or right except in cases specified therein. Article 135 merely provides that the S. Ct. shall have jurisdiction & powers with respect to any matter to which the provisions of Art. 133 or Art. 134 do not apply, if the jurisdiction & powers in relation to that matter were exercisable by the F. C. immediately before the commencement of the Constitution under any existing law."

It is to be observed that Art. 135 of the Constitution has reference to the Abolition of the Privy Council Jurisdiction Act, 1949, which came into force on 10-10-1949, & under which all the powers that were possessed by the Judicial Committee of the P. C. in regard to cases or matters arising in India became exercisable by the F. C. of India, whether those powers were exercisable by reason of statutory authority or under the prerogative of the King.

[19] His Lordship then quoted Art. 136 & summarised the position thus:

"The points to be noted in regard to this article are firstly, that it is very general & is not confined merely to criminal cases, as is evident from the words 'appeal from any judgment, decree, sentence or order' which occur therein & which obviously cover a wide range of matters; secondly, that the words used in this article are 'in any cause or matter', while those used in Arts. 132 to 134 are 'civil, criminal or other proceeding', & thirdly, that while in Arts. 132 to 134 reference is made to appeals from the H. Cs. under this article, an appeal will lie from any Ct. or tribunal in the territory of India."

His Lordship then stated that by authority of Art. 136 the S. C. can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunals & in a variety of other cases. It is worthy of note that income-tax cases are referred to separately from civil cases. The same point has been referred to again in the *Bharat Bank Ltd., Delhi* v. *Employees of the Bharat Bank*, A. I. R. (37) 1950 S. C. 188 : (1950 S. C. R. 459). I must say that the question whether income-tax cases, or for that matter, sales tax cases, are civil proceedings within the meaning of Art. 133 of the Constitution, did not specifically arise for decision in *Pritam Singh's case*, A. I. R. (37) 1950 S. C. 169 : (51 Cr. L. J. 1270); but the observations made therein seem to imply that income-tax cases or sales tax cases are not civil proceedings within the meaning of Art. 133, Const. Ind. In F. C. App. No. 71 of 1948 leave was granted by a Division Bench of this Ct. in a Bihar Sales Tax case on the assumption that the proceeding was a civil proceeding. The matter, therefore, requires consideration by a larger Bench.

[20] *By the Court.*—We are agreed that, if Art. 133, Const. Ind. applies, leave to appeal should be granted under cl. (1) sub-cl. (c) of that Article. But, for the reasons which we have given above, we are not agreed whether the order of this Ct. against which the right of appeal is claimed, is or is not a judgment within the meaning of Art. 133. The further question if it was a civil proceeding within the meaning of that Article also requires consideration by a larger Bench in view of the Division Bench decision in F. C. App. No. 71 of 1948, regarding the correctness of which we entertain some doubt. In the circumstances, we submit the case to his Lordship the Chief Justice with the suggestion that it may be referred to a larger Bench for disposal.

Opinion of the Full Bench

[21] **Sarjoo Prasad J.** — This is an appln. for leave to appeal to the S. C. from a decision of this Ct. arising out of a reference under S. 21 (3), Bihar Sales Tax Act, 1944 (Bihar Act VI [6] of 1944).

[22] The matter was at first placed for hearing before Reuben & Das JJ. Their Lordships were agreed that if Art. 133, Const. Ind. applied leave to appeal should be granted under cl. (1) sub-cl. (c) of that Article. There was, however, a difference of opinion between them as to whether the order of this Court from which the right of appeal was claimed is or is not a "judgment" within the meaning of Art. 133. The further question which arose for consideration by them was whether the decision in question related to or was a decision in a "civil proceeding' under the said Article. On this point, they doubted the correctness of the decision of this Ct. in F. C. App. No. 71 of 1948 in which leave was granted by a Division Bench in a Bihar Sales Tax Act case on the assumption that the proceeding was a civil proceeding. Reuben J. was of the view that the decision of this Ct. against which the present appln. is directed was not a decision in a "civil proceeding' as contemplated by Art. 133 of the Constitution Act. Das J. was inclined to the same view; but as both of their Lordships entertained doubt about the correctness of the aforesaid order in F. C. App. No. 71 of 1948 granting leave to appeal, they suggested that the matter should be referred for disposal to a larger Bench. Accordingly the matter has been placed before us.

[23] Mr. P. R. Das appearing on behalf of the appct. has conceded that the appln. for leave to appeal in the present case does not fall under ss. 109 & 110, Civil P. C., because the decision in question is neither a decree nor a final order coming under any of the said provisions. He also concedes that he has no right of appeal under the Letters Patent of this Ct. He, however, contends & very strongly contends that he is entitled to appeal under Art. 133, Constitution Act, & leave to appeal should, therefore, be granted to him.

[24] Article 133, Const. Ind. provides that "an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies (c) that the case is a fit one for appeal to the Supreme Court."
(I have omitted the irrelevant portions of the Article). It would, therefore, appear from the above that the two essential requisites of the Article in question are (1) that the appeal should be from any *judgment, decree or final order* & (2) that the said judgment, decree or final order must have been passed in a *civil proceeding*. It is, therefore, to be determined whether these two requisites of the Article have been satisfied before the appct. can be held entitled to a right of appeal to the S. C. As I have stated above, Reuben J. was definitely of the view that the decision of this Ct. from which the appeal is sought to be preferred does not fulfil either of these requirements. Das J. on the contrary, was of the view that it was a judgment & fulfils the first requirement but is doubtful in regard to the second requirement. His own view seems to be that it did not relate to a 'civil proceeding' though he felt some difficulty on account of the order of a Division Bench of this Ct. passed in F. C. App. No. 71 of 1948 following a F. B. decision of the Lahore H. C. in *Feroze Shah* v. *Commissioner of Income-tax*, 12 Lah. 166 : (A. I. R. (18) 1931 Lah. 138 F. B.). The net result is that both the learned Judges were of the opinion that the essential conditions of Art. 133 were not fulfilled. The co-existence of the two requisites being essential as enjoined by Art. 133, the appln. for leave to appeal should have been dismissed by their Lordships. The reference to this Bench, however, appears to have been necessitated merely because of the Division Bench order in F. C. App. No. 71 of 1948. Mr. P. R. Das for the appct. did not seriously press for our consideration the correctness of that order. He conceded that the said order had been passed at a time when the Constitution Act was not in force & he could not rely upon it in support of his present appln. for leave. My learned brother Reuben J. also observes that

"the decision in F. C. App. No. 71 of 1948 is clearly distinguishable & Mr. P. R. Das has not pressed his appln. as one under the Letters Patent."

There was, therefore, no further point to be considered. It is necessary to mention in this

context that the S. C. has since decided the appeal in which leave had been granted by this Ct. in F. C. App. No. 71 of 1948. I will have occasion to refer to this case at a later stage, but it may be sufficient to point out that the S. C. approved of the decision of this Ct. in *Sri Harihar Gir* v. *Commissioner of Income-tax, B. & O.*, A. I. R. (28) 1941 Pat. 225 : (20 Pat. 561 S.B.) which refused to accept the view taken by the F. B. of the Lahore H. C.

[25] Mr. P. R. Das for the appct., however, argues that it should be held in disagreement with Reuben J. & in agreement with Das J. that the decision of this Ct. from which the appeal is sought to be preferred is a *judgment*, & it should also be held in disagreement with both the learned Judges that the decision in question did arise out of a *civil proceeding*. As elaborate arguments have been advanced at the Bar, I will deal with both these arguments separately. I may, however, say at once that I feel no hesitation in agreeing with my learned brother Reuben J, as to his decision on both the points canvassed before us. In doing so, I find that whatever doubts I may have had in the beginning have been more than dispelled & dissipated not only by the decision of the Judicial Committee in *Tata Iron and Steel Co.* v. *Chief Revenue Authority, Bombay*, 50 I. A. 212 : (A. I. R. (10) 1923 P. C. 148) on which Reuben J. relies, but also, as I shall presently show by a number of other authoritative pronouncements in all of which the same meaning of the term "judgment" has been consistently adopted. In order, however, to appreciate the legal aspect of the matter, it would be just as well to refer briefly to some of the salient facts giving rise to this appln. for leave.

[26] At the instance of the appct. who is also the assessee, this Ct. called upon the Board of Revenue to state a case in regard to certain points formulated by this Ct. This was done under authority of S. 21 (3), Bihar Sales Tax Act, 1944 (Bihar Act VI [6] of 1944), the relevant taxing statute. The Board of Revenue accordingly made a reference to this Ct. on those points of law affecting the assessment of the appct. during the period running from 1-10-1944 to 31-3-1945. The accepted gross turnover of the assessee during this period was Rs. 3,41,98,000. The petnr. claimed deduction under S. 5, sub-s. (2), cl. (a) (v) of the taxing Act in respect of a turnover of Rs. 2,93,15,000. This clause provides that the assessee is exempted from liability to pay sales tax on turnover derived from

"the sales of goods which are shown to the satisfaction of the Comr. to have been despatched by, or on behalf of, the dealer to an address outside Bihar."

The exemption was claimed in respect of goods despatched by the assessee Company to an address outside Bihar though the sale itself had been completed in this province.

[27] This reference under S. 21 (3) of the taxing statute was first heard by my learned brother Das J. & myself, & as there was a difference of opinion between us in regard to this deduction claimed by the assessee, it was referred to my learned brother B. P. Sinha J. who by another line of reasoning arrived at the same conclusion as myself. On the facts we were all agreed that the transactions amounted to sales, & that the sales were completed & the property in the goods had passed to the vendee before the despatch of the goods outside the province. Das J. considered that the physical despatch of the goods by the assessee was all that was contemplated by the relevant clause of the taxing Act, &, therefore, the assessee was entitled to the deduction; whereas my own view was that the sale having been completed in this province before the despatch of the goods, & the title being no longer in the vendor, the exemption clause could not operate to the benefit of the assesee inasmuch as the taxing statute operated on all sales of goods in the Province. In my opinion, the exemption clause applied only with reference to sales of goods which were despatched by the dealer to an address outside the province, & in which the dealer retained a title in the goods before he despatched them. B. P. Sinha J. held that the clause laid stress on the comr. being satisfied as to despatch being by the dealer or otherwise, & the H. C. was bound to accept the finding of the Comr. on the point that the despatch was on behalf of the vendee. Thus the ultimate effect of these decisions was that all the points on which the Board of Revenue had been called upon to state a case under S. 21 (3) of the Act were answered against the petnr. It is against this decision of the Ct. that the petnr. has presented the above appln. for leave to appeal to the S. C.

[28] Mr. P. R. Das argues that the decision given by this Ct. under S. 21 (5) of the taxing statute is a judgment inasmuch as that sub-section itself provides that the H. C. on the hearing of a reference "shall decide the question of law" referred to & "shall deliver its judgment" which it shall send to the Board of Revenue "& the Board shall dispose of the case accordingly." Mr. Das, therefore, urges that this decision of the Court being a 'judgment' as provided by S. 21 (5) of the taxing statute, it must be held to be appealable under Art. 133, Constitution Act which does not speak of any final judgment but of "any judgment, decree

or final order." Here he contrasts the language of Cl. 31, Letters Patent, which speaks of "any final judgment, decree or order of the High Court." According to the learned counsel, a judgment in order to be appealable need not be a 'final judgment,' & even if it is of an interlocutory character, it would still be appealable as the right of appeal appears to have been enlarged under Art. 133, Constitution Act, by dropping the word 'final' before 'judgment.' He also points out that the word 'final' has been used in that article with reference to an 'order' but not with reference to a 'judgment,' & from this he submits that it was never intended that the judgment from which the petnr. has a right of appeal must necessarily be in the nature of a *final* judgment.

[29] In order to understand the import of the term 'judgment' Reuben J. relied upon a decision of the P. C. in *Tata Iron & Steel Company* v. *Chief Revenue Authority, Bombay*, (50 I. A. 212: A.I.R. (10) 1923 P. C. 148) (*supra*). The decision, in consonance with old English precedents, adopts the meaning of the term 'judgment' which in legal phraseology has been all along attributed to it. I do not propose to encumber my discussion of the subject with long quotations from the aforesaid decision specially when the case has been succinctly analysed by my learned brother Reuben J. But I cannot help referring to a passage from the judgment of Lord Esher which the P. C. has quoted with approval and which has been so often quoted in Indian decisions. The passage runs as follows :

"In the same case Bowen L. J. says there is an inherent distinction between judgments and orders, & that the words 'final judgment' have a professional meaning, by which expression I think he meant to say, as Cotton L. J. had previously said, that a 'judgment' is a decision obtained in an action; and if that was his meaning, both these learned Lords Justices gave judgment to the same effect, and Fry L. J. agreed with him. A 'judgment', therefore, is a decision obtained in an action, and every other decision is an order. . . . . That is, in my opinion, a proper distinction. . . . . "

Following the above distinction the Privy Council held :

"This decision clearly establishes that the decision and an order made by the Court under S. 51 of the jurisdiction *(sic)* cannot be held to be a 'final judgment' within the meaning of Cl. 39, Letters Patent, since there is nothing to show an intention in the year 1862 to use those words in a sense more extended than their legal sense."

[30] I may observe in the context that Cl. 39, Letters Patent under consideration by the P. C. corresponds to Cl. 31, Letters Patent of this Court. Their Lordships further pointed out the danger of confusing the meaning of the expression 'judgment' in a popular or loose sense with the 'professional' or legal sense of the term. I will quote their own words :

"The word 'judgment' is indeed popularly used in many different senses, as when one says a certain man is a man of sound judgment, meaning that he is possessed of the intellectual faculty of deciding rightly on fact or circumstances, or where even in legal matters the expression of the opinion formed in a case by a judge who dissents from his colleagues is commonly called his judgment, though it can have no effect whatever on the determination of the suit or action in which it is delivered."

Therefore, the use of the term 'judgment' or 'final judgment' in the eye of law does not bear any different significance, and the use of the word 'final' as qualifying 'judgment' is merely *ex cautela*. It is in this orthodox and juristic sense that the term 'judgment' appears to have been used in Ss. 205 & 206, Government of India Act, 1935 or for the matter of that in Arts. 132, 133 and 134 of the present Constitution of India.

[31] Mr. P. R. Das, however, seeks to distinguish the above decision of the P. C. in *Tata Iron & Steel Co.* (50 I. A. 212 : A. I. R. (10) 1923 P. C. 148) *(supra)* in two ways. He contends in the first place that the decision is based upon the language of Cl. 39, Letters Patent, which used the expression 'final judgment'. If I may say so, this was the main point of distinction pressed by Mr. Das which found favour with the other learned Judge. The other point of distinction was sought to be evolved by the learned counsel out of a suggestion which fell from one of us in course of his reply to the arguments of the learned Govt. Pleader. The point is that under the Income-tax Act, 1918, there was no power in the H. C. to call upon the taxing authorities to state a case & that, therefore, the H. C. in deciding the points of law referred to it by the revenue authorities acted merely in an advisory capacity. It is for this reason that it was suggested that the judgment pronounced by the H. C. was not a judgment in the real sense of the term & the observations of the Judicial Committee should be confined only to that contest.

[32] It is true that under the law of Income-tax in India as it now stands or for the matter of that under S. 21 (3), Bihar Sales Tax Act, the H. C. is also empowered to call for a reference from the Revenue Authorities. This is what was done in the present case; but this factor to my mind does not improve the position & does not lend any additional finality to the judgment which the H. C. comes to pronounce on the hearing of the reference. Whether the Revenue authorities state a case to the H. C. on certain points of law arising out of their judgment or the H. C. calls upon them to state a case on such points of law, in either

event the H. C. after the hearing of the case shall "deliver its judgment" & "shall send to the Board of Revenue a copy of such judgment" & "the Board shall dispose of the case accordingly." The position was exactly the same under S. 51, Income-tax Act, 1918 which came in for consideration by the P. C. If, therefore, the H. C. was then held to be acting in advisory capacity in delivering its judgment, the capacity of the H. C. is not altered when acting under S. 21 (5), Bihar Sales Tax Act, 1944. That the aforesaid change in the law has not affected the function of the H. C. in delivering its 'judgment' on such references is clear from another decision of the Judicial Committee in *Rajendra Narayan Bhanj Deo* v. *Commissioner of Income-tax, B. & O.*, 21 P. L. T. 869 : (A. I. R. (27) 1940 P. C. 158). In that case the H. C. had called for a reference under S. 66 (3), Income-tax Act, from the Revenue-authority & answered the points of law against the assessee who obtained special leave to appeal from the judgment of the H. C. The Judicial Committee, while disposing of the appeal, observed :

"The function of the H. C. in cases referred to it under S. 66 of the Act is advisory only & is confined to considering & answering the actual question referred to it."

[33] This is exactly the function under S. 21 (5), Sales Tax Act which says : "The High Court upon the hearing of any such case shall *decide the question of law raised thereby . . .*" (Italics are mine).

[34] In my opinion, there is no substance at all in this ground of distinction.

[35] The other point of distinction, namely, that the decision in *Tata Iron and Steel Co.*, (50 I. A. 212 : A.I.R. (10) 1923 P. C. 148) (supra) being based only upon the language of Cl. 39, Letters Patent, can have no application to a case where the right of appeal is claimed under Art. 133, Constitution Act, is equally without merit. True it is that the right of appeal in that case was claimed under Cl. 39, Letters Patent where the expression 'final judgment' occurs but the decision proceeds not so much upon the language of Cl. 39 as upon the language of S. 51, Income-tax Act, which uses the word 'judgment' & which is very similar to S. 21 (5), Sales Tax Act.

[36] The question which the Judicial Committee posed for consideration was

"what is the nature & character of the acts which S. 51, Income-tax Act, authorizes & empowers the H. C. to do."

It then proceeds to analyse the various provisions of S. 51, Income-tax Act, which under sub-s. (3) provides

'that on the hearing of the case the High Court shall 'decide' the questions raised thereby, and shall 'deliver judgment' thereon containing the grounds on which the decision is founded and shall send to the Revenue-authority a copy of this judgment under the seal of the Court and the signature of the Registrar, and the Revenue-authority shall dispose of the case accordingly . . . .".

In view of this provision the P. C. observed as follows :

"This last provision merely means that the Revenue Officer in proceeding with the work in the course of which he was engaged when the question referred arose, shall be guided by the decision given, & shall make his assessment accordingly—the ultimate result being that he assesses the taxpayer at an amount which in his instructed opinion he Judges to be right . . . . The decision of the H. C. does not in any way enforce the discharge of that liability. It would appear clear to their Lordships that the word 'judgment' is not here used in its strict legal & proper sense."

[37] At another place with reference to such a judgment the Judicial Committee says :

"It amounts only to a ruling that a certain deduction claimed by a taxpayer to be allowed from the sum for which he has been already assessed to income-tax is not permissible."

and then the judgment finally concludes with these pertinent observations :

"It would appear to their Lordships that having regard to the authorities cited, & for the reasons already stated, the decision, judgment or order made by the Ct. under S. 51, Income-tax Act in this case, was merely advisory, & not in the proper & legal sense of the term final, & thus so far as these considerations are concerned that the appeal is incompetent."

[38] These observations apply with equal force to the language of S. 21 (5), Bihar Sales Tax Act, & it is perfectly clear from these observations that any judgment which the H. C. pronounces in regard to the questions of law referred to it by the Revenue-authorities is not a judgment in the technical sense of the term but merely a sort of opinion or advice; undoubtedly on those questions of reference the Revenue authorities are governed & they have to mould their order of assessment in the light of the advice so tendered by the H. C.

[39] It is significant to note that in the decision in question the P. C. relied upon the observations of Lord Esher in the case of *Onslow* v. *Commissioner of Inland Revenue*, (1890) 25 Q. B. D. 465 : (59 L. J. Q. B. 556) which arose under the Stamp Act, 1870 (34 & 35 Vict. C. 7). Under S. 19 of the said Statute a person dissatisfied with the order of the Comrs. could appeal to the Ct. of Exchequer & require the Comrs. to state a case upon the points on which the opinion of the Ct. was required & the Comrs. were bound to do so. On the hearing of the case the Ct. had the power to determine the questions submitted, & if the instrument in question in the opinion of the Ct. was chargeable with any duty, the Ct.

could assess that duty. If, on the other hand, the Ct. decided that the Comr.'s assessment is erroneous, any excess of duty which may have been paid thereunder or any penalty in respect thereof could be ordered by the Ct. to be refunded to the applts. with costs incurred in relation to the appeal. Under R. 15 of the Supreme Court Rules, the question arose whether such an order of the Ct. of Exchequer was a judgment or an order, & I have already shown, it was held that the order in question was not a 'judgment,' & therefore, special leave had to be obtained in order to enable the party to appeal within the meaning of the rule, Sections 56 to 59, Indian Stamp Act (II [2] of 1899) also provide for such references to the H. C. to be made by the Revenue-authority & the language of S. 59 also shows that the H. C. upon the hearing of any such case shall decide the question raised thereby & shall deliver its 'judgment' thereon containing the grounds on which such decision is founded; & the Ct. shall then send a copy of such judgment to the Revenue authority by which the case was stated, & the said authority shall dispose of the case conformable to such a 'judgment.' Here also although the word 'judgment' has been used, I do not know of any case where a party has been held entitled to prefer an appeal to the P. C. against a judgment of this character. Nor, in my opinion, such an appeal could be entertainable, the Stamp Act itself not having provided for such a contingency, because a judgment of such a nature is not a 'judgment' in the real sense of the term although it has its finality in respect of the points which are stated to the Ct. for its decision.

[40] The learned Govt. Pleader has further drawn our attention to the fact that Arts. 132 & 133, Constitution Act, are very much on the same lines as Ss. 205 & 206, Government of India Act, 1935. In Ss. 205 & 206, Government of India Act the expression 'judgment decree or final order' also occurs, & the decisions bearing on the interpretation of these sections of the Government of India Act *a fortiori* must have an important bearing upon the interpretation of Arts. 132 & 133, Constitution Act. He points out that the language of Arts. 132 & 133 in using the expression 'judgment, decree or final order' is not altogether new, & it must be assumed that when the Const. Ind. was framed, the framers of the Constitution must have been conscious of the law as it then stood. Indeed, my learned brother Das J., has very rightly pointed out that

"it must be taken that the Constituent Assembly which made the Constitution, were aware of the previous state of the law & advisedly dropped the word 'final' before the word "judgment".

With great respect, I entirely endorse this view; but it appears that the attention of my learned brother was not drawn to the language of Ss. 205 & 206, Government of India Act, 1935, & the various decisions bearing on the point which support the conclusion that the word 'judgment' as used in the Government of India Act was used in the technical sense as understood in the English precedents, namely, in the sense in which Lord Esher understood it & Lord Atkinson approved of it in the aforesaid decision of *Tata Iron and Steel Co.* (50 I. A. 212 : A. I. R. (10) 1923 P. C. 148 (supra)).

[41] I shall now refer to one or two cases on the point. The first is the decision in *S. Kuppuswami Rao* v. *The King*, A. I. R. (36) 1949 F. C. 1 : (49 Cr. L. J. 625). There the question arose on the interpretation of S. 205, Government of India Act, in connection with a criminal appeal in which the H. C. had granted a certificate for leave to appeal to the F. C., Kania, C. J., in dealing with the preliminary objection as to the maintainability of the appeal observed that in order to determine that the Ct. had jurisdiction under the provisions of S. 205, it was necessary "to ascertain whether the appeal is really from judgment, decree or final order of the H. C.". He then considered the question as to what was the meaning of 'judgment, decree or final order of a High Court' within the meaning of the section, & following the decisions in various English & Indian precedents his Lordship held that it was not a final judgment. His Lordship next proceeded to ascertain the meaning of the words 'judgment & decree' & referred to the historic observations of Lord Esher M. R. in the case of *Onslow* v. *Commissioners of Inland Revenue*, (1890-25 Q. B. D. 465 : 59 L. J. Q. B. 556) (supra). Then his Lordship observes :

"These & other English decisions make it clear that in England when the word judgment or decree is used, whether it is preliminary or final, it means the declaration or final determination of the rights of the parties in the matter brought before the Ct".

His Lordship further observes :

"In our opinion, the decisions of the Cts. in India show that the word 'judgment', as in England means the determination of the rights of the parties in the matter brought before the Ct.".

[42] An argument was advanced before their Lordships, as it has been advanced before us, that Cl. 39, Letters Patent of the H. Cts. of Calcutta, Bombay & Madras provided for appeals to His Majesty in Council from 'any final judgment, decree or order', & it was urged that in the absence of the qualifying word, 'judgment' in S. 205 (1), Constitution Act, it must be held to include a preliminary or interlocutory judgment, and that the order now under

appeal fell under that category. His Lordship disposed of the argument thus :

"We are unable to accede to this view. In our opinion, the term 'judgment' itself indicates a judicial decision given on the merits of the dispute brought before the Ct."

[43] It has been argued that this decision being a decision in a criminal case can be no guide to us in the interpretation of Art. 133 of the Constitution Act. This contention does not appeal to me; nor did it appeal to their Lordships who said :

"The words are used in S. 205(1), Constitution Act, & impart jurisdiction to the F. C. to entertain appeals both in civil & criminal matters. As the same words give jurisdiction to the Court in both classes of cases, it will be improper to construe them in a certain way when applicable to appeals in civil matters & give them a wider meaning when considered in connection with appeals from criminal proceedings. The words judgment & final order, in connection with civil appeals, have received a definite judicial interpretation. In connection with civil appeals to this Ct. therefore, that interpretation has to be accepted. If so, the same interpretation has to be accepted in case of appeals from criminal proceedings brought to this Ct. under S. 205 (1), Constitution Act."

[44] The words 'judgment, decree & final order' are common to both Arts. 132 & 133 of the Constitution, & it cannot be doubted that Art. 132 applies to all proceedings including 'civil' & 'criminal'.

[45] To a similar effect is another decision of the F. C. in *Mohammad Amin Brothers Ltd.*, v. *The Dominion of India*, A. I. R. (37) 1950 F. C. 77 : (1949 F. C. R. 842). This appeal did not arise out of a criminal proceeding but was directed against an order of the H. C. setting aside an order of another learned Judge of the same Ct. directing the compulsory winding up of the applt. Company. A preliminary objection was raised that the appeal was incompetent under S. 205 (1), Government of India Act, 1935, under which the H. C. had granted a certificate. The question which, therefore, arose was if the decision of the H. C. appealed from did or did not amount to "a final order, judgment or decree", B. K. Mukherjea J., who delivered the judgment of the Ct. observed that all the relevant authorities bearing on the question had been reviewed by the Ct. in the recent pronouncement of *Kuppuswami Rao* v. *The King*, A. I. R. (36) 1949 F. C. 1 : (49 Cr. L. J. 625) (supra), & the law on the point so far as that Ct. was concerned seemed to be well settled. His Lordship observed :

"The fact that the order decides an important & even a vital issue is by itself not material. If the decision on issue puts an end to the suit, the order will undoubtedly be a final one, but if the suit is still left alive & has got to be tried in the ordinary way, no finality could attach to the order."

I should observe that the effect of the H. C. order which was appealed against in that case was to keep the appln. for winding up on the file to be taken up for hearing after the final determination of certain income-tax & excess profits tax cases which were then pending. It was lastly contended before their Lordships that although the order in question may not have the effect of a final order "it could still be regarded as a judgment", & as such coming within the purview of S. 205, Government of India Act. This argument also did not find favour with their Lordships & they disposed of the same in the following words :

"In English Cts. the word 'judgment' is used in the same sense as a 'decree' in the Civil P. C., & it means declaration or final determination of the rights of the parties in the matter brought before the Ct; *vide, S. Kuppuswami Rao* v. *The King*, 1947 F. C. R. 180 at p. 189: (A.I.R. (36) 1949 F.C. 1: 49 Cr. L. J. 625). According to the definition given in the Civil P. C., a judgment is the statement of reasons given by a Judge on which a decree or order is based. If the order which is made in this case is an interlocutory order, the judgment must necessarily be held to be an interlocutory judgment & the collocation of the words 'judgment, decree or final order' in S. 205 (1), Government of India Act, makes it clear that no appeal is provided for against an interlocutory judgment or order."

Mr. P. R. Das has frankly conceded that the judgment in the present case was in the nature of an interlocutory judgment, but he argued, as it was argued on behalf of the applt. before their Lordships, that it was nonetheless a 'judgment' because it finally disposed of all the points of law referred to this Ct. by the Revenue-authorities. Having regard to these decisions, it is now too late to contend that a judgment of the character with which we are concerned is a 'judgment' within the meaning of Art. 133, Constitution Act. I have no doubt that the term 'judgment' in Art. 133 has been used in the same sense as it was used in S. 205, Government of India Act, & the dropping of the word 'final' before the word 'judgment' did not make any difference whatsoever.

[46] It is, therefore, unnecessary for me to refer to several other decisions on which reliance has been placed by Mr. P. R. Das. There has been undoubtedly a great deal of controversy over the meaning of the word 'judgment' as used in the Letters Patent of the Indian H. Cs. The decision of Page C. J. in the F. B. case of *In re Dayabhai Jiwandas* v. *Murugappa Chettiar*, 13 Rang. 457 : (A. I. R. (22) 1935 Rang. 267 F.B.) is remarkably refreshing for its hisoric details, its originality of thinking & boldness & clarity of expression. In that case, after a close analysis of numerous authorities on the point, his Lordship fell back upon the meaning which was attached to the word in the English precedents & held that the word 'judgment' in the Letters Patent meant a decree in a suit by which "the rights of the

parties at issue in a suit are determined". In doing so, his Lordship observed as follows :

"Moreover, the view that we take of the meaning & effect of the term 'judgment' in the Letters Patent is in consonance with the opinion that has been expressed by the Judicial Committee of the Privy Council on no less than three occasions; &, I apprehend, it is not open to the Cts. in India to construe the term 'judgment' as used in the Letters Patent in any other sense."

His Lordship then referred to the observations of Sir John Edge in *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*, 30 C. W. N. 459 : (A.I.R. (12) 1925 P. C. 155) & the observations of Lord Atkinson in *Tata Iron & Steel Company*, 50 I. A. 212 : (A. I. R. (10) 1923 P. C. 148) (supra) which I have already discussed above. He also referred to another decision of the Judicial Committee in *Sabitri Thakurain* v. *Savi*, 48 Cal. 481 : (A. I. R. (8) 1921 P. C. 80) and then summed up in these words :

"It appears, therefore, that the Judicial Committee in three cases have expressly & plainly laid down that the term judgment' in the Letters Patent of the H. C. means 'decree' & not 'order,' in the strict legal sense in which those terms are understood & defined."

Page C. J. has very rightly conceded that the construction which in the opinion of the Full Bench was placed upon the term 'judgment' in the Letters Patent had not found favour in other H. Cs. in India. But at the same time, in my opinion, his Lordship was justified in asserting that this was of no consequence, when he found ample support for his construction on the repeated pronouncements of the Judicial Committee based on English precedents as to the right & technical meaning of the word 'judgment.' I am not here unmindful of the doubt expressed by Rankin C. J. in *Brajagopal Roy* v. *Amar Chandra*, 56 Cal. 135 : (A. I. R. (16) 1929 Cal 214 F. B.) as to whether for the purposes of interpreting S. 15 of the Letters Patent "the correct technical use of the word 'judgment' in England is safe guide." Speaking for myself, with great respect, I do not see why it should not be so especially when the Judicial Committee itself in dealing with various cases on the point from Indian Cts. arising under the Letters Patent has repeatedly expressed itself in consonance with the English precedents. Instead of being tossed about on the waves of doubts & uncertainties in a vast sea of literature on the subject, I consider it safe to adhere to old & well-established moorings. The matter, as I have shown appears now to be concluded by the view taken in the F. C. decisions mentioned by me above pertaining to the construction of the very same expression 'judgment-decree or final order' used in S. 205, Government of India Act of 1935.

[47] Fortunately for us there is another very recent decision of the S. C. which has a direct bearing upon the interpretation of S. 21, Bihar Sales Tax Act, & the meaning of the word 'judgment' as used in that Section. I refer to the decision of *Premchand Satramdas* v. *The State of Bihar*, Supreme Court Appeal No. 61 of 1950 : (A.I.R. (38) 1951 S. C. 14). I have already shown that the decision relates to the F. C. App. No. 71 of 1948 in which leave had been granted by this Ct. The assessee applt. in that case had applied to the H. C. for requiring the Board of Revenue to state a case but his appln. was summarily rejected. He then applied for leave to appeal to the F. C. which the H. C. granted following the decision of a F. B. of the Lahore H. C. in *Feroze Shah* v. *Income-tax Commissioner, Punjab & N. W. F. P. Lahore*, (12 Lah. 166 : A.I.R. (18) 1931 Lah. 138 F.B.) (*supra*). The said appeal from the judgment of the Lahore H. C. was dismissed by the Privy Council on merits though the Privy Council did not decide the objection as to competency of the appeal which it characterised to be a serious objection. At the commencement of the hearing of the appeal before the S. C., a preliminary objection was raised that the appeal was not competent & their Lordships upheld the objection as well founded. In that connection their Lordships referred with approval to a Special Bench decision of this Ct. in *Harihar Gir* v. *Commissioner of Income-tax, B. & O.*, A.I.R. (28) 1941 Pat. 225 : (20 Pat. 561 S.B.) where it was held on an exhaustive review of various authorities that

"no appeal lay to His Majesty in Council under Cl. 31, Letters Patent of the Patna H. C. from an order of the H. C. dismissing an appln. under S. 66 (3), Income-tax Act (a provision similar to S. 21 of the Act before us) to direct the Commissioner of Income-tax to state a case."

Their Lordships then proceeded to construe S. 21, Bihar Sales Tax Act, & held as follows :

"All that the H. C. is required to do under S. 21, Bihar Sales Tax Act is to decide the question of law raised & send a copy of its judgment to the Board of Revenue. The Board of Revenue then has to dispose of the case in the light of the judgment of the H. C. It is true that the Board's order is based on what is stated by the H. C. to be the correct legal position but the fact remains that the order of the H. C. standing by itself does not affect the rights of the parties, & the final order in the matter is the order which is passed ultimately by the Board of Revenue. This question has been fully dealt with in *Tata Iron & Steel Co.* v. *Chief Revenue Authority Bombay*, 50 I. A. 212 : (A. I. R. (10) 1923 P. C, 148) where Lord Atkinson pointed out that the order made by the H. C. was merely advisory & quoted the following observations of Lord Esher in *In re Knight & the Tabernacle Permanent Building Society*, (1892) 2 Q. B. 613 at p. 617 : (62 L. J. Q. B. 33).

In the case of *Ex parte County Council of Kent*, (1891-1 Q. B. 725) where a statute provided that a case might be stated for the decision of the Ct. it was

held that though the language might *prima facie* import that there has to be the equivalent of a judgment or order, yet when the context was looked at it appeared that the jurisdiction of the Ct. appealed to was only consultative, & that there was nothing which amounted to a judgment or order."

Their Lordships also held that the decision in question was not given by the H.C. in the exercise of either original or appellate jurisdiction because the H. C. acquired jurisdiction to deal with the case by virtue of an express provision of the Bihar Sales Tax Act, & they held that

"the crux of the matter, therefore, is that the jurisdiction of the H. C. was only consultative & was neither original nor appellate."

Having regard to the categorical observations it is beyond any shadow of doubt that the judgment of the H. C. pronounced on such references under the taxing statute cannot be called such a 'judgment' as to give the appct. a right of appeal under Art. 133, Constitution Act, Mr. P. R. Das further relied upon a decision in *P. A. Raju Chettiar* v. *Commissioner of Income-tax, Madras*, (1949) 17 I. T. R. 353 (Mad.). This decision no doubt supports Mr. Das, but, in my opinion, the decision of the S. C. now puts the matter beyond the pale of controversy.

[48] On the other question as to whether the decision from which the petnr. seeks to appeal to the S. C. arises out of a 'civil proceeding,' both Reuben & Das JJ. seem to be in agreement that it did not, & the contention of Mr. P. R. Das that a 'civil proceeding' means & includes all proceedings except those that are criminal does not appear to have found favour with their Lordships. Indeed, as Reuben J. observed, Art. 132 itself contemplates that the H. C. may exercise jurisdiction in 'other proceedings' besides 'civil proceedings' & 'criminal proceedings' & the special jurisdiction of the H. C. under the taxing Act may be one instance of such 'other proceedings.' Therefore, it follows that 'civil proceedings' cannot be held to include all proceedings save 'criminal proceedings.' The learned Govt. pleader has contended that proceedings under the taxing statutes stand entirely on a different footing inasmuch as the ruling authority in such cases proceeds to levy taxes in exercise of its sovereign rights. The proceeding, therefore, under the taxing statute cannot be regarded as a 'civil proceeding.' He relies upon a decision of the Judicial Committee of the P. C. in *Raleigh Investment Co., Ltd.* v. *Governor-General in Council*, A. I. R. (34) 1947 P. C. 78 : 74 I. A. 50 where it was pointed out that a jurisdiction to question the assessment of income-tax otherwise than by use of the machinery expressly provided by the Act would appear to be inconsistent with the 'statutory obligation to pay arising by virtue of the assessment. Their Lordships did not lend countenance to the claim of the assessee to question the assessment in a Civil Ct. on the ground that the assessing officer had taken into account an *ultra vires* provision of the taxing statute. Their Lordships observed that the Act contained the machinery which enabled an assessee to effectively raise the question whether or not a particular provision of the Act bearing on the assessment made upon him is *ultra vires*, & the assessee should avail himself of that provision for getting redress against the order of assessment & could not institute a civil suit for the purpose. It may be that this decision may in some respects have to be considered in the light of the fundamental rights vouchsafed under the Constitution Act. But at any rate it is quite clear from this decision that the proceedings under the taxing statutes are something quite different from 'civil proceedings'. Das J. if I may say so with respect, has very aptly referred in this context to the decisions of the S. C. in *Pritam Singh* v. *The State*, A. I. R. (37) 1950 S. C. 169 : (51 Cr. L. J. 1270) & *Bharat Bank Ltd. Delhi* v. *Employees of the Bharat Bank*, A. I. R. (37) 1950 S. C. 188 : (1950 S. C. R. 459), which also support the same inference. The provisions of Art. 136, Constitution Act, indicate that the S. C. can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunals and in a variety of other cases. I agree with Das J., therefore that the observations made in those cases seem to imply that income-tax cases and sales tax cases are not 'civil proceedings' within the meaning of the Constitution Act.

[49] The result is that the application before us does not fulfil either of the two requirements of Art. 133 of the Constitution Act. It may be that, as in the present Income-tax law a right of appeal has been specifically provided for, the State Government or the Union of India may provide in the taxing statute itself dealing with the levy of sales tax for a right of appeal to the S. C., but so long as it is not done, a right of appeal cannot be claimed as a matter of course ; and it is impossible for me now to attach any different meaning to the term 'judgment', as used in Art. 133, Constitution Act, than what has been attributed to it consistently by the various authoritative pronouncements which I have discussed above. For these reasons, I hold that the petnr. has no right of appeal to the S. C., and, therefore, leave to appeal cannot be granted. The appli-

cation fails and must be dismissed with costs, hearing fee five gold mohurs.

[50] **Rai J.** — I entirely agree with the Hon'ble Sarjoo Pd. J. I have nothing more to add.

[50a] **Shearer J.** — The marginal note to Art. 133 of the Constitution is "appellate jurisdiction of S. C. in appeals from H. C. in regard to civil matters." This is very similar to the marginal note to Art. 73, Australian Constitution Act, 1900, which is "appellate jurisdiction of H.C." Whereas, however, the opening words of Art. 73, Australian Constitution Act, 1900, are

"The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences,"

the opening words of Art. 133 (1) are

"an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies."

It is thus clear that Art. 133 (1) of the Constitution confers, as S. 205, Government of India Act 1935, conferred, a general right of appeal. In England, where civil actions were until very recent times ordinarily tried with the aid of a jury, the word 'judgment' does not mean & has never meant what it means in this country. A judgment in England was & still is, the formal order drawn up at the conclusion of a trial embodying the decision of the Ct. To be more strictly accurate, it was originally the formal order drawn up at the conclusion of trials in the Common Law Cts. At the conclusion of trials in the Ct. of Chancery, the formal order was denominated a decree. When the first of the codes of Civil Procedure was enacted by the Indian legislature in 1859 the legislature chose to direct that the decisions of Civil Courts should be embodied in decrees & not in judgments & it gave to the word 'judgment' the meaning which it still has today. In consequence, under that Code & under each successive Code, appeals have lain from decrees or orders but not from judgments. Why is it then that the word 'judgment' appears along with 'decree' 'order' in S. 205, Government of India Act, 1935 & in Art. 133 (1) of the Constitution? The answer is, I think, to be found in history. The Judicial Committee of the P. C. as it now exists, was constituted in 1844 & S. 1 of 7 & 8 vict, C. LXIX under which it was constituted, enacted:

"That it shall be competent to Her Majesty, by any Order or Orders to be from time to time for that purpose made with the Advice of Her Privy Council, to provide for the Admission of any Appeal or Appeals to Her Majesty in Council from any judgments, Sentences, Decrees, or Orders of any Ct. of Justice within any *British* Colony or possession abroad .... & it shall also be competent to Her Majesty, by any such Order or Orders as aforesaid, to make all such Provisions as to Her Majesty in Council shall seem meet for the instituting & prosecuting any such Appeals."

It will be observed that the words used by the Imperial Parliament in 1844 were used by it again in 1900 in enacting S. 73, Commonwealth of Australia Act & still again in 1935 in enacting Ss. 205 & 206, Government of India Act except that in the latter Act the word "sentence" was for obvious reasons, omitted. There is no doubt, I think, that the words used in the statute of 1844 were used advisedly to embrace every kind of decision. There may in the British Empire, as it existed in 1844, have been colonies in which, the original settlers having carried the Common Law with them, the decisions of the Cts. were embodied in formal judgments based on the writs with which the action was commenced or in the formal decrees in use in the Ct. of Chancery in England, but in India & in other colonies or dependencies this was certainly not so. That appears to me to be a strong reason for supposing that the word 'judgment' was not used in S. 205, Government of India Act, 1935, on which Art. 133 (1) of the Constitution is based, in any narrow or technical or, as it has been called professional sense. In construing the words "any judgment, decree or final order," which appear in both of them, there are in my opinion two assumptions which can reasonably & ought to be made. One is that the draftsman of the Government of India Act, 1935, perfectly well aware of the meaning which the word "judgment" had in this country. The other is that, in using the words "judgment", the draftsman was not using it as synonymous with the word "decree", but as can nothing something which was or might not be either a decree or a final order. It is impossible, & indeed absurd, to suppose that the words "judgment" & "decree" were used in contradistinction to one another & as connoting a decision given, in the one case in the exercise of legal, & in the other in the exercise of equitable jurisdiction. That being so, it appears to me that the words "judgment, decree or final order" must be read together as a single phrase compediously including every decision except a decision which is an order & is not a final but a preliminary or interlocutory order. It is important to notice that these words occurred not only in S. 205, Government of India Act, but also in the section immediately following. Now. S. 206 conferred on the Indian Legislature power to abolish the jurisdiction exercised by His Majesty in Council in civil appeals. If the word "judgment" was intended to exclude a

judgment under S. 21 (5), Bihar Sales Tax Act, 1944, it would also have excluded a judgment under S. 66A, Income-tax Act. In other words, while the Indian Legislature, in exercise of the power conferred on it by S. 206, Government of India Act, 1935, might have abolished the jurisdiction of His Majesty in Council in every other class of civil appeals, appeals against orders made by the H. C. on references under the Income-tax Act would still have lain to the Judicial Committee, & in order to transfer such appeals to the F. C., an Act of the British Parliament amending S. 206, Government of India Act, 1935, would have been necessary. Such a situation could not possibly have been intended. That it was not intended is, I think, made quite clear when one considers the amendment made in S. 206, Government of India Act, 1935, by the India Provincial Constitution Order, 1947. The words "judgment, decree or final order" were retained in the amended section. As, in 1947, the intention of His Majesty in Council in amending S. 206 was to enable the Dominion Legislature forthwith to abolish any right of appeal to the Judicial Committee, it is perfectly clear that the British Parliament & also the Govt. of India considered that the expression "judgment, decree or final order" was wide enough to cover decisions of the H. C. on references under S. 66A, Income-tax Act, &, if it is wide enough to cover such decisions it must also cover decisions under S. 21 (5), Bihar Sales Tax Act, 1944.

[51] In the course of the argument a large number of decisions were cited, but, as the question is one of first impression, these decisions are of no assistance, & it is, I consider, unnecessary to refer to them. Indeed, while decisions as to the construction to be put on S. 205, Government of India Act, 1935, may be in point, any other decisions cited were not strictly relevant, & to place any reliance on them would be to be in danger of falling into the cardinal error of attempting to construe one document by reference to the manner in which another & possibly similar, but nevertheless, different document has been judicially interpreted. I ought, however, to refer to the decision of their Lordships of the Judicial Committee in *Tata Iron & Steel Co. Ltd.* v. *Chief Revenue Authority Bombay*, 50 I. A. 212 : (A. I. R. (10) 1923 P. C. 148). The recent decision of the Supreme Court in *Premchand Satramdas* v. *The State of Bihar*, Civil Appeal No. 61 of 1950 : (A. I. R. (38) 1951 S. C. 14) on which much reliance was placed by the learned Govt. Pleadar, merely affirmed the decision of their Lordships of the Judicial Committee. In considering the applicability of the decision in *Tata Iron & Steel Co. Ltd.*, v. *Chief Revenue Authority Bombay*, 50 I. A. 212 : (A I. R. (10) 1923 P. C. 148) it is necessary to bear in mind what exactly happened in that case. An assessee to income-tax, being dissatisfied with the assessment made on him, applied to the Chief Revenue Authority to state a case for the consideration of the H. C. The Chief Revenue Authority declined to do so, &, thereupon, the assessee applied under S. 45, Specific Relief Act, to the H. C. asking that a writ of mandamus should issue on the Chief Revenue Authority requiring him to do what he had declined to do. This appln. was successful, & in response to the writ which was issued, the Chief Revenue Authority stated a case. The decision of the H. C. was however, adverse to the assessee, & the assessee then applied for & was granted leave to appeal to His Majesty in Council. The ground on which, apparently, leave was asked for & was granted was that the decision of the H. C. was "a final judgment . . . . . made in the exercise of original jurisdiction". When the appeal came on for hearing, it was contended that no appeal lay & that leave ought not to have been granted by the H. C. The expression "final judgment", which occurs in the Letters Patent, occurs also in the English Bankruptcy Act, & Lord Atkinson, who delivered the judgment of their Lordships, strongly relied on interpretations which had been put on the expression in cases under the Bankruptcy Act. Under that Act a person, against whom a final judgment had been obtained & who had omitted to pay the judgment debt within a certain period after a notice had been served on him, was deemed to have committed an act of bankruptcy. In *Ex Parte Chinery*, (1884) 12 Q. B. D. 342 : (53 L. J. Ch. 662) the question that arose was whether or not a garnishee order absolute was a final judgment & in *Ex Parte Moore*, (1885) 14 Q. B. D. 627 the question that arose was whether a judgment under which costs were awarded & under which also an enquiry had to be made as to damages was a final judgment or merely a preliminary or an interlocutory judgment. It was held that the latter was a final judgment, whereas the former was not & Bowen L. J. observed in the earlier case that the provisions in the Bankruptcy Act defining acts of bankruptcy should be construed as strictly as if they had occurred in a section which was defining a misdemeanour, because the commission of an act of bankruptcy entailed a disability on the person who commits it. Lord Atkinson, in following these decisions & pointing out that, technically in English law, a judgment was the decision obtained in an

action & that any other decision was an order, did not explain why he considered it necessary to construe the language used in the Letters Patent with the same strictness as Bowen, L. J. had in a somewhat different case, thought desirable. The reason, however is. I venture to think, reasonably clear on general principle. In *Sandback Charity Trustees* v. *North Staffordshire Railway Co.*, (1878) 3 Q. B. D. 1 : (47 L. J. Q. B. 10) Bramwell, L. J. observed :

"An appeal does not exist in the nature of things, a right to appeal from any decision of any tribunal must be given by express enactment."

In the British Commonwealth of Nations the Sovereign, as the head of the State is entitled, except in so far as He has parted with his prerogative right, to entertain appeals against any decision of any tribunal throughout His Dominions. His Majesty parts with this prerogative right either to entertain or to decline to entertain an appeal when any statute either expressly bars or expressly confers a right of appeal, the reason why, in such a case, the prerogative right is surrendered, being that His Majesty is an integral part of the legislature which has enacted the statute, & if assent to the statute is not, as in the case of Acts of the British Parliament, given by His Majesty himself, assent to it is given in His name. The Indian Income-tax Act, 1918, did not confer any right of appeal, nor, on the other hand, did it expressly bar an appeal. The appellant in *Tata Iron & Steel Co., Ltd.* v *Chief Revenue Authority, Bombay*, (50 I. A. 212 : A. I. R. (10) 1923 P. C. 148) was, therefore, entitled to ask for leave to appeal to His Majesty in Council. In order to avoid the inconvenience which would be caused by requiring every suitor, who desired to appeal to His Majesty in Council, to apply for and obtain leave in London, His Majesty in Council has delegated to various tribunals in His Dominions the power to grant leave to appeal on His behalf. It was commonly said, but incorrectly, that a litigant in India had a right to appeal under the Letters Patent. In constitutional law, the real position in such a case, was that the H. C. had power to grant him leave to appeal. It necessarily followed that, when leave had been granted by a H. C. in India, the resp. in the appeal was entitled to contend in London that leave had been wrongly granted. In such a case the onus was on the applt. to show that, in granting him leave, the H. C. had not exceeded the power which had been delegated to it. That, in my opinion, was why their Lordships of the Judicial Committee took the words "final judgment, decree or order" as having been used in the Letters Patent distributively & why also they construed each of them strictly. Although, as I have said, Lord Atkinson did not explain why he chose to interpret the Letters Patent in the manner in which he did, his observation in the earlier part of the judgment that no general right of appeal, such as was conferred by the Judicature Act, 1873, existed strongly suggests that some such considerations weighed with him. Incidentally, it may be observed that the language used in the judicature Act, 1873, is not dissimilar to that used in S. 205, Government of India Act, 1935. In construing any Constitution Act, the Cts. are bound to give it a broad & liberal interpretation. For that reason, the words "judgment", "decree" "order" in Art. 133 (1) are not to be construed distributively. Regard must be had to the cumulative effect of them, & the phrase "any judgment, decree or final order" made in a civil proceeding must be regarded as a single compendious phrase, embracing every decision in a civil proceeding which is not a final but is merely a preliminary or an interlocutory order. It is in this manner that the very similar language used in S. 73, Commonwealth of Australia Act, 1900, appears to have been construed by the Cts. in Australia (*see* Quick & Garran on the Constitution of the Australian Commonwealth, p. 741). Apparently, in the Australian Cts., while the meaning of the individual words may be looked to in order to appreciate in effect of the whole it is the combined scope of the words to which regard is invariably had. If Art. 133 (1) of the Constitution is construed in this way, then, it appears to me that an appeal now lies agaist a decision of the H. C. given under S. 21 (5), Bihar Sales Tax Act, 1944. The decision is described in the Act itself as a judgment. There is no reason to assume that an appeal does not lie merely because the judgment is one given in exercise of a consultative or advisory jurisdiction. In *Onslow* v. *Commissioners of Inland Revenue*, (1890) 25 Q. B. D. 465 : (59 L. J. Q. B. 556) a decision on which much reliance has been placed by the learned Govt. pleader, an appeal did lie against such a decision, the only question at issue being whether the decision of the Ct., against which an appeal was sought to be preferred, was a judgment or an order, the point being of importance as if the decision was a judgment, an appeal lay, whereas, if it was an order, an appeal was barred by limitation. I said a moment ago that, in my opinion, no decisions were directly relevant except decisions under S. 205, Government of India Act, 1935. Both parties have relied on two such decisions of the F. C. *Mohammad Amin Brothers Ltd.* v. *The Domi-*

nion of India, A. I. R. (37) 1950 F. C. 77 : (1949 F. C. R. 842) & *Kuppuswami Rao* v. *The Governor General of India*, A.I.R. (36) 1949 F. C. 1: (49 Cr. L. J. 625) Mr. P. R. Das, for instance, says that a judgment under S. 21 (5), Bihar Sales Tax Act, 1944, is, in the words of the learned Chief Justice of India, "a judicial decision given on the merits of the dispute brought before the Ct.". It is Mr. Das says, immaterial that, before an actual assessment can be made, the matter has to go back to the Income-tax Officer. What is material, Mr. Das contends, is that, in making the assessment, the Income-tax Officer is bound by the judgment of the H. C. It is, I must confess, possible to isolate passages in each of the two judgments as supporting the other point of view. It has, however, to be remembered that in both cases the order against which an appeal was sought to be preferred was, quite plainly, a preliminary or interlocutory order, & the question that really arose was whether or not, although it was a preliminary or an interlocutory order it might not also be regarded as a judgment. While I feel some difficulty in accepting the contention of Mr. P. R. Das that these decisions support his argument, I am also unable to take the view that they can be relied on by the learned Government Pleader as completely decisive.

[52] The constitution, it appears to me, proceeds on the assumption that proceedings are either civil proceedings or criminal proceedings. In England proceedings arising out of references made after under fiscal statutes are governed by a special procedure & are heard by the King's Bench Division on the revenue side. Nevertheless, they are, I believe, regarded as civil proceedings. I am unable to regard the observation of Fazl Ali J. *in Pritam Singh* v. *The State*, A. I. R. (37) 1950 S. C. 169: (51 Cr. L. J. 1270) that the S. C. can by virtue of Art. 136, grant :

"special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunals & in a variety of other cases."

as an authority for the proposition that a proceeding on a reference made under the Indian Income-tax Act or under the Bihar Sales Tax Act, 1944, is not a civil proceeding. His Lordship was there merely explaining the scope of the power conferred on the S. C. to grant special leave to appeal. For the reasons already given, the British Parliament & the Govt. of India must have been of opinion that decisions of the H. C. on references made under the Income-tax Act were "civil cases" within the meaning of the expression as used in S. 206, Govt. of India Act, 1935, & it appears to me necessarily to follow that under Art. 133 of the Constitution a proceeding arising out of such a reference is a civil proceeding. Reuben J. has drawn attention to the words "other proceeding" which appear in Art. 132 (1) & to the word "determination" which appears in Art. 136 (1) of the Constitution. These words appear to me to have been inserted *pro majore cautela*. It is obviously desirable that, when any question as to the interpretation of the Constitution arises, a decision on that question should not have to be postponed because of any doubt arising as to whether the proceeding in which the question arose was neither a civil nor a criminal proceeding. Similarly, it is desirable that there should be no doubt as to power of the S. C. to grant special leave to appeal in any case whatsoever. It has to be remembered that the Constituent Assembly was legislating not for today, nor for tomorrow, but for an indefinite future, & it presumably realised that at some time or other a question might be raised as to whether a proceeding was or was not a civil proceeding. More particularly, it may perhaps have considered that such a doubt might arise regarding proceedings in connection with one of the writs which the H. Cs. are empowered to issue under Art. 226 (1). In England, a doubt appears at one time to have arisen as to whether proceeding in *quo warranto* were civil proceedings, & S. 15, Supreme Court of Judicature Act, 1884, was, in consequence, enacted providing that they should be deemed to be civil proceedings, whether for purposes of appeal or otherwise. I have read & considered with the care which it deserves the judgment which has been prepared by my learned brother Sarjoo Prasad J. The difference between us is a difference as to the method of interpretation to be employed. My learned brother adopts the method of interpretation which has been employed in construing the Letters Patent. The Letters Patent are, however, an instrument containing a delegation of power by His Majesty in Council to the H. Cs. in India, & in construing such an instrument, it is not merely reasonable but essential that a strict interpretation should be put on the expression "final judgment made in exercise of original jurisdiction", which expression, taken as a whole, does not, in any case, readily import more than a decision in an action. The constitution of a great people is not to be interpreted in precisely the same manner as a power of attorney which can be cancelled or modified at will. More particularly is that so when the provision in it which is under examination, confers a right on every citizen. Article 133 confers a right of appeal to the highest tribunal in the land. A right of that kind must, in the nature

of thing be as restricted right. The first part of the article imposes one restriction, namely, that the decision from which an appeal is sought to be brought is not a preliminary or an interlocutory order which is what the Federal Ct. held in the two cases already cited & the second part of the article imposes another restriction namely, as to the value of the subject-matter & the difficulty or importance of the point of law which arises. Construed in this broad and liberal manner, the petitioner has now a right of appeal which he did not have previously. When I am invited, as I have been by the learned Government Pleader to isolate as it were, the word "judgment" & to give to it a meaning which in this country is an esoteric meaning, the origin & scope of which I did not myself appreciate until I consulted Seton on Judgments & Orders, I must decline to do so on the ground that the Constitution was not the result of a revolution but the outcome of an orderly progress towards self-government, that the S. C. is the heir of the F. C. & of the Judicial Committee, that in the Acts of the British Parliament constituting each of these great Tribunals & defining their jurisdiction the word "judgment" was used as part of a comprehensive phrase which, in my opinion, admits of no such construction & that that comprehensive phrase has been adopted by the makers of the Indian Constitution. I would myself grant leave to appeal. But as each of my learned brother is of a contrary opinion, the appln. must be disposed of in the manner just stated by Sarjoo Prasad J.

D.H. *Application dismissed.*

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* A. I. R. (38) 1951 Patna 47 *[C. N. 6.]*

DAS AND NARAYAN JJ.

Dayanand Modi — Petnr. v. The State of Bihar and others.

Cr. Misc. Nos. 590, 613, 610, 536, 535 and 537 of 1950, D/-5-1-1951.

✠(a) Public Safety — Preventive Detention Act (1950), S. 3 (1) (a) (iii)—Interpretation of.

The words "the maintenance of supplies and services essential to the community" occuring in S. 3 (1) (a) (iii), Preventive Detention Act, 1950, are taken from Entry 3, List III of Sch. VII, Constitution of India. On a careful consideration of English Statutes, namely, Emergency Powers (Defence) Act, 1939, & 1940, Defence Regulations made thereunder as also the Defence of India Act, 1939 & the Rules made thereunder it is clear that the word "and" between the words "supplies" & "services" is not used in any restrictive sense, but in a comprehensive sense. The manifest intention of Parliament, therefore, in the use of the expression "maintenance of supplies and services essential to the community" in S. 3 (1) (a) (iii), Preventive Detention Act, 1950, is to provide for preventive detention for reasons connected with the maintenance of supplies essential to the community or the maintenance of services essential to the community or both. [Para 8]

Hence any activity which directly interferes with or threatens the maintenance of the supply of such primary necessities of life as food or cloth attracts the operation of S. 3 (1) (a) (iii). The supply of an essential commodity cannot be contemplated as entirely divorced from service; because an essential supply is a service to the community. Thus any apprehended act of blackmarketing or hoarding will directly affect maintenance of supply & service essential to the community. [Paras 9, 10, 11]

(b) Constitution of India, Sch. VII, List II, Entries 26, 27 & List III, Entry 3 — Entries whether mutually exclusive — "For reasons connected with"—Detention under Preventive Detention Act (1950), S. 3 (1) (a) (iii).

It is wrong to say that because production, supply & distribution of goods or trade & commerce within the State are separate entries in the State List, namely, Entries 26 & 27, List II of Sch. VII, Constitution of India, therefore, the expression used in S. 3 (1) (a) (iii), Preventive Detention Act, 1950, has a narrow or restricted meaning. For, the entries in the Legislative Lists are not to be treated as water-tight compartments. It is worthy of note that Entry 3, List III of Sch. VII, Constitution of India, talks of preventive detention for reasons *(inter alia)* connected with the maintenance of supplies & services essential to the community. The expression "for reasons connected with" is important : it means that the detention is for reasons connected with the maintenance of supplies & services essential to the community. Such detention may affect the supply of goods, but that does not mean that the detention is for an object other than what is contemplated by Entry 3 of that List. [Para 12]

(c) Public Safety — Preventive Detention Act (1950), S. 3 (1) (a), cls. (ii) and (iii) — Clauses whether to be construed on principle of *ejusdem generis.*

Section 3 (1) (a) (iii) need not be construed on the principle of *ejusdem generis* as being related to cl. (ii) which precedes cl. (iii) & which relates to the security of the State or the maintenance of public order. The *ejusdem generis* rule is one to be applied with great caution & not pushed too far. Where the words are clearly wide in their meaning, they ought not to be qualified on the ground of their association with other words. Hence the contention that the maintenance of supplies & services essential to the community referred to in cl. (iii) must have some relation to the maintenance of public order or the Security of State mentioned in the proceeding cl. (ii) cannot be accepted as it leads to a narrow construction of cl. (iii). [Para 13]

✠(d) Public Safety — Preventive Detention Act (1950), S. 3 (1) — More courses than one open to State Government — It may take any effective course.

In starting proceedings against a person where more courses than one are open to the State Govt. to wit, cancellation of the licence issued in his favour under one of the Control Orders, prosecution under the Essential Supplies (Temporary Powers) Act, 1946, or detention under the Preventive Detention Act, 1950, it is for the State Govt. to decide which alternative it should adopt or which is most effective in the circumstances of the case. It is not for the Ct. to decide the matter or even to express any opinion as to which alternative should be the most effective. [Para 15]

(e) Public safety — Preventive Detention Act (1950), S. 3 (1) — Detention and prosecution whether be simultaneously made—Test to be applied.

Whether detention of a person & prosecution started against him can be simultaneously made does not depend on any rule of law: the question has to be approached, & answered in each case, on the footing whether the order of detention, in view of the pending prosecution, is *bona fide* or not. For answering the question the uncontroverted facts may have to be considered, & the test will be whether the order of detention is for the purpose it purports to be or really for any *ulterior* or collateral purpose. [Para 15]

(f) Public safety — Preventive Detention Act (1950), S. 3 (1)—Satisfaction of State Government — Function of Court — Contravention of Constitution of India, Art. 22 (5).

The satisfaction, which S. 3 (1) speaks of, is the satisfaction of the State Govt. It is not open to the Ct. to substitute its own judgment for that of the State Govt. Thus, the sufficiency or adequacy of the facts on which the grounds of an order of detention are based is not a question which can be agitated in the Ct., though if the grounds are vague & indefinite & afford no real opportunity to make a representation, the Ct. may hold that there has been a contravention of the mandatory provisions of Art. 22 (5) of the Constitution. [Para 20]

✠(g) Public safety — Preventive Detention Act (1950), S. 3 (1) — Bona fide order—Court's power to test — Mala fide order, meaning of — Constitution of India, Art. 22 (5).

The Ct. can examine the grounds in order to see if the order of detention is *bona fide* or whether the grounds on which the order of detention is founded are based on materials of rationally probative value. If the alleged grounds or the facts on which they are stated to be based do not exist at all, then the order of detention cannot be said to be *bona fide* order. When it is stated that the order is *mala fide*, no dishonest motive is necessarily imputed: It merely means that the order is bad for want of necessary care & caution, or is for some purpose other than what is stated in the order of detention. If an order of detention is stated to be based on certain grounds but on uncontroverted facts it appears that those grounds do not really exist, then it follows that the order of detention is made for reasons other than those disclosed in the grounds: in that sense the order will be a *mala fide* order, & will also contravene Art. 22 (5) of the Constitution. [Para 20]

(h) Public safety — Preventive Detention Act (1950), S. 3 (1) — Mala fide order — Onus to show lies on detenu — Onus how may be discharged.

The onus of showing that the order is *bona fide* rests on the detenu; and the onus is a heavy onus which may be very difficult to discharge. One of the ways by which a detenu can show that the order is not *bona fide* is by stating facts by means of an affidavit, & if those facts are uncontroverted, they may be taken into consideration by the Ct. for the purpose of seeing if the order is *bona fide* or if the order is based on materials of a rationally probative value, or if the order contravenes the fundamental right guaranteed by Art. 22 (5) of the Constitution. A mere denial by the detenu would not be enough to discharge the onus which rests on him; but the detenu may be in a position to state definite facts which would show that the order of detention was bad either for want of good faith, or on the ground that it was based on materials which did not at all exist in fact. [Para 20]

(i) Public safety — Preventive Detention Act (1950), S. 3 (1) — Alleged facts or ground non-existing — Detention order fails.

Where the facts alleged by the State Govt. exist but two inferences are possible, it is for the State Govt. to make up its mind as to the inference to be drawn. The Ct. cannot say that a particular inference should have been drawn from the facts. But if the affidavit on behalf of the detenu discloses such specific circumstances as to show that the alleged facts or grounds are *non est*, then the order has no legs to stand upon. [Para 22]

Sir Sultan Ahmed (in Nos. 590, 536), P. R. Das (in No. 590), Basanta Chandra Ghose (in Nos. 590; 613, 610, 536, 535 & 537), D. K. Sinha (in Nos. 590, 613, 610, 536, 535 & 537), Nageshwar Pd. (in No. 610) & Ramananda Sinha (in Nos 535 & 537)— for Petnrs.; Advocate-General (in Nos. 590 & 536), S. C. Chakravarty for Govt. Advocate (in Nos. 613 & 610); Government Advocate (in No. 537) — for the State.

Das J.— Since the latter part of November 1950, we heard, with occasional breaks, a large number of *habeas corpus* appls. in which common questions of law & fact arose for our consideration & decision. We reserved judgment in these cases to enable learned counsel, arguing the different applns. to make all their submissions before we pronounced judgment. We are now proceeding to judgment in these cases in batches. The first batch of cases, which will be governed by this judgment, consists of six applns. the numbers of which have been mentioned in the first two pages of this judgment.

[2] All the applns relate to, & are on behalf of, certain persons who have been detained by an order of the State Govt. under S. 3, Preventive Detention Act, 1950 (to be referred to hereinafter as the Detention Act). The State Govt. states, in the orders of detention, that it is satisfied that it is necessary to make the orders, with a view to preventing the detenus from acting in any manner prejudicial to "the maintenance of supplies & services essential to the community"; in other words, the orders purport to have been made under S. 3 (1) (a) (iii) of the Detention Act. In the grounds communicated to the detenus, the expression used, in some of the cases, is that "the State Government is satisfied that if the detenu is allowed to remain at large, he will indulge in activities prejudicial to the maintenance of "supplies essential to the community", the expression "and services" having been dropped. I am mentioning this fact at this stage, as one of the main contentions of learned counsel for the petnrs. relates to this matter. It would, I think, be convenient if we first consider in these cases the questions of law that have been raised, & then go into the grounds of detention, in detail, of each detenu. The questions of law are common to all the applns. but the grounds communicated though similar in nature, vary

from case to case & would require a separate treatment in each case.

[3] The principal contention of law, which is common to all these applns. & has been very strenuously canvassed at the bar, may be thus put in nutshell; it is contended that the activities on the basis of which the orders of detention have been made (which activities are loosely & commonly called "blackmarketing" or "hoarding" in food or cloth) do not attract the operation of cl. (iii) of sub-sec. 1 (a) of S. 3 of the Detention Act. To understand this contention, it is necessary to give some more details. The relevant portion (omitting unnecessary details) of S. 3 of the Detention Act reads thus:

"The State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the community, make an order directing that such person be detained."

Learned counsel for the petnrs. have emphasised the word "and" occurring between the words "supplies" & "services". It is contended that the word "and" has been used in the ordinary conjunctive sense, & mere maintenance of supplies *or* maintenance of services does not attract the operation of cl. (iii) aforesaid. It is argued that what attracts the operation of that clause is the maintenance of *both supplies & services* essential to the community; in other words, the "supplies" must go together with the "services."

[4] This argument has been further developed with reference to the three Lists—Union List, State List & Concurrent List—in the Seventh Schedule of the Constitution of India. The Detention Act is an Act made by Parliament & extends to the whole of India. It is a temporary Act in the sense that it shall cease to have effect on 1-4-1951, save as respects things done or omitted to be done before that date, *vide* S. 1 (3) of the Detention Act. Entry 9 of the Union List is:

"Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention."

The concurrent list also deals with preventive detention in Entry 3, which reads thus:

"Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies & services essential to the community; persons subjected to such detention."

It is to be noted that cl. (iii) of S. 3 (1) (a) of the Detention Act is taken from Entry 3 of the Concurrent List. It should be made clear at the very outset, that the question raised before us is not really one of legislative competency: it is conceded that by reason of Entry 3 above, Parliament had power to legislate for preventive detention for reasons connected with the maintenance of supplies & services essential to the community. What is contended before us is that the kind of activities to which a reference has been made in the grounds of detention in these cases, does not attract the operation of cl. (iii). It is pointed out that Entries 26 & 27 of the State List relate to:

"26. Trade and commerce within the State, subject to the provisions of Entry 33 of List III.

27. Production, supply and distribution of goods, subject to the provisions of Entry 33 of List III."

Entry 33 of List III relates to a different matter & need not detain us. What is contended before us is that the activities in respect of which the orders of detention have been made come more properly under Entry 27, or possibly Entry 26, of the State List; & under Art. 246, Constitution of India, the Legislature of the State had exclusive power to make laws with regard to those items: therefore, those activities do not come within the meaning of the expression "maintenance of supplies & services essential to the community" as contemplated in Entry 3 of the Concurrent List. It is contended that that expression embraces such matters as the supply of electric energy, public water works, etc., the maintenance of which comprises both "supplies and services essential to the community."

[5] Learned counsel for the petnrs. took us through the Defence of India Act & the Rules made thereunder, Ordinance XVIII [18] of 1946 & Ordinance XX [20] of 1946. A reference was also made to the Essential Supplies (Temporary Powers) Act, 1946. It was pointed out that S. 2 (1), Defence of India Act, used the expression "for maintaining supplies and services essential to the life of the community." Clause (ix) of sub-s. (2) of S. 2 & Cl. (xx) of the same sub-section also used the same expression. In the Rules made under the Defence of India Act, the expression used was "maintenance of supplies and services essential to the community" in some Rules; in other Rules, "maintenance of essential services or supplies;" in some other Rules, the word "services" was dropped altogether, & the expression used was "maintaining supplies essential to the life of the community" (see in this connection Rr. 65, 77A, 80, 81D & 88, Defence of India Rules). It is contended that by reason of the use of the aforesaid expressions in the Defence of India Act and the Rules made thereunder, the expression "maintenance of supplies and services essential to the community" with the use of the conjunctive 'and' therein, acquired a technical meaning, & Parliament when it enacted the Detention Act, must have had that meaning in

mind when it used the expression "maintenance of supplies and services essential to the community." It is contended that the technical meaning of the expression is such as to relate to the supply of electrical energy, water & such other articles as are dealt with by what are known as public utility concerns. It is pointed out that the Essential Supplies (Temporary Powers) Act, 1946, & Ordinance XVIII [18] of 1946, on the other hand, purport to legislate for production, supply & distribution of goods, or trade & commerce in certain commodities; in other words, they relate to Entries 26 & 27 of the State List. By Ordinance XX [20] of 1946, R. 81, Defence of India Rules was altered, & the expression used was "maintaining supplies and services essential to the life of the community in connection with regulating or prohibiting the production, distribution, use or consumption of electric energy, etc.:" therefore, it is contended that the expression "maintenance of supplies and services essential to the community" has a connotation which is different from mere production, supply & distribution of goods, or trade & commerce; & the activities of the detenus in these cases, assuming the activities to be such as are mentioned in the grounds, come more properly under the latter than the former category.

[6] In order to dispose of these arguments & contentions, the details whereof I have stated above, it is necessary to make a brief reference to the "activities" on the basis of which the orders of detention have been made. I shall, latter on, refer to the grounds of detention in detail when I take up the case of each detenu. Here, I shall refer to the grounds in two of the cases by way of illustration only. In the case of *Dayanand Modi* (Cr. Misc. No. 590 of 1950), which was the first case heard by us & in which the legal contentions mentioned above were elaborated by Sir Sultan Ahmed, the grounds, after referring to the duties of a licensee under the Bihar Cotton Cloth and Yarn (Control) Order 1948 & the artificial scarcity in cloth created by withholding from sale of certain varieties of cloth, stated that on a search of the shop of the detenu an excess of some *dhotis & saris* & of several thousand yards of a popular variety of cloth was found which, it was stated, was evidently kept for blackmarketing. In Cr. Misc. 613 of 1950, the detenu is one Mohan Lal. The grounds communicated to him show that on a search of his shop, he was found to be in possession of 138 pairs of *dhotis & saris* in excess of the quantity shown in his accounts. The accounts also disclosed a shortage of 458½ yards of yardage cloth. It was further alleged that he attempted to mislead the checking officer by counting only ten pieces of *saris* in each bundle when they contained twenty pieces. For the purpose of the argument which we are now considering, it must be assumed that the grounds, or the facts relating thereto, are correct & do exist in fact. In this batch of cases, when we originally heard them, there were some cases which related to similar activities in the matter of foodstuff, such as rice & wheat. By reason of the fact that some of the detenus have already been released by the State Govt., this batch now no longer contains any case relating to food, but the nature of the activities with regard to food is the same as with regard to cloth, & the question of law which we are now deciding will apply equally to both classes of cases.

[7] Now, the question is whether activities of the nature referred to above come within the expression "maintenance of supplies and services essential to the community" occurring in cl. (iii) of S. 3 (1) (a) of the Detention Act. In my opinion, the answer to the question should be in the affirmative, & my reasons are these.

[8] The expression "maintenance of supplies and services essential to the community" which was used in the Defence of India Act & the Rules made thereunder was, in all probability, copied from the Emergency Powers (Defence) Act, 1939, passed in England during the last war (2 & 3 Geo. VI, C. 62). Section 1 of that Act enabled His Majesty to make Defence Regulations by Orders in Council for, among other things, "maintaining supplies *and* services essential to the life of the community". The entire fascicle of Defence Regulations made under that statute were not available to us, but in two of the English decisions which were brought to our notice, some of the Defence Regulations were quoted. In the celebrated case of *Liversidge* v. *Anderson*, (1942) A. C. 206: (1941-3 ALL E. R. 338), Regn. 18B was quoted, in para (1A) of which the expression used was "the maintenance of supplies *or* services essential to the life of the community." It is worthy of note that though the parent statute used the expression "and" the Regulation made thereunder used the expression "or". In *Point of Ayr Collieries, Ltd.* v. *Lloyd George*, (1943) 2 ALL E. R. 546, Regn. 55 (4) was quoted: the expression used in this Regulation was "for maintaining supplies *and* services essential to the life of the community". It would, thus, appear that in the Regulations made under the Emergency Powers (Defence) Act, 1939, the word "supplies" and the word "services" were sometimes coupled with the

conjunctive "and" & sometimes with the disjunctive "or", though the statute itself used the expression "for maintaining supplies *and* services essential to the life of the community". In the subsequent statute, Emergency Powers (Defence) Act, 1940, which extended the powers under the previous statute, the expression used was "for maintaining supplies *or* services essential to the life of the community". On a careful comparison of the English Statutes & the Regulations made thereunder as also the Defence of India Act & the Rules made thereunder, it seems to me that the word "and" between the words "supplies" & "services" was not used in any restrictive sense, but in a comprehensive sense; in other words, authority was given to make Regulations or Rules, as the case might be, for maintaining supplies essential to the life of the community, or for maintaining services essential to the life of the community, or for both. That is the reason why in some of the Defence Regulations made under the English statute & in some of the Rules made under the Defence of India Act in India, the expression "and" was used while in some others the expression 'or' was used. The authority was there to make Regulations or Rules for either of the two matters, essential supplies & essential services, & also for both together. I do not think that there was any necessary intendment to restrict the operation of the expression to such matters only as the supply of electrical energy, public water supply, etc., as is contended by learned counsel for the petnrs. I think that exactly same is the meaning of the expression used in the Detention Act of 1950. With regard to the use of the conjunctions "or" & "and", Maxwell has made the following observations (Maxwell on Interpretation of Statutes, 9th Edn., p. 244) :

"To carry out the intention of the Legislature, it is occasionally found necessary to read the conjunctions 'or' & 'and' one for the other. The 43 ELIZ. C.3, for instance, in speaking of property to be employed for the maintenance of 'sick and maimed soldiers, referred to soldiers who were either the one 'or' the other, & not only to those who were both."

It is observed in Stroud's Judicial Dictionary (2nd Edn., p. 82), that the word 'and' had generally a cumulative sense; some times, however, it is by force of context read as 'or'. It seems to me that the manifest intention of Parliament in the use of the expression "maintenance of supplies and services essential to the community" in cl. (iii) of S. 3 (1) (a) of the Detention Act was to provide for preventive detention for reasons connected with the maintenance of supplies essential to the community or the maintenance of services essential to the community or both.

[9] The matter may also be looked at from another point of view. A supply of food or cloth which is essential to the community has, indeed, a service aspect as well. If the supply is stopped or interfered with, then the service which that supply ensures is also stopped or interfered with. The word "service" has a wider connotation, & one can think of "services" which do not necessarily depend on a supply of goods or commodities; e.g., the service rendered by workers in essential undertakings. But the supply of an essential commodity cannot be contemplated as entirely divorced from service; because an essential supply is a service to the community.

[10] One can easily imagine a situation in which the supply of food or cloth is more essential to the life of the community than the supply of electric energy. To say, in that situation, that the supply of electric energy is a service to the community, but the supply of food or cloth is not a service to the community will, in my opinion, be absurd. I am definitely of the opinion that any activity which directly interferes with or threatens the maintenance of the supply of such primary necessities of life as food or cloth attracts the operation of cl. (iii) of S. 3 (1) (a) of the Detention Act.

[11] One word of caution is, however, necessary here. The word "maintenance" has to be given its due meaning : it means "act of maintaining," "keeping up," "continuance." In my opinion, any apprehended act of blackmarketing or hoarding will directly affect maintenance (as that word is ordinarily understood) of supply & service essential to the community.

[12] It is, I think, wrong to say that because production, supply & distribution of goods or trade & commerce within the State are separate entries in the State List, therefore, the expression used in cl. (iii) of S. 3 (1) (a) of the Detention Act has a narrow or restricted meaning. It has been said more than once that the entries in the Legislative Lists are not to be treated as water-tight compartments. For judging legislative competence, what is to be seen is the primary object of the legislation or the pith & substance. We are not here concerned with legislative competency. As observed by Patanjali Sastri J., in *Machindar Sivaji* v. *The King*, (1949) 11 F. C. R. 827 : (A. I. R. (37) 1950 F. C. 129) there is a distinction between legislation in exercise of the power granted under an entry in the legislative list & action taken by the executive in pursuance of such legislation. When Parliament enacted cl. (iii) of S. 3 (1) (a) of the Detention Act, the primary object was preventive detention of a person who was likely to act in a manner prejudicial to the mainten-

ance of supplies & services essential to the community: the apprehended act may incidentally have reference to the production, supply or distribution of goods, but that would not necessarily take it out of the mischief sought to be reached by cl. (iii) of S. 3 (1) (a) of the Detention Act. It is worthy of note that entry 3 of the Concurrent List talks of preventive detention for reasons (*inter alia*) connected with the maintenance of supplies & services essential to the community. The expression "for reasons connected with" is important: it means that the detention is for reasons connected with the maintenance of supplies & services essential to the community. Such detention may affect the supply of goods, but that does not mean that the detention is for an object other than what is contemplated by Entry 3 of the Concurrent List.

[13] Mr. Basanta Chandra Ghose, who argued some of these cases raised another contention to which a passing reference may be made at this stage. He contended that cl. (iii) of S. 3 (1) (a) of the Detention Act should be construed on the principle of *ejusdem generis* as being related to cl. (ii), which precedes cl. (iii) & which relates to the security of the State or the maintenance of public order. His contention is that the maintenance of supplies & services essential to the community referred to in cl. (iii) must have some relation to the maintenance of public order or the security of the State. I need only say that I am unable to accept this narrow construction of cl. (iii). The *ejusdem generis* rule is one to be applied with great caution & not pushed too far. The caution given by Farwell L. J., that "unless you can find a category, there is no room for the application of the *ejusdem generis* doctrine" can bear repetition, & where the words are clearly wide in their meaning, they ought not to be qualified on the ground of their association with other words (see Craies on Statute Law, Edn. 4, p. 167). In *Rex* v. *Basudeva*, A. I. R. (37) 1950 F. C. 67: (51 Cr. L. J. 1011), the question of the relation between blackmarketing in essential commodities & the maintenance of public order was considered by the F. C. It was observed by their Lordships:

"It is true that blackmarketing in essential commodities may at times lead to a disturbance of public order, but so may, for example, the rash driving of an automobile or the sale of adulterated food stuffs. Activities such as these are so remote in the chain of relation to the maintenance of public order that preventive detention on account of them cannot, in our opinion, fall within the purview of Entry 1 of List II."

The Entry to which their Lordships were referring in that case was Entry I of List II of Sch. VII, Government of India Act, 1935, which related, among other things, to "preventive detention for reasons connected with maintenance of public order." There was no such expression as "maintenance of supplies and services essential to the community" in that Entry. It may well be that the scope of Entry 3 of the Concurrent List was advisedly widened by including the maintenance of supplies & services essential to the community, as one of the matters in connection with which a law for preventive detention could be made.

[14] For all these reasons, I must overrule the contention that the activities referred in the grounds of detention in these cases do not attract the operation of cl. (iii) of S. 3 (1) (a) of the Detention Act.

[15] The other contention of law which has been raised in some of these cases is this. It is pointed out that S. 3 (1) of the Detention Act says that the State Govt. must be satisfied that it is necessary to make the order with a view to preventing a person from acting in any manner prejudicial to the maintenance of supplies & services essential to the community. The argument before us is that three courses were open to the State Govt.: (a) cancellation of the licence; (b) prosecution under the Essential Supplies (Temporary Powers) Act, 1946; (c) detention. It is contended that when cancellation of the licence or prosecution of the offender would have more effectively served the purpose, it was not open to the State Govt. to pass an order of detention. Another contention has been that it was not at all open to the State Govt. to detain a person against whom a prosecution for an alleged offence was pending. As to the first argument, the short answer, I think, is that it was for the State Govt. to decide which alternative it should adopt or which was most effective in the circumstances of the case. I do not think that it is for this Ct. to decide the matter, or even to express any opinion as to which alternative should be the most effective. I can do no better than quote the observations of Lord Greene M. R. in *Point of Ayr Collieries Ltd.* v. *Lloyd George*, (1943) 2 ALL. E. R. 546:

"If one thing is settled beyond the possibility of dispute, it is that, in construing regulations of this character expressed in this particular form of language, it is for the competent authority, whatever Ministry that may be, to decide as to whether or not a case for the exercise of the powers has arisen."

As to the second argument that it was not open to the State Govt. to detain a person against whom a prosecution was pending, we recently considered this question in Cri. Misc. Nos. 626 & 627 of 1950, D/- 21-12-1950. I do not wish to repeat what I said there, after a careful consideration of the cases cited at the bar. I need merely summarise the conclusions at

which we arrived. The answer to the question whether detention & prosecution can be simultaneously made does not depend on any rule of law : the question has to be approached, & answered in each case, on the footing whether the order of detention, in view of the pending prosecution, is *bona fide* or not. For answering the question the uncontroverted facts may have to be considered, & the test will be whether the order of detention is for the purpose it purports to be or really for any *ulterior* or collateral purpose. One point of distinction between some of these cases & Cri. Misc. Nos. 626 & 627 of 1950 must be noted here. We found in Cri. Misc. Nos. 626 & 627 of 1950 that the grounds of detention & the grounds on which prosecution was made were not the same. In these cases, however, the prosecution, if any, for an offence under the Essential Supplies (Temporary Powers) Act, 1946, arose out of the same facts which ultimately led to the detention. In the course of his arguments the learned Govt. Advocate stated before us that the State Govt. had passed orders for taking necessary steps for the withdrawal of pending prosecutions in cases where such prosecution was pending on the same facts. In view of this statement it is, I think, unnecessary to consider this matter any further, except to state that I am unable to accept the extreme proposition of Mr. Basanta Chandra Ghose to the effect that when an offence is alleged to have been committed, the State Govt. has no authority to detain, but must launch a prosecution & wait for the decision of the Ct. Nor am I impressed by the other argument that the withdrawal of a pending prosecution will, in certain cases, amount to an acquittal & therefore, deprive the State Govt. of any legal authority to make an order, of detention on the same facts. These contentions fail to take note of the basic distinction between preventive detention & punitive detention, & if accepted, will defeat the very object of the Detention Act. Mr. Ghose relied on certain observations of Ram Labhaya J. in *Labaram Deka* v. *The State*, (a decision of the Assam High Court) 55 C. W. N. 13 : (A. I. R. (38) 1951 Assam 43) which seem to lend some support to his contention. Thadani C. J., another member of the Bench, made it clear that he was not a party to those observations. With due respect, I am unable to accept those observations as laying down any rule of law. The other decisions cited at the bar on this point we considered in Cri. Misc. Nos. 626 & 627 of 1950.

[16] Having disposed of the contentions of law which are common to these cases, I now proceed to a consideration of the grounds of detention in each case in order to determine (a) if there has been any failure to comply with the mandatory provisions of Art. 22 of the Constitution; (b) if the order of detention is *mala fide*; or (c) if it is bad for any other reason. For the sake of convenience, I would take each case separately.

[17] *Cri. Misc. No. 590 of 1950.* (Name of the detenu is Dayanand Modi) — The order of detention in this case was passed on 11-10-1950, & the petnr. was arrested on 13-10-1950. The grounds of detention were communicated to the petnr. on 22-10-1950. In the grounds it was stated that the petnr. Sri Dayanand Modi was the director & one of the proprietors of the firm of Messrs Modi & Sons, which firm held a licence under S. 3, Bihar Cotton Cloth and Yarn (Control) Order, 1948. It was stated that in the capacity of a licensee the firm was appointed as one of the cloth importers in Bihar. In paras. 2 & 3 of the grounds, a reference was made to the method by which importers of cloth in the State of Bihar got their quota of the cloth allotted to them, & also to the conditions of the licence under which a register of daily transactions has to be maintained. In para. 4, reference was made to the scarcity of cloth artificially created by some anti-social cloth dealers who withheld from sale certain varieties of cloth. Then follow paras. 5, 6 & 7 which I had better quote in extenso :

"5. The stock & account of the firm, relating to cloth were accordingly checked on 4-10-1950, & it was discovered that account books had not been written properly from 3-8-1950 to 4-10-1950, in respect of the receipt & sale of cloth from the mill by the Textile Comr. & received by the licensee.

6. According to the stock register they should have the following cloths in their shop on 4-10-1950.

Dhotis & saris	...	14,460 pairs
Yardage	...	3,01.668 yards
Chadars	...	3,722
Fents	...	14 lbs.

But on physical verification the following stocks were found in the shop,

Dhotis & saris	...	16,491 pairs
Yardage	...	3,37,412¼ yards
Chadars	...	1,454
Fents	...	240

Thus an excess of 2031 saris & dhotis & 35,743¼ yards of popular variety cloth was found in the shop which was evidently kept for black-marketing during the Puja & Muharram. The shortage of 2268 chadars had evidently been sold in blackmarket.

7. The following past history of the proprietors of the firm shows that Shri Dayanand Modi habitually indulged in hoarding cloth & selling the same in black market at exorbitant prices. (a) Shri Dayanand Modi was prosecuted under S. 81 (4), Defence of India Rules, read with Ss. 353/188, I. P. C., for snatching the cloth seized on account of forged stamping from the hands of the cloth Inspector. He was, however, acquitted of the charges. (b) In accordance with the instructio

contained in telegram No. 75TRX, dated 4-2-1948, the S. D. O. Sadar reserved 20% of the cloth for supply to the low paid Govt. servants. But this firm disposed of the stock in black-market for getting more money than what he would have got by selling to Govt. servants at controlled price. (c) In spite of a decision of Cloth Controller that distribution of popular & non-popular variety of cloth to the retailers from the stock of Messrs. Modi & Sons will be made by the D. C. Ranchi, Shri Dayanand Modi disposed of 18,000 yards of popular variety of cloth on 25-7-1950 to retailers of his own choice. (d) On 3-8-1950, the retailers linked to this importer, staged a demonstration of dissatisfaction with black flags & bundle of non-saleable cloth kept in rickshaw protesting against the firm as they had sold popular varieties of cloth in blackmarket & supplied them only non-popular varieties which had no market. (e) A truck load of cloth sent by Shri Dayanand Modi outside Ranchi towards the Daltonganj was detected near Kuru barrier by the Inspector of anti-smuggling force."

In the concluding portion of the grounds, it was stated that the State Govt. was satisfied that if the petnr. was allowed to remain at large, he would indulge in activities prejudicial to the maintenance of supplies essential to the community.

[18] It has been contended before us that the order of detention in this case is *mala fide* & bad, because (a) the alleged grounds have no existence in fact, & (b) there is no firm of the name of Messrs Modi & Sons, & the petnr. is not one of the proprietors of any such firm. It is stated that there is a limited liability company of the name of Modi & Sons Limited; but the petnr. was neither the managing director, nor the manager of the said company.

[19] To appreciate contention (a) above, it is necessary to refer to the affidavit made by one Sitaram Lohia, a relative of the detenu, in support of the petn. In this affidavit, it was stated that on 3-8-1950, the District Supply Officer of Ranchi removed the stock register, vouchers & other papers. These papers were demanded back several times, but were not returned: therefore, it was stated that the allegation in para. 5 of the grounds had no existence in fact, because in the absence of the stock register & other books of account which had been removed on 3-8-1950, it was physically impossible to write up the books which were not in the possession of the company. As to the allegations in para. 6 of the grounds, they were denied; moreover, it was stated that as the stock register had been taken away on 3-8-1950, & no entries could be made therein between 3-8-1950 & 4-10-1950, on which date the physical verification was made, there would inevitably be a discrepancy between what was shown in the stock register & what was found on physical verification. As to the allegations in para. 7 of the grounds, it was stated that ground (a) of para. 7 showed that the order was *mala fide*, because even after the acquittal of the petnr. on merits, the State Govt. were alleging a prosecution which had failed as one of the grounds for detention. As to ground (b) of para. 7, it was alleged that the order of the Sub-Divisional officer dated 4-2-1948, was not addressed to Modi & Sons. It was further stated that the direction of the Sub-Divisional Officer to supply cloth to Govt. servants was fully complied with, & cloth was supplied to all Govt. servants mentioned in a chart kept by the District Supply Inspector. As to ground (c) of para. 7, it was stated that the decision referred to therein was never communicated to Messrs Modi & Sons. As to ground (d) of para. 7, it was stated that Messrs Modi & Sons supplied cloth to such retailers as were duly approved of by the District Supply Officer. As to ground (e) of para. 7, it was stated that it related to cloth freely released (as distinguished from quota cloth) & was sold to licensed dealers of Daltonganj—which was permissible under the law.

[19a] The aforesaid statements made in the affidavit of Sita Ram Lohia were not controverted by the State of Bihar. The learned Advocate-General, who appeared for the State of Bihar in some of these cases, took up the following position. He contended that it was not open to this Ct. to go behind the grounds communicated by the State Govt. or to enquire into the correctness or otherwise of the facts stated therein : according to him, this Ct. must accept the grounds or facts as stated by the State Govt. & the only point to be considered by this Ct. is whether the grounds are relevant to the object of detention. He further submitted that the correctness or otherwise of the grounds would be a matter for the Advisory Board constituted under S. 8 of the Detention Act : therefore, no affidavit in reply need be filed by the State Govt. The learned Advocate General made it clear to us that, in his view, a question of principle was involved, & he invited a decision on that question. He said that he took whatever risk there was in not filing an affidavit in reply.

[20] It is important to remember here why the grounds have to be communicated to the detenu. Under Art. 22 (5) of the Constitution, the authority making the detention order shall, as soon as may be, communicate the grounds on which the order has been made & shall afford the detenu the earliest opportunity of making a representation against the order. I think that it is quite clear that the grounds have to be communicated so as to afford the detenu an opportunity of making a representation against the order. Clause (6) of Art. 22 of the Constitution says that nothing in cl. (5)

shall require the authority making the detention order to disclose facts which such authority considers to be against the public interest to disclose. It is clear that a distinction is drawn between 'grounds' & 'facts.' There is, in the reported decisions, a discussion of the meaning of the aforesaid two expressions. In *Safatulla Khan* v. *Chief Secretary of West Bengal*, 55 C. W. N. 27 : (A.I.R. (38) 1951 Cal. 194 : 51 Cr. L. J. 1569), it has been stated that the grounds are the bases of the allegations, & the facts are the evidence on which the bases of the allegations are to be established. Without going into an exact definition of the aforesaid two expressions 'grounds' & 'facts,' one can say, without fear of much contradiction, that the 'grounds,' are based on & arise out of 'facts.' In this case, we are concerned only with such facts as have been disclosed & on which the grounds are based. It is, I think, now well-settled law that the satisfaction, which S. 3 (1) of the Detention Act speaks of, is the satisfaction of the State Govt., & it is not open to this Ct. to substitute its own judgment for that of the State Govt. In other words, the sufficiency or adequacy of the facts on which the grounds of an order of detention are based is not a question which can be agitated in this Ct., though if the grounds are vague & indefinite & afford no real opportunity to make a representation, the Ct. may hold that there has been a contravention of the mandatory provisions of Art. 22 (5) of the Constitution. The matter was put very succinctly in *Point of Ayr Collieries, Ltd.* v. *Lloyd George*, (1943) 2 All. E. R. 546 :

"It is for the competent authority to judge of the adequacy of the evidence before it. It is for the competent authority to judge of the credibility of that evidence. It is for the competent authority to judge whether or not it is desirable or necessary to make further investigations before taking action. It is for the competent authority to decide whether the situation requires an immediate step, or whether some delay may be allowed for further investigation & perhaps negotiation . . . . . one thing is certain, & that is that those matters are not within the competence of this Ct. It is the competent authority that is selected by Parliament to come to the decision, &, if that decision is come to in good faith, this Ct. has no power to interfere, provided, of course, that the action is one which is within the four corners of the authority delegated to the Minister."

The same point of view was expressed in *Machindar Shivaji* v. *The King*, A. I. R. (37) 1950 F. C. 129 : (51 Cr. L. J. 1480), which dealt with the C. P. and Berar Public Safety Act. Referring to section 2 (1) (a) of that Act, his Lordship Patanjali Sastri J. observed :

"In the present case, S. 2 (1) (a), like most other similar enactments, authorises the detention of any person if the Provincial Govt. is 'satisfied' that he is acting or is likely to act in a manner prejudicial to public safety, order or tranquillity. The language clearly shows that the responsibility for making a detention order rests on the provincial executive, as they alone are entrusted with the duty of maintaining public peace, & it would be a serious derogation from that responsibility if the Ct. were to substitute its judgment for the satisfaction of the executive authority &, to that end, undertake an investigation of the sufficiency of the materials on which such satisfaction was grounded."

His Lordship went on, however, to point out :

"The Ct. can, however, examine the grounds disclosed by the Govt. to see if they are relevant to the object which the legislation has in view, namely, the prevention of acts prejudicial to public safety & tranquillity, for 'satisfaction' in this connection must be grounded on material which is of rationally probative value."

His Lordship then considered the affidavit of the Chief Secretary filed on behalf of the Provincial Govt. & found that the test laid down by him was fulfilled. Therefore, it is not quite correct to say that this Ct. cannot examine the grounds at all. It is true that this Ct. cannot examine the grounds for the purpose of substituting its own judgment for that of the State Govt., but surely this Ct. can examine the grounds in order to see if the order of detention is *bona fide* or whether the grounds on which the order of detention is founded are based on materials of rationally probative value. If the facts (disclosed in the grounds) to which the grounds relate, or on which the grounds are based, do not at all exist, how then can one say that non-existent facts or non-existent materials have a rationally probative value ? If the alleged grounds or the facts on which they are stated to be based, do not exist at all, then the order of detention cannot be said to be a *bona fide* order. It must be remembered that when it is stated that the order is *mala fide*, no dishonest motive is necessarily imputed: it merely means that the order is bad for want of necessary care & caution, or is for some purpose other than what is stated in the order of detention. If an order of detention is stated to be based on certain grounds but on uncontroverted facts it appears that those grounds do not really exist, then it follows that the order of detention is made for reasons other than those disclosed in the grounds : in that sense the order will be a *mala fide* order, & will also contravene Art. 22 (5) of the Constitution. I must make it clear, however, that the onus of showing that the order is *mala fide* rests on the detenu; & the onus is a heavy onus which may be very difficult to discharge. One of the ways by which a detenu can show that the order is not *bona fide* is by stating facts by means of an affidavit, & if these facts are uncontroverted, they may be taken into consideration by this Ct. for the purpose of seeing if the order is *bona fide*, or if the order is

based on materials of a rationally probative value, or if the order contravenes the fundamental right guaranteed by Art. 22 (5) of the Constitution. I remember many cases in which an affidavit in reply was made by the State Govt., particularly in cases where the facts alleged by the detenu, if uncontroverted, were likely to lead to the inference that the order was not *bona fide*. A mere denial by the detenu would not be enough to discharge the onus which rests on him; but the detenu may be in a position to state definite facts which would show that the order of detention was bad either for want of good faith, or on the ground that it was based on materials which did not at all exist in fact. I respectfully agree with the observations of Meredith J. (as he then was) in connection with a similar question of principle raised by the Advocate-General in *Basanta Chandra* v. *Emperor*, 23 Pat. 968 at p. 991 : (A. I. R. (32) 1945 Pat. 44 F. B.). The observations were :

"I will not go so far as to hold that in no case could an affidavit be necessary. There might be cases where the affidavits of the petnrs. disclosed specific circumstances casting a real doubt on the *bona fides* of the orders."

I am, therefore, of the opinion that the extreme position taken up by the learned Advocate-General with regard to the filing of an affidavit in reply by the State Govt. has no support in law or reason.

[21] The grounds communicated to the detenu of this case show that the main ground on which the order of detention was based was the failure to enter the stock book between the dates, 3-8-1950 & 4-10-1950. On the uncontroverted affidavit of Sita Ram Lohia, it appears that the stock book was taken away by the District Supply Officer of Ranchi: therefore, the failure to enter the stock book had no rationally probative value, nor any relevance to the object of detention. In my opinion, the same infirmity affects grounds 6 & 7, in view of the circumstances disclosed by the affidavit of Sita Ram Lohia.

[22] One other point must be made clear here. Affidavits have been filed on behalf of the detenus in almost all the cases. Some affidavits contain mere denials; some attempt to give an explanation of the facts found against the detenus, which explanation may or may not be true. Such affidavits do not, in our opinion, discharge or shift the onus. If the alleged facts exist but two inferences are possible, it is for the State Govt. to make up its mind as to the inference to be drawn. This Ct. cannot say that a particular inference should have been drawn from the facts. But if the affidavit on behalf of the detenu discloses such specific circumstances as to show that the alleged facts or grounds are *non est*, then the order has no legs to stand upon.

[23] For these reasons, I would hold that the order of detention in this case is bad. It is unnecessary to consider the other contention that the petnr. is not the proprietor, nor the managing director of Messrs. Modi & Sons. I would accordingly allow the petn. & direct that the petnr. be released forthwith.

[24] (His Lordship then considered the petns. in Cr. Misc. 613 of 1950 (detenu Mohan Lal), Cr. Misc. 610 of 1950 (detenu Shree Nivas Murerka), Cr. Misc. 536 of 1950 (detenu Mahabir Prasad), Cr. Misc. 535 of 1950 (detenu Kedar Nath Poddar) & Cr. Misc. 537 of 1950 (detenu Govind Ram) & concluded :) The result, therefore, is that we would allow only one of the petns., namely that of Dayanand Modi (Cr. Misc. 590 of 1950), & reject the applns. on behalf of the other detenus. We direct that Dayanand Modi be released forthwith.

[25] **Narayan J.** — I agree.

V.S.B. *Ordered accordingly.*

A. I. R. (38) 1951 Patna 56 *[C. N. 7.]*

LAKSHMIKANTA JHA C. J. & REUBEN J.

Awadh Bihar Prasad & others — *Applts.*
v. *Ramji Mahton & others* — *Resps.*

L. P. A. Nos. 2, 3 & 4 of 1949, D/- 9-1-1951, from decision of Shearer J., D/- 4-5-1949.

(a) Tenancy Laws—Bihar Tenancy Act (VIII [8] of 1885), S. 112—Reduction of rent—No notice to parties concerned—Validity of reduction.

An examination of the different provisions of Part II of Chap. X, Bihar Tenancy Act, shows that in settling fair & equitable rent or in reducing the rent of any holding it is obligatory on the revenue officers to give special notice to the parties concerned in the manner provided for in the rules made by the Govt. in this behalf. Hence, an order of the revenue officer reducing the rent under S. 112, in the absence of the parties concerned & without any notice to them, must be held to be *ultra vires* & without jurisdiction. [Paras 9, 10]

(b) Tenancy Laws—Bihar Tenancy Act (VIII [8] of 1885), S. 112—Revenue Officer—Jurisdiction of, how to be exercised.

The revenue officers are invested with powers under a special statute & exercise delegated authority. They must, therefore, act within the ambit assigned to them under the statute & exercise jurisdiction only in the manner provided for in Part II of Chap. X of the Act & the rules made by the Provincial Govt. under S. 189 of the Act. They have accordingly no jurisdiction over persons who are not in the category of parties before them nor over persons who being entitled to special notice as "parties interested" in the proceedings have not been served with such notice. [Para 10]

(c) Tenancy Laws—Bihar Tenancy Act (VIII [8] of 1885), S. 112 & R. 73—Rule for special notice is mandatory.

Rule 73 framed by State Govt. under the Bihar Tenancy Act, prescribing in its proviso a rule for special notice, is mandatory. The underlying object of the rule is that before the rent of the holding is proposed to be altered to the prejudice of any party it should not be done until that party had notice of the rent settlement proceedings. [Para 10]

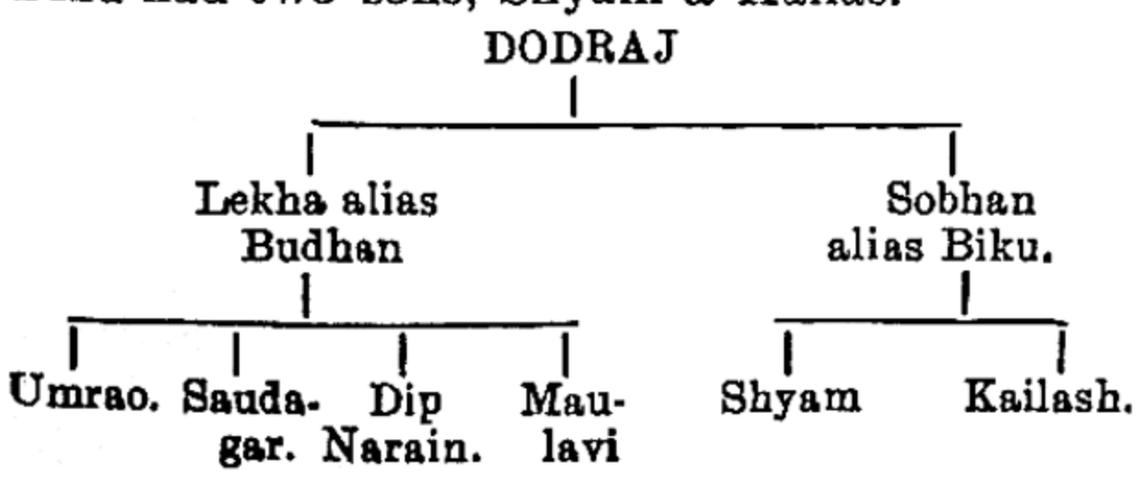
(d) Tenancy Laws—Bihar Tenancy Act (8 [VIII] of 1885), S. 112 & R. 73—Special notice — Burden of proof.

Where in a suit brought by the pltfs. for a declaration that the order of the revenue officer reducing the rent of holdings in dispute is void & without jurisdiction, the tenants-defts. admit that the pltfs are cosharer landlords having separate collection & separate realisation, thus admitting that the pltfs. are persons immediately under whom they hold, & plead the bar of service of special notice under R. 73, then the onus lies on the defts. to prove service of special notice. [Para 10]

Lal Narain Sinha & Indrabhanu Singh — for Applts.; Raj Kishore Prasad & K. D. De for S. C. Chakraverty — for Resps.

Lakshmikanta Jha C. J. — These three appeals by the pltfs. are under Cl. 10, Letters Patent, from a decision of a Single Judge of this Ct. modifying a decision of the Subordinate Judge who upheld the findings of the trial Ct. & affirmed the decree made in favour of the pltfs.

[2] The following pedigree shows that one Dodraj had two sons, Lekha alias Budhan, & Sobhan alias Biku; Lekha had four sons, Umrao, Saudagar, Dip Narain & Maulavi, & Biku had two sons, Shyam & Kailas:



Pltfs. 1 to 3 are sons of Saudagar & Dip Narain & Maulavi are pltfs. 4 & 5 respectively. Other members of the family are *pro forma* defts. in these suits.

[3] It appears from the record of rights that the land in respect of which these three suits have been instituted constituted eleven *batai* holdings of the tenants defts. under the pltfs. & the *pro forma* defts. In December 1922, an arrangement was come to between the landlords & the different tenants whereby the *batai* holdings were converted into *naqdi* holdings, & later on the three groups of defts. executed three kabuliats under which the eleven holdings were amalgamated into three new holdings for which they agreed to pay money rent. On the basis of these three kabuliats three rent suits were instituted against the three groups of tenants. In these suits the defts.' plea was that the original—eleven holdings still existed & that there had been no amalgamation. The litigation came up to the H. C. in second appeals & a compromise was entered into under which, on the defts. making certain payments to the landlords by 29-9-1928, the landlords were in their turn to treat the original *batai* holdings which existed before December, 1922, as still existing. There is no evidence to show that any payment was made by the tenants under the terms of the compromise. In 1938, however, the defts. made eleven applns. under S. 112, Bihar Tenancy Act, for the reduction of their rents on the basis that there were eleven (& not three) *naqdi* holdings. In these applns. only Biku & Umrao were made parties & the pltfs. were not impleaded. A reduction of four annas in the rupee was allowed by the revenue officer. Subsequently, he revised his own order under S. 104E (2) and allowed a reduction of six annas in the rupee, that is, 37½ per cent. reduction in the rents of all the holdings, without giving any notice to the pltfs.

[4] The pltfs. have instituted these suits for a declaration that the order of the revenue officer reducing the rent of the holdings in dispute is void & without jurisdiction. They have also claimed arrears of rent for the year 1347 to 1350 Fasli in respect of each of the three holdings at the original jama. Their case, in short, is that there are only three holdings (and not eleven), that they are cosharer landlords having separate collections & that they realise rents separately according to their shares. The defts. admitted by their written statements the pltfs.' case of separate collection & separate realisation of rents from them; but their case was that the suits were in respect of more than one holding & therefore, bad for multifariousness. They further alleged that the jama of each of the holdings had been reduced under S. 112, Bihar Tenancy Act, & the same was binding upon the pltfs.

[5] The learned Munsif held that payment was not made in accordance with the compromise & there were only three *naqdi* holdings, & this finding was not challenged in appeal. He also held that the order of the revenue officer is without jurisdiction & not binding on the pltfs. & has summed up his finding thus:

"In any case, the order of reduction has to be held without jurisdiction for two reasons. In the first instance, the holdings were misdescribed in the applications for reduction. Secondly, none of the pltfs. were impleaded as parties in the reduction proceedings. As such, no notice could have been issued upon them. The defts. have not shown that in spite of the pltfs. not being parties notices have been served upon them."

On appeal by the defts. the finding of the learned Munsif that the pltfs. were not parties to the proceedings under S. 112 was not chal-

lenged but it was contended, for the first time, that the present pltfs. were effectively represented by Biku & Umrao. This contention of the defts. was not accepted by the learned Subordinate Judge. In repelling the defts.' contention he held that

"there is no evidence on the record to justify this assertion & I have no doubt whatever that in the absence of the three sons of Budhan the Rent Reduction Officer had no jurisdiction to entertain the applns. & reduce the rent."

He also found that the applns. for reduction of rent were not with respect to the holdings of the defts. In this view of the matter also he held that the revenue officer had no jurisdiction & his order reducing rent of "non-existent holdings" must be held to be *ultra vires*.

[6] When the matter came up in second appeal here, Shearer J. modified the decrees & held that

"the defts. are, however, in possession of the land set out in their applns. & the mere circumstance that an incorrect description was given of the holdings in which it was comprised could not affect the jurisdiction of the Settlement Officer to reduce the rent."

The other ground on which he modified the decision of the Cts. below was that, special notices having been served upon Umrao & Biku, the pltfs. as cosharer landlords must also be bound. He has held that

"the onus was on the pltfs. not merely to show by producing the record of the Settlement Officer that a notice was not issued on them, but also to show that they were entitled to notice, & that this onus was discharged."

In the result, he allowed the appeals & gave the pltfs. decrees for rent & interest at the reduced rate of rent.

[7] The points for our consideration are: (1) whether the order of the Settlement Officer reducing the rent under S. 112, Bihar Tenancy Act, without special notice to the pltfs. is a nullity & (2) whether the Settlement Officer had jurisdiction to reduce the rent in view of the fact that there were eleven applns., in respect of three occupancy holdings. On the view that I take with respect to the first point, it is not necessary to decide the second question.

[8] On an anxious consideration of the points raised, I do not agree with the view taken by the learned Judge of this Ct. that, although the pltfs. were not parties to the applns. made by the defts. under S. 112, Bihar Tenancy Act, the order of the Settlement Officer is binding on them.

[9] By Notfn. No. 2814-IIT-34-R, dated 19-6-1937, as amended by Notfn. No. 3536-S-53-R, dated 14-8-1937, the Govt. of Bihar being satisfied that in the interest of the local welfare it was necessary to exercise the powers conferred on it by S. 112, Bihar Tenancy Act, invested certain revenue officers in the district of Patna with power (a) to settle rents, & (b) when settling rents, to reduce rents if, in their opinion, the maintenance of the existing rents would on any ground be unfair or inequitable in the following class of cases, namely, cases of money rents of occupancy raiyats then payable or being paid which became payable or commenced to be paid on or after 1-1-1915, & on or before 31-12-1933. Thus the revenue officers were invested with powers to settle or to reduce rents in cases of money rents of occupancy raiyats only. In settling the rents the revenue officers had to follow under S. 112 (2a) the procedure provided by Ss. 104 to 104J (both inclusive). Section 104D provides that in framing a table of rates under S. 104B, & in settling rents under S. 104C, the revenue officers shall be guided by such rules as the Provincial Govt. may make in this behalf. Section 104E lays down the procedure for preliminary publication & amendment of settlement rent-roll. The revenue officer at this stage may of his own motion or on the appln. of any party aggrieved, at any time before a settlement rent-roll is submitted to the confirming authority under S. 104F, revise any rent entered therein; but the proviso lays down that no such entry shall be revised until reasonable notice has been given to the "*parties concerned*" to appear & be heard in the matter. Section 104F (2) gives power to the confirming authority to sanction the settlement rent-roll with or without amendment; but the proviso thereto lays down that no entry shall be amended, or omission supplied, until reasonable notice has been given to the "parties concerned" to appear & be heard in the matter. Thus an examination of the different provisions of Part II of Chap. X, Bihar Tenancy Act, shows that in settling fair & equitable rent or in reducing the rent of any holding it is obligatory on the revenue officers to give special notice to the parties concerned in the manner provided for in the rules made by the Govt. in this behalf. The Provincial Govt. under S. 189, Bihar Tenancy Act, has power, by notification in the Bihar Gazette, to make rules for the purpose of carrying out the provisions of the Act. In exercise of such powers certain rules have been framed by the Provincial Govt. for service of notice, & it may be observed, that they have the force of law: see *Secy. of State* v. *Nitya Singh*, 21 Cal. 38 at pp. 49-50 (F. B.). Rule 65 provides for general notification in the case of settlement of fair rents under Part II of Chap. X, Bihar Tenancy Act. This will notify the date on which & the place at which the fair rents will be settled. Rule 73 prescribes the procedure to be followed by the Revenue Officer on the fixed date & by a proviso lays down that:

"when a revenue officer proposes to alter an existing rent, & the parties have not attended in compliance with the general notice prescribed in R. 65 above, the revenue officer shall serve each person interested with a special notice, & the fair rent shall not be settled in the absence of such person until after due service of such special notice has been proved."

Under S. 78, Rr. 65 to 77 (both inclusive) are made applicable to a settlement of rents under S. 112, Bihar Tenancy Act.

[10] The pltfs. as already stated, set up a case of separate collection & separate realisation of rent from the defts. The defts. did not controvert this case of the pltfs., on the other hand, in each suit they admitted by their written statements that

"the realisation & collection in respect of 2 annas *kham* share in the possession of pltfs. 1 to 3 & in respect of 2 annas *kham* share in the possession of pltfs. 4 & in respect of 2 annas *kham* share in the possession of pltf. 5 are separate (from each group)."

Thus, in view of the clear admission by the defts. the pltfs were not required to prove separate collection & separate realisation of rents from the defts. On the findings of the Cts. below the pltfs. were neither parties to the rent reduction proceedings, nor were they represented by Biku or Umrao, who alone were in the category of parties as landlords in the petitions filed by the defts. under S. 112 of the Act. The revenue officers are invested with powers under a special statute & exercise delegated authority. They must, therefore, act within the ambit assigned to them under the statute & exercise jurisdiction only in the manner provided for in Part II of Chap. X of the Act & the rules made by the Provincial Govt. under S. 189 of the Act. They have accordingly no jurisdiction over persons who are not in the category of parties before them, nor over persons who being entitled to special notice as "parties interested" in the proceedings have not been served with such notice. Therefore, any rent settled by the revenue officer without notice to the pltfs. who are "parties concerned" & interested in objecting, cannot bind them, & the order made by the revenue officer may be ignored by them & treated as a nullity. It was observed by Willes, J., in *Cooper* v. *Wandsworth Board of Works*, (1863) 143 E. R. 414 at p. 418 : (14 C. B. N. S. 180.) that

"a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; & that rule is of universal application and founded upon the plainest principles of justice."

The rule for special notice is mandatory & this rule, it must be observed, is founded on the principles of justice. In this respect there is, in my opinion, no difference between S. 112 & 112A of the Act. The underlying object of the rules in each case is, as observed by Mukharji J., in a case arising under S. 112A of the Act *Basdeonarain* v. *Karumahton*, 26 Pat. 592 at p. 597 : (A. I. R. (35) 1948 Pat. 153), that

"before the rent of a holding is proposed to be altered to the prejudice of any party it should not be done until that party had notice of the rent settlement proceedings."

Mookerjee, J., in *Gora Chand* v. *Rakhal Chandra*, 37 C. L. J. 473 : (A. I. R. (10) 1923 Cal. 364 held that an order made under S. 40 commuting rent without service of notice is *ultra vires* even though there is no express rule for notice on persons interested. The order of the revenue officer reducing the rent under S. 112, in the absence of the pltfs. & without any notice to them, must, therefore, be held to be *ultra vires* & without jurisdiction, & the civil Ct. can ignore it. The onus, in my opinion, was on the defts. to prove service of special notice on the pltfs. The defts. as already stated, have admitted that the pltfs. are cosharer landlords having separate collection & separate realisation. They have, therefore, admitted that the pltfs. are persons immediately under whom they hold. The pltfs. were, in my opinion, as such landlords, entitled to special notice, even if it be assumed that they do not stand recorded in register D as proprietors. The defts. have pleaded the bar of service of special notice & asserted the affirmative. The pltfs. can, therefore, be defeated only if the defts., prove that special notice was served on them even though they were not party to the proceedings. In the absence of proof of the bar the pltfs. must succeed.

[11] In the result, I would allow the appeals & restore the decrees of the Cts. below. The pltfs. will get their costs throughout.

[12] **Reuben J.** — I agree. In *Jagdishwar Dayal* v. *Dwarka Singh*, 12 Pat. 626 : (A. I. R. (20) 1933 P. C. 122), Lord Thankerton observed relative to the power of the Revenue Cts. under the Chota Nagpur Tenancy Act to sell tenures in execution of decrees for arrears of the rent thereof :

"Under Chap. XVI of the Act a statutory jurisdiction is conferred on the Revenue Cts. but that jurisdiction must be exercised within the statutory powers conferred. If then, as already stated, it is not competent to order a sale of the tenure under S. 208 unless the whole interests in the tenure are represented before the Ct. it is clear that the order for sale of the tenure in the present case was *ultra vires* of the Revenve Ct. & it follows that the sale was not 'made under this chapter' & was outside the jurisdiction of that Ct."

The principle is that a statutory power affecting rights of property must be exercised strictly in accordance with the provisions of the statute. Here, the requirements of the Bihar

Tenancy Act & the statutory rules thereunder relating to special notices have not been observed. This is evident from a perusal of the order-sheet of the proceedings under S. 112, Bihar Tenancy Act. The general notice under R. 65 was issued on 26-10-1937. On that date the rents were settled under R. 73. It is not suggested that the pltfs. attended on that day in answer to the general notice & as rents were settled on that very day it is not likely that the special notice required by the proviso was issued to them. Then 4-6-1938 was fixed for re-examination under S. 104E (2) of the equity of the rents entered in the rent roll. On that date there was no attendance on behalf of the landlords; nevertheless, orders were passed forthwith making a further reduction of the rents. As the pltfs were not impleaded the notices for 4-6-1938 could not have been directed to them, & the order-sheet shows that no other notices were issued before the rents were further reduced.

[13] The question of representation is a question partly of fact & partly of law. It was not raised in the Ct. of first instance. Hence the defts. cannot be allowed to raise it in appeal. Even if it is permitted to be raised, the plea must fail for the reasons given by my Lord the Chief Justice.

V.S.B. *Appeals allowed.*

A. . R. (38) 1951 Patna 60 *[C. N. 8.]*

SHEARER AND JAMUAR JJ.

Mir Hasan Khan and others — *Applts.* v. *The State.*

Cri. Appeals Nos. 115, 156 and 584 of 1949, D/- 21-12-1950.

(a) Penal Code (1860), S. 121 — "Waging war" — Meaning—Words and phrases.

"The expression "waging war" in S. 121 can only mean "waging war in the manner usual in war." In other words, in order to support a conviction on such a charge, it is not enough to show that the persons charged have contrived to obtain possession of an armoury & have, when called upon to surrender, it used the rifles & ammunition so obtained against the King's troops. It must also be shown that the seizure of the armoury was part & parcel of a planned operation & that their intention in resisting the troops of the King was to overwhelm & defeat these troops & then to go on & crush any further opposition with which they might meet until either the leaders of the movement succeeded in obtaining possession of the machinery of Government or until those in possession of it yielded to the demands of their leaders. [Para 11]

Anno. Penal Code, S. 121, N 1.

(b) Penal Code (1860), S. 121A —Scope—"Conspires to overawe"—Meaning—Words & Phrases.

The words "conspires to overawe by means of criminal force or the show of criminal force the Central Govt. or any Provincial Govt." clearly embrace not merely a conspiracy to raise a general insurrection, but also a conspiracy to overawe the Central Govt. or any Provincial Govt. by the organisation of a serious riot or a large & tumultuous unlawful assembly. [Para 14]

As the section stands, in certain circumstances persons who organise a strike among police men or certain other public or Municipal employees might render themselves liable to prosecution under it. Clearly, however, persons do not commit this crime unless it was part & parcel of their plans to overawe the Central or the Provincial Govt. by criminal force or show of criminal force. [Para 15]

The word "overawe" clearly imports more than the creation of apprehension or alarm or even perhaps fear. It appears to connote the creation of a situation in which the members of the Central or the Provincial Govt. feel themselves compelled to choose between yielding to force or exposing themselves or members of the public to a very serious danger. It is not necessary that the danger should be a danger of assassination or of bodily injury to themselves. The danger might well be a danger to public property or to the safety of members of the general public. [Para 16]

Where a large number of police havildars & constables conspired to withhold their services with the object of compelling the Prov. Govt. to yield to their demands & the conspirators seized the armouries & took possession of the arms & ammunition but remained peacefully in the police lines & did nothing to intimidate the general body of citizens, but took steps to ensure that the working of the treasury should not be interrupted. *Held* that it could not fairly be said that there was any such show of criminal force as was contemplated by S. 121A. [Para 22]

Anno. Pen. Code, S. 121A, N. 1.

(c) Penal Code (1860), S. 121A — Conspiracy — Proof.

It is not usual for a prosecution for conspiracy to be instituted unless the public prosecutor is in a position to put into the witness box one or more persons who have, at one time or another, been parties to the conspiracy & also to produce documentary evidence in the shape of letters or communications which have passed between some of the conspirators showing what exactly they intended to do & how they intended to do it. [Para 19]

Anno. Pen. Code, S. 121A, N. 2.

(d) Penal Code (1860), S. 120B — Accused in pursuance of conspiracy, inciting police constables to desert their posts & withhold their services & rise in mutiny—Charge of conspiracy to commit offence under S. 3, Police (Incitement to Disaffection) Act, 1922 — Accused held guilty & could be sentenced to 6 months R. I. [Para 25]

Anno. Pen. Code, S. 120B, N. 6.

Awadheshnandan Sahai & Lal Kishore — for Applts; The standing Counsel and Pandey Narsingh Sahai —for the State.

Shearer J. — The applts. in two of these three appeals are, or were, constables, belonging to the armed police in the districts of Patna, Gaya & Monghyr. Ramanand Tewari, the applt, in the third appeal, was at one time a constable, but was dismissed in 1942. The applts. were prosecuted in consequence of the part taken by them in what has been described as a rebellion, but what may, I think, more accurately be described as a mutiny among certain sections of the police force stationed in

five districts of the province, which occurred in the spring of 1947. Although Ramanand Tewari had ceased to be a member of the police force five years previously, he was the President of an assocn. formed by constables & havildars. This assocn. or police union, as it was called, had not then been recognised by the Provincial Govt. the reason, apparently, being that the Provincial Govt. was of opinion that no one should be permitted to be an office-bearer of such an assocn. unless he were a serving member of the police force. On 20-3-1947, a havildar, Kamta Singh, was called to give evidence in the Ct. of Mr. Bishwambhar Chaudhuri, the Sub-divisional Mag. of Gaya. In consequence of some incident which occurred, Mr. Chaudhuri prosecuted this havildar for contempt of Ct. & sentenced him to pay a fine of Rs. 100. Kamta Singh was unable to pay this fine immediately, & instead of giving him time to pay it, Mr. Chaudhuri committed him to jail. The constable or constables on duty in his Ct. declined to remove the havildar, & thereupon Mr. Chaudhuri came down from the dais & himself removed the havildar to the *hajat*. Not unnaturally, perhaps, this incident aroused a great deal of indignation among the havildars & constables at Gaya. At one of the meetings, which took place in consequence of it, they decided to go on strike from 23-3-1947, & a telegram communicating this decision was sent by or on behalf of the police Union to the Superintendent of Police.

[2] This telegram was despatched at about midday on 21-3-1947. On the day following, Ramanand Tewari arrived in Gaya & held consultations with the leaders of the havildars & constables & also with certain prominent congress men in the town. At a meeting, which was held at 8 p. m. on 23-3-1947, the decision to go on strike was affirmed & at the roll call, which took place at 9 p. m. that night, none of the constables in the police lines attended. At this time the communal situation in the town of Gaya & elsewhere in the province was tense, & largely in consequence of this, a number of constables belonging to the armed police were stationed at various points in the town. These constables abandoned their posts & returned to the lines, taking their arms & ammunition with them. The armed guards over the armoury & over the treasury remained, however, at their posts, & on the day following & indeed throughout the period of the strike the treasury was permitted to function. The armed police of two of the three outlying sub-divisions, namely, Jehanabad & Nawada, also went on strike. At Nawada they prevented the sub-treasury from functioning, but at Jehanabad, as at Gaya, the working of the sub-treasury was not interfered with.

[3] At about midday on 24-3-1947, a sergeant J. G. Lacey, was sent by the sergeant-major to the armoury to obtain ropes & handcuffs with which to bring under-trial prisoners from the jail to the Ct. of Session. Sargeant Lacey was permitted to open the armoury & take out the handcuffs & ropes, but, when he was about to take them away, he was stopped & was also compelled to hand over the key. On the evening of 25-3-1947, a public meeting was held in the Whitty Park at Gaya, which was addressed by Ramanand Tewari & by certain constables, among them one of these applts. While this meeting was in progress, certain events to which I will refer presently, were taking place in Patna & in consequence of them, the action which the Provincial Govt. decided to take against Mr. Chaudhuri had no effect, & it had eventually to call in troops in order to recover possession of the armoury.

[4] At 5 P. M. on 27-3-1947, an armed force consisting of officers & men of the Bihar Regiment surrounded the police lines & also the treasury. An armoured car was sent into the police lines & drew up at a distance of 35 yards or so in front of the armoury. The sergeant major of police, who was in the armoured car, climbed on to the top of it & called on the havildars & constables to surrender. One of them fired a shot at him which, fortunately, went wide. The officer in charge of the armoured car then ordered his crew to fire a number of shots at the wall of the armoury, which they did. Certain constables, who were in possession of rifles & ammunition, had taken up positions in the armoury & also at some other points in the police lines. Some of these men fired on the troops, & the fire was returned, two constables being killed & one, who died later, being wounded. Eventually, after a desultory exchange of shots over a period of about an hour, the havildars & constables decided to surrender. According to Captain Chet Singh Parwal, who was the officer in charge of the troops which surrounded the treasury, a number of constables had taken up their positions on the roof of the treasury & had trained their rifles on him & his men. These constables, hower, did not open fire, nor in consequence, did Captain Chet Singh Parwal. At about 9 P.M., when these constables realised that the constables in the police lines had surrendered, they too agreed to come out & surrender.

[5] It seems clear that the resistance which was put up to the troops by the havildars & constables in the police lines was largely due to incidents which had taken place in Patna on

the previous two days. In the afternoon of 25-3-1947, the constables at Patna organised a meeting in the police lines at which, presumably, they intended to express their sympathy with the constables at Gaya & also, possibly, to decide to go on strike themselves. Mr. S. P. Varma, the City Superintendent of Police & several other police officers went to the police lines & attempted to prevent the meeting being held. Mr. Varma was assaulted & those of the other police officers who went to his assistance were assaulted also. The District Mag., Patna, decided to call in the assistance of the military, & troops belonging to a British regiment, which was stationed at Dinapur, came to the police lines & trained machine guns on the constables assembled there. These constables thereupon surrendered. Prior to this, however, one Barhamdeo Singh, a constable employed as the driver of a motor vehicle, succeeded in getting away from the police lines with his truck & also with some rifles & ammunition. Barhamdeo Singh & the other constables, who were with him in this truck, drove to Gaya, stopping on the way at the police stations at Fatwa, Bakhtiarpur & Bihar, in order to tell the constables there what had happened & to call on them to go on strike also. Their purpose in going to Gaya was to get into communication with Ramanand Tewari.

[6] Ramanand Tewari decided to go at once to Patna, & presumably, because he suspected that his truck had been followed, Barhamdeo Singh took another route via Bikram, Bihta & Maner. At each of the police stations the truck was stopped & Ramanand Tewari got out of it & urged the constables there to join in the strike. On reaching Patna, Ramanand Tewari drove, in the first instance, to the new police lines & thence to the police station at Pirbahore where, apparently, he incited the constables to join in the strike. From the Pirbahore police station he set out for the Kadamkuan police station, but in the meantime police officers in Patna had got to know of his arrival & had set out in pursuit of him. The truck driven by Barhamdeo Singh was overtaken in a narrow road which was, partially blocked by a stationary motor car in which two civilians were sitting. The men in the truck got out of it & one or more of them opened fire on their pursuers. This fire was returned, & most unfortunately, the two civilians in the motor car were killed, as also was one of the occupants of the truck. Ramanand Tewari himself got away & went either that night or early next morning to Chapra.

[7] Another ex-constable, Indradeo Singh, who has been described as a lieutenant of Ramanand Tewari, left Patna immediately after this incident for Monghyr. Indradeo Singh appears to have assumed that, as British troops had been called in on the previous night, it must have been British troops who were responsible for opening fire on the occupants of the truck driven by Barhamdeo Singh in Kadamkuan. His resentment at the employment of British troops & at what, he supposed, quite wrongly it would seem, had been their behaviour, had, I am inclined to think a good deal to do with what took place at Monghyr & also possibly at Gaya. Indradeo Singh reached Jamalpur at about 5 P.M. & went to the police lines & called on the havildars & constables there to go on strike, Sergeant Ashtan, on being told of what was going on in the lines, at once went to the armoury & ordered Indradeo Singh out of it. Indradeo Singh called on him to hand over the key of the armoury, & when sergeant Ashtan declined to do so, he was assaulted, one constable striking him a blow on the head with an iron bar. Indradeo Singh then took possession of the key & opened the armoury & issued rifles & ammunition to the havildars & constables Prior to this, Indradeo Singh had been in communication by telephone with the police lines at Monghyr. At about 7 P. M. the alarm was sounded there & the havildars & constables decided to go on strike. At about 11-30 P.M. the armoury was broken open & rifles & ammunition were issued to those constables who were not already in possession of them.

[8] In the meantime the District Mag. & the Superintendent of Police, Mr. A. B. Banerji, who had displayed much tact & had done his utmost to prevent a strike, received orders from Patna that the Military should be called in to suppress it. Shortly after midnight, a detachment of troops took up positions at or near the gate of the Fort close to the police lines. An order to surrender was given, &, when this was not obeyed, the officer commanding ordered six of his men to fire one round each into the police lines. This fire was returned. Between 3 a. m. & 4 a. m. the constables at Jamalpur decided to abandon the armoury there & to move in to Monghyr. They stopped & boarded a cooly train which arrived in Monghyr at about 4 a. m. & proceeded to the police lines to join the constables there. The latter mistook them for troops & opened fire on them, & several of the Jamalpur constables were wounded before the mistake was discovered. Orders to stop firing were then given & the Jamalpur constables were admitted into the police lines. At about 7 a. m. next morning, Mr. Banerji made another effort to put an end to the strike, & on this occasion succeeded in getting the constables to surrender. Indradeo Singh succeeded in getting away &

appears to have crossed the river with the intention of creating trouble at Begusarai. So far, however, as appears from the record, he either did not go there or did not succeed in his mission.

[9] Ramanand Tewari arrived in Chapra on 27-3-1947, & between 4 p. m. & 6 p. m. on that day addressed a meeting of the constables in the police lines. A number of men at this meeting decided to go on strike. Any attempt to obtain possession of the armoury was, however, foiled by the energy & courage of Sergeant Major Chandradeo Singh who was in charge of the special armed police force. This man & his jamadar, Manzoor Khan, succeeded in preventing their own men from taking any part in the meeting, &, when it appeared that an attempt might be made to take possession of the armoury marched their men there & ordered them to resist. The strike of Chapra was, in consequence, very much less serious although, apparently, troops had to be brought from Muzaffarpur before it was finally quelled. The only other district in which any constables went on strike was Shahabad. At Arrah the ring-leaders were apprehended with the assistance of troops from Dinapur &, in consequence, nothing untoward happened. At Sasaram the armed police deserted their posts & took up their positions at the sub-treasury, although, as at Jehanabad, they allowed the staff of the sub-treasury to carry on their work as usual. This strike was brought under control by the Superintendent of Police, apparently without any assistance from the Military, on 29-3-1947.

[10] The evidence relating to these various events is extremely voluminous. It is, however, quite unnecessary to refer to it as Mr. Awadhesh Nandan Sahay, for the applts., has conceded that it is substantially correct. The decision of each of the appeals depends mainly, if not wholly, on certain points of law, &, as such evidence as a material bearing on these points of law was adduced at each of the three trials, the three appeals can conveniently be disposed of in one & the same judgment.

[11] The applts. in Criminal Appl. No. 115 of 1949 have been convicted under S. 121 of the Penal Code for having waged war against the King. So far as some of these applts. are concerned, there was no evidence on which such a charge could possibly have been framed. So far as the remaining applts. are concerned the charge is sought to be sustained on the ground that they were among those who took possession of the armoury on 23-3-1947, &, so far as a small minority of them are concerned, also on the ground that they took part in the resistance which was put up to the troops on 27-3-1947. The expression "waging war" means & can, I think, only mean "waging war in the manner usual in war." In other words, in order to support a conviction on such a charge, it is not enough to show that the persons charged have contrived to obtain possession of an armoury & have, when called upon to surrender it, used the rifles & ammunition so obtained against the King's troops. It must also be shown that the seizure of the armoury was part & parcel of a planned operation & that their intention in resisting the troops of the King was to overwhelm & defeat these troops & then to go on & crush any further opposition with which they might meet until either the leaders of the movement succeeded in obtaining possession of the machinery of Govt. or until those in possession of it yielded to the demands of their leaders.

[12] That this is so is I think, made quite clear by an examination of the Bill which led to the insertion of S. 121A, in the Penal Code. The section, as it appears in the Bill &, more particularly, the latter portion of it, is not precisely the same as the section, which was ultimately enacted. For our present purpose the relevant words in the Bill were :

"Whoever . . . . . conspires to wage or abet civil war shall be punished with transportation for life, or any shorter term, or with imprisonment of either description which may extend to ten years."

Explanation 2 ran thus :

"Civil war means permanent & organized hostile operations carried on by any one section of the community against any other section of it."

Appended to this were two illustrations, one of which was : "An attack upon an arsenal might be civil war if it was intended as the first step towards permanent hostilities." (Gazette of India, dated 27-8-1870). The then Legislative member of the Govt. of India was Sir James Fitzjames Stephen who later became one of the Judges of the H. C. in England & was perhaps the greatest authority of his generation on criminal law. In his Digest of the Criminal Law. Edn. 8, p. 57, one of the meanings given to the expression "to levy war" is "attacking in the manner usual in war the King himself or his military forces, acting as such by his orders, in the execution of their duty." It is, I think, quite impossible to say that any of these applts. waged war in the sense in which that expression, as it occurs in S. 121, Penal Code, was used. The applts. or some of them were in possession of the armoury at Gaya for several days, & it is perfectly clear that they never intended to use it as a base for further operations. As to the engagement, if it can be called an engagement, between them & the troops, who were sent against them, it has to be re-

membered that very fantastic rumours had apparently been spread as to the treatment which had been meted out to the constables at Patna. It may be that those of the applts. who were inside the police lines & the other havildars & constables who were there with them expected the troops to shoot them down & determined to put up as much of a desperate resistance as they could before they were shot down. That, I think, is suggested by what was said by Sergeant Lacey who was inside the police lines & who described the constables as having run about "like mad fools" when the armoured car proceeded towards the armoury. The utmost that can, I think, possibly be said is that their leaders were determined to make the troops sent against them have recourse to force in order to arouse public sympathy in their cause & to put or try to put the Provincial Govt. in the wrong. Even, however, if that was so, the convictions under S. 121, Penal Code cannot be supported. The applts. were no more guilty of that offence than any other persons, who, when called upon to submit to arrest, offer resistance.

[13] When any body of men, whether factory operatives or clerks or policemen go on strike, their object clearly is to coerce their employers into yielding to their demands. Until the early part of the 19th century combinations of this kind in England were criminal. Subsequently, it ceased to be a crime for the great majority of workers to resort to a strike although certain acts done by strikers were & are still punishable as crimes. Policemen, however, & certain other classes of employees are forbidden by law to go on strike. Each one of the applts. who went on strike committed an offence & when each of them agreed with the others to do so, they jointly committed another & more serious offence, namely, the offence of conspiracy. A conspiracy is in substance an agreement to do an unlawful act. The only case which I have been able to discover in which a number of public servants simultaneously declined to perform their duties in order to extort concessions in the matter of pay from the State is a very old one decided in 1769. *Vertue* v *Lord Clive*, (1769) 4 Burr. 2472 : (98 E. R. 296). Certain military officers in the army of the East India Company simultaneously tendered their resignations of their commissions on the ground that they had not received as much in the way of allowances as they believed they were entitled to. Lord Clive, in order to meet the very dangerous situation which was thus created, had the officers placed under arrest, & when they returned to England, some of them instituted actions to recover damages for assualt & false imprisonment. These actions were dismissed, & in dismissing them, one of the Judges observed that "this combination was a criminal act." This decision, however, while it shows that the applts. were guilty of conspiracy, is of no assistance to us in deciding the real point of difficulty arising in the appeal, which is whether the conspiracy was a conspiracy of such a kind as to attract the operation of S. 121A, Penal Code.

[14] The marginal note to S. 121A is "conspiracy to commit offences punishable by S. 121." This was strictly accurate description of the section which it was proposed to enact in the bill originally introduced in the Legislative Council. It is quite clear that the conspiracies aimed at in the bill were conspiracies either to wage war against the King in the manner in which it is usual to wage war or conspiracies to raise an insurrection with the object of subverting the constitution. The section, however, as finally enacted, brought within its scope other conspiracies also, & the marginal note is not a strictly accurate description of what is contained in it. The words "conspires to overawe by means of criminal force or the show of criminal force the Central Govt. or any Provincial Govt." clearly embrace not merely a conspiracy to raise a general insurrection, but also a conspiracy to overawe the Central Govt. or any Provincial Govt. by the organisation of a serious riot or a large & tumultuous unlawful assembly.

[15] Possibly, in modifying the section as it stood in the bill, the Legislative Council had in mind the case of Lord George Gordon (21 State Trials 486). Lord George Gordon put himself at the head of a large mob which proceeded to the Houses of Parliament in order to protest against the enactment of certain legislation. After having made its protest, the mob dispersed, but certain members of it proceeded to perpetrate outrages in different parts of the city of London. Lord George Gordon was tried on a charge of a high treason, & was acquitted, the reason apparently being that, while he had intended to make a demonstration outside the Houses of Parliament, he had not been a party to the disorders which resulted from it. Section 121A, occurs in a chapter of the Penal Code which is headed "offences against the State" whereas the offence of conspiracy is contained in the preceding chapter, Chap. VA. which is headed "criminal conspiracy." The Legislature in enacting S. 121A clearly had in mind the English Treason Felony Act of 1848 & I am very much inclined to think that, in enacting it, it did not aim at conspiracies other than conspiracies which had a political object,

that is, conspiracies to overthrow the existing constitution or conspiracies to prevent the enactment of legislation which was considered to be obnoxious or to compel the resignation of a member or members of the Govt. who had become unpopular. As the section stands, however, I am not prepared to say that in certain circumstances persons who organise a strike among police men or certain other public or Municipal employees might not render themselves liable to prosecution under it. Clearly, however, persons do not commit this crime unless it was part & parcel of their plans to overawe the Central or the Provincial Govt. by criminal force or show of criminal force. The word "overawe" does not appear anywhere else in the Penal Code except in this section & in another section in the same chapter (S. 124).

[16] In the Treason Felony Act, 1848, which the authors of S. 121-A appear to have had in mind, the words used are "intimidate or overawe both Houses or either House of Parliament", & the words there must be read in conjunction with the words immediately preceding them, which are "in order by force or constraint to compel His Majesty to change his measures or counsel". The word "overawe" clearly imports more than the creation of apprehension or alarm or even perhaps fear. It appears to me to connote the creation of a situation in which the members of the Central or the Provincial Govt. feel themselves compelled to choose between yielding to force or exposing themselves or members of the public to a very serious danger. It is not necessary that the danger should be a danger of assassination or of bodily injury to themselves. The danger might well be a danger to public property or to the safety of members of the general public. In *Reg.* v. *Thomas Gallagher*, (1885) 15 Cox. C. C. 291 & in *Reg.* v. *Deasy*, (1883) 15 Cox. C. C. 334 certain persons were convicted of treason-felony on the ground that they had entered into a conspiracy to cause explosions with dynamite in different parts of the United Kingdom, their object being to compel the British Govt. to make alterations in the Govt. of Ireland. I refer to these decisions because, as will appear presently, the object of the promoters of this conspiracy, assuming that they intended to use criminal force or to make a show of criminal force, was not to bring that force directly to bear on the members of the Cabinet at the seat of the Provincial Govt., but to bring it to bear on them indirectly at a number of points in the province.

[17] In order to show that the promoters of this conspiracy intended to achieve their objects by means of criminal force, the prosecution relied mainly on what was said by Ramanand Tewary at the meeting which he addressed at Gaya on 25-3-1947, & what was said by him at two of the three police stations which he visited on his way to Patna next morning & on what was said by his lieutenant Indradeo Singh to the Dist. Mag. & the Superintendent of Police of Monghyr later on that day. In the *sanahas* which the sub-inspectors of the Bikram & the Bihta police stations recorded in their station diaries immediately after Ramanand Tewari & his companions left, Ramanand Tewari is stated to have said in the one case that he & his associates intended to arrest the Chief Minister as Mr. Bishwambhar Chaudhuri was a relation of his, & in the other that they intended to arrest the members of the Cabinet & also the Inspector-General & the Deputy Inspector-General of Police. The record of what was said by Ramanand Tewari at the other police station, which he visited, contains nothing of this kind, & in the trial Ct. & also in this Ct. it has been suggested that interpolations were made later in the station diaries at Bikram & Bihta. The intrinsic evidence afforded by the entries in the station diaries themselves shows that there is no substance in this.

[18] The explanation for the apparent discrepancy between the entry in the station diary at Maner & the entry in the station diaries at Bikram & Bihta is, I think, that, while the sub-inspector at Maner thought, & perhaps rightly, that it was of importance to record what the conspirators intended & were in a position to do immediately the sub-inspectors at Bikram & Bihta were more impressed by the violence of the language used by Ramanand Tewari & thought it important to record what he boastfully said he proposed or hoped to do ultimately in the event of the conspiracy proving completely successful. The conduct of Ramanand Tewari & his companions when they reached Patna shows that there was not then, & could not possibly have been, any plot to kidnap the Chief Minister or any member of the Cabinet. It is, I think, a pity that several police officers were not deputed to attend the public meeting addressed by Ramanand Tewari at Gaya on 25-3-1947, & to make as full & accurate a record as possible of what he said. Only one assistant sub-inspector attended this meeting or was called to give evidence, & this assistant sub-inspector did not produce the record which he made at the meeting. Pandey Narsingh Sahay produced in this Ct. a copy of a report which he submitted after the meeting. This contains the very

briefest of summaries of what was said. All that can be gathered from it is, I think, that Ramanand Tewari made it clear that he intended to call out the whole of the constabulary in the province, numbering some 30,000 men & that, while he had no intention of resorting to force immediately, he was prepared to resort to it if & when necessary.

[19] The Dist. Mag. & the Superintendent of Police of Monghyr deposed that in the conversation which they had with Indradeo Singh, Indradeo Singh gave them to understand that he was awaiting instructions from Ramanand Tewari & that, among other instructions which he expected to receive, was an instruction to march some of the constables at Jamalpur or Monghyr to Bhagalpur. This statement, it is clear, was not made in pursuance of the conspiracy & was not really admissible in evidence. It seems to me very doubtful if any such action was really contemplated by Ramanand Tewari & the other leaders of the movement. Even, however, if it was, it does not carry the case for the prosecution appreciably farther. It is not usual for prosecution for conspiracy to be instituted unless the public prosecutor is in a position to put into the witness box one or more persons who have, at one time or another, been parties to the conspiracy & also to produce documentary evidence in the shape of letters or communications which have passed between some of the conspirators, showing what exactly they intended to do & how they intended to do it. There is no evidence of this kind on the record except the telegrams which were despatched by Ramanand Tewari from Gaya on 24-3-1947. These, however, are of no importance as they merely show that, at the time when they were despatched, Ramanand Tewari & his associates had not yet finally made up their minds to convert a local into a provincial strike.

[20] In this situation, in order to decide what the object of the conspirators was & how exactly they hoped or intended to effect it, we are compelled to rely on what they or their dupes actually did. It appears that in 1946 the police union had made certain demands & that while the Provincial Govt. had conceded some of these it had declined to concede the others. Although, before this strike was precipitated, no communication was sent by or on behalf of the police union to the Provincial Govt., it appears clearly enough from what was said by Ramanand Tewari in the public meeting & at the police stations which he visited in Patna that it was intended to extort from the Provincial Govt. the concessions or some of the concessions which they had declined to grant. As to the methods which were to be employed to coerce the Provincial Govt. it is clear that the intention of the conspirators was that at each headquarters or in any subdivision in the province in which armed police were stationed & there was an armoury, the armed police were to be induced not merely to mutiny & to refuse to obey orders & perform their ordinary duties, but were also to take possession of the armoury & of the rifles & ammunition contained in them & were further not to yield them up unless compelled to by main force. It was further intended that, where small parties of armed police were stationed at outlying police stations, they should desert their posts & return with their arms & ammunition to the police lines to reinforce the havildars & constables there. Finally it was intended that constables attached to police stations in the muffasal should similarly refuse to obey the orders of their sub-inspectors & should remain idle at the police stations. The administration of this country in the mufassil depends very largely on the police & if police constables at every police station in the mufassil had withheld their services as in this conspiracy, then the machinery of administration would have been seriously dislocated; also sooner or later, & sooner rather than later, crime against property would have greatly increased. The withdrawal of traffic constables & police pickets in towns would have had equally disastrous consequences. It is to the credit of the Provincial Govt. that they acted with resolution & promptitude & brought the mutiny to an end in the only way that was possible.

[21] A great deal was made at the trials over the assaults committed on Mr. Varma & the other police officers at Patna, over the skirmish between the Gurkha Military police & some of the occupants of the motor truck in which Ramanand Tewari came to Patna & over the assaults, on Sergeant Lacey at Gaya & on Sergeant Ashton at Jamalpur. The assault on the police officers at Patna & the firing on the Gurkha Military police were not acts done in the pursuance of the conspiracy & the large body of evidence which was adduced as to these incidents was wholly irrelevant. The assaults on Sergeant Lacey & Sargeant Ashton were, no doubt, acts done in pursuance of the conspiracy but the criminal force there used was clearly not intended directly to overawe the Provincial Govt. It was used in order to obtain the keys of the armouries. As to the firing at Gaya & Monghyr, this cannot bring the conspiracy under the latter part of S. 121A. If, in consequence of these incidents, the conspirators are liable under S. 121A, they can only be liable

under the earlier & not under the latter part of the section.

[22] For the reasons already given, however, the conspirators were not guilty of waging war against the King. The decision, in my opinion, turns on a very narrow point, namely whether the conduct of the conspirators in seizing the armouries & taking possession of the arms & ammunition, constituted a show of criminal force. If having possessed themselves of the rifles & ammunition, any considerable number of constables had swaggered about the streets of Gaya, Jamalpur & Monghyr, causing alarm to the citizens in general, it might, I think myself, have been argued that by a legitimate extension of the principle underlying the decisions in *Reg.* v. *Thomas Gallagher*, (1885) Cox. C. C. 291 & in *Reg.* v. *Deasy*, (1885) 15 Cox. C. C. 334, there had been a show of Criminal force capable of overawing the Provincial Govt. Nothing. however, of this kind happened. The havildars & constables at Gaya remained peacefully in the police lines for several days & did nothing to intimidate the general body of citizens, but took steps to ensure that the working of the treasury should not be interrupted. The conspirators, I think myself, intended to place the Provincial Govt. in what they considered would be a dilemma for men who were wedded to the principle of non-violence, that is they intended to compel them to choose between yielding to their demands or calling in the troops to compel them to surrender, & if necessary, to open fire on them. However that may be, it cannot, I think, fairly be said on the evidence that there was any such show of criminal force as is contemplated by S. 121A, Penal Code.

[23] In that view of the matter, while there was a conspiracy it was a conspiracy on the part of a large number of havildars & constables to withhold their services. Under the Penal Code, when there has been a conspiracy to commit an offence & the offence has been committed in pursuance of the conspiracy, the punishment provided is the same as the punishment provided for the offence. I think myself that this is unfortunate. It may not be a very serious matter when a constable or a small number of constables withhold their services, but when a large number of constables all over the province band themselves together to withhold their services & when trcops have to be called in to quell the mutiny, this amounts to a very serious public mischief. Under the Common law of England a conspiracy to commit an offence could be punished more severely than could the commission of the offence itself, and in any case, in England a person who incites constables to mutiny is liable to a sentence of two years' imprisonment. When it is remembered that in England the police are not armed and that there is not one police force but a great many police forces, while in India the police force in every Province is a single police force and a not inconsiderable proportion of it is armed the Legislature might well be asked, I think, to consider whether the maximum sentence which can be imposed in this country and which is six months' rigorous imprisonment is not wholly inadequate, at least in cases of this kind.

[24] The charge of conspiracy, which was framed at each of the three trials, was not a charge of conspiracy to commit an offence under the Police Act but a charge of conspiracy to commit an offence under S. 3, Police (Incitement to Disaffection) Act, 1922. It is, therefore, necessary to distinguish between those of the applts. who incited other constables to mutiny and those of them who merely yielded to such incitement and withdrew their services. Ramanand Tewari, in Criminal Appeal No. 584 of 1949, was found guilty of this charge, he will be sentenced on it to undergo rigorous imprisonment for six months; his conviction on the other charges must, however, be set aside. Subject to this modification, Criminal Appeal No. 584 of 1949 is dismissed. In Criminal Appeal No. 115 of 1949 the applts. who are clearly guilty on this charge are Mir Hassan Khan, Ram Balak Singh, Ganga Singh, Mohammad Sabir and Leyakat Hussain, who constituted themselves a committee of action and attended on & assisted Ramanand Tewari, and Brahmadeo Singh, Brijnandan Singh and Suraj Saran Upadhyaya, who were on the truck in which Ramanand Tewari went from one police-station to another in Patna, inciting constables to desert their posts. The convictions of these eight appellants on this charge will be affirmed and, as the trial Court did not impose any separate sentence, they will be sentenced on it to undergo rigorous imprisonment for six months each. The other convictions of these applts. will be set aside. Subject to this modification, their appeal is dismissed. The appeal of the other applts. is allowed, the convictions and sentences imposed on them are set aside and they will be released and set at liberty forthwith.

[25] In Criminal Appeal No. 156 of 1949, there is evidence that a small number of the applts., particularly, Dinanath Singh, Mohammad Khalil and Ramnaresh Misra, took a more prominent part in the occurrence than did the others. Unfortunately, however, there is no

evidence to show that they or any of the other applts. except Indradeo Singh incited other constables to mutiny. The result is that the appeals of all the applts. except Indradeo Singh must be allowed, the convictions and sentences imposed on them must be set aside and they must be released and set at liberty forthwith. Indradeo Singh was convicted under S. 395, Penal Code. There is no doubt that he was not merely responsible for the constables at Jamalpur and Monghyr taking part in the mutiny but that he was also responsible for depriving Sergeant Ashton of the key of the armoury. Although it was not he who struck Sergeant Ashton on the head with an iron bar but another constable, this applt. and that constable were acting in concert with one another. The offence committed was not, however, the offence of dacoity but the offence of robbery, and the conviction of this applt. under S. 395, Penal Code will be altered to one under S. 392, Penal Code. His conviction under S. 3, Police (Incitement to Disaffection) Act, 1922, will be maintained. On the former charge he will be sentenced to undergo rigorous imprisonment for seven years and on the latter to undergo rigorous imprisonment for six months, the two sentences to run concurrently.

[26] I cannot leave this case without commenting on the manner in which the proceedings were conducted. The paper books weigh more than 14 lbs. and contain between two thousand and three thousand closely printed pages. In one case the trial lasted for 80 days and in another for 59 days. In the former, the presiding Addl. Sess. Judge, Mr. Brindaban Bihari Lal, found it necessary to spend 23 days in listening to arguments while in the latter, Mr. Uma Kanta Prasad Singh, allowed the arguments to continue for 17 days. In my opinion, neither of them can have exercised any effective control or, indeed, any real control at all over the proceedings. The Provincial Govt. may have been justified in sanctioning the prosecution of at least some of these applts. under S. 121A, Penal Code, but it is, I think, unfortunate that their legal advisers did not exercise more control over the Public Prosecutor. It may perhaps have been necessary to try Ramanand Tewari separately, but the other applts. in each of the other two appeals could and ought to have been tried together. They had all been concerned in the same conspiracy and there was no justification for trying some of them in one trial and others in another trial. Apart, moreover, from the same evidence having had to be adduced at each of these trials, a great deal of evidence, which was either wholly irrelevant or was of very doubtful relevance, was adduced. In the time which was wasted over these trials the causes of scores of ordinary litigants could have been heard and determined.

[27] **Jamuar J.** — I agree.

V.B.B. *Order accordingly.*

A. I. R. (38) 1951 Patna 68 *[C. N. 9.]*

DAS AND NARAYAN JJ.

Subodh Kumar Singh & another—*Petnrs.* v. *The State and others*—*Opposite Party.*

Criminal Misc. Nos. 626 & 627 of 1950, D/- 21-12-1950.

(a) Public Safety — Preventive Detention Act (1950), S. 13 — Revocation of detention order — Fresh order of detention.

Where an order of detention passed by the Dist. Mag. was revoked, it is open to the State Govt. to issue a fresh order of detention against the same person. [Para 4]

(b) Public Safety — Preventive Detention Act (1950), Ss. 3, 13 — Detention order — Validity — Mala fides — Burden of proof.

The burden of proving bad faith is on the detenus, & the burden is a fairly heavy burden. [Para 5]

When the law gives the State Govt. the power to issue a fresh order of detention after the revocation of the order of the Dist. Mag., the exercise of that power cannot be held to be *mala fide* merely because the State Govt passed the orders of detention at a time when a *habeas corpus* appln. was pending in the H. C. [Para 5]

(c) Public Safety — Preventive Detention Act (1950), S. 7—Detention grounds — Inaccuracy in —Effect—Constitution of India, Art. 22 (5).

Any slight inaccuracy in details of the grounds stated cannot be held to invalidate an order of detention. The inaccuracy has to be considered in the light of, & against the background of, all the grounds which have been communicated to the detenu. It would be pushing technicality to an unreasonable extent, if it were to be held that a slight inaccuracy in the name of the village or regarding a date amounts to a contravention of cl. (5) of Art. 22 of the Constitution, or shows that the order is *mala fide* or that the detaining authority did not apply its mind before passing the orders of detention. The inaccuracies complained of are not in accuracies which affect either the form or substance of the orders of detention. [Paras 7, 8]

(d) Public Safety — Preventive Detention Act (1950), S. 7 — Detention grounds — Inference from past activity.

It is open to the detaining authority to apply its mind afresh to the past activities of the detenus to draw the inference from the past activity that if the detenus be allowed to remain at large, they will indulge in activities to the prejudice of public safety & the maintenance of public order. [Para 9]

(e) Public Safety — Preventive Detention Act (1950), S. 3 (2) — Detention of person accused of offence—Legality—Mala fide order—Test.

It cannot be stated as a rule of law that when a person is accused of an offence, the only alternative is to prosecute him, & there is no legal authority to to detain him. It is a fallacy to say that the right to prosecute a person under the ordinary criminal law.

& the right to detain him are mutually exclusive. A. I. R. (32) 1945 Bom. 533, *Rel. on.* [Para 11]

There is no rule of law that unless a choice of one of two alternatives, prosecution or detention, is made at the earliest moment, the order of detention must be held to be invalid. The proper approach is to consider the facts of each case & then consider whether the order of detention is *mala fide* or not. [Para 11]

No doubt there may be cases in which there will be a clash between the different rights, if & when both detention & prosecution are made & pursued at the same time. In such cases, if the State Govt. wish to pursue the prosecution it must be prepared to comply with the safeguards of Criminal P. C., & must give to the undertrial prisoner such rights as he may have under the law. It would not be open to the State Govt. to fall back on cl. (3) of Art. 22 & hold an investigation or trial in disregard of the provisions of Criminal P. C. Apart, however, from this difficulty which may arise in some cases, the test whether a detention order is or is not *mala fide* depends on whether the order is for the purpose mentioned in the order itself, namely, the maintenance of public order, or whether it is for any ulterior or collateral purpose. [Para 13]

Basanta Chandra Ghose, D. K. Sinha & U. C. Pd. Sinha — for Petnrs.; The Govt. Advocate—for Opposite Party.

Das J. — These two applns. on behalf of two detenus have been heard together, as they raise common questions of fact & law.

[2] The petnr. in Cri. Misc. No. 626 of 1950 is Subodh Kumar Singh, & the petnr. in the other case, Cri. Misc. No. 627 of 1950, is Kishori Prasanna Sinha. I may briefly state the relevant facts. The two petnrs. along with several other persons. were taken in custody on 22-7-1949. It was alleged then that they had committed offences under several sections of the Penal Code & under S. 19 (f), Arms Act, the first information in the case having been lodged on 27-5-1949, & charge sheet having been submitted on 17-7-1949. While in custody the petnrs. moved for bail which was refused by the Mag. & the Ses. J. The petnrs. then moved this Ct. & on 13-10-1950, an order was passed directing the release of the petnrs. on bail to the satisfaction of the Dist. Mag. There was also an order that the hearing of the case against the petnrs. should be expedited. It is stated by the petnrs. that on 19-10-1950, the petnrs. were released on bail, but as they came out of the jail gate, they were arrested on the strength of an order of detention passed by the Dist. Mag. of Muzaffarpur in exercise of the power vested in him under sub-s. (2) of S. 3 of the Preventive Detention Act, 1950 (hereinafter to be referred to as the Detention Act). On 13-11-1950, the petnrs. made their applns. to this Ct. for a writ of *habeas corpus* under Art. 226 of the Constitution of India, & also under S. 491, Criminal P. C. The applns. were admitted on 14-11-1950, & a rule was issued returnable within ten days. On 17-11-1950, the Dist. Mag., it is stated, served the grounds of detention on the petnrs. The two applns. were listed to be heard on 22-11-1950. On that date, the order of detention passed by the Dist. Mag. was revoked & another order of detention was made by the State Govt. being Govt. order Nos. 365 & 366 C. D. dated 22-11-1950. The grounds of detention were also served on that very day.

[3] It is necessary now to state what these grounds are. The first para. of the grounds states that the two petnrs. are important or active members of the Communist Party of India. Then, the plan of action of the Communist Party of India is indicated, the plan being to overthrow the Govt. of India as constituted by law, through violence. Then, follow certain details of the programme of the Communist Party as stated by the General Secretary of the Party at a Congress held in Calcutta on 28-2-1948; the details include such items as gathering stocks of fire arms & ammunition, smuggling of explosives on a large scale, collection of implements for breaking jails, capturing different service associations to bring about a collapse of the administration, inciting Kishans to take forcible possession of the lands of the zamindars, inciting workers to resort to violence in the industrial area, carrying out sabotage of important industrial & other installations, etc. It is stated that secret instructions were issued to party members to offer resistance to the police at the time of arrest. After a statement of the above details of the programme of the Communist Party of India, the grounds refer to the two petnrs. individually & state the following (I am quoting from the grounds given for the detention of Kishori Prasanna Sinha, as the grounds in the case of other detenu are, more or less similar; some of the grounds being the same.)

"Kishore Prasanna Sinha continues to be an active member of the Communist Party of India.

He is a firm believer in violent methods & is an ex. terrorist. He joined the Communist Party of India in 1940 & has been a very prominent leader of the same ever since. He is one of the seven members of the Bihar Provincial Committee which was re-constituted recently after purging the reformist elements, i. e. those elements which are suspected, by the more extreme elements who are in control of the party, to be more inclined to reformist or constitutional approach rather than a violent revolutionary one.

He attended a meeting of the Bihar Provincial Communist Party which was held at Goraul (Muzaffarpur) on 26-12-1947, & 27-12-1947. In this meeting it was decided to organise 'Red Volunteers' on military lines to work on the agrarian & labour fronts. Later, on 16-3-1947 he discussed the formation of 'Lal Sena' at a meeting which was held at Saidpur, Gopalpur P. S. (Bhagalpur) in June 1947; he incited the kisans of Sondho, Mahua P. S. (Muzaffarpur) against the

zamindars & exhorted them to forcibly harvest crops standing on bakast lands.

In September, 1947, he was reported to have been planning extensive kisan trouble in Sakra P. S. jurisdiction of Muzaffarpur which led to rioting cases in the zamindari of Rai Bahadur Shyamnandan Sahay. Trouble subsided only when the communist workers were put under arrest. In November 1947, at a secret meeting at Bisesar Pethia, Kanti, Muzaffarpur, he advised forcible harvesting of crops on bakast lands. In November 1947, he held a kisan meeting at Rahua, sadar P. S. (Muzaffarpur) in which he incited the kisans against the zamindars & as a result the kisans later indulged in acts of lawlessness for which an armed police contingent had to be deputed for some time to control the situation.

In January, 1949, he moved in the jurisdiction of Lalganj P. S. particularly in the vicinity of Patehri & Karenji villages to organise the loyal youths against the Govt. He also held secret meetings & instigated the tenants to forcibly harvest standing crops on bakast lands. On 11-5-1949, he along with other communists led a violent mob which attempted to rescue communist Chitranjan Singh who had been arrested by a police party at Belsar, Lalganj P. S. (Muzaffarpur). Two constables of the escort party were severely assaulted & the situation became so alarming that the police party had to open fire killing one & injuring four.

On 11-5 49, Deonandan Sinha of Arara P. S. Hajipur (Muzaffarpur) complained before the S. D. O, that the communists of Jagodih P. S. Lalganj used to vex him by catching fish from his pond forcibly & also looted his standing crops. The S. D. O. had enquiries made by the local S. I. & issued notices against 31 communists of Jagodih to show cause against action under S. 107, Cr. P. C. Kishori Prasanna Sinha visited Jagodih on 10-7-1949 & 11-7-1949 & asked his followers not to obey the Ct's. orders. On 16-7-1949, he again visited Jagodih & threatened Deonarain Sinha the complainant.

Kishori Prasanna Sinha with Subodh & other held a secret meeting on 11-6-1949 in Chookaha P. S. Paru at 12 in the night. At this meeting Kishori Prasanna Sinha gave out that he had gone to Patna to attend a meeting of the Provincial Committee where he stressed the necessity of starting a terrorist movement against the zamindars & cultivators of Patehri.

Kishori Prasanna & Subodh Kumar Sinha held a cell meeting in village Chakviki P. S. Lalganj on the 18th June, 1949 at 11.30 in the night. At the meeting Kishori Prasanna reviewed the international situation & said that the kisans and labourers of India will very soon follow the examples of those of Burma, China, Italy & France. At the second session of this meeting in the early hours of the following morning Subodh, the Dist. Secretary of the Party, read out his report on party activities in the Dist. & said that arrangements for terrorist activities should be made immediately.

Kishori Prasanna Sinha stated that Kalika Singh of Patehri should be made the first target of such activities & Ramagar Singh took upon himself the responsibility for this.

He is one of the principal communist leaders who directed the entire communist activities including the numerous unlawful activities throughout north Bihar, & is one of the trusted workers who is likely to throw himself heart & soul, as soon as he has an opportunity, in setting up through violence what the C. P. I. describe as liberated areas on the Telangana model.

He is an accused in the case under Ss. 148/353/225, I. P. C. & 19 (f), Arms Act which was instituted. On July 1949, (sic) he instigated the agricultural labourers of village Jagodih not to work for a local zamindar on whose report some communists of the locality were being prosecuted under S. 107, Cr. P. C.

At the time of his arrest on 22-7-1949, important party documents were recovered from the house of Mahabir Pasi where he was concealing. One of the documents was proof copy of an unauthorised news sheet entitled 'Muzaffarpur Zila men Congressi Sarkar ka zulum aur atank ka raj', a slip in his handwriting showing the expenditure incurred in getting the leaflet printed was also recovered.

Removing Shri Ranadive from the post of the General Secretary, the Communist Party of India has formed a new Central Committee also called the Action Committee or steering Committee under Shri Rajeshwar Rao of Andhra & some of the main features of the future strategy & tactics of the Communist Party of India, expressed in a resolution are as follows:

'(a) The Chinese experience tells that a decisive condition for the victorious outcome of the national liberation struggle is the formation, when the necessary internal conditions allow for it, for peoples' liberation armies under the leadership of the Communist Party.

(b) Many activities of the Chinese Working class went to the country side & set in motion the broad present peasant (?) masses against the landlords, built up numerous small armed forces & set up guerilla bases which grew into powerful people's liberation army in course of long period of guerilla warfare. Once we realise that the key tasks of the working class is to lead armed struggle of the peasantry in the rural areas, the whole question becomes clear. All activities must be guided by this prime consideration how to develop Telanganas in as many areas as possible. Telangana must be our principal way.' As the facts stated above show Shree Kishori Prasanna Sinha has been active in implementing this resolution.

In the circumstances, the State Govt. are satisfied that if he is allowed to remain at large, he will indulge in activities to the prejudice of public safety & the maintenance of public order. For prevention of such activities the State Govt. consider his detention necessary."

[4] Mr. Basanta Chandra Ghose, appearing for the two petnrs. has urged the following points in support of his contention that the detention of the two petnrs. is illegal. First, he has contended that it was not open to the State Govt. to pass an order of detention in respect of the two petnrs. when there was already an order of detention by the Dist. Mag. I think that the answer to this contention is provided by S. 13, Detention Act. That section, so far as it is relevant for our purpose, states that the State Govt. has the power to revoke an order passed by a subordinate officer mentioned in sub-s. (2) of S. 3. The section also makes it clear that the Dist. Mag. himself can revoke an order passed by him. Then, there is sub-s. (2) of S. 13 which, I think, is important. It states: "The revocation of a detention order shall not bar the making of a fresh detention order under S. 3 against the same person." If, therefore, the order of detention passed by the Dist. Mag. of Muzaffarpur was revoked & we are satisfied that it was revoked, then it was open to the

State Govt. to issue a fresh order of detention against the two petnrs. There was no illegality in the issue of a fresh order of detention.

[5] Mr. Ghose has contended, however, that the order of the State Govt. was *mala fide*, & he gave various reasons in support of his contention. I propose to consider these reasons *seriatim*. It is stated by Mr. Ghose that there was great delay in serving the grounds of detention on the petnrs. in respect of the orders of detention passed by the Dist. Mag. of Muzaffarpur. The Dist. Mag. passed the orders of detention on 19-10 1950, & the grounds were communicated to the petnrs. on 17-11-1950. There was thus, a delay of 28 or 29 days. Mr. Ghose's contention is that when this Ct. admitted the applns. & issued a Rule, the State Govt. realised that the Dist. Mag's. orders might be held to be bad on the ground of delay in communicating the grounds of detention: therefore, the State Govt. stepped in & passed the orders of detention & communicated the grounds of detention in a great hurry on the same day on which the applns. were listed to be heard. The dates given by Mr. Ghose of the different orders etc. are, I think, correct; but the question is if the orders of detention passed by the State Govt. can be said to be *mala fide* because of the facts stated above. It is well-settled that the burden of proving bad faith is on the petnrs. & the burden is a fairly heavy burden. In my view, it does not necessarily follow from the facts stated above that the orders of detention passed by the State Govt. were *mala fide*. It is to be remembered that under sub-s. (3) of S. 3, Detention Act, the Dist. Mag. has to send a report to the State Govt. to which he is subordinate, together with the grounds on which the order has been made & such other particulars as in his opinion have a bearing on the necessity for the order. On receipt of the report of the Dist. Mag., the State Govt. may well have come to the conclusion that the orders of detention should be passed in these cases by them instead of by a subordinate officer. Some of the grounds of detention given by the Dist. Mag. were read to us. Though the grounds are similar, they are not identical. The grounds given by the State Govt. cover a much wider field than the grounds given by the Dist. Mag. When the law gives the State Govt. the power to issue a fresh order of detention after the revocation of the Order of the Dist. Mag., the exercise of that power cannot be held to be *mala fide* merely because the State Govt. passed the orders of detention at a time when a *habeas corpus* appln. was pending in this Ct. It is also worthy of note that under the law the grounds of detention have to be communicated "as soon as may be." No hard & fast rule can be, or has been, laid down as to the time limit within which the grounds should be communicated: that will depend on the circumstance of each case. It cannot, therefore, be said that the delay made by the Dist. Mag. in communicating the grounds of detention was such as to make it certain to the State Govt. that the orders of detention passed by him were invalid. To say that the State Govt. passed fresh orders of detention in order to get over the invalidity of the orders of detention passed by the Dist. Mag. seems to me to be going too far.

[6] Mr. Ghose has then contention that the grounds of detention were incorrect, at least, in two particulars, & showed that the detaining authority had not applied its mind before passing the orders of detention: & therefore, the orders were not *bona fide* orders. The two particulars in respect of which an inaccuracy is alleged relate to the name of the police station mentioned in ground NO. 12 against Kishori Prasanna Sinha. The name of the village mentioned there is village Chakbhiki in police station Lalganj, where it is stated that a "cell" meeting was held on 18-6-1949. It is stated in a supplementary affidavit (para. 7) made by one Arjun Singh on behalf of the petnrs. that the

"petnrs, do not know of any village of the name of Chakbhiki in Lalganj police station, & to the knowledge of the petnrs. there is no such village in Lalganj police station."

We consulted the thana map of Lalganj, & it appears that there are several villages beginning with the name "Chak", though we could not trace a village with exactly the same name. On the days when we heard arguments in this case, the learned Govt. Advocate was not in a position to explain the inaccuracy. Subsequently, on receipt of further instructions from the State Govt., the Govt. Advocate stated, in the presence of & after notice to the learned Advocate for the detenus, that the name of the village is correct, but it is in police station Kurhani which borders Lalganj police station. It appears, therefore, that there is a mistake in the name of the police station. In my view, this inaccuracy does not, by itself, show that the order was not made in good faith. The other inaccuracy relates to the date '11-5-1949' mentioned in ground NO. 9, where it is stated that on that day the petnrs. along with others led a violent mob which attempted to rescue one Chitranjan Singh. It is not denied that such an incident took place, but in para. 8 of the supplementary affidavit made by Arjun Singh it is stated that no attempt to rescue was made on that particular date. This contention of inaccuracy is based on certain statements made in the appln.

for bail in Crim. Misc. No. 521 of 1950. It appears that the first information was lodged on 27th May, & charge-sheet was submitted on 17th July. It appears that the correct date is 27th May, & there is an inaccuracy about the date; I am of the view, however, that the inaccuracy does not, in substance, affect the ground mentioned. Our attention has been drawn to the decision in *Re Shoilen Dey*, A. I. R. (36) 1949 Bom. 75 : (50 Cr. L. J. 173), where the ground supplied to the detenu under S. 3, Bombay Public Security Measures Act, was that he was inciting a section of labourers of Tata Air India, Bombay, & it was found that there was no company as 'Tata Air India,' but Air India Ltd., which did not belong to the Tatas & that the Tatas had interest in more than one Air Co.; but there was no indication as to which company was meant. In these circumstances, it was held that the detaining authority had been casual in its approach & had not applied its mind with that diligence which was necessary. The detaining authority in that case was the Comr. of Police. Having regard to the facts of the Bombay case, I am of the opinion that the decision does not lay down any rule of law that any inaccuracy in the statement of grounds must necessarily render the detention illegal: all that the decision amounts to is that in that particular case the error was not considered trivial, & showed want of due care & caution on the part of the detaining authority. If that decision were intended to lay down a rule of law that any departure from absolute accuracy in every detail of the grounds stated must necessarily invalidate a detention order, I must respectfully dissent from the decision.

[7] Another decision to which the learned Advocate has made a reference is *M. R. S. Mani* v. *Dist. Mag., Mathurai*, A. I. R. (37) 1950 Mad. 162 : (51 Cr. L. J. 525). It is laid down in that decision that it is open to the detenu, if he can, to establish that the detaining authority has not applied its mind to the materials placed before it & has not satisfied itself about the necessity for the detention &, therefore, the order of detention, though purporting to be passed under S. 2 (1) (a), Madras Maintenance of Public Order Act, must be deemed not to be an order under that section. Whether the rule laid down therein applies or not must depend on the facts of each case. Any slight inaccuracy cannot, in my view, be held to invalidate an order of detention. In the two cases before us, a large number of grounds, sufficiently precise & clear, have been communicated to the two detenus. It is, I think, impossible to raise any contention that the detenus have not been afforded the earliest opportunity of making a representation against the orders of detention.

[8] While on this point, I must make a reference to cls. (5) & (6) Art. 22 of the Constitution of India. Clause (5) lays down, in substance, that the authority making the order shall, as soon as may be, communicate to the detenu the grounds on which the order has been made & shall afford him the earliest opportunity of making a representation against the order. Clause (6) says that nothing in the above clause shall require the authority to disclose facts which such authority considers to be against the public interest to disclose. In the cases before us, the grounds contain clear details & also a number of facts. & if there has been an inaccuracy with regard to the name of a village or a date, the inaccuracy has to be considered in the light of, & against the background of, *all* the grounds which have been communicated to the petnrs. It would, I think, be pushing technicality to an unreasonable extent, if we are to hold that a slight inaccuracy in the name of the village or regarding a date amounts to a contravention of cl. (5) of Art. 22 of the Constitution, or shows that the order is *mala fide* or that the detaining authority did not apply its mind before passing the orders of detention. I say this, though I am fully aware of the observations made in several cases that an order of detention, which deprives a person of his liberty without a trial, must be entirely regular in form & the detaining authority must take care to see that every step in the process of detention without trial is carried out with extreme regularity : *see* the observations in *Dale's case*, (1881) 6 Q. B. D. 376. In the cases before us, the orders of detention are completely regular in form; the grounds of detention have been communicated as soon as possible & in sufficient detail. The two inaccuracies complained of are not inaccuracies which affect either the form or substance of the orders of detention. Therefore, I am unable to hold that there has been any failure to comply with the provisions of cl. (5) of Art. 22 of the Constitution of India or S. 7, Detention Act.

[9] Another argument of Mr. Ghose has been that the two petnrs. are in jail for about fifteen months, & the acts which they are alleged to have committed relate to the past & have no immediate connection with the orders of detention. Mr. Ghose has relied on certain observations made by his Lordship Chagla C. J. in *Re S. V. Ghate*, 52 Bom. L. R. 711 : (A.I.R. (38) 1951 Bom. 161 : 52 Cr. L. J. 62). The observations are these :

"The past activities must be related to the situation existing at the moment when the detaining authority

makes the order, because it is necessary to emphasise again, the satisfaction which the law requires is the satisfaction of the detaining authority making the order at the time when the order is made. It is not open to the detaining authority in 1950 to fall back upon the satisfaction of the detaining authority in 1948. Therefore, if in this case we are satisfied that there was not the satisfaction which the law requires, then undoubtedly the petnr, is entitled to succeed even on this ground."

These observations & similar observations made in other cases were considered by a Bench of this Ct. in Cri. Misc. No. 525 of 1950 disposed of on 4-12-1950. Their Lordships expressed the view, a view with which I respectfully agree, that those observations did not lay down any rule of law. The earlier decision of the Bombay H. C. in *Hirji Shivram* v. *Commissioner of Police*, A. I. R. (35) 1948 Bom. 417 : (49 Cr. L. J. 579) on which also Mr. Ghose, relied, can be clearly distinguished on the ground that S. 2, Bombay Public Security Measures Act, 1947, used the words "any person *is acting* in a manner prejudicial to the public safety." In the later decision of *S. V. Ghate*, 52 Bom. L. R. 711 : (A.I.R. (38) 1951 Bom. 161 : 52 Cr. L. J. 62), the question no doubt, arose under the Preventive Detention Act of 1950; but Chagla C. J. himself observed that

"it would be very difficult to lay down at what point of time a particular activity of a particular person ceases to furnish any connection with the subsequent order directing him to be detained,"

and his Lordship said,

"we refuse to express any opinion that necessarily a period of two years would lead the Ct. to come to the conclusion that there could be no connection whatever between the activities of a detained person two years prior to the making of the order & the apprehension felt by the detaining authority."

It is clear that the detaining authority in the two cases before us applied its mind afresh to the past activities of the two detenus, & then stated in the clearest terms possible that if the detenus be allowed to remain at large, they will indulge in activities to the prejudice of public safety & the maintenance of public order. It was open, I think to the detaining authority to draw that inference from the past activities of the two petnrs. It is worthy of note that in the grounds communicated to Subodh Kumar Singh it was stated by the State Govt. that he was detained under the Bihar Maintenance of Public Order Act, but was later released on 23-10-1948. On 13-12-1948, the State Govt. passed orders restraining his movements within his own home village. This order could not, however, be served on him as he went underground immediately after his release, & while underground he made strenuous efforts to organise & incite kishans against zamindars. This shows clearly enough that the State Govt. considered the past activities of the detenus with reference to the situation existing at the moment when the detaining authority made the orders of detention.

[10] Lastly, Mr. Ghose has very strenuously contended that the orders of detention were *mala fide*, inasmuch as a criminal case against the two detenus, for various offences, was pending at the time when the petnrs. were detained, & it is pointed out that the grounds of detention communicated to the detenus referred to the facts of that very case. It must be made clear at this stage that the grounds of detention communicated to the two detenus cover a much wider field than the facts of the criminal case pending against them: as a matter of fact, the grounds of detention are not identical with the grounds for which the detenus were being prosecuted. I must also state that though we have not the entire record of the criminal case before us & are not, therefore, in full possession of the details of the criminal prosecution, it was stated at the bar that the case against the two detenus was separated from the case of twenty-eight others who were sent up in the same case, & the case against the two detenus appears to be still pending. Mr. Ghose has contended that (a) when a person is accused of an offence, there is no power in the detaining authority to pass an order of detention without waiting for the result of the prosecution, & (b) even if the detaining authority has a choice of two alternatives prosecution or detention, the detaining authority must elect or make its choice at the earliest point of time & cannot pursue both "remedies" at the same time. A large number of cases have been cited before us in support of these contentions: *Kamla Kant* v. *Emperor*, 23 Pat. 252 : A. I. R. (31) 1944 Pat. 354), *Hirji Shivram* v. *Commr. of Police*, A. I. R. (55) 1948 Bom 417 : (49 Cr. L. J. 579), *Maledath Bharathan* v. *Commissioner of Police*, A.I.R. (37) 1950 Bom. 202 : (51 Cr. L. J. 1126 F. B.), *Vimlabai* v. *Emperor*, A. I. R. (32) 1945 Nag. 8 : (I. L. R. (1945) Nag. 6) & *M. R. S. Mani* v. *District Magistrate Mathurai*, A. I. R. (37) 1950 Mad. 162 : (51 Cr. L. J. 525) Since the observations in *Kamla Kant Azad's case*, 23 Pat. 252: (A. I. R. (31) 1944 Pat. 354), this question has been considered by this Ct. on more than one occasion. In the F. B. decision of *L K. Burman* v. *The State*, 29 Pat. 502 F. B., this very question was raised, & Meredith C. J. (as he then was) said as follows :

"Lastly, Mr. Ghosh has argued on the question of *mala fides*. His contention is that a detention order cannot be *bona fide* in the case of a man on trial for a substantive offence because he can always be dealt with, if he is dangerous, by expediting his trial & refusing him bail. But I am not prepared to go so far as that. The offence might be a petty one, a bailable

offence in regard to which a Ct. would not be justified on the facts & the evidence before it in refusing bail. Yet the man might conceivably be a dangerous man whom it was necessary to detain in the interests of public security. In such circumstances, it seems to me that a detention order might be perfectly *bona fide* & legitimate. If the Govt. had waited until the man was released on bail before making a detention order it might be too late, & it might then be said with some force that the order had been made only to frustrate the order of the Ct. granting bail. In the present case Govt. might very well have thought it would not be wise to wait the doubtful issue of the bail appln. Nor would it be possible for the Govt. to oppose bail on grounds not strictly relevant to the offence charged. The consideration which determines a bail appln. are generally the possibility of absconding & the possibility of suborning witnesses. It is easy to think of a case where neither of these grounds could be successfully urged, & yet, on grounds quite extraneous to the case, it might be dangerous in the opinion of the State for the man to be at large. Therefore, I do not think that the course adopted by Govt. in the prsent case necessarily implies *mala fides*, & there is nothing in the particulars of the case as disclosed in the grounds to suggest any *mala fides* on the part of the Govt."

I also expressed a similar view in the following words:

"Lastly, it has been contended that the order of detention was not *bona fide*, because it was in respect of a person who was already in detention as an undertrial person on a charge under the Explosive Substances Act. Our attention has been drawn to certain observations made by a Bench of this Ct. in *Kamla Kant* v. *Emperor*, 23 Pat. 252 : (A. I. R. (31) 1944 Pat. 354), in connection with certain persons detained under R. 26, Defence of India Rules when they were already under detention for a substantive offence. If it were possible to hold that the order of detention passed against the petnr. in this case was for the purpose of frustrating his trial for the substantive offence, the position might have been different; but on the materials before us, it cannot be held that the order of detention was passed for the purpose of frustrating the trial of the petnr. for a substantive offence."

These observations were quoted with approval in later D. B. decisions in what is known as *Yusuf Churihara's case*, Cri. Misc. No. 340 of 1950, D/- 31-8-1950 & the second *Lalit Burman's case*, Cri. Misc. No. 398 of 1950, D/- 1-9-1950. Mr. Ghose has contended that the observations in the F. B. decision were *obiter*, because the petnrs. had been convicted before we heard the appln. He has further submitted that the decision in second *Lalit Burman's case*, Cri. Misc. No. 398 of 1950, D/- 1-9-1950 is under appeal in the S. C.

[11] I have examined with care the decisions which Mr. Ghose has placed before us. I do not think that any useful purpose will be served by examining each decision in detail, because I do not think that the question raised rests on a rule of law. From an examination of the decisions it seems to me that the first contention of Mr. Ghose, stated as (a) above, is not correct. It cannot be stated as a rule of law that when a person is accused of an offence, the only alternative is to prosecute him, & there is no legal authority to detain him. As was observed in *Gajanan Krishna* v. *Emperor*, A. I. R. (32) 1945 Bom. 533 : (47 Cr. L. J. 297), it is a fallacy to say that the right to prosecute a person under the ordinary criminal law & the right to detain him are mutually exclusive. In this matter, I respectfully agree with the view expressed in that decision. I think that in each of the decisions which Mr. Ghose has placed before us, the question has been considered not as a proposition or rule of law, but on the footing whether, in the circumstance of the case, the order of detention can be held to be *mala fide* (in the sense of "malice in law" as explained in *Vimlabai* v. *Emperor*, A. I. R. (32) 1945 Nag. 8 : (I. L. R. (1945) Nag. 6). Therefore, the facts of each case have to be considered, & the test as explained in the case of *Maledath Bharathan* v. *Commr. of Police*, A. I. R. (37) 1950 Bom. 202 : (51 Cr. L. J. 1126 F. B.) is whether the order of detention has been made for "an ulterior motive or a collateral purpose," such as holding a secret investigation in disregard of the safeguards provided by Criminal P. C., stifling defence, etc. There is no rule of law that unless a choice of one of two alternatives, prosecution or detention, is made at the earliest moment, the order of detention must be held to be invalid. In my view, the proper approach is to consider the facts of each case & then consider whether the order of detention is *mala fide* or not in the sense in which the expression '*mala fide*' has been explained in the decisions referred to above.

[12] Let me now come back to the facts of these two cases. There was no order of detention at the time when the investigation of the criminal case against the detenus was proceeding. I have already given the dates when the first information was lodged & the charge sheet was submitted. There can be no complaint that the provisions of Criminal P. C., were not then complied with; therefore, there was no attempt at a secret investigation in disregard of the safeguards of the Code of Criminal P. C., as in the case of *Maledath Bharathan Malyali*, A. I. R. (37) 1950 Bom. 202 : (51 Cr. L. J. 1126 F. B.). The petnrs. were not released on bail for a long time; & when they obtained an order in their favour from this Ct. they were released but arrested at the jail gate under the orders of detention passed by the Dist. Mag. Those orders were revoked, & the State Govt. then passed orders of detention. The question is—do these facts show that the order of detention is *mala fide*? I would answer this ques-

tion in the negative. As I have already observed, the grounds of detention cover a much wider field than the incidents which led to the prosecution of the petnrs. On the materials placed before us, I am unable to come to the conclusion that there was any attempt to stifle the defence by passing the orders of detention. I do not wish to say anything more on this point, because if there has been any disregard of the provisions of the Criminal P. C. with regard to the trial of the petnrs., it would certainly be open to them to raise that point at the appropriate time. We are not at the present moment directly concerned with the validity or invalidity of the trial. On the days on which we heard arguments, the learned Govt. Advocate was not in a position to state whether the prosecution against the two petnrs. will or will not be withdrawn, as no final order had been passed by the State Govt. by that time. Subsequently, the learned Govt. Advocate stated that the State Govt. did not propose to move for the withdrawal of the prosecution against the two petnrs., as, in their opinion, their detention under the Detention Act is on altogether different grounds.

[13] Mr. Ghose has drawn our attention to some decisions in which the possibility of a loss or deprivation of the rights of an undertrial prisoner under Criminal P. C. or under cls. (1) & (2) of Art. 22, Constitution of India, as a result of an order of detention, has been adverted to: in some of these cases, it has been held that if such a loss or deprivation is the primary object of detention, then the order of detention will be *mala fide*. A reference may be made in this connection to cl. (3) of Art. 22 of the Constitution, the relevant part of which states that nothing in cls. (1) & (2) of Art. 22 shall apply to any person who is arrested or detained under any law providing for preventive detention. I realise that there may be cases in which there will be a clash between the different rights, if & when both detention & prosecution are made & pursued at the same time. If the State Govt. wish to pursue the prosecution, I think that it must be prepared to comply with the safeguards of Criminal P. C., & must give to the under-trial prisoner such rights as he may have under the law. I do not think that it would be open to the State Govt. to fall back on cl. (3) of Art. 22 & hold an investigation or trial in disregard of the provisions of the Criminal P. C. Apart, however, from this difficulty which may arise in some cases, the test whether a detention order is or is not *mala fide* depends on whether the order is for the purpose mentioned in the order itself, namely, the maintenance of public order, or whether it is for any ulterior or collateral purpose. Therefore, it is that test which has to be applied to the facts of each case. On the materials so far placed before us, we cannot hold that the purpose of the detention of the petnrs. is other than what is stated in the orders of detention, namely, the maintenance of public order in the State of Bihar.

[14] The detaining authority had clearly stated that it would be taking an undue risk to the maintenance of public order if the petnrs. were allowed to remain at large. In the matter of the bail appln. which the petnrs. filed in this Ct., the relevant considerations were different. The question of public security or the maintenance of public order did not then arise, & this Ct. dealt with the appln. for bail on the principles embodied in Ss. 497 & 498, Criminal P. C. In these circumstances, I think that it would be wrong to assume that the detaining authority had some ulterior or collateral purpose & not the purpose of maintenance of public order, for the detention of these two persons.

[15] My conclusion, therefore, is that the petnrs. have been legally detained, & there are no grounds for interference by us. I would accordingly dismiss the two applns. & discharge the Rule.

[16] **Narayan J.** — I entirely agree.

V.B.B. *Applications dismissed.*

A. I. R. (38) 1951 Patna 75 *[C. N. 10.]*

SPECIAL BENCH

SINHA, SARJOO PRASAD AND RAI JJ.

Chanderdeo Sharma—Petnr. v. *The State of Bihar.*

Misc. Judicial Case No. 212 of 1949, D/- 15-2-1951.

(a) Press (Emergency Powers) Act (1931), S. 4 (1) (d) — "To bring into hatred or contempt the Govt. established by law."

The words "to bring into hatred or contempt the Govt. established by law" connote something more than mere criticism of the various branches of administration with a view to improve them and not with a view to overthrow the Govt. itself. The hatred or contempt preached must be of such a nature as to excite a feeling tending towards overthrow of the existing system of Govt. Where in a booklet no hatred or contempt has been preached against the Govt. itself and the booklet read as a whole leaves only one impression, namely, the lapses of the followers of Mahatma Gandhi since they actually came into power and it depicts how they have neglected the great ideal or selfless service and how they have indulged in self seeking and self-profiteering the book does not bring it within the mischief of S. 4 (1) (d): A. I. R. (26) 1939 Cal. 529 (S.B.), *Rel. on*; A. I. R. (37) 1950 Sau. 1 (SB) and A. I. R. (35) 1948 Lah. 6 (S. B.), *Ref.* [Para 24]

Anno. Press (Emergency Powers) Act, S. 4, N. 5.

(b) Press (Emergency Powers) Act (1931), S. 4 (1) (d)—"To bring into hatred or contempt the administration of justice."

The phrase "to bring into hatred or contempt the administration of justice" connotes something as one preached during the time of the non-co-operation movement when the followers of the movement openly used to preach disregard of the Court of law. This and similar actions might be called acts which bring into hatred or contempt the administration of justice. But the suggestion that the appointment of Judges should be taken out of the hands of the executive authority and be placed in

the hands of judicial authority is not such a statement as to bring it within the purview of S. 4 (1) (d). So also where a booklet deals more with the interference by members of the Congress party in judicial matters rather than the failing of the Judges and refers to some Judge, having been influenced, that does not amount to bringing into hatred or contempt the administration of justice in the Dominion of India : A. I. R. (5) 1918 Cal. 988 (S. B.) and A. I. R. (19) 1932 Cal. 547 ; A. I. R. (5) 1918 Mad. 1210 (S. B.) and A. I. R. (29) 1942 Lah. 105 (F. B.), *Distd.* [Para 25]

Anno. Press (Emergency Powers) Act, S. 4. N. 5.

(c) Constitution of India, Arts. 13, 19 (1) (2)—Retrospective operation — Press (Emergency Powers) Act (1931), S. 19.

Where the Order under S. 19, Press (Emergency Powers) Act was notified in the Bihar Gazette before the Constitution of India came into force the validity of the order cannot be called into question with reference to a higher right granted to a citizen of the Indian Union by the Constitution : A. I. R. (38) 1951 S. C. 128, *Folld.* [Paras 29, 30]

(d) Press (Emergency Powers) Act (1931), S. 4 (1) (d)—Criticism of individuals.

(Per *Sarjoo Prasad J.*) — The fact that a booklet purports to be a bitter satire and at places it even degenerates into scurrilous and personal attacks on individuals by itself does not amount to bringing into hatred or contempt Government established by law in the State or the administration of justice therein. A mere criticism of man and measures or of the persons running the administration, however bitter that criticism may be and even if the criticism is misguided, does not necessarily amount to bringing into contempt the Govt. of the State or the administration of justice. [Para 34]

Anno. Press (Emergency Powers) Act, S. 4, N. 5.

Ramchandra Sinha, Lakshman Saran Sinha and Lakshmi Narain Sinha — for Petnr.; Govt. Pleader— for the State of Bihar.

Rai J. — The petnr. has moved this Court under S. 23, Press (Emergency Powers) Act (XXIII [23] of 1931), 1931, for setting aside the order referred to in the notification dated 14-7-1949, whereby all copies of the booklet entitled 'Bapu ke Saputon ka Raj' have been declared to be forfeited to His Majesty.

[2] The notification dated 14-7-1949, runs thus :

"Government of Bihar,
Political Department,
Special Section.

Notification,
Dated 14-7-1949.

No. 18975C. — In exercise of the powers conferred by S. 19, Press (Emergency Powers) Act, 1931, (XXIII [23] of 1931) the Governor of Bihar hereby declares to be forfeited to His Majesty all copies wherever found, of the booklet in Hindi entitled "Bapu ke Saputon ka Raj" by Pandit Chanderdeva Sharma and printed at the Chand Press, Jehanabad, Gaya, all other documents containing copies, reprints or translation of, or extracts from the said booklet on the ground that it contains words of the nature described in cl. (2) of sub-s. (1) of S. 4 of the said Act.

By order of the Governor of Bihar,
Sd. B. K. Dutta,
Under Secretary to Government."

Mr. Ramchander Sinha, learned counsel for the petnr., urged before us that the booklet in question did not contain any words, signs or visible representations of the nature described in S. 4, sub-s. (1), cl. (d) of Act XXIII [23] of 1931.

[3] The relevant provisions of Act XXIII [23] of 1931 run as follows :

Section 4 (1). —"Whenever it appears to the Provincial Govt. that any printing press in respect of which any security has been ordered to be deposited under S. 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which tend, directly or indirectly :

(d) to bring into hatred or contempt His Majesty or the Govt. established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Govt.: the Provincial Govt. may, by notice in writing to the keeper of such printing-press, stating or describing the words, signs or visible representations which in its opinion are of the nature described above :

(i) where security has been deposited, declare such security or any portion thereof, to be forfeited to His Majesty, or

(ii) where security has not been deposited, declare the press to be forfeited to His Majesty,

and may also declare all copies of such newspapers, book or other document wherever found in British India to be forfeited to His Majesty.

Explanation 2.—Comments expressing disapprobation of the measures of the Govt. with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in cl. (d) of this sub-section.

Explanation 3.—Comments expressing disapprobation of the administration or other action of the Govt. without exciting or attempting to excite hatred, contempt or disaffection shall not be deemed to be of the nature described in cl. (d) of this sub-section.

Section 23 (1).—"The keeper of a printing-press who has been ordered to deposit security under sub-s. (3) of S. 3, or the publisher of a newspaper who has been ordered to deposit security under sub s. (3) of S. 7, or any person having an interest in any property in respect of which an order of forfeiture has been made under S. 4, S. 6, S. 8, S. 10 or S. 19, may, within two months from the date of such order, apply to the High Court for the local area in which such order was made to set aside such order, and the High Court shall decide if the newspaper, book or other document in respect of which the order was made did or did not contain any words, signs or visible representations of the nature described in S. 4, sub-s. (1)."

[4] The effect of S. 4, cl. (2), of the Indian (Adaptation of Existing Indian Laws) Order, 1947, was to substitute "all the Provinces of India" in place of the words "the British India" in S. 4 (1) (d) of the said Act XXIII [23] of 1931.

[5] The booklet in question is a kind of satire written by way of a comic drama. Read as a whole, it advocates the path of truth and selfless service chalked out by the great leader Mahatma Gandhi. It also depicts at places in a rather vulgar language the subsequent deviation from that august path by some of his distinguished followers. It is unnecessary for me to consider in detail the entire booklet, but I will content myself by referring only to those portions of it

which were read to us by the learned counsel representing the State of Bihar who submitted before us that it is not possible for him to point out a particular passage from the booklet in question to justify the order impugned against, but, if it is considered as a whole, the order of forfeiture would appear to have been justly passed.

[6] At p. 7 of the booklet starts the second scene in heaven where the departed souls of Lokmanya Tilak, Gokhale, Bipin Chandra Pal, Lala Lajpat Rai, Dr. Hume, Deshbandhu Andrews, Pandit Madan Mohan Malviya, C. R. Das, Prof. Bari, Mohammad Ali & others had assembled. They were all enquiring of Mahadeo Desai about the Health of revered Bapuji. On enquiry Mahadeo Desai told them that every arrangement had been made for the speedy recovery of Gandhiji. According to him, his recent illness was due to the serious shock received by him on account of the misdeeds of his followers in the Congress & mismanagement of the Congress Ministry, which had compelled many of his trusted followers to leave the Congressfold when they found that it was not possible for them to render real service to the masses by remaining in the Congress. It gives an extract from a letter of resignation submitted by one of such Congressmen. Nothing objectionable was pointed out to us from this portion of the booklet.

[7] The third scene of the Act describes a meeting of Naradji with Gandhiji, when the former tells the latter that he proposed to go on a visit of Bharat. Narad asked Gandhiji if he had any message to be given there, whereupon the latter requested the former to report to him about the conditions prevailing there.

[8] It may be mentioned here that Narad is a mythological figure who roams about everywhere chanting the name of God. He is said to carry a stringed Ektara in one of his hands. Sometimes, he is characterised as creating misunderstanding between persons.

[8-A] The fourth scene runs from pp. 12 to 14 of the booklet. It represents a talk between the girl students in the garden of a college for women where they are discussing about the propriety of the selection of a woman candidate for the Legislative Assembly. They are depicted to have expressed their dissatisfaction over the non-selection of a lady condidate from Saran district. They criticise the selection of an almost illiterate lady, simply because she happened to be the sister of one of the topmost leaders in the Congress party. So far as this portion of the booklet is concerned I do not find anything there to bring it within the purview of s. 4 (1) (d), Press (Emergency Powers) Act.

[9] The next portion read to us was the fifth scene beginning at p. 15 & ending at p. 18 of the booklet. This scene represents one of the Parliamentary Secretaries in a drunken revelry. He dances & sings in presence of a girl. In that intoxicated condition he has been presented singing a song the purport of which was that the Ministers & Parliamentary Secretaries were all powerful, & that they had arranged for all amenities for themselves. When asked about the members of the Legislative Assembly he said that they were also getting Rs. 200 p. m. besides Rs. 10 for every day of the sitting of the Assembly. They also command great influence in the sub-division from which they come. Then, towards the end of that scene the girl asked him, "Are you not taken to task for your misdeeds by the great Congress leader?" The answer given by the drunken Parliamentary Secretary is "How can he find fault with others when he himself is not spotless." Then he by way of a question asks :

"Why don't you see as to who is the head of the Bettiah Estate these days ? Who is the chief Labour Comr. of India & whose relations have the good fortune of occupying high posts in the Central Govt. ?"

[10] Act II scene 1 starts at p. 19 of the booklet & ends at p. 21. This depicts a scene wherein it has been represented that most of the time of the Governor of a Province is taken in laying down foundation stones & presiding over other functions without any real effective & useful service to the province.

[11] Scene 2 depicts a talk amongst several Rly. passengers wherein it has been represented that relations of influential persons in the Congress are appointed to high posts without requisite qualifications & without advertisement. At one place an Honorary Mag. by the name of Pikdan Ali says that he succeeded in being appointed as an Honorary Mag. because of the influence of the son-in-law of a Minister. The scene ends with a statement of Pikdan Ali that he does not purchase a rly. ticket though he travels in first class.

[12] The fourth scene of Act II depicts a toddy-shop where several persons are taking toddy & singing in an intoxicated condition. During that conversation they criticise the idea of complete prohibition at least so far as toddy is concerned. They refer to the harmful habit of smoking cigarettes rather excessively by one who advocates complete prohibition. They say that so far as toddy is concerned, it does some good to health but smoking for which there is no talk of prohibition, is always injurious.

[13] The fifth scene starts by a conversation between the Sub-divisional Officer & his wife at their bungalow when the former says that unless he keeps the influential Congressmen of his sub-division pleased, his own position might be endangered.

[14] Scene 1 of Act III depicts the chamber of a Sub-divisional Officer where he is busy collecting

subscription for the Gandhi Memorial Fund from several persons. The Sub-divisional Officer notes the amounts of subscription against their names without their free consent.

[15] Scene 2 depicts a scene from the Bettiah Palace. There is a talk between the Maharani of Bettiah & Narad. The Maharani complains to him that the management of Bettiah Raj under the present regime is no better than what it was during the British Rule: she also complains to him that Managers of this Raj are appointed not on account of their qualifications but simply because their appointment to that post will please a particular section of the Congress party.

[16] Scene 5 of Act III depicts a talk between a highly placed Congress leader, his son & his two relations. The booklet having been written in a comic form one finds that during that conversation there is a lot of fling in loose language by one relation on the other. At one place the conversation refers to the fact that by his appointment to a high post in the Central Govt. one Mr. J. has gained an unexpected elevation much above the place he occupied as a member of the bar. It also refers to the settlement of several pieces of land of the Bettiah Estate by its manager to some of his relations & his acquaintances. A list is given of the various settlement holders. It also contains a statement by the manager of Bettiah Raj himself that he had got monetary help from some of the business concerns.

[17] Act IV, scene I represents a talk between two litigants wherein they speak of the malpractices prevalent amongst the process servers & the peshkars who are apt to harass the litigant public unless they are paid some reward.

[18] Scene 2 represents a talk between Narad & some of the villagers of village Churiharwa, a village in the Bettiah Estate, wherein it is said that a Congress leader of eminence had not discharged his duties properly for which he was given certain land by the Ramnagar Estate from the produce of which his son gets about 32 to 40 thousand rupees a year. The lands given belonged to different rayats who were dispossessed with the help of lathials supplied by the Harinagar Sugar Mill.

[19] Scene 4 of Act IV represents a collection of flatterers at the Govt. Conference Hall. The flatterers praised the Ministers right & left. They tell them that their praise is on the lips of all, everywhere. Chorus songs are sung in their praise. At the end of the performance the flatterers disperse with a promise of grant of permits.

[20] Act V, scene 1 depicts the good qualities of a police constable Ramanand Tewari.

[21] The last scene of this booklet represents a talk between Gandhiji & Narad when the latter goes to him to report about what he has seen his followers doing in Bharat. Naradji recites to Gandhiji the degradations in which the Congress leaders had fallen. At one place there has been a suggestion put in the mouth of Naradji that the Judges should not be appointed by the Governor-General. He is purported to have suggested that (a) the F. C. Judges should be appointed by the international Ct. of Justice, (b) H. C. Judges should be appointed by the Chief Justice of the F. C. (c) Dist. Judges & Munsifs should be appointed by the Chief Justice of the H. C. & (d) all cases, civil & criminal should be tried by Munsifs & Judges so that the executive authorities may not exercise any undue influence over any of the officers presiding over a Ct. of Justice. On these suggestions Mahadeo Desai is represented to have put this question to Naradji: "Why are you suggesting such a procedure? Has there been perpetrated any serious injustice?" To this Naradji replies:

"A great injustice has been perpetrated. A criminal has been acquitted by a Judge under the influence of Munshiji. That Judge has thereafter been promoted."

At the end Naradji says that the act of administration by Congress Ministers is not laudable at all. In the Supply & Control Department there is a lot of corruption. The Ministers are, in hot haste in appointing their dear & near ones, however unqualified, to various posts. Even if candidates are selected by the Public Service Commission, they are liable to be not taken in on account of various other considerations at the hands of the Ministers. At another place Naradji has been made to say that the Police Dept. is also rotten from top to bottom.

[22] This, in short, is the purport of the comic drama. Now the question is whether it comes within the mischief of S. 4 (1) (d) of Act XXIII [23] of 1931. Mr. Ramchandra Sinha, learned counsel for the petnr. submitted that this Act had been brought on the statute book in 1931 to meet the emergency created by the non-co-operation movement, whose avowed object was to preach hatred & contempt against the Govt. established by law & also against the administration of justice then in vogue. By this preaching the followers of that movement wanted to create a mentality whereby people should be prepared to overthrow the Govt. It is well known that the Civil Disobedience Movement exorted people to shun law Cts. to treat their orders with contempt, to disobey laws promulgated by the then Govt. of the country to leave the army & the police force & so on & so forth. The Civil Disobedience Movement advocated disregard of Govt. in every sphere. According to the learned Counsel, it is this emergency which called for an amendment of the original S. 4 of Act XXIII [23] of 1931 by adding the following

provisions which may be quoted *in extenso* to illustrate the significance of the above argument :

Amendment of S. 4, Act XXIII [23] of 1931.—"In sub-s. (1) of S. 4, Press (Emergency Powers) Act, 1931,

(a) after cl. (b) the following words & clauses shall be inserted, namely :

"or which tend, directly or indirectly,

(c) to seduce any officer, soldier, sailor or airmen in the military, naval or air forces of His Majesty or any police officer from his allegiance or his duty, or

(d) to bring into hatred or contempt His Majesty or the Govt. established by law in British India or the administration of justice in British India, or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Govt. or

(e) to put any person in fear or to cause annoyance to him & thereby induce him to deliver to any person any property or valuable security or to do any act which he is not legally bound to do, or to omit to do any act which is legally entitled to do, or

(f) to encourage or incite any person to interfere with the administration of the law or with the maintenance of law & order, or to commit any offence, or to refuse or defer payment of any land-revenue, tax, rate, cess or other due or amount payable to Govt. or to any local authority, or any rent of agricultural land or anything recoverable as arrears of or along with such rent, or

(g) to induce a public servant or a servant of a local authority to do any act or to forbear or delay to do any act connected with the exercise of his public functions or to resign his office, or

(h) to promote feelings of enmity or hatred between different classes of His Majesty's subjects, or

(i) to prejudice the recruiting of persons to serve in any of His Majesty's forces or in any police force, or to prejudice the training, discipline or administration of any such force;"

(b) the Expln. shall be numbered as Expln. 1 & after the Expln. as so numbered the following Explns. shall be inserted, namely ;

"**Expln. 2.** — Comments expressing disapprobation of the measures of the Govt. with a view to obtain their alteration by lawful means without exciting or attempting to excite hatred, contempt or disaffection should not be deemed to be of the nature described in cl. (d) of this sub-section.

Expln. 3. — Comments expressing disapprobation of the administrative or other action of the Govt. without exciting or attempting to excite hatred, contempt or disaffection, shall not be deemed to be of the nature described in cl. (d) of this sub-section.

Expln. 4. — Words pointing out, without malicious intention & with an honest view to their removal, matters which are producing or have a tendency to produce feelings of enmity or hatred between different classes of His Majesty's subjects shall not be deemed to be words of the nature described in cl. (h) of this sub section."

[23] The learned counsel for the petnr. therefore, contended that the relevant words of the section, namely, "to bring into hatred or contempt the Govt. established by law or the administration of justice" should be construed in that light. He further contended that the words "hatred or contempt of the Govt. established by law" do never mean a criticism of the administration of the various branches of the Govt. According to him there is not the least attempt by the author of this booklet to incite any feeling to overthrow the Govt. established by law & substitute it by another form of Govt. He further contended that Explns. 2 & 3 attached to S. 4 are wide enough to include the comments made in this booklet. In support of his contention he relied upon the decision in the case of *Bhanushanker L. Joshi* v. *The State*, A.I.R. (37) 1950 Saurastra 1 : (1950-3 Sau. L. R. 103 (S. B.)), wherein it was held that criticism against the Food Dept. of the Govt. or the criticism against the Police Dept. of the Govt. did not come within the mischief of S. 4, sub-s. (1), cl. (d), Press (Emergency Powers) Act. 1931. It also held that a suggestion that influential persons in Saurashtra took advantage of their influence to secure employment in Govt. service is not such a statement that it could be brought within the said section of the Press (Emergency Powers) Act, 1931. He also relied upon the case of *In re Jangi-i-Azadi Lahore*, A. I. R. (35) 1948 Lah. 6 : (48 Cr. L. J. 931 S. B.), wherein it was held that critism of certain officer or officers of Govt. cannot be deemed to be a criticism of the Govt. established by law. In that case one of the learned Judges, merely, Teja Singh, J. considering the question of the criticism of the action of ministers said as follows :

"Under the present constitution the Ministers belong to one or more political parties & a criticism of their doings or policy, even if it be strongly worded, cannot be said to bring into hatred or contempt His Majesty's Govt, established by law in British India.".

[24] In the case of *Emperor* v. *Hemendra Prasad*, I. L. R. (1939) 2 Cal. 411 : (A.I.R. (26) 1939 Cal. 529 : 40 Cr. L. J. 782 S. B.) a Special Bench of the Calcutta H. C. held :

"In our view, Ministers chosen from the elected representatives of the people of the province for the purpose of carrying into effect, if possible & within prescribed limits, their wishes, & acting as advisers to the Governor, cannot be described as "officers subordinate" to the Governor, within the meaning of S. 49, Govt. of India Act, 1935. It follows, therefore, that, although in popular language, the Ministers may be referred to as "the Govt." they are not "the Govt." within the meaning of Ss. 17 & 124A, Penal Code. Whatever may happen in practice the Ministers are, in law, the Governor's advisers."

The relevant provisions of S. 124A, Penal Code, quoted below are similar to those of S. 4 (1) (d) of Act XXIII [23] of 1931 :

Section 124A. — "Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, Her Majesty or the Crown Representative or the Govt. established by law in British India or British Burma shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Expln. 1. — The expression "disaffection" includes disloyalty & all feelings of enmity.

Expln. 2.—Comments expressing disapprobation of the measures of the Govt. with a view to obtain, their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Expln. 3.—Comments expressing disapprobation of the administrative or other action of the Govt. without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

I respectfully agree with the view taken in the case of *Emperor* v. *Hemchandra Prasad*, (I.L.R. (1939) 2 Cal. 411 : A.I.R. (26) 1939 Cal. 529 : 40 Cr. L. J. 782 S. B.) (*supra*), & I am also of opinion that the words "to bring into hatred or contempt the Govt. established by law" connote something more than mere criticism of the various branches of administration with a view to improve them & not with a view to overthrow the Govt. itself. The hatred or contempt preached must be of such a nature as to excite a feeling tending towards overthrow of the existing system of Govt. In the present booklet no hatred or contempt has been preached against the Govt. itself. The booklet read as a whole leaves only one & one impression, namely, the lapses of the followers of Mahatma Gandhi since they actually came in power. It depicts how they have neglected the great ideal or selfless service & how they have indulged in self-seeking & self-profiteering. I do not consider that the book read as a whole or any portion of it brings it within the mischief of S. 4 (1) (d), Press (Emergency Powers) Act (Act XXIII [23] 1931), 1931.

[25] Mr. Lal Narain Sinha, learned counsel for the State of Bihar, contended that the booklet has been written in a very bad taste & it has tried to bring into prominence the defects only of the various branches of the administration. The motive of the author in so doing, therefore must be to bring into contempt the present Govt. He further contended that the booklet has not only criticised the executive side of the present Govt., but it has criticised the judicial side of it as well. The booklet suggests that the executive officers functioning as Judges, such as Sub-divisional Officers, etc., & even Judges are amenable to outside influence. He contended that this amounts to contempt of the administration or justice in the Dominion of India. I have gone through the relevant portion of the booklet dealing with this topic & to me it appears that it deals more with the interference by members of the Congress party in judicial matters rather than the failing of the Judges. At one place no doubt the booklet refers to some Judge, having been influenced, but that, in my opinion, does not amount to bringing into hatred or contempt the administration of justice in the Dominion of India. The phrase "to bring into hatred or contempt the administration of justice" connotes something different, as one preached during the time of the non-co-operation movement when the followers of the movement openly used to preach disregard of the Cts. of law. They used to say :

"Don't take part in proceedings of the Ct. Do not defend any charge framed against you. Do not pay fine. Break all laws."

This & similar actions might be called acts which bring into hatred or contempt the administration of justice. But the suggestion that the appointment of Judges should be taken out of the hands of the executive authority & be placed in the hands of Judicial authority is not such a statement as to bring it within the purview of S. 4 (1) (d) of Act XXIII [23] of 1931. Mr. Lalnarain Sinha, learned counsel appearing for the opposite party, in this connection referred to the cases of *The King* v. *Davies*, (1906) 1 K. B. 32 : (75 L. J. K. B. 104), *In the matter of K. L. Gauba*, I. L. R. (1942) Lah. 411: (A.I.R. (29) 1942 Lah. 105: 43 Cr. L. J. 599 F. B.) and *In re Motilal Ghose*, 45 Cal. 169:(A.I.R. (5) 1918 Cal. 988 : 19 Cr. L. J. 530 S. B.), but they were all cases in connection with proceedings taken for contempt of Ct., they were not cases under the Press (Emergency Powers) Act (Act XXIII [23] of 1931) & any observation made in those decisions is not very relevant in the present case.

[26] Mr. Lal Narain Sinha further relied upon the decision in the case of *Kshiteesh Chandra* v. *Emperor*, 59 Cal. 1197 : (A. I. R. (19) 1932 Cal. 547: 33 Cr. L. J. 690) to say that

"the Govt., established by law in British India includes the executive power in action & does not mean merely the constitutional frame-work & it also includes the local Govt. as well as the Central Govt."

In that particular case, their Lordships of the Calcutta H. C. were considering the legality or otherwise of a conviction under S. 124A, Penal Code. They have quoted *in extenso* various portions from a newspaper called 'Desherbani' from which they inferred that the conviction of the applt. was justified under the provisions of S. 124A, Penal Code; but the present booklet has not been written in such a way as to bring into hatred or contempt the Govt. established by law or the administration of Justice in the Provinces within the Indian Union.

[27] The learned counsel for the opposite party further relied upon the case of *Mrs. Annie Besant* v. *Govt. of Madras*, 39 Mad. 1085 : (A.I.R. (5) 1918 Mad. 1210 : 18 Cr. L. J. 157 S. B.). In that case the petnr., who was the keeper of a printing press & publisher of a newspaper, had been asked to deposit security for two thousand rupees under S. 3 (1), Press Act (I [1] of 1910). He had moved the H. C. under S. 17 of the Act for setting aside the order demanding the security. In that connection, their Lordships of the Madras H. C. had to consider, apart from other provisions of the Act, the provisions contained in S. 4 (1) (c) of the Act which runs thus :

"4 (1) Whenever it appears to the Local Govt. that any printing press in respect of which any security has been deposited as required by S. 3 is used for the purpose of printing or publishing any newspaper, book or other

document containing any words, signs or visible representations which are likely or may have a tendency, directly, or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise—

* * * *

(c) to bring into hatred or contempt His Majesty or the Govt. established by law in British India or the administration of justice in British India or any Native Prince or Chief under the suzerainty of His Majesty, or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His majesty or the said Govt. or any such Prince or Chief, or

* * * *

the local Govt. may, by notice in writing to the keeper of such printing press, stating or describing the words, signs or visible representations which in its opinion are of the nature described above, declare the security deposited in respect of such press & all copies of such newspaper, book or other documents wherever fouud to be forfeited to His Majesty.

Explanation I.— In cl. (c) the expression 'disaffection' includes disloyalty & all feelings of enmity.

Explanation II.— Comments expressing disapproval of the measures of the Govt. or of any such Native Prince or Chief as aforesaid with a view to obtain their alteration by lawful means, or of the administrative or other action of the Govt. or of any such Native Prince or Chief or of the administration of justice in British India without exciting or attempting to excite hatred contempt or disaffection do not come within the scope of cl. (c)."

The judgment of the H. C. quotes in detail the various passages published from time to time in the newspaper, but it is not necessary for me to quote them here. Suffice it to say that at one place Abdur Rahim C. J. says about the Act :

"The Act as is well known was passed in order to counteract the manifold ingenious devices adopted by the anarchists of Bengal for carrying out their propaganda. How far it has been instrumental in accomplishing that object is not a question with which we are concerned; nor are we concerned with the question whether the Legislature was justified in applying such a drastic press law to the whole of India, while the evil sought to be met was mainly connected with the activities of a band of young revolutionaries in one part of the country."

While considering the meaning of the words "the Govt. established by law in British India" the learned Judge held :

"It is contended by the appct. that what is meant by that phrase is the supremacy of the British Crown & the British connection as opposed to independence. This cannot be a definition of 'Govt.' as used in the section, it would only indicate the essential elements in the political relation between India & Great Britain. Government denotes as established authority entitled & able to administer the public affairs of the country. On the other hand Govt. is not identical with any particular individuals who may be administering the Govt."

He quoted with approval from the judgment of Batty J. in the case of *Emperor* v. *Bhaskar*, 8 Bom. L. R. 421 at p. 438:30 Bom. 421:(4 Cr.L.J. 1) :

"What is contemplated under the section is the collective body of men—the Govt., defined under the Penal Code. It means the person or persons collectively, in succession, who are authorised to administer the Govt. for the time being. One particular set of persons may be open to objection, & to assail them & to attack them & excite hatred against them is not necessarily exciting hatred against the Govt because they are only individuals, & not representatives of that abstract conception which is called Govt. . . .The individual is transitory & may be separately criticised, but that which is essentially & inseparably connected with the idea of Govt. established by law cannot be attacked without coming within this section."

This case also, in my opinion, does not help the opposite party. The booklet in question does not contain any passage to merit the order of forfeiture in question.

[28] Mr. Ramchandra Sinha further contended that the provisions of S. 4 (1) (d), Press (Emergency Powers) Act of 1931 are *ultra vires* of Art. 19, sub-cls. (1) & (2) read with Art. 13, Constitution of India.

[29] The Constitution of India came into force on 26-1-1950. The order in question was, however, notified by a notfn. dated 14-7-1949, in the Bihar Gazette dated 27-7-1949. The order of forfeiture had taken effect on a date before the Constitution of India came into force & it is difficult to say how the validity or otherwise of that order can be called in question with reference to a further right granted to every citizen of the Indian Union by the Constitution.

[30] A similar matter came recently to be considered by the S. C. in the case of *Keshavan Madhava* v. *The State of Bombay*, Case No. IX of 1950, disposed of on 22 1-1951: (A.I.R. (38) 1951 S. C. 128). In that case the applt. who was the Secretary of the People's Publishing House, Ltd. was prosecuted under S. 18 (1), Press (Emergency Powers) Act, 1931. During the pendency of the prosecution the Constitution of India came into force on 26-1-1950. The accused thereafter filed a written statement contending that the provisions of the Act for the breach of which he was prosecuted was *ultra vires* & void in view of Art. 19 (1) (a) read with Art. 13 of the Constitution. He filed a petn. before the H. C. of Bombay under Art. 228 of the Constitution praying for a declaration that Ss. 15 & 18 read with Ss. 2 (6) & 10 of the Act were *ultra vires* of Art. 19 (1) (a) of the Constitution & are, therefore, void & inoperative & that he should be ordered to be acquitted. The H. C. came to the conclusion that the proceedings under the Press (Emergency Powers) Act, 1931, which were pending at the date of the commencement of the Constitution were not affected even if the relevant provisions of the Act were inconsistent with the fundamental rights conferred by Art. 19 (1) (a) of the Constitution. The accused went in appeal before the S. C. against the order of the H. C. The majority judgment of their Lordships of the S. C. held that :

"It is, therefore, clear that the idea of the preservation of past inchoate rights or liabilities & pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. We are, therefore, unable to accept the contention about the spirit of the Constitution as invoked by the learned counsel in aid of his plea that pending proceedings under a law which has become void, cannot be proceeded with further, if it is against the spirit of the Constitution to continue the pending prosecution under such a void law, surely it should be equally repugnant to that spirit that men who have already been convicted under such repressive law before the Constitution of India came into force should continue to rot in jail. It is, therefore, quite clear that the Ct. should construe the language of Art. 13 (1) according to the esta-

blished rules of interpretation & arrive at its true meaning uninfluenced by any assumed spirit of the Constitution.

Article 13 (1) with which we are concerned for the purposes of this appln. is in these terms : 'All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void'.

It will be noticed that all that this clause declares is that all existing laws, *in so far as they are inconsistent* with the provisions of Part III shall, *to the extent of such inconsistency*, be void. Every statute is *prima facie* prospective unless it is expressly or by necessary implications made to have retrospective operation. There is no reason why this rule of interpretation should not be applied for the purpose of interpreting our Constitution. We find nothing in the language of Art. 13 (1) which may be read as indicating an intention to give it retrospective operation. On the contrary the language clearly points the other way. The provisions of Part III guarantee what are called Fundamental rights. Indeed the heading of Part III is 'Fundamental Rights'. These rights are given, for the first time, by & under our Constitution. Before the Constitution came into force there was no such thing as fundamental right. What Art. 13 (1) provides is that 11 existing laws which clash with the exercise of the fundamental rights (which are for the first time created by the Constitution) shall to that extent be void. As the fundamental rights became operative only on & from the date of the Constitution the question of the inconsistency of the existing laws with those rights must necessarily arise on & from the date those rights came into being. It must follow, therefore, that Art. 13 (1) can have no retrospective effect but is wholly prospective in its operation."

Therefore, the order in question which was passed in July, 1949, if valid in accordance with the provisions of law then in existence, cannot be questioned because of some higher right having been granted by the Constitution which came into force on 26-1-1950.

[31] In my opinion, the booklet in question does not contain any words, signs or visible representations of the nature described in S. 4 (1), Press (Emergency Powers) Act, 1931; hence the order of forfeiture referred to in the notfn. dated 14-7-1949, as quoted above must be set aside.

[32] The result is that the appln. is allowed, but without cost.

[33] **Sinha J.**—I agree to the order proposed.

[34] **Sarjoo Pd. J.** — I agree that this appln. should be allowed. On a careful perusal of the offending booklet, I am unable to find that its contents bring it within the mischief of S. 4 sub-S. (i) cl. (d) of Act XXIII [23] of 1931. The booklet purports to be a bitter satire & at places it even degenerates into scurrilous & personal attacks on individuals. That, however, by itself does not amount to bringing into hatred or contempt Govt. established by law in the State or the administration of justice therein. A mere criticism of man & measures or of the persons running the administration, howsoever bitter that criticism may be & even if the criticism is misguided, does not necessarily amount to bringing into contempt the Govt. of the province or the administration of justice. I, therefore, substantially agree with my learned brother Rai J. in holding that the booklet does not offend against the relevant section of the Indian Penal Act, & the order of forfeiture has, therefore, to be set aside.

D.H. *Application allowed.*

A. . R. (38) 1951 Patna 82 [C. N. 11.]

SHEARER & JAMUAR JJ.

Sheobachan Pandey & others—Petnrs. v. The State.

Cri Misc. No. 697 of 1950, D/- 27-2-1951.

Criminal P. C. (1898), Ss. 220 & 497 — Ses. J. releasing accused on bail during committal proceedings—Mag. committing them for trial u/s. 302, I.P.C. & taking them in custody—Validity of the order.

Certain accused were released on bail by the Ses. J. during the committal proceedings. Subsequently the Mag. committed them to Ses. Ct. for trial u/s. 302, I. P. C. & took them in custody. The order was objected to on the ground that the Mag. had no jurisdiction u/s. 497 (5) to cancel the bail granted by the Ses. J., which was therefore still in force :

Held (1) that where a Mag. is of the opinion that there are reasonable grounds for believing that an accused has been guilty of an offence punishable with death or transportation for life, he is bound, when committing him, under the provisions of S. 220 of the Code, to commit him to custody; [Para 8]

(2) that the words 'subject to the . . . . taking of bail' in S. 220 clearly refd. to sub-s. (1) of S. 497 which is the only provision for *taking of the bail* & did not refer to sub-s. (5) of that section : A. I. R. (35) 1948 All. 366 F. B., *Dissent.* [Para 8]

Anno. Cr. P. C., S. 497 N. 7 Pt. 18a..

K. C. Sanyal & Baidyanath Pd. No. 1 — for Petnrs.; Standing Counsel — for the State.

Jamuar J. — The question for decision raised in this appln. is whether there is jurisdiction in a Mag. when committing an accused for trial to a Ct. of Session, to order him to be taken into custody, when previously there had been an order passed by the Ses. J. for the release of the accused on bail.

[2] The three petnrs. along with three others have been committed to the Ct. of Session to take their trial on a charge of murder & abetment of murder. During the commitment stage, an appln. had been moved to the Ses. J. for the release of the petnrs. on bail & an order was passed accordingly. Subsequently, when committing the accused to the Ct. of Session, the committing Mag. refused to allow them to remain on bail. Against this last order the six accused moved the Ses. J. who ordered for the release of three of them on bail but rejected the appln. of the three petnrs. before us. Before us, accordingly, it is now contended that the order of the committing Mag. refusing the prayer of the petnrs. for bail was without jurisdiction since the order of the Ses. J. releasing them on bail still remained in force, & that, therefore, the petnrs. should be ordered to be released from custody forthwith.

[3] Mr. Sanyal, who has appeared on behalf of the petnrs. has placed reliance upon some cases in support of his contention. He has cited *Ahmad* v. *The Crown*, A. I. R. (37) 1950 Lah. 195 : (Pak. L. R. (1950) Lah. 720), *The Crown Prosecutor* v.

N. S. Krishnan, A. I. R. (32) 1945 Mad. 250 : (47 Cr. L. J. 106) & *Seoti* v. *Rex*, A. I. R. (35) 1948 ALL. 366 : (49 Cr. L. J 521 F. B.).

[4] The only case which supports the contention of Mr. Sanyal is *Seoti* v. *Rex*, A. I. R. (35) 1948 ALL. 366 : (49 Cr. L. J. 521 F. B.). The question now to be decided did not specifically arise in the other cases. In *Ahmad* v. *The Crown*, A. I. R. (37) 1950 Lah. 195 : (Pak. L. R. (1950) Lah. 720), the facts were that certain accused were being prosecuted on a charge of murder & the enquiry was pending before the committing Mag. On an appln. to the Ses. J. they were released on bail. At that time the evidence of the prosecution had not yet begun to be recorded. When some witnesses were examined implicating the accused, an appln. was made on behalf of the Crown to the Ses. J. that the bail should be cancelled on the ground that a large number of witnesses had deposed against them & that the accused were trying to suborn the witnesses. The Ses. J. accepted the petn. & cancelled the bail bonds & directed that the accused be taken into custody. Hence the question for decision in that case was whether the Ses. J. was empowered to cancel the bail granted by himself. This is not the issue in this case before us.

[5] In the *Crown Prosecutor* v. *N. S. Krishnan*, A. I. R. (32) 1945 Mad. 250 : (47 Cr. L. J. 106), which is a S. B. decision, also the question was not the same as in the present case. The facts were that the accused who were arrested by the police on certain charges were refused bail by the Presidency Mag. but were enlarged on bail by the H. C. u/s. 498, Cr. P. C., pending the investigation of the case. Subsequently, an appln. was made by the Crown to the H. C. for cancellation of the bail u/s. 497 (5) of the Code on certain grounds. The question for decision was whether the H. C. had the jurisdiction to cancel the bail & it was held that although S. 497 (5) of the Code could have no appln. to the case of an accused person who had been released on bail u/s. 498 of the Code, the Ct. had adequate jurisdiction u/s. 561A of the Code to continue or discontinue an order granting bail in the circumstances which enured for a limited period only.

[6] As I have already stated, it is the case of *Seoti* v. *Rex*, A. I. R. (35) 1948 ALL. 366 : (49 Cr. L. J. 521 F. B.) which is in support of the proposition contended for on behalf of the petnrs. in the case before us. In that case proceedings were continuing against the accused before the committing Mag. One of the accused had been released on bail by an order of the Ses. J. & two of them by an order of the H. C. When the Mag., however, passed an order committing the accused to the Ct. of Session, he cancelled the bail of all the accused & ordered them to be taken into custody. The question was whether the committing Mag. had that jurisdiction & it was held that he had no such jurisdiction to cancel bail granted to the accused without any limitation by the H. C. or by the Ses. J. before they were committed to the Ct. of Session. With the greatest respect, I do not find myself in agreement with their Lordships. In my opinion, the most relevant section applicable in such cases is S. 220, Cr. P. C. This section is as follows :

"Until and during the trial, the Mag. shall, subject to the provisions of this Code regarding the taking of bail, commit the accused, by warrant, to custody."

Their Lordships of the Allahabad H. C. did make a reference to the section & observed as follows :

"No doubt, S. 220 gives power to a Mag. to commit an accused person by warrant to custody 'until & during the trial' of a case exclusively triable by the Ct. of Session or the H. C. But this power, as would appear from a perusal of that section, is subject to the provisions of the Code regarding the taking of bail & obviously the power to cancel it is in every case governed by the provisions of S. 497. The committing Mag. had, therefore, no power to cancel the bail which had been granted in the case of two of the appts. by the H. C. & in the case of the third appt. by the Ct. of Session at Mathura."

[7] Their Lordships refd. to sub-s. (5) of S. 497, Cr. P. C., which provides as follows :

"A H. C. or Ct. of Session &, in the case of a person released by itself, any other Ct. may cause any person who has been released under this section to be arrested & may commit him to custody,"

& it was pointed out that from a perusal of this sub-section it would appear that no Ct. other than the H. C. or a Ct. of Session has any power to cause any person who has been released on bail to be arrested & committed to custody unless he has been released by an order passed by itself. This is the only provision which enables the cancellation of a bail granted earlier & a Mag. cannot cancel a bail which he himself has not granted. In my view, however, when a Mag. acts u/S. 220, Cr. P. C., he is not cancelling any bail granted earlier but he is following the direction given in that section.

[8] S. 220 imperatively directs a Mag. to commit the accused to custody but this direction is "subject to the provision of this Code regarding the taking of bail." No question of any cancellation of bail arises in its direction to commit the accused to custody subject to the condition just stated. The words "subject to the provisions of this Code regarding the taking of bail" refer to S. 497 of the Code. This is the only section which deals with "the taking of bail." We cannot read sub-s. (5) of S. 497, only within the restrictive portion of S. 220 since the words used in S. 220 are "the taking of bail." One ought to refer to that part of S. 497 which deals with "the taking of bail," that is, sub-s. (1) of that section. Under sub-s. (1) when any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Ct., he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life & a special provision is

made regarding the release of a person under the age of sixteen years or any woman or any sick or infirm person. It is clear, therefore, that when a Mag. commits an accused for trial before a Ct. of Session, he cannot order for the release of the accused if there appear to be reasonable grounds for believing that the accused had been guilty of an offence punishable with death or transportation for life unless the special provisions regarding the age or sex or sickness apply. Where, therefore, a Mag. is of the opinion that there are reasonable grounds for believing that an accused has been guilty of an offence punishable with death or transportation for life, he is bound, when committing him under the provisions of S. 220 of the Code to commit him to custody & there can be no question of cancellation of any bail previously granted to such an accused. In the present case before us, the order passed by the Mag. is in the following terms:

"Heard bail petn. Since the provision of S. 497, Cr. P. C., cl. (1) is mandatory regarding S. 302, I. P. C., or where there is sentence for transportation of life, the committing Ct. can't exercise its discretion. The accused persons in this case stand charged u/S. 302, I. P. C. & Ss. 302/109, I. P. C. I, therefore, see no reason to grant even ad interim bail to these accused. Their bail petn. is, therefore, rejected."

In my view, this order is in compliance with S. 220, Cr. P. C. I do not think, therefore, that the case of *Seoti* v. *Rex*, A. I. R. (35) 1948 ALL. 366 : (49 Cr. L. J. 521 F.B.) was correctly decided & I would respectfully express my dissent from the view expressed therein.

[9] Mr. Sanyal also urged that since the Ses. J. had not imposed any condition when releasing the petnrs. on bail, that order would hold good even after the commitment. Apart from the view which I have already expressed, there is another reply to this argument. It must be presumed that the order of the Ses. J. was good up to the last stage of the commitment proceedings. The order, in effect, exhausts itself on the day that the enquiry ends. From a reference to the bail bonds in the present case it will appear that they were to enure only till the end of the commitment proceedings.

[10] For these reasons I am of the opinion that the committing Mag. was right in refusing the prayer for bail when committing the petnrs. for trial, & I would, therefore, dismiss the appln.

[11] **Shearer J.** — I agree.

D.R.R. *Application dismissed.*

A. I. R. (38) 1951 Patna 84 *[C. N. 12.]*

RAMASWAMI J.

Kunj Behari Banka & others — *Petnrs.* v. *The State.*

Cri. Revn. Nos. 1269, 1270 & 1404 of 1950, D/- 14-12-1950.

(a) Evidence Act (1872), Ss. 114, 133—Accomplice —Corroboration.

The corroboration of an accomplice must be by independant testimony which confirms in material particular not only the evidence of the crime which has been committed but also that the prisoner committed it. [Para 6]

Anno. Evi. Act, S. 114, N. 3, 4 ; S. 133, N. 4 to 10.

(b) Evidence Act (1872), Ss. 114, 133—Accomplice —Corroboration.

The evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The danger of acting upon an accomplice's evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence & afterwards to save himself betrayed his former associates; the real danger is that he is telling a story which in its general outline is true, & it is easy for him to work into the story matter which is untrue. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting upon independent evidence which in some measure implicates each accused. [Para 7]

Anno. Evi. Act, S. 114, N. 3, 4 ; S. 133, N. 8.

(c) Evidence Act (1872), Ss. 114, 133—Accomplice —Corroboration.

Non-denial by the accused of the evidence given by the accomplice incriminating the accused affords no corroboration of the evidence given by the accomplice. [Para 7]

Anno. Evi. Act, S. 114, N. 3, 4 ; S. 133, N 4 to 10.

Baldeva Sahay, Jaleshwar Pd. & H. K. Banerji (in No. 1269) ; *Nageshwar Prasad & Surendra Pd. (in No. 1270) & A. N. Chatterji, (in No. 1404)—for Petnrs; P. K. Bose for Govt. Advocate—for the State.*

Order. — These rules are directed against the judgment of Mr. Damodar Prasad, Addl. Ses. J. of Monghyr convicting the petnrs. of the charges u/Ss. 379 & 120B, I. P. C. & sentencing them to R. I. for two years each & also to pay amounts of fine.

[2] According to prosecution case Babu Lal Agarwal had booked 74 bales of cloth from Jamalpore under two consignments of 22 & 52 bales each. The consignments were placed in wagon No. 38946H which was rivetted & sealed The wagon was attached to a goods train & taken to Kiul on 9-1-1949. From Kiul the wagon was taken to Lakhisarai by a pilot engine. It is stated that on 10-1-1949, the petnrs. having entered into a conspiracy to commit theft had gone to the goods shed & having tampered with the seal of the goods shed broke open the wagon & removed five bales of cloth from the consignment. The cloth was taken to the dispensary of Dr. Raja Ram which was opened by his servant Raghua & the cloth was stored in the inner room of the dispensary. The next morning Dr. Raja Ram having been appraised of the incident by Raghua made a report to the station master who in his turn informed the police. During the course of the investigation the dispensary was searched & three bales in addition to other cloth were recovered therefrom. Babulal Agarwal later identified the cloth as having formed part of the consignment which he had sent from Jamalpore.

[3] On 31-1-1949 Karua (P. W. 3) made confession (Ex. 4). On 8-2-1949 Raghua (P. W. 2) made confession which was recorded by another Mag. (Ex. 3). The trial of Karua & Raghua was split up in the Ct. of the Mag. They had been examined as witnesses in the present case in which petnrs. alone have been charged.

[4] The learned Mag. convicted the petnrs. of the charges u/Ss. 379 & 120B, I. P. C. The decision of the Mag. has been affirmed in appeal by the Addl. Ses. J. of Monghyr.

[5] In support of these rules Mr. Baldeva Sahay points out that the lower Cts. have based the conviction of the petnrs. in the main upon the statement of P. W. 2 Raghua & P. W. 3 Karua, that there was no independent evidence to corroborate the statement of these witnesses who are accomplices in the crime & that as a rule of practice, though not as a rule of law, it was unsafe to convict the petnrs. on the testimony of accomplices of which there is no corroboration by independent evidence. In my opinion this argument is well-founded & must prevail. From the record of the case it is plain, the prosecution evidence against the petnrs. consisted of the statement of P. Ws. 2 & 3 who said that the petnrs. had taken part in the conspiracy & in the theft of the bales of cloth after breaking open the rly. wagon. The lower Cts. have referred to the evidence of P. W. 60, Ramprasad Mahto, who deposed that in the night of 10-1-1949, at about 10 P. M. he had seen the petnrs. near the goods shed. It is not possible to hold that the statement of P. W. 60 corroborates the evidence of P. Ws. 2 & 3, for, in my opinion, the circumstances indicate that P. W. 60 has not given truthful evidence. In the first place, P. W. 60 made statement before the Police for the first time about 10 days after the investigation started. There is also proof that Kunjbehari had a dispute with Kataghara Singh & there was a proceeding u/S. 107, Cr. P. C. in which P. W. 60 was witness on behalf of Kataghara Singh against Kunjbehari. There is another fact to be taken into account. P. W. 60 stated that Jitu Pd. Varma was present at the time he saw the petnrs. near the rly. goods shed. But the latter, when examined in Ct., denied that he saw the petnrs. at the rly. goods shed at the alleged time. The trying Mag. who had an opportunity to see P. W. 60 in the witness-box has characterized his evidence as "somewhat shaky". In my opinion, it is impossible to hold that P. W. 60 has given true or reliable evidence in this case or that he corroborated the evidence of the two accomplices, P. Ws. 2 & 3 as regards participation of the petnrs. in the alleged crime.

[6] In the important case *The King* v. *Baskerville*, (1916) 2 K. B. 658 : (86 L. J. K. B. 28), the principle has been stated that the corroboration of an accomplice must be by independent testimony which confirms in material particular not only the evidence of the crime which has been committed but also that the prisoners committed it. It was pointed out that the rule of practice as to corroborative evidence had arisen in consequence of the danger of convicting a prisoner upon the unconfirmed testimony of one who was admittedly a criminal. It is true that in India S. 133, Evidence Act, lays down that an accomplice shall be a competent witness against an accused person & that conviction was not illegal merely because it proceeded upon uncorroborated testimony of an accomplice. But there is a rule of guidance which the Ct. should also regard & it is to be found in illustration (b) of S. 114 which enacts a rule of presumption that an accomplice is unworthy of credit unless he is corroborated in material particulars. The rules laid down in S. 133 & in S. 114 illustration (b) are part of one subject & neither section is to be ignored in the trial of a case. On the whole the effect of these sections is that the Legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person unless he is corroborated in material particulars in respect to that person & that it is the duty of the Ct. which in any particular case has to deal with an accomplice's testimony to consider whether this maxim applies to exclude that testimony or not. In the present case, it is impossible upon the facts proved to accept the uncorroborated testimony of P. Ws. 2 & 3 or to hold that P. W. 60 has given reliable or independent evidence in corroboration of the testimony of P. Ws. 2 & 3. As regards petnr. Ratan Dusadh prosecution has adduced some additional evidence to corroborate P. Ws. 2 & 3. P. W. 38, Station Master, deposed that on 16-1-1949, Ratan made statement admitting to have taken part in the crime. The statement on the whole is apparently exculpatory & the lower appellate Ct. has consd. that the evidence of the Station Master in this respect is suspicious. According to this witness Ratan made the alleged statement on 16-1-1949. The statement was recorded by the Station Master but the statement does not bear the signature or thumb impression of Ratan. It is of significance that the Station Master produced this statement for the first time in Ct. on 23-9-1949. There is no good expln. why he did not produce this statement to the Police during investigation or in the Ct. of the Mag. during trial at an earlier stage. The lower appellate Ct. has, therefore, held that the evidence of the Station Master was of no value. Consequently, it cannot be said that the Station Master corroborates the testimony of P. Ws. 2 & 3 to any conceivable extent.

[7] It is also established by authority that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The danger of acting upon an accomplice's evidence is not merely that the accomplice is on his own admission a man of the bad character who took part in the offence & afterwards to save himself betrayed his former associates; the real danger is that he is telling a story which in its general outline is true, & it is easy for him to work into the story matter which is untrue. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting upon independent evidence which in some measure

implicates each accused. The principle has been clearly stated by the Judicial Committee in *Bhuboni Sahu* v. *The King*, A.I.R. (36) 1949 P. C. 257 : (50 Cr. L. J. 872). To the same effect is the decision of the Judicial Committee in *Tumahole Berang* v. *The King*, 1949 A. C. 253 in which Lord MacDermott refd. to the cautionary rule of English practice emphasising the danger of acting on an accomplice's evidence which is uncorroborated in some material respect implicating the accused. An accused admits nothing by exercising at his trial the right of electing not to deny the charge on oath, & silence of that kind affords no corroboration to satisfy the cautionary rule of English law as stated above. The Judicial Committee observed that the trial Judge in holding that the rule of practice was satisfied by the non-denial by the applts. of the evidence given by the accomplices incriminating the applts. had misdirected himself as to the nature of the corroboration required by the rule of practice & that for the purposes of the rule of practice the evidence of one accomplice is not corroborative of the evidence of another. Applying this principle to the present case it is manifest that the evidence of P. W. 2 cannot be corroborated by P. W. 3 who is admittedly an accomplice in the crime.

[8] Upon these grounds, I am of opinion that the charges have not been proved against the petnrs. beyond reasonable doubt. Accordingly I would make the rules absolute & set aside the conv ction & sentences imposed upon the petnrs. by the lower Cts. If the petnrs. are in jail they should be released forthwith.

D.H. *Rules made absolute.*

A. I. R. (38) 1951 Patna 86 *[C. N. 13.]*

RAMASWAMI & NARAYAN JJ.

The Province of Bihar—Applt. v. *Surendra Prasad Ojha—Resp.*

Govt. Appeal No. 3 of 1950, D/- 7-12 1950.

(a) Penal Code (1860), S. 464—'Makes'—Meaning of—(False document—Making of).

Making of a document does not necessarily mean signing or otherwise executing it. It only means creating or bringing into existence. [Para 10]

Anno. Penal Code, S. 464 N. 1.

(b) Evidence Act (1872), S. 24—Retracted confession—(Confession).

(Obiter.) A voluntary & genuine confession of the prisoner, though retracted & uncorroborated, is legal & sufficient proof of the guilt. [Para 8]

Anno. Evi. Act, S. 24 N. 9.

S. C. Chakraverty—for Applt.; *Nageshwar Prasad & Padmanand Jha—for Respt.*

Ramaswami J.—This appeal is by the Govt. of Bihar against the judgment of Mr. Tribhuwan Nath Singh, Asst. Ses. J of Mozaffarpore, acquitting the resp. of various charges.

[2] The case for the prosecution is that Govt. had established grain godowns in Hajipore sub-division for distribution of grain through multi-purpose co-operative societies. Govt. had appointed certain firms to be in charge of the godowns which were under double locks, one set of keys remaining with the Market Inspector & the other set with the stockists. The Grain Control Officer, Hajipore, used to grant "Store Issue Order" in favour of the said societies after the price of the grain had been deposited in the treasury by chalan. According to the prosecution case the resp. forged Store Issue Order No. 366 dated 18-4 1947 with the intention of cheating Govt. It is said that on 25-4-1947 the resp. presented the Store Issue Order to the Govt. stockist M/s. Khublal Sah Gopal Sah by representing himself to be Rambilas Sharma of Bakatpore Society & thereby dishonestly obtained delivery of 145 maunds of rice worth Rs. 1696/8/0.

[3] The resp. denied all the allegations.

[4] Three out of the four assessors held that the charges were not fully proved. Agreeing with their opinion the learned Judge acquitted the resp.

[5] The prosecution case was based in the main upon a confession made by the resp. on 30-7-1947 before a Mag. Mr. R. D. Narain. The Asst. Ses. J. held that S. 164 (3) had not been complied with & the confession was not admissible in evidence. In support of this appeal, Mr. S. C. Chakravarti contended that the opinion :of the Asst. Ses. J. was erroneous. S. 164 (3) is to the following effect:

"A Mag. shall, before recording any such confession, explain to the person making it that he is not bound to make a confession & that if he does so it may be used as evidence against him, & no Mag. shall record any such confession unless upon questioning the person making it he has reason to believe that it was made voluntarily."

In the present case Mr. R. D. Narain, Mag. when examined in Ct. deposed that he was satisfied that the confession was voluntary. The record of the confession (Ex. 9) also indicates that the Mag. had questioned the resp. in order to satisfy himself that the confession was voluntarily made. The relevant portion of Ex. 9 is reproduced beneath:

Questions.	Answers.
I am a first class Mag. You are not in any way bound to make a statement before me. Any statement which you will make before me shall be used as evidence against you. Do you want to make a voluntary statement or is it caused by pressure or threat by police or any other person? Has any inducement been given to you? Do you want to make a voluntary statement? Do you want to make any statement?	I want to make a voluntary statement. No pressure has been brought to bear upon me & no inducement has been given to me. I belong to a good family. I have committed some mistakes in the company of bad persons which I want to state clearly in the presence of all persons. I shall speak the truth.

Mr. Narain deposed in Ct. that on 30-7-1947 he had warned the resp. & given him 25 minutes' time to reflect. On the previous date, that is, on 29-7-1947 also the Mag. had warned the resp. It is plain from the record of the confession coupled with the oral evidence of the Mag. that

S. 164 (3), Cr. P. C. has been complied with. The learned Asst. Ses. J. did not believe that Mr. Narain gave warning to the resp., on 29-7-1947. But I see no reason why the sworn testimony of Mr. Narain on this point ought not to be accepted as true. Even if no warning had been given by the Mag. to the resp. on 29-7-1947, it is manifest from the evidence that S. 164 (3) has been complied with. The Asst. Ses. J. has refd. to *Punia Mallah* v. *Emperor*, A. I. R. (33) 1946 Pat. 169: (48 Cr. L. J. 30) in support of his finding. But the facts of that case must be distinguished. In that case the Mag. who recorded the confession deposed that

"he did not give warning to the accused that he was not bound to make a statement & if he did so it might be used as evidence against him."

The H. C. also found upon evidence that no questions were put by the Mag. to satisfy himself that the confession was voluntary. Upon these grounds the H. C. observed that S. 164 (3) was not complied with & the confessional statement was not admissible. In the present case the record of the confessional statement (Ex. 9) clearly shows that the Mag. had given warning to the accused that he was not bound to make statement. The Mag. had further posed several questions to the resp. with a view to ascertain whether the confession was voluntary. The Mag. had questioned as follows:

"Do you want to make a voluntary statement or is it caused by pressure or threat? Has any inducement been given to you or not? Do you want to make a statement?"

To these questions the resp. replied :

"I want to make a voluntary statement. Neither any pressure has been brought to bear upon me nor any inducement has been given to me. I want to make a true statement before you."

Learned counsel for resp. placed reliance upon *Baldeo Musehar* v. *Emperor*, A. I. R. (34) 1947 Pat. 281 : (48 Cr. L. J 86) in which the H. C. held that there was a violation of the mandatory provision of S. 164 (3) which made the confession inadmissible in evidence. In that case, however, the column intended for recording questions in the form prescribed contained no questions whatsoever but merely the warning which the Mag. gave to the deponent. The facts of the present case are, as I have indicated, manifestly different. In this context reference should be made to *Emperor* v. *Dubai*, A. I. R. (29) 1942 Pat. 113 : (43 Cr. L. J. 90) in which it was argued that the confession was not in accordance with law since S. 164 (3) had been violated. In that case the Mag put only this question to the accused : "If you want to make any statement of your own free will, you may do that". The answer of the accused was "I want to make my statement of my own accord". The learned Mag. put the question "what statement you want to make". The accused thereupon made the confessional statement. Upon these facts, the H. C. held that S. 164 (3) had been complied with & the confession was admissible in evidence. The H. C. refd. with approval to the decision of a F. B. in *Ghinua Uraon* v. *Emperor*, 3 Pat. L. J. 291 : (A. I. R. (5) 1918 Pat. 179 : 19 Cr. L J. 135 S. B.) in which Sir Dawson-Miller C. J. states :

"The last objection that the confession was on the face of it bad as it did not disclose all the questions & answers put & received must also fail. No form of questions is prescribed by S. 164 (3) from which the Mag. must satisfy himself that he believes the confession was made voluntarily. The questions recorded as having been put & the answers given as well as the demeanour of the applt. may well have convinced the Mag. that the confession was a voluntary one, & there is no reason to suppose that the recorded statement does not record all the questions put. Moreover, u/s 533 a defect in the compliance with the provisions of S. 164 or S. 364 can be cured by evidence taken by the Ct. before which the confession or statement of the accused person is tendered. In the present case the Mag. was examined by the Ct. & deposed that the statement was recorded as given & that he was satisfied that it was voluntarily made."

In *Emperor* v. *Dubai*, A. I. R. (29) 1942 Pat. 113 : (43 Cr. L. J. 90), the learned Judges held that the law had been authoritatively stated in the F. B. case & there was nothing in the subsequent P. C. case *Nazir Ahmad* v. *King Emperor*, 63 I. A. 372: (A. I. R. (23) 1936 P. C. 253 : 37 Cr. L. J. 897 P C.) to detract from the authority of the F B case. Reference should also be made to *Emperor* v. *Ramsidh Rai*, A. I. R. (25) 1938 Pat. 352 : (39 Cr. L. J. 725) in which the confession was admitted in evidence, Khaja Mohammad Noor J. observing:

"In recording the confession in this case the learned Mag. omitted to put any question to the accused whether he was confessing voluntarily. No doubt the learned Mag. gave him a warning .... but the Cts. before whom the confession is used have materials on which they can be satisfied that the confession was in fact voluntary. In the present case the record does not show that any question was asked by the Mag. in order to ascertain that the confession was made voluntarily. It appears, however, that in giving answer to the warning of the Mag., Jagdish himself stated that he was making the statement voluntarily; & the Magistrate has in his evidence stated that he was satisfied that the confession was voluntary."

In the present case for the reasons already recorded I am of opinion that S. 164 (3) has been complied with, that the confessional statement of the resp. has been voluntarily made & is admissible against the resp.

[6]. Mr. Nageshwar Prasad, however, stressed the argument that there was material to indicate that the resp. has not given a true account of the facts in the confessional statement. Learned counsel pointed out that in Ex. 9 the resp. admitted that after forging the Store Issue Order he had gone to Mehnar & negotiated with Bhagwan Lal & Gopalji for its sale; that Gopalji did not deliver any rice but handed a sum of about Rs 2,100 to the resp. who made over the amount to Rajindra Babu. According to the confession Bhagwan Lal was, therefore, an accomplice in the conspiracy to cheat the Govt. But Bhagwan Lal deposed that he did not know the resp. from before, that on 25-4-1947 the resp. had produced the Store Issue Order & thereupon Bhagwan Lal delivered 145 maunds of rice. Rit Lal (P. W. 1), Kodai

Mahto (P. W. 2) & Ramdeo Mahto (P. W. 3) also deposed that they were cartmen whom the resp. had engaged for carrying the rice to Mehnar pethia. It is true that there is a conflict between the prosecution evidence & the confessional statement. But for the reasons which will be shortly stated I am of opinion that the prosecution case in this respect is not true, that in the confessional statement the resp. has given a true account of the manner in which he sold the Store Issue Order to Bhagwan & Gopal Sah.

[7] There are indeed important circumstances which corroborate the confessional statement. In the first place there is evidence that Babu Ramanand Sinha accompanied by the Market Inspector had raided the godown of Khublal Sah & Gopal Sah on 17-7-1947 & seized the Store Issue Order No. 366 dated 18-4-1947 from the premises. The recovery of this document from the godown of Khublal Sah & Gopal Sah is an important circumstance which confirms the confession of the resp. that he had forged the Store Issue Order & had gone to Mehnar & sold it to Bhagwan Lal & Gopalji. In the second place, there is the significant fact that on 29-7-1947 at about 2 P. M. Inspector Jagdish Pandey searched the person of the resp. after the latter's arrest & seized EX. I, a booklet containing blank Store Issue Orders. The Inspector prepared a seizure list (EX. 4) which has been signed by two witnesses, Udit Narain Choudhury & Saligram Singh. The booklet contains signature or initials of "R. Prasad" on the first 16 or 17 pages. The evidence of the Inspector Jagdish Pandey is supported by Markandey Jha (P. W. 7) who has deposed to the same effect. Mr. Nageshwar Prasad contended that it was improbable that the resp. should be moving about at the time alleged with store issue order booklet. The argument is plausible, but it is impossible to accept it. For I hold that the direct evidence adduced for the prosecution with respect to this incident is reliable & unshaken. The recovery of the booklet of Store Issue Order (EX. I) is a very material circumstance which corroborates the confession made by the resp.

[8] On behalf of the resp. Mr. Nageshwar Prasad contended that the confession having been retracted no weight should be attached to it even against the person making it. Authority for this contention is sought in *Queen Empress* v. *Rangi*, 10 Mad. 295, a case which on difference between two judges was decided in accordance with the opinion of a third judge. The authority of the case is doubtful for it does not appear to have been folld. in later cases of the same H C., e. g. *Queen Empress* v. *Raman*, 21 Mad. 83 or *Kesava Pillai* v. *Emperor*, A. I. R. (16) 1929 Mad. 837 : (31 Cr. L. J. 768). As far back as *Queen* v. *Jhurree*, 7 W. R. Cr. 41, it was held that a voluntary & genuine confession of the prisoner is legal & sufficient proof of guilt & this decision has never been overd. though it has sometimes been said that the rule of prudence is in favour of seeking corroboration of a confession which has been retracted. The view taken accords with the decision of this Ct. in *Guja Majhi* v. *King*, 2 Pat. L. J. 80 : (A. I. R. (4) 1917 Pat 247 : 18 Cr. L. J. 445). In that case the only evidence given during the trial to connect the accused with the act of murder with which they were charged, was their own confessions contained in statements voluntarily made by them u/s. 164, Cr. P. C., which confessions were retracted before the trial commenced. Upon these facts the learned Judges held that the confessions were admissible in evidence against the accused & that the latter were properly convicted & sentenced of the charge of murder. The point, however, does not arise in the present case for as I have already shown there is sufficient corroboration of the confessional statement of the resp. by independent evidence.

[9] As regards the charges u/ss. 468 & 471, I. P. C., the primary evidence consists of the confessional statement of the resp., the material portion of which is to the following effect :

"Subsequently, in the month of April Rajindar Babu again got a blank store order for 145 maunds of rice in the name of K G., Mehnar filled up by me & after that he forged the signature of G. C. O by his own pen & handed it over to me to be taken to Mehnar. I went to Mehnar after a day or two & visited the godown of Gopalji where Bhagwan Lal & Gopalji were sitting. I negotiated with them to sell it. Gopalji asked Bhagwan Lal to settle the matter with me. Thereafter, Bhagwan Lal asked me to sell it by hunda sale. After that, I told Bhagwan Lal that I would make over the store order to him only after making a note of full delivery on it & that I would not take the delivery. He said that in that case I should pay money to him to be paid to the person who would be produced before the Marketting Officer. For this purpose he deducted the sum of Rs. 500 (rupees five hundred) (from my account). Thereafter, Gopalji gave me the sum of about Rs. 2100. I left the place & handed over the entire amount to Rajindar Babu."

This part of the confessional statement is, as I have already shown, corroborated by the seizure of the document (EX. I) from the premises of the firm Khublal Sah Gopal Sah at Mehnar. There is in addition the significant circumstance that on 17-7-1947 EX. I was seized from the person of the resp. after he was arrested. It is important to notice that the booklet contained blank forms, of which p. 17 contained the apparent signature or initial of "R. Prasad," who was Grain Control Officer at that time. Upon the evidence I am of opinion that the charges u/ss. 468 & 471, I. P. C. have been established against the resp.

[10] Mr. Nageshwar Prasad stressed the argument that even if the resp. had filled up the columns of the Store Issue Order there was no evidence to the effect that the resp. had forged the signature of R. Prasad therein, that therefore as a matter of law the Ct. ought not to hold that the offence of forgery was committed by the resp. Learned counsel reld. upon *In the matter of the petn. of Riasat Ali*, 7 Cal. 352 : (8 C. L. R. 572) in which Garth C. J. stated :

"The 'making' of a document, or part of a document, does not mean 'writing' or 'printing' it, but signing or

otherwise executing it; as in legal phrase we speak of 'making an indenture' or 'making a promissory note,' by which is not meant the writing out of the form of the instrument but the sealing or signing it as a deed or note. The fact that the word 'makes' is used in the section in conjunction with the words 'signs,' or 'seals' 'executes,' or makes any mark 'denoting the execution, &c.,' seems to me very clearly to denote that this is its true meaning. What constitutes a false document, or part of a document, is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some person to the document, or part of a document, knowing that the seal or signature is not his, & that he gave no authority to affix it. In other words, the falsity consists in the document, or part of a document, being signed or sealed with the name or seal of a person who did not in fact sign or seal it."

But the authority of this case is weak. It has been dissented from in *Emperor* v. *Krishtappa Khandappa*, 27 Bom. L. R. 599 : (A. I. R. (12) 1925 Bom. 327 : 26 Cr. L. J. 1014) in which a reference was made by the learned Chief Justice to the definition of a document in S. 29 of the Code which has not been considered in the Calcutta case. In my opinion, the word 'makes' in S. 464 does not mean anything other than 'makes,' that is to say, creates or brings into existence. This opinion is consistent with illustration (c) to S. 464 which is to the following effect :

"*A* picks up a cheque on a banker signed by *B*, payable to bearer, but without any sum having been inserted in the cheque. *A* fraudulently fills up the cheque by inserting the sum of ten thousand rupess. *A* commits forgery."

Reference may also be made to the English case *Queen* v. *Batmar* (1845) 1 Cox. C C. 186 in which a party received a blank cheque signed, with directions to fill in a certain amount, & to appropriate the instrument to a certain purposes, but the party fraudulently filled in a different amount, & devoted the cheque to other purposes. It was held that forgery was committed. Erle J. stated:

"If a cheque is given to a person with a certain authority, the agent is confined strictly within the limits of that authority & if he chooses to alter it, the crime of forgery is committed. If the blank cheque was delivered to him with a limited authority to complete it & he filled it up with an amount different from the one he was directed to insert & if, after the authority was at an end he filled it up with any amount whatever, that too would be clearly forgery."

In the present case I am of opinion that the resp. committed forgery by filling in the blank columns in the Store Issue Order which he knew was signed not by R. Prasad but by Rajindar who forged the signature of "R. Prasad" therein. According to the confession the resp. had sold the forged order to Bhagwan Lal & Gopalji for a sum of Rs. 2,100. In my opinion this part of the confession has been corroborated & must be accepted as true. It follows that the resp. is guilty of the charge u/s. 468 & of the charge u/s. 471, I. P. C.

[11] As regards the charges u/ss. 419 & 420 I. P. C. the matter is somewhat different. Bhagwan Lal deposed that on 25-4-1947 the resp. produced the Store Issue Order & obtained delivery of 145 maunds of rice on account of Bakatpore Multipurpose Co operative Society. Bhagwan Lal said that he did not know the accused in dock from before. According to the witness the Market Inspector Shambhunath Choubey was present when the rice was delivered. It is significant that the Marketting Inspector has not been examined on behalf of the prosecution. It is admitted by the Police Inspector (P. W. 12) that in case No. 12 of July 1947, Bhagwan Lal & Gopal Sah were accused along with Shambhunath Choubey, Marketing Inspector. This circumstance throws doubt on the evidence of Bhagwan Lal. I am inclined to think that Bhagwan Lal was in the conspiracy to cheat Govt., that the resp. had produced the forged Store Issue Order before Bhagwan but no actual delivery of rice was made to the resp. but the latter was given a sum of money as illegal profit. This conclusion is supported by the admissions of the three cartmen (P Ws. 1 to 3). These witnesses were examined for the prosecution to prove that on 25 4-1947 the respt. had conveyed the bags of rice on bullockcart to Mehnar pethia. P. W. 1 denied in Ct. that Bhagwan Lal had engaged the cart. But before the police he admitted that Bhagwan Lal engaged his cart. P. W. 2 similarly deposed that the resp. had engaged the cart, Bhagwan Lal was not even present in the Gola at the time the cart was engaged. Before the police, however, the witness had stated that Bhagwan Lal had engaged the carts. P W. 3 likewise denied in Ct. that Bhagwan Lal engaged the cart but before police he made a contradictory statement. All the cartmen admitted that it was not a pothia day & so the learned Judge rightly held that it was improbable that the bags of rice should have been taken to Mehnar pethia & stocked under a pipal tree on a day on which no bazar was held. For these reasons, the story of Bhagwan Lal that he had delivered the rice to the resp. after the Store Issue Order was presented cannot be accepted as true. But it is manifest that the evidence of Bhagwan Lal supports the confessional statement of the resp. that on the alleged date the latter had presented the forged Store Issue Order. If Bhagwan Lal had known the resp. from before, if he was cognizant of the fact that the Store Issue Order was forged, if he had conspired with the resp. & other persons to cheat the Govt. it is impossible to hold that the charges u/ss. 419 & 420, I. P. C. as framed by the lower Ct. have been established against the resp. In my opinion the lower Ct. has rightly acquitted the resp. of these two charges.

[12] But for reasons already recorded I would set aside the judgment of the lower Ct. & convict the resp. of the charges u/ss. 468 & 471, I. P. C. & sentence him to rigorous imprisonment for a period of three years on each of these charges. The sentences of imprisonment will be concurrent.

[13] I would accordingly allow this appeal.

[14] **Narayan J.**—I agree.

D.H. *Appeal allowed.*

A. I. R. (38) 1951 Patna 90 *[C. N. 14.]*

RAI J.

Ram Prasad Sao—Petnr. v. *Shankar Prasad Sao—Opp. Party.*

Cr. Revn. No. 1127 of 1950, D/- 8-9-1950.

(a) Cr. P. C. (1898), S. 144—Order—Effect.

The order u/s. 144 has no evidentiary value on the question of possession. [Para 5]

Anno. Cr. P. C., S. 144, N. 8.

(b) Cr. P. C. (1898), S. 144—Order spent—Revn. where the order under S. 144 had spent its force the H. C. refused to interfere in revn. [Para 5]

Anno. Cr. P. C., S. 144, N. 15.

Bhabananda Mukherji—for Petnr.; Sudhir Chandra Ghosh—for Opp Party.

Order.—This is an appln. by the petnr. who was the second party to a proceeding u/s. 144, Cr. P. C. before Mr. G. V. Lele, Mag. first class, Purulia. The proceeding was started in connection with the breach of the peace concerning the possession of plot Nos. 1101 & 1093 of village Brojopur. Proceedings were started on a police report dated 26-6-1950. On 30-6-1950, the learned Mag. issued notices to both the parties forbidding them not to go upon the land. After they had both filed their show-cause petns. he heard the parties & passed an orderon 22-7-1950, in the following words:

"I find the second party in possession, make the order dated 30-6-50 absolute against the first party & rescind it as against the 2nd party."

[2] The first party thereafter moved the Dy. Comr. of Manbhum under the provisions of S. 144, sub-cl. (4), Criminal P. C. The learned Dy. Comr., however, set aside the order of the Mag. & substituted the following order in its place:

"In the result the order of the learned lower Ct. is set aside & the appeal is allowed. The order u/s. 144, Cr. P. C. is modified. It will be in force against the opposite party."

[3] Mr. Mukherji on behalf of the petnr. urges that the order of the learned Dy. Comr. of Manbhum is without jurisdiction. According to him he had no jurisdiction to order rescinding the second party from going near the land, because the words of sub cl. (4) of S. 144 do not authorize him to pass that order. He contended that the words "rescind or alter any order made under this section' mean rescinding or altering the order passed against the party by the Mag. It does not authorise the Dy. Comr. to pass an order against the present petnr. as he has done in the present case. In support of his contention he relies upon the case of *Ganpat Singh* v. *Emperor*, 3 Pat. L. J. 287: (A. I. R. (5) 1918 Pat. 672: 19 Cr. L. J. 880), where a D. B. of this Ct. held that the Mag. cannot substitute an order of his own forbidding the successful party before the first Ct. from going near the land or exercising a right of possession. He also reld. upon the case of *Sevugan* v. *Karuppan*, A. I. R (24) 1937 Mad. 487: (38 Cr. L. J. 864) & also on an unreported case of *Dewan Singh* v. *Deo Narain Singh*, Cr. Revn. No. 737 of 1950, decided by Ramaswami J. on 28-8-1950: (A. I. R. (38) 1951 Pat. 253).

[4] On behalf of the opposite party, the judgment reported in *Ganpat Singh's case*, 3 Pat. L. J. 287: (A. I. R. (5) 1918 Pat. 672: 19 Cr. L. J. 880) is sought to be distd. on the ground that in that case initial notices had not been issued against both the parties; it had been issued against only one of the parties, the Mag. exercising his power u/s. 144 sub-cl. (4), Cr. P. C. wanted to make the rule absolute against that party which had not been even asked to show cause. In this case he submitted that the initial notices had been issued against both the parties & both of them had an opportunity to show cause. In this connection he also refd. to the case of *Panchkesar Kuar* v. *Madho Singh*, 1938 P. W. N. 709), laying down the same proposition of law as is laid down in the case of *Ganpat Singh* v. *Emperor*, 3 P. L. J. 287: (A. I. R. (5) 1918 Pat. 672: 19 Cr. L. J. 880). Mr. Ghosh appearing for the opposite party also refd. to the case of *Manu Khan* v. *Sundar Singh*, 15 P. T. L. 216: (A. I. R. (21) 1934 Pat. 313) where a D. B. of this Ct. had refused to interfere with an order passed by a Mag. u/s. 144, sub-cl. (4), Cr P. C., altering the order passed by the first Ct. & substituting another order of himself. Though the facts & circumstances of that case are not on all fours with the facts & circumstances of the present case, the principle of law enunciated in that case, according to him, supports his contention.

[5] In the present case, I find that the notices were issued on 30-6-1950 & the order has spent its force by this date. Though there are several decisions of this Ct. wherein it has been held that this Ct. has power to interfere even if the order has spent its force, yet in the facts & circumstances of the present case I am not inclined to do so. It may be noted that the order passed u/s. 144, Cr. P. C., is a sort of temporary measure to prevent the breach of the peace. It has been repeatedly held by this Ct. that the order has no evidentiary value on the question of possession. In the present case neither the order passed by the first Ct. nor that of the learned Dy. Comr. can be used as evidence of possession whenever the question of possession has to be decided in future.

[6] In the circumstances of the present case it is fit & proper that if any subsequent dispute crops up, the Mag. will be well advised to start proceedings u/s. 145, Cr. P. C. to effectively decide the question of possession of one party or the other on legal evidence led in the case.

[7] With these observations the petn. is rejected.

D.H. *Petition rejected.*

✻ A. I. R. (38) 1951 PATNA 91 (C. N. 15)

SPECIAL BENCH

SHEARER, REUBEN AND DASS JJ.

Kameshwar Singh and others, Pltfs.-Petnrs. v. The State of Bihar and another, Opp. Party.

Title Suits Nos. 1 to 3 of 1951 with Misc. Judicial Cases Nos. 230 to 234, 237 to 244, 246 to 254, 257, 261 to 264, 266, 268, 270 to 277, 287 to 290 & 297 of 1950, D/- 12-3-1951.

✠(a) *Bihar Land Reforms Act (30 of 1950), Pre. — Subject-matter of Act whether within legislative powers of State — Const. Ind., Art. 246 (3), Sch. VII, List II, Entry 36.*

Per Special Bench: The subject-matter of the Bihar Land Reforms Act, 1950 is within the legislative jurisdiction of the Bihar Legislature. The Act is covered by Entries 36 of List II and 42 of List III in Sch. VII, Const. Ind. It is therefore, not 'ultra vires' of the Legislative powers of the State Legislature so far as the subject matter of Legislation is concerned. (Paras 16, 62, 82)

✠(b) *Bihar Land Reforms Act (30 of 1950), Pre. — Validity of Act — Const. Ind., Arts. 14, 31 (1) and 31 (2).*

Per Special Bench: The Bihar Land Reforms Act, 1950, is unconstitutional and void as it contravenes the provisions of Art. 14, Const. Ind. (Paras 16, 62, 106)

Per Shearer, J: Art. 31 (4) does not debar the Ct. from entering into the question of compensation in order to decide whether or not the Bihar Act offends against Art. 14. (Para 16)

Per Reuben and Das, JJ: The assent of the President under Cl. (4) of Art. 31 protects the Act from challenge on the ground that it contravenes the provision of Cl. (2) of that Article; it does not protect the Act from attack on a ground not arising under Cl. (2), Art. 31. (Paras 62, 108)

Per Reuben, J: There can be no challenge regarding the adequacy of the compensation or the correctness of the principles prescribed by the Act for determining the compensation or of the manner in which that Act directs that the compensation is to be given. The assent of the President under Art. 31 (4) does not protect the Act if there is no provision for compensation. (Para 62)

(c) *Bihar Land Reforms Act (30 of 1950), Pre. — Nature of Act — Const. Ind., Sch. VII, List II, Entry 36.*

Per Shearer, J: The Act is not in the nature of a tax law. It cannot be regarded as a law imposing a levy on capital. (Para 12)

Per Das, J: In its true nature, scope and effect, the Act is acquisition of property in the sense that it transfers to the State the entire or totality of interests of proprietors and tenure-holders in land and of the mtgees. and lessees of such interests, even though such transference be part of a general scheme of land reform or a stage in the evolution of a new system of land tenure: it is still acquisition of property, though different from acquisition 'simpliciter'. (Para 75)

(d) *Const. Ind., Art. 14 — "Equal protection of the laws" — Class legislation is forbidden but not classification.*

Per Reuben and Das, JJ: The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction: it merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. Mathematical nicety and perfect equality are not required, and one who assails classification must carry the burden of showing that it does not rest upon any reasonable basis. A I R (38) 1951 S C 41, Rel on. (Paras 42, 98)

Per Reuben, J: Classification is permissible, but it must be on a principle which bears some relation to the object sought to be attained. The object of the Bihar Land Reforms Act, 1950, is the giving of compensation, that is, something which will represent the value in money of the property that is being acquired. It is not a reasonable classification which assesses that value at twenty times the net income in the case of the poor man and three times in the case of the rich man. The principle of progressive taxation does not apply to compensation for land acquired. (Para 53)

(e) *Const. Ind., Art. 31 (2) — "Public purposes" — Absence of.*

Per Reuben, J: If the Ct. is satisfied that there is no public purpose in the acquisition of property forming the subject-matter of an Act, the assent of the President cannot save the legislation. (Para 33)

(f) *Const. Ind., Art. 31 (2) — "Public purpose" — Meaning of.*

Per Reuben and Das, JJ.: Taking into consideration Entries 33 of the Union List, 36 of the State List and 42 of the concurrent List, the intention of the Constitution appears to be to give the term "public purpose" a wide and comprehensive meaning. Therefore, acquisition for a purpose of the Union or for a purpose of a State is acquisition for a public purpose. So also is the nationalization of land. (Paras 37, 40, 89)

(g) *Const. Ind., Art. 31 (2) and Govt. of India Act, 1935, S. 299 (2) compared — "For compensation" and "for the payment of compensation".*

Per Shearer, J.: Cl. (2), Art. 31, Const. Ind. substantially reproduces sub-s. (2), S. 299, Govt. of Ind. Act, 1935. However, the substitution of the words "for compensation" in Cl. (2) for the words "for the payment of compensation in sub-s. (2) indicates that compensation may now be given not in money, but in bonds, or possibly, in land, the reason being that when large numbers of individuals are to be expropriated under a scheme of land reform it may be impossible to compensate them in money, and that when large numbers of cultivators are to be expropriated in order that land may be taken for such a public purpose as the construction of a dam it may be in their own interest to receive land elsewhere rather than money. (Para 4)

(h) *Const. Ind., Art. 31 (2) — Compensation — What it should be.*

Per Shearer, J.: Although, under the Constitution compensation need not necessarily be in money, nevertheless, whatever compensation is made, it should be something which could fairly be said to be equivalent in value to the property taken over by the State. (Para 9)

Per Reuben, J.: Compensation represents the money value of the property acquired. It is usual to give the owner something more than the value of the property by way of a solatium for the compulsory nature of the acquisition. The use of the word "compensation", is to be taken in the accepted sense as representing the money value of the property. The giving of compensation for property compulsorily acquired was consd. to be of sufficient importance to be guaranteed by a provision in the Part of the Constitution dealing with Fundamental Rights. It does not appear likely that the Constituent Assembly would by that very provision empower the Legislature to give as compensation such amount as it thinks proper without any reference to the real value of the property acquired. (Para 50)

(i) Const. Ind., Art. 31 (2) and (4), Sch. VII, List II, Entry 36 and List III, Entry 42 — Power of Legislature to legislate for acquisition without legislating for compensation — Cl. (2) whether "provision" within meaning of Cl. (4), Art. 31.

Per Reuben, J.: The legislative heads contained in Entry 36 of the State List and Entry 42 of the Concurrent List empower the Legislature to pass laws relating to the subject-matter contained therein without placing any restrictions on the powers of the Legislature within the limits of those heads. As these entries stand, it would be open to the Legislature to legislate for acquisition without at the same time legislating about compensation. The limitation which makes provision about compensation essential is imposed by Cl. (2) of Art. 31 read with Cl. (2), Art. 13. This requirement is, therefore, a "provision" of Cl. (2), Art. 31 coming within the meaning of that word used in Art. 31 (4) and (6). (Para 29)

(j) Const. Ind., Art. 31 (2) — Provision in enactment laying down principles of compensation whether justiciable by Ct.

Per Reuben, J.: The power given to the Legislature to legislate with regard to the principles on which compensation for the property acquired is to be determined does not make the matter of compensation non-justifiable. The fact that this matter has been included in Part III of the Constitution and that it has been thought necessary to provide protection to such legislation under Cls. (4) and (6) of Art. 31 shows that the matter was intended to be justiciable. What Cl. (2) requires is provision for compensation and the Cts. are entitled to enquire, subject to Cl. (4), whether the payment for which the impugned legislation provides is "compensation" within the meaning of this clause. (Para 51)

But an investigation of the question whether the sums determined by the principles laid down in the Bihar Land Reforms Act are compensation or not is an investigation which the Ct. is precluded from making by reason of the assent under Cl. (4), Art. 31 of the Constitution. (Para 60)

(k) Const. Ind., Art. 31 (4) — "Reserved for the consideration of the President" — Object of reservation of bill.

Per Shearer, J.: The reservation of bills for the assent of a higher authority is not a mere matter of procedure. It is an essential and important part of the law-making machinery set up by the Constitution. When bill is reserved for the consideration of the President it is the duty of the law Officers to examine it with a view to ascertaining whether, in the first place, it is unconstitutional in whole or in part, and, secondly, whether, if assent is given to the bill the differences between the law obtaining in the State to which the bill applies and the law obtaining in other provinces will be merely differences in point of detail rather than in principle. (Para 14)

(l) Const. Ind., Art. 31 (4) — Assent of President to reserved bill — Propriety of, if can be questioned.

Per Shearer, J.: The broad principles on which assent is intended to be given to, or withheld from, a reserved bill are not specifically laid down in the Constitution. The result of this is that it is not open to the Cts. to question the propriety of the President's action. (Para 15)

(m) Const. Ind., Art. 31 (4) — Construction of.

Per Das, J.: Cl. (4), Art. 31 seeks to cut down a fundamental right and must be construed strictly. The words "notwithstanding anything in this Constitution" occurring in that clause cannot have the effect of enlarging the operative portion of the clause which, in clear terms, mentions one and one ground only, namely, the ground arising out of the contravention of the provisions of Cl. (2), Art. 31. (Para 107)

(n) Const. Ind., Art. 31 (4) — "Bill pending at the commencement" — Identity between bill and Act.

Per Reuben, J.: Cl. (4), Art. 31 does not require that the Act as passed as State Legislature must be identical in every detail with the bill that was pending at the commencement of the Constitution. There may be alterations during the passage of the bill; but these alterations should not be such as to make the Act distinguishable from the bill which was pending. (Para 22)

(o) Const. Ind., Art. 31 (4) — "Law" meaning of.

Per Reuben, J.: The word "Law" in Art. 31 (4) seems to have been used as a compendious way of describing legislation which has passed through the Legislature of a State and has not yet received assent. The protection given by Art. 34 (4) assumes that the "law" is open to attack and therefore is not law in the strict sense. (Para 34)

Per Das, J.: The word "law" in Art. 31 does not appear to have been used exactly in the same sense in all the clauses; the context makes that quite clear. In Cl. (1), Art. 31, the expression "law" means a valid law. (Para 97)

✠ (p) Const. Ind., Art. 246 — State Legislature whether acts as agent of Parliament — 'Delegatus non potest delegare' — Applicability of.

Per Special Bench: The maxim 'delegatus non potest delegare' has no application to sovereign legislative bodies under the written constitution. Within the limits of their jurisdiction the State Legislatures have plenary powers. The conferment of the power on the State Legislatures to make laws for the State and for State purposes in relation to the matters enumerated in the lists of Sch. VII is not in any sense to be exercised by delegation from or as agents of the Parliament. Within these limits of subjects and area the State Legislatures are supreme and have the same authority as the Parliament. (1883) 9 A C 117; 4 Cal 172 (P C), Rel. on.

The Bihar Land Reforms Act (30 of 1950), though it leaves by its provisions contained in S. 32 (2) read with S. 43 (1) (p) a fairly wide discretionary power to the State Govt. in the matter of form and manner of compensation, settles the legislative policy, lays down the limits of the discretion but confides to the State Govt. certain powers to carry out the details of the objects of the enactment. The Act is not, therefore, invalid on the ground of delegated legislation. (Paras 13,, 59, 112, 113)

(q) Const. Ind., Art. 246 — Affirmative and negative power of Legislature.

Per Das, J.: The power of the Legislature to legislate on a subject, particularly in a written federal constitution where there must be a nice balance of jurisdiction, can be looked at from two points of view — affirmative and negative. The conferment of the power is the affirmative aspect; a restraint or restriction on the exercise of the power is the negative aspect. The limitation on the power of legislation may arise by reason of restrictions imposed within the entry which confers the powers; and when the question of exceeding such a restriction arises, it is relevant to consider the true nature and character of the legislation. (Para 74)

(r) Const. Ind., Sch. VII, List II, Entry 18 — Scope of.

Per Shearer, J.: Legislation regarding land acquisition does not come within the general Entry 18 of List II. (Para 21)

(s) *Const. Ind., Sch. VII, List II, Entry 36 — "Subject to the provisions of Entry 42" — Meaning and construction.*

Per Shearer, J.: The words "subject to the provisions of Entry 42 of List III" which occur at the end of Entry 36 of List II indicate the existence of a condition or restriction on the power of the State Legislature. When a State Legislature ignores that condition or restriction, its purported law is a nullity. But the condition or restriction is not imposed by the concluding words in the entry. It is really imposed by Cl. (2), Art. 31. (Para 7)

Per Reuben, J.: The words "subject to" have the effect of excluding from the legislative power under Entry 36 in the State List, matters covered by Entry 42 of the Concurrent List. This interpretation is consistent with the meaning of this term in Entries 17, 22, 23, 24 and 33 of the State List and a similar limitation on the powers of the State Legislature seems to be imposed in entries Nos. 11, 26, 27 and 57 of the State List. (Para 25)

Per Das, J.: The expression "subject to" means that principles of compensation, etc. which have to be laid down for compulsory acquisition of property by reason of the provisions in Part III of the Constitution relate to and are a matter within the concurrent field of legislation, and a law relating thereto made by a State will attract the operation of Art. 254 of the Constitution. (Para 82)

In T. S. Nos. 1 and 2 and M. J. C. Nos. 230 and 233; P. R. Das, Sir S. M. Bose and S. P. Srivastava, Balbhadra Prasad Singh; P. Jha and Girindra Mohan Misra; In M. J. C. No. 234, P. R. Das Kanhaiyajee; In M. J. C. No. 239; M/s. P. R. Das and S. C. Mazumdar; In M. J. C. Nos. 240 and 241; P. R. Das, Jyotimoy Ghose, S. S. Rakshit and Salil Kumar Ghosh; In M. J. C. Nos. 243 and 244; P. R. Das, Balabhadra Prasad Singh, P. Jha and K. Ahmad; In T. S. No. 3 and M. J. C. No. 231; N. C. Chatterjee, Sambu Prasad Singh and S. K. Chaudhury; In M. J. C. No. 232; R. S. Chatterjee and A. K. Chatterjee; In M. J. C. Nos. 237, 238 and 242; Ragho Saran Lall; In M. J. C. Nos. 246 and 250; J. C. Sinha and S. S. Rakshit; In M. J. C. No. 247; J. C. Sinha and Rameshwar Prasad Singh; In M. J. C. No. 248; J. C. Sinha and H. K. Banerji; In M. J. C. Nos. 249, 251, 270, 276, 277; J. C. Sinha and S. Mustafi; In M. J. C. No. 262; J. C. Sinha and S. K. Chaudhury; In M. J. C. Nos. 274 and 275; J. C. Sinha, S. Mustafi and D. K. Sinha; In M. J. C. No. 252; Baldeo Sahay, Raghunath Jha and Padmanand Jha; In M. J. C. No. 254; Baldeo Sahay; Nakuleshwar Prasad, Shivanugrah Narain Singh; In M. J. C. No. 257; S. C. Mazumdar and S. K. Mazumdar; In M. J. C. No. 261; Prem Lall; In M. J. C. No. 253 Girish Nandan Sahai Sinha, Jamuna Prasad Chaudhury, and Bindeshwari Prasad; In M. J. C. No. 287; B. C. De, J. M. Ghosh, S. S. Rakshit and S. K. Ghosh; In M. J. C. Nos. 288 to 290; B. C. De, J. M. Ghosh and S. S. Rakshit; In M. J. C. Nos. 263 and 264; T. K. Prasad; In M. J. C. No. 272 to 273; Balbhadra Prasad Singh; In M. J. C. No. 266; L. M. Ghosh, Kanhaiyaji; In M. J. C. No. 268; Harnarayan Prasad; In M. J. C. No. 271; G. N. Mukherjee; In M. J. C. No. 297; S. Anwar Ahmad and Chandi Prasad, for the Petnrs — The Attorney-General of India, The Advocate-General of Bihar and G. N. Joshi, Alladi Kuppaswamy, Bajrang Sahai, Shyam Nandan Prasad Singh, S. C. Chakravarty and B. B. Saran, for the State.

SHEARER, J: On 9-5-1950, the Bihar Land Reforms Act, XXX (30) of 1950, having passed through the Legislative Assembly & the Legislative Council, was reserved by the Governor for the consideration of the President The President assented to the Act on 11-9-1950. On 24-9-1950, the Govt. of Bihar issued a Notfn. u/s. 1 (3) of the Act declaring that on the day following the estates & tenures of three leading 'zamindars' in the province, namely, Sir Kameshwar Singh, the Maharajadhiraja of Darbhanga, his brother Raja Bahadur Visheshwar Singh & Raja Bahadur Kamakshya Narayan Singh of Ramgarh, should pass to & become vested in the State. These three 'zamindars' at once gave notice u/s. 80, Civil P. C. of their intention to institute suits & also applied to this Ct. for an injunction to restrain the Govt. of Bihar from taking possession of their property. 'Ad interim' injunctions were granted, &, in due course, suits were instituted & were withdrawn to be tried by this Ct. in the exercise of its extraordinary original civil jurisdiction. The applns. have been heard along with the suits as also have a number of similar applns. made by other 'zamindars', who apprehend that notfn. may issue declaring that their estates & tenures also shall pass to, & become vested in, the State. The following issues in the suits were framed:

"1. Is the Bihar Land Reforms Act XXX (30) of 1950, 'ultra vires' the legislative powers of the State of Bihar?

2. Is the said Act unconstitutional, unreasonable, inoperative & void for the reasons mentioned in para 5 of the plaint or any of them?

3. Have the properties of the pltf. vested in the State of Bihar under the said Act? If so, have they so vested under the authority of law?

4. Can any question regarding compensation or principles for the determination & giving of compensation be raised in this suit in view of the assent of the President under Cl. (4), Art. 31 of the Constitution?

5. Is the pltf. entitled to any of the reliefs prayed for?"

It will be convenient to deal with these issues together as, in effect, two points only are raised, namely, whether the Bihar Land Reforms Act, 1950, is or is not a constitutional law, &, if it is not a constitutional law, whether this Ct. is, by reason of Art. 31 (4) of the Constitution, disentitled to pronounce it to be unconstitutional, & to give the pltfs. the reliefs for which they ask.

(2) It is not necessary to set out in any detail the provisions of the impugned Act. The Act is described in the preamble as an Act

"to provide for the transference to the State of the interests of proprietors & tenure-holders in land & of the mtgees. & lessees of such interests including interests in trees, forests, fisheries, jalkars, ferries, hats, bazars, mines & minerals."

It is enough for our present purpose to say that certain rights of proprietors & tenure-holders are to be extinguished, & other rights are to be modified. The rent payable by 'raiyats' to the proprietors of estates or the holders of tenures, is in future to be paid to the State, & not to the proprietors or tenure-holders, this right of the latter being wholly extinguished. Proprietors & tenure-holders are, on the other hand, to be permitted to continue in possession of their homesteads, their 'zerat' & other agricultural or horticultural land actually cultivated by them, of any 'golas', factories or mills situated on their property & belonging to them, & of any mines which they themselves are working. They are to hold their homesteads free of rent, but are to be assessed to a fair & equitable rent so far as any other land of which they are permitted to continue in possession is concerned. Similarly, if they themselves are actually working any mines & are permitted to continue to do so, they must take a lease from the State, the terms of which are either to be settled by agreement or are to be determined by a Mines Tribunal. Any mines which are not being work-

ed by the proprietors or tenure-holders themselves, but by their lessees, are to vest in the State, & the lessees are, except in certain circumstances, to be granted leases by the State. Compensation is to be given to proprietors & tenure-holders who are expropriated, & to these provisions in the Act I will refer in some detail later. Generally speaking, therefore, it may be said that the purpose of the Act is to substitute a 'raiyatwari' for a 'zamindari' system of land tenure, or, alternatively, to prevent any individual from deriving an income, which is an unearned income, from land, & to ensure that the whole of the land in the State shall belong to, & be in the possession of, the persons who actually cultivate it.

(3) The Const. Ind. recognises the inviolability of private property except in so far as the property of an individual may be required for the purposes of the Union or State or for some other public purpose, in which case compensation must be paid, in order that the individual expropriated may not be compelled to contribute to expenditure incurred by the State more than any other citizen does. Otherwise private property is sacr anct. To this, however, there is one important exception, namely, land or rather certain rights in land. The British Parliament, in enacting the Govt. of India Act, 1935, also recognised that land did not stand on precisely the same footing as other kinds of property. Sub-s (1) of S. 299, Govt. of India Act, 1935, embodied the general principle that no person should be deprived of his property save by authority of law. Sub-s. (2) provided that when property, or property of certain descriptions, belonging to an individual was taken over for public purposes compensation had to be paid. Sub-s. (3) dealt with bills

"making provision for the transference to public ownership of any land, or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue."

When a comparatively small parcel of land belonging to an individual or to a small number of individuals is acquired for public purposes there is ordinarily no great difficulty either in determining the market-value of the land or in compensating the individual or individuals expropriated in money. When, however, some far-reaching scheme of land reform is undertaken, involving the extinguishment or modification of rights in land belonging to a great number of private individuals, it must necessarily be a matter of greatest difficulty, both to determine what is adequate compensation & to pay such compensation immediately, & in money. It is one thing to expropriate an individual, & it is quite another to expropriate an entire class of individuals, & legislation which has as its aim the latter object may have to be based on principles somewhat different to those underlying legislation which has as its aim the former object. That this was recognised by the British Parliament, & that it quite deliberately dealt in Sub-ss. (2) & (3), S. 299, Govt. of India Act in a very different manner with what it considered to be very different subjects of legislation is made clear by what is contained in para. 369 of the Report of the Joint Committee on Indian Constitutional Reforms. This is as follows:

"369. We think that some general provision should be inserted in the Constitution Act safeguarding private property against expropriation, in order to quiet doubts which have been aroused in recent years by certain Indian utterances. It is obviously difficult to frame any general provision with this object without unduly restricting the powers of the Legislature in relation particularly to taxation; in fact, much the same difficulties would be presented as those which we have discussed above in relation to fundamental rights. We do not attempt to define with precision the scope of the provision we have in mind, the drafting of which will require careful consideration for the reasons we have indicated; but we think that it should secure that legislation expropriating, or authorising the expropriation of, the property of particular individuals should be lawful only if confined to expropriation for public purposes & if compensation is determined, either in the first instance or on appeal by some independant authority. General legislation, on the other hand, the effect of which would be to transfer to public ownership some particular class of property, or to extinguish or modify the rights of individuals in it, ought, we think, to require the previous sanction of the Governor General or Governor (as the case may be) to its introduction; & in that event he should be directed by his Instrument of Instructions to take into account as a relevant factor the nature of the provisions proposed for compensating those whose interests will be adversely affected by the legislation."

(4) It will be seen that Sub-s. (3), S. 299 provided that no such bill or amendment as was refd. to in it should be "introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion." Para. XVII of the Instrument of Instructions to the Governor forbade him to assent in His Majesty's name to "any bill which would alter the character of the Permanent Settlement" & required him to reserve it for the consideration of the Governor-General. At the same time the Governor was instructed not to withhold his sanction to the introduction of the bill, the object of this being, no doubt, to ensure that the merits or demerits of the bill should be fully discussed in the Legislature. Para XXVII of the Instrument of Instructions to the Governor-General similarly forbade the Governor-General to assent to "any bill passed by a Provincial Legislature & reserved for his consideration which would alter the character of the Permanent Settlement" & directed him to reserve it for the signification of His Majesty's pleasure. From a very early period in the history of the British Colonial Empire it was the practice for instructions to be issued to Colonial Governors requiring them to reserve bills passed by Colonial Legislatures for the signification of His Majesty's pleasure. Ss. 55 & 57, British North America Act, 1867, & Ss. 58 & 60, Commonwealth of Australian Constitution Act, 1900, made it obligatory on the Governor-General in certain cases to withhold his assent to legislation & made provision as to the circumstances in which such legislation should or should not take effect. The reason why this constitutional machinery was invented was to ensure that colonial legislation should not be such as to conflict with legislation by the British Parliament or to endanger imperial interests or lead to international complications. In enacting Sub-s. (3), S. 299, Govt. of India Act, 1935, & in issuing the instructions to the Governor-General & to Governors of Provinces to which I have refd., the British Parliament was making use of this constitutional machinery for another & somewhat different purpose, namely, to ensure that, if the Permanent Settlement was abolished or substantially altered, it should only be on conditions which were not unfair to the successors-in-interest of the persons with whom in 1793 the British Govt. had entered into a contract or agreement. Cl. (1), Art. 31 of the Constitution reproduces Sub-s. (1) of S. 299, Govt. of India Act,

1935. Cl. (2) of the Article substantially reproduces Sub-s. (2), S. 299. It is true that under Cl. (2) property of any kind may now be acquired or requisitioned by the State, & it is also true that the substitution of the words "for compensation" for the words "for the payment of compensation" indicates that compensation may now be given not in money, but in bonds, or possibly, in land, the reason, no doubt, being that when large numbers of individuals are to be expropriated under a scheme of land reform it may be impossible to compensate them in money, & that, when large numbers of cultivators are to be expropriated in order that land may be taken for such a public purpose as the construction of a dam, it may be in their own interest to receive land elsewhere rather than money. But, with these exceptions, the alterations made in Sub-s. (2), S. 299 are purely verbal. There is nothing in Art. 31 corresponding to Sub-s. (3), S. 299, but Cl. (3) requires that any expropriatory law must be reserved for the consideration of the President & must receive his assent before it can take effect. If Cls. (1) to (3) in Art. 31 had stood alone & had not been folld. by Cls. (4) to (6) proprietors of estates held under the Permanent Settlement would now have been in a very much stronger position than they were in under the Constitution in force prior to 15-8-1947. Under that constitution the terms on which they were liable to be expropriated was a matter in the last resort for the decision of a British Secretary of State or the British Cabinet. Once the Act rendering them liable to be expropriated had received the assent of His Majesty, the adequacy or even the validity of the provisions contained in it providing for compensation could not have been challenged in the Cts. Under the Constitution, however, if Cls. (4) to (6) had not been inserted in Art. 31, they could have appealed to the Cts. challenging the validity of the law on, among other grounds, that the compensation provided represented less than the market-value of their property. A multiplicity of suits would have been instituted & quite possibly each suit would have had to be decided on its own particular facts. Cls. (4) to (6) were, it is clear, inserted in order to prevent an impasse of this kind arising. Another consideration, however, may also have weighed with the Constituent Assembly.

(5) In the history of India an interregnum occurred between 15-8-1947, & 26-1-1950. The Constitution under which we lived during this brief period was very different to the Constitution under which we had lived hitherto. The conduct of the Governor-General & of the Governors of Provinces ceased to be regulated by the instructions which had been passed under the "Royal Sign Manual & Signet" to their predecessors. Ss. 13 & 53, Govt. of India Act, 1935, were deleted. So also were the concluding words of S. 76 (1) requiring the Governor-General, in certain circumstances, to reserve bills for the signification of His Majesty's pleasure thereon. The result, clearly, was that if the impugned Act, which was introduced into the Legislature on 30-12-1949, had been introduced & passed into law sooner than it was, or if the constitution had been adopted later than it was, the impugned Act would, at the commencement of the Constitution, have been an existing law which, however, would have become void in consequence of what is contained in Art. 13 (1) of the Constitution. The Constituent Assembly, in enacting Cl. (4), Art. 31, obviously desired to ensure that the time which the State Legislature had spent over the enactment of the impugned Act should not necessarily be altogether wasted, & that in certain circumstances, or subject to certain conditions, the Act should not be void. What exactly these circumstances or conditions were is the narrow point which we are called upon to decide. It is extraordinary that when the point at issue is so narrow a one, & when barely twelve months have elapsed since the adoption of the Constitution, the arguments before us should have occupied some ten days, & should have involved the citation of one hundred & fifty or more authorities. The expln. is to be found in the fact that the Indian Constitution is not, as were originally most written Constitutions, the Constitution of a political entity, which, until immediately before it was adopted, had had no separate existence. Nor is it, as was the American Constitution, a tiny organism intended to expand & grow with the passage of time into something very much bigger & perhaps something very different. India was already, & had for long been, a highly centralised State. The Constitution embodied in the Govt. of India Act, 1935, was, if I may change the metaphor, an elaborate piece of machinery so designed that with the removal or replacement of comparatively few parts, it was capable of being transformed into a Constitution similar to that of the dominions of the British Commonwealth. In point of fact, the necessary alterations were made in 1947. In 1950, however, while the basic structure of the machinery was left more or less intact, certain new devices were introduced into it which were borrowed from constitutional machinery of a radically different pattern. It is in consequence of this that Mr. P. R. Das for the pltfs. has been able to put forward, with a great show of plausibility, most of the arguments which have been addressed to us. In dealing with these arguments it is essential to bear in mind how the Constitution came to be evolved. If we fail to do so, we may be in danger of clutching at the shadow & missing the substance.

(6) It is well recognised in the United States of America & also in the Dominions of Canada & Australia that a law made in excess of the power conferred on the Legislature is not a law at all. Any one may disregard it. No doubt the individual who disregards it may find himself involved in litigation, but the law is not a valid (sic; invalid?) law unless & until it is pronounced by a Ct. of law to be unconstitutional. It is void. Relying on this principle Mr. P. R. Das contends that the impugned Act is not, & never has been, a law as there is no power conferred by the Constitution on the Bihar Legislature to enact it, & that, in consequence, the Govt. of Bihar is not entitled to rely on it as authorising it to take possession of his clients' estates & tenures. The subject-matter of the impugned Act is not, Mr. Das vehemently contends,

"Land, that is to say, rights in or over land, land tenures including the relation of landlord & tenant, & the collection of rents; transfer & alienation of agricultural land; land improvement & agricultural loans; colonization." (Item 18 in List II).

There are, it is said, no 'latifundia' in Bihar. The pltfs. are not the owners of vast demesne lands, which they cultivate through an army of labourers, paying subsistence wages to the labourers & appropriating & selling at great profit the crops grown by them. It may, perhaps, be that some of the 'parti' land, of which the State is to take possession, may prove to be culturable, & a small number of landless men may be settled on it. But it is not even suggested that the powers taken by the State under the impugned Act will result in a more equable distribution of land, or in any

very considerable area of land becoming available for distribution to cultivators who, for one reason or another, have been reduced to the position of landless labourers. Nor, Mr. Das contends, with almost equal vehemence, is the subject-matter of the impugned Act

"Acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III'. (Item 36 in List II)."

The Govt. of Bihar has, it is said, taken powers under this Act, & intends, to expropriate nearly one & a half million of property owners. The scheme is so vast that, in the nature of things, it cannot possibly be carried to completion in the immediate, or even the near, future. Years must elapse before the great number of estates & tenures are taken over by the State, & during this period, hundreds of thousands, & possibly, several millions, of citizens, whose sole means of livelihood is the income which they derive from their property, will be left in suspense, unable to raise money on the security of it & not knowing at what precise moment they are to be dispossessed. That, Mr. Das says, is not acquisition but spoliation, & that that is so, is made still more clear by the provisions contained in the Act relating to the payment, or rather to the partial cancellation, of debts secured on estates & tenures. In this part of his argument Mr. Das relied strongly on 'Gallagher v. Lyan', (1937 A C 863: (106 L J P C 161). The question that arose in that case was whether or not the Legislature of Northern Ireland had exceeded the power conferred on it by the British Parliament, or to be more strictly accurate, whether, in enacting certain legislation, it had acted in contravention of an express prohibition contained in the Act constituting it. The decision, however, can have no application unless it is conclusively shown either that the subject-matter of the impugned Act comes under one or other of the entries between entry No. 1 & Entry No. 96 in the Union List or that it does not or cannot come under any entry in the State List, in which latter case, of course, the subject-matter would come under entry No. 97 in the Union List, which is the residuary entry, & Parliament alone would have been competent to enact it. Mr. Das did not & could not make any serious attempt to do this. As was pointed out by the Judicial Committee in 'Megh Raj v. Allah Rakhia', 74 I A 12 at p. 20: (A I R (34) 1947 P C 72) land is primarily a matter of provincial concern, & it is abundantly clear that it was the intention of the Constituent Assembly, as it had also been the intention of the British Parliament, that bills of which the object was land reform should be introduced in, & passed into law by the Provincial Legislature, & not by the Central Legislature. The provisions in the Instruments of Instructions to the Governor-General & to the Governors of Provinces show that this was so in the one case, & Cl. (4), Art. 31 of the Constitution shows that this was so in the other. We may not be entitled to refer to the debates which took place in the Constituent Assembly when Art. 31 was finally adopted, for the purpose of construing any part of that Article, but we are entitled to refer to them for the purpose of ascertaining why so very extraordinary provisions as Cls. (4) & (6), Art. 31 were inserted in the Constitution at all. (See 'Attorney General for Alberta v. Attorney General for Canada', (1939) A C 117: (A I R (26) 1939 P C 53).

(7) Once it is established that it was the intention of the makers of the Constitution that land reform should be a subject for provincial legislation, it seems to me of little moment whether the impugned Act was made in exercise of the one power or in exercise of the other, or whether it was made partly in exercise of the one & partly in exercise of the other. I agree, however, with the learned Attorney General that Entry 18 is more directly applicable than Entry 36. The impugned Act, no doubt, states that estates & tenures are to pass to & become vested in the State, but as I have already pointed out, in actual fact certain rights of proprietors & tenure-holders are to be extinguished & others are to be modified, & so far as part at least of their property is concerned, their possession is not to be disturbed. S. 299, Govt. of India Act, was drawn in the way it was because the British Parliament drew a distinction between the acquisition of land for public purposes & schemes of land reform involving the transference of land to public ownership. It contemplated that schemes of land reform would necessarily involve the payment of compensation to persons adversely affected, but it did not contemplate that the insertion of provisions in a land reform bill for the payment of compensation would, of necessity make the bill also a bill for the compulsory acquisition of land. In fact it was in order to prevent such a contention being raised in the Cts. that sub-s. (3), S. 299 was enacted, & that instructions were issued to the Governor General to reserve for the signification of His Majesty's pleasure bills which involved an alteration in the character of the Permanent Settlement. It is not without significance that the word 'etc.' appears in the marginal note to S. 299 after the words "compulsory acquisition of land". Under the Constitution contained in the Govt. of India Act, 1935, compulsory acquisition of land was a provincial subject. There was no similar entry in the Federal legislative List, presumably because S. 127 required the provinces to acquire land compulsorily for the purposes of the Central Govt. Under the Constitution power is conferred both on the Union & on the States, & for that reason both are also given power to legislate regarding the principles to be followed in assessing compensation for land which is compulsorily acquired. An elaborate & very subtle argument has been addressed to us by Mr. Das, which is based on the words "subject to the provisions of Entry 42 of List III" which occur at the end of Entry 36. I agree with Mr. Das that these words indicate the existence of a condition or a restriction on the power of the State Legislature, & that when a state Legislature ignores that condition or restriction, its purported law is a nullity, but I cannot agree that the condition or restriction is imposed by the concluding words in the entry. It is really imposed by Cl. (2), Art. 31 of the Constitution. The same condition or restriction exists on the power of Parliament itself, & yet there is nothing in Entry 33 in List I to show that.

(8) Under the Constitution the validity of a law may be challenged in one or other of two ways. It may be challenged on the ground that in enacting it the Legislature which did so has usurped the jurisdiction of another Legislature. It may also be challenged on the ground that in enacting it the Legislature has exercised a jurisdiction which the Constitution forbade either it or any other Legislature to exercise. The Articles in the Constitution which confer on the citizens of India certain fundamental rights are themselves a fundamental law, that is a law which does not so much confer rights or impose duties, as a law which lays down the 'norm' or standard by which the validity of all other laws is to be tested. The impugned Act deals with a subject over which the State Legislature had legislative

jurisdiction. Has it, nevertheless, so dealt with the subject as to transgress one of the fundamental laws embodied in the Constitution? Certain affidavits have been put in by or on behalf of the Maharajadhiraja of Darbhanga. One of these affidavits shows that a part of the estates of the Maharajadhiraja was acquired under sale deeds and that the aggregate of the consideration money given for the sale deeds was Rs. 89,96,528, & that, so far as another part of the property affected by the impugned Act is concerned, the Maharajadhiraja is in possession as a usufructuary mtgee., the aggregate amount of the money secured by the various mtge. deeds being Rs. 59,16,282. Another affidavit shows that the amount of compensation which will be payable to the Maharajadhiraja will be Rs. 8,89,452/-. The same affidavit shows that the arrears of rent due to him amount in the aggregate to Rs. 30,80,967. Now, under the impugned Act these arrears of rent are to be collected by the State, & the State is to pay over to the Maharajadhiraja only one half of the amount due. In effect, therefore, the Maharajadhiraja will receive no compensation whatever for the property of which the State deprives him, & will, in addition, be deprived of a part of the arrears of rent due to him. An affidavit has been put in on behalf of the petnr. in M. J. C. 239 of 1950 stating that, while under the scheme adopted in the impugned Act, the gross assets of his estate amount to Rs. 10,06,259, the deductions to be made will aggregate somewhat more than that namely, Rs. 10,26,108. No counter affidavits have been put in, & the learned Attorney General could only say that in particular cases, the results arrived at might be very inequitable, but that, nevertheless, as the impugned Act laid down the principles on which compensation was to be assessed, its validity could not be challenged. Clearly, however, it is necessary to inquire whether the principles of compensation embodied in the Act are, in fact, principles of compensation in the sense that, by the application of them, the compensation which proprietors & tenure-holders will receive will be what the law regards as compensation. Fletcher Moulton L. J. in 'In re, an Arbitration between Lucas & the Chesterfield Gas & Water Board', (1909) 1 K B 16 at p. 29: (77 L J K B 1009), explained the meaning of the expression "compensation" thus:

"The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent i.e. that which they were worth to him in money. His property is, therefore, not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, & not on the value to the purchaser, & hence it has from the first been recognised as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market-value of his lands as they stood before the scheme was authorised by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, & any & every element of value which they possess must be taken into consideration in so far as they increase the value to him."

(9) Now, in arriving at the net annual income of the proprietor or tenure-holder who is to be expropriated, the Act directs that from his gross annual assets deductions shall be made on account of the expenses of management & on account of works of benefit to the raiyats. The former deduction may amount to as much as 20 per cent, & the latter to as much as 12½ per cent of the gross annual assets. In certain parts of the province proprietors or tenure-holders may be under a legal obligation to maintain irrigation works but so far as I am aware, no proprietors or tenure-holders are under a legal obligation to expend as much or nearly as much as 12½ per cent of the gross receipts from their estates or tenures on such a purpose. Again, while the impugned Act takes into account the income derived from fruit-bearing trees, it does not take into account the value of standing timber, still less, the existence of mineral deposits. As is shown by the affidavit which has been put in on behalf of the Maharaja of Chotanagpur, who is the petnr. in M. J. C. 232 of 1950, such deposit may be very valuable indeed. Finally, the number of years' purchase is to vary from twenty years in the case of the smallest proprietors & tenure-holders to three years in the case of the pltfs. It is quite obvious that it is impossible for the latter to find any investment which can give them 33 1/3 per cent or indeed anything approaching that. Although, as I have pointed out, under the Constitution compensation need not necessarily be in money, nevertheless, it was, I have no doubt, intended by the Constituent Assembly when it enacted Art. 31 (2) that whatever compensation was made, it should be something which could fairly be said to be equivalent in value to the property taken over by the State.

(10) Mr. P. R. Das also attacked the impugned Act on the ground that the purpose for which the estates & tenures of his clients were to be taken over was not, in law, a public purpose. There is, Mr. Das points out, no recital in the impugned Act that it is enacted for a public purpose, nor is it possible to collect from what is contained in it the existence of any public purpose. All that the impugned Act does, Mr. Das says, is to augment the public revenues. Practically the whole of the culturable land in the province is, it is asserted, already in the possession of professional cultivators, who pay a rent which is a fair rent, & who enjoy fixity of tenure & freedom of transfer. They will continue to pay the same rent as they do at present. It will merely be collected by another agency which may be less efficient & more ruthless than the old, & in order to meet the ever-growing expenditure of the State, rents may soon have to be raised. On such grounds, Mr. Das invites us to say that, in the words of Lord Dunedin in 'Hamabai v. Secy. of State', 42 I A 44: (A I R (1) 1914 P C 20), the scheme embodied in the impugned Act is not one "which will redound to public benefit". In this part of his argument Mr. Das also reld. on 'Province of Bombay v. Khushaldas S. Advani', A I R (37) 1950 S C 222: (1950 S C R 621), & on a number of passages in Cooley's Constitutional Limitations. It is one thing to say that the judicature is entitled to question the correctness of a decision by the executive that the purpose for which in exercise of a power conferred on it by the Legislature, it proposes to acquire property is a public purpose, which was what was decided in the 'Province of Bombay v. Khushaldas S. Advani', A I R (37) 1950 S C 222: (1950 S C R 621), & another to say that when, as here, the Legislature has itself decided to acquire property, the judicature may question the propriety of its decision, at all events, in cases where the legislation embodies a scheme designed to advance the general welfare. As to the American decisions cited, these cannot be of assistance, &, in fact, are merely likely to mislead. Under the American Constitution property of all kinds, including land, is sacrosanct. In Kent's Commentaries, Edn. 14, Vol. II, p. 340, it is stated that

"if they (i.e. the Legislature) should vacate a grant of property, or of a franchise, under the

pretext of some public use or service, such cases would be gross abuses of their discretion, & fraudulent attacks on private right, & the law would be clearly unconstitutional & void."

But under our Constitution land, or certain kinds of landed property, are not sacrosanct. On the contrary, the Constituent Assembly, by enacting Cls. (4) & (6), Art. 31, gave their express approval to legislation abolishing the Permanent Settlement, & extinguishing certain rights in land. Whatever our own views may be, we must, in my opinion, regard the scheme embodied in the impugned Act as a scheme intended to benefit the public. We cannot shut our eyes to the patent fact that the makers of the Constitution regarded it as likely to do so. Whatever construction may eventually have to be put on the expression "public purpose" in Art. 31 (2) is immaterial. We are, in my opinion, estopped from saying that the acquisition of estates & tenures is not an acquisition for such a purpose. That it is, has been decided by the Constituent Assembly itself.

(11) Finally, it has been contended by Mr. Das that the impugned Act is void as it is a piece of legislation which is expressly prohibited by Art. 14 of the Constitution. Art 14 is based on, & largely reproduces, the language used in the fourteenth amendment to the Constitution of the United States of America. That amendment was adopted after the war of succession because, in the southern States, the negro population had never enjoyed equality with the white race in the Cts. of law. The American Constitution is a very brief instrument couched in very general language, & the framers of it & also the framers of the amendments were content to leave a very great deal to the Cts. In the period of very nearly a century which has elapsed since the fourteenth amendment was adopted the language used in it has been interpreted in an evergrowing variety of ways in order to make it applicable to the rapidly changing conditions of American life. How far these decisions may legitimately be called in aid in construing Art. 14 of our Constitution remains to be seen. The S. C. in 'Charanjit Lal v. Union of India', (A I R (38) 1951 S C 41), has, however, held that Art. 14 prohibits, as the S. C. of America has long since decided that the fourteenth amendment prohibits, legislation which is discriminatory & is hostile to an individual or class of individuals. Legislation which affects only one particular class is permissible so long as it does not discriminate against individuals within the class, & so long as it can be said that such a class does, in fact, exist; that is, that there is something to distinguish the individual citizens composing it from all other citizens. It is, I think, clear that proprietors of estates & tenure-holders may be said to form a distinct class, in that they all enjoy an income, which is an unearned income, & that they derive this unearned income from land, which economists have uniformly regarded as standing on a different footing from other kinds of property. The impugned Act, however, discriminates between individuals falling within the class which it affects. In fact, it divides the class into a large number of sub-classes, & to these sub-classes differential treatment is meted out. It is quite impossible to say that this subdivision is based on any rational grounds. On what principle, for instance, ought a proprietor or tenure-holder, whose net income is Rs. 20,000, to be given eight years' purchase, while a proprietor or tenure-holder, whose net income is Rs. 20,001 is given only six years' purchase? At one end of the scale are a vast number of proprietors & tenure-holders who are to be allowed twenty years' purchase. It is common knowledge that many small proprietors have a relatively large area of 'bakasht' land in their estates & that, in recent years, they have had difficulty in collecting such rents as are payable to them. As the net income is to be computed, not on the income actually received, but on the income that ought to have been received if all 'raiyats' had paid their rent, such small proprietors, who are to retain their 'bakasht land, are likely to receive adequate, & possibly more than adequate, compensation. At the other end of the scale are the great 'zamindars', who are to be allowed three years' purchase, &, as I have already pointed out, the result, at least in certain cases, will be that these men will not merely be deprived of their land, but will also be deprived of considerable sums of money which are due to them. The impugned Act confers power on the excutive to take over estates & tenures as & when it chooses. The Bihar Zamindari Abolition Act, 1948, which the impugned Act replaced, contained a provision that when any estate or tenure belonging to a particular category was taken over, all other estates & tenures belonging to that category should be taken over also. I can well understand that such a provision may have led to administrative difficulties. Nevertheless, the provision in the impugned Act, which confers the wide power it does on the executive, is clearly discriminatory in character, & there is an obvious danger that when the smaller estates come to be taken over & decisions as to whether particular estates should or should not be taken over have to be made on the recommendation, in the ultimate analysis, of quite subordinate officials, grave abuses may result. The difficulty which has been experienced in other countries in carrying out reforms, the object of which is to ensure that the whole of the land in the State will be in the possession of professional cultivators who are likely to make the best use of it, has been the difficulty of providing the funds necessary to expropriate the landlords. The charges for interest on loans raised in order to provide the money necessary were, it has usually been felt, likely to endanger the financial stability of the State.

(12) One extraordinary feature in the scheme embodied in the impugned Act is that it makes no provision whatever for the raising of money. The Legislature, it is clear, are optimistic enough to hope that this reform may conceivably be effected without raising any great loan. The conclusion, to my mind, is irresistible that the intention is to take over the great estates in the province, paying no compensation or the most inadequate compensation, & out of the considerable profits which are likely to be derived from them, to take over, in course of time, the remaining estates & tenures. In other words, a comparatively small minority belonging to this particular class are to be expropriated without compensation or with the most inadequate compensation in order that, when the great majority are expropriated, they may receive compensation which will not be inadequate & may, quite possibly, in many cases, be more than adequate. The learned Attorney-General was unable to deny that this amounted to discrimination of a very flagrant kind, but put forward two arguments in support of his contention that nevertheless the validity of the impugned Act could not be assailed, or at all events, could not be assailed at present. In dealing with 'Yick Wo v. Peter Hopkins', (1886) 30 Law Edn 220: (118 U S 356), on which Mr. P. R. Das had strongly relied, the learned Attorney-General pointed out that in that case there had already been discrimination, & suggested that, unless & until an estate or tenure had been actually taken over, the owner was not entitled to come to the Cts. & ask for relief. It is, no doubt, true that Mathews J. relied on the manner

in which the ordinance had been administered as going to show that

"though the law itself be fair on its face & impartial in appearance, yet, if it is applied & administered by public authority with an evil eye & an unequal hand, so as practically to make unjust & illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

It is, however, clear that the ground on which the petnrs. were ordered to be released from custody was that the ordinance, under which they had been imprisoned, was held to be unconstitutional & void the decision was later so understood by the S. C. itself. (Vide 'Homer Adolph Pleasy v. John H. Ferguson', (1896) 41 Law Ed. 256: (162 U S 537). The other argument put forward by the learned Attorney-General is that the impugned Act is, or is very much in the nature of a tax law, & that tax laws may operate inequitably, & yet nevertheless be constitutional. It seems to me quite impossible to say that the impugned Act is or is in the nature of a tax law. It cannot be regarded as a law imposing a levy on capital & clearly, if it is so regarded, it is a levy, not on the whole capital of the persons affected, but only on a portion of their capital. The great 'zamindars', or some of them, may have invested much of the income which they have derived from their estates in stocks & shares, or in businesses of various kinds, & if they are now deprived of their estates, may still have ample means left to them. On the other hand, there must be other 'zamindars' belonging to the middle classes, who have used their savings to enlarge their 'zamindaris'. Such men may have little or no other property, & may, when their 'zamindaris' are taken over, be reduced to poverty. In other words, if the impugned Act can at all be regarded as in the nature of a tax law imposing a levy on capital, it operates with such patent inequality that it would be void under Art. 14 of the Constitution. It will serve no useful purpose to refer to the numerous American decisions which were cited, as for the most part they were cited in the S. C. & have been dealt with in the decision of the S. C. on which I rely. I ought, however, to make an exception in the case of two decisions, namely, 'George O. Campbell v. State of California', (1906) 50 Law Ed 382: (200 U S 87) & 'Jessie Norton Torrence Magoun v. Illinois Trust & Savings Bank', (1898) 42 Law Ed 1037: (170 U S 283). The question that arose in each of these cases was the validity of State legislation imposing a graduated tax on inheritances. The legislation was, in each case, upheld. But the ground on which it was upheld was that the State, in exercise of its plenary power to regulate inheritances, could take more from one class of heir than from another. Brewer J. who delivered dissenting judgment in the earlier case, (that is, 42 Law Edn. 1037 at pp. 1045, 1046 — Ed.) observed:

"It seems to be conceded that if this were a tax upon property such increase in the rate of taxation could not be sustained, but being a tax upon the succession it is held that a different rule prevails,"

& concluded his judgment with the following remarks:

".....by this statute upon property passing in accordance with its statutes a tax is imposed; a tax unequal because not proportioned to the amount of the estate; unequal because based upon classification purely arbitrary, to wit, that of wealth — a tax directly & intentionally made unequal. I think the Constitution of the United States forbids such inequality."

I must confess that I have found it difficult to understand & have been unable to discover, why Art. 14 was inserted in the Constitution. So far as I am aware, there was, in 1950, no class of persons anywhere in India who were subjected to such discrimination before the law, as, in 1867, the victorious Northern States apprehended the negro population of the Southern States might be subjected to. Art. 14 occurs at the beginning of a series of five articles which appear under the heading "Right to Equality" &, having regard to the succeeding articles, I should have been disposed myself to think that what the makers of the Constitution had in mind were potential evils of the mind which the American people aimed at when they adopted the fourteenth amendment. There are a number of articles in the Constitution which rather express the ideals of the makers than aim at existing evils or evils which are likely to arise. The S. C. has, however given to the article the extended interpretation which has been put on the fourteenth amendment in modern times in America. I am bound by that decision & am constrained to hold that the impugned Act is unconstitutional as it transgresses Art. 14.

(13) S. 32 (2) of the impugned Act provides that the amount of compensation shall be paid in cash or in bonds, or partly in cash & partly in bonds. The bonds shall be either negotiable or non-negotiable & non-transferable & be payable in forty equal instalments & shall carry interest at two & a half 'per centum per annum'. Cl. (p), S. 43 (1) empowers the Provincial Govt. to make rules as to the proportion in which compensation shall be payable in cash & in bonds & the manner of payment of such compensation. These provisions are in direct contravention of Cl. (2), Art. 31 which requires that if payment is to be made in bonds, this provision must be made in the Act itself, & not in rules made under the Act. It is immaterial that the Provincial Govt. may intend to make payment in cash, but cannot at the moment foresee whether it may not eventually be necessary to make payment in bonds, & it is also immaterial that, if the Act were to provide for payment in money & had later to be amended, amendment might be a matter of perhaps insuperable difficulty. Mr. P. R. Das, however, does not invite us merely to say that these provisions in the impugned Act transgress Cl. (2) of Art. 31. Mr. Das invites us to go a very great deal further. What the learned Counsel contends is that so wide a delegation of legislative power, whether contained in an Act relating to the acquisition of property for public purposes, or in any other Act on a subject within the legislative jurisdiction of the State, is impliedly prohibited by the Constitution. Further, Mr. Das contends, these provisions are not severable from the rest of the impugned Act, & in consequence, if they are void, the Act as a whole is necessarily void, & the provisions contained in Cl. (4), Art. 31 cannot validate it. Reliance was mainly placed by Mr. Das on the recent 'decision of the S. C. in the 'State of Bombay v. Narottamdas', (A I R (38) 1951 S C 69)'. It is to be observed that the Act, the validity of which was there challenged, was an Act made under the Constitution embodied in the Govt. of India Act, 1935, & its validity was upheld on the ground that it was a piece of conditional legislation, that is, that the Legislature had itself decided what the law should be & had merely left it to an external authority to decide when the law should be brought into operation. There is nothing in the judgment to suggest ,for a moment, that, when an Act delegating legislative power cannot properly be described as a piece of conditional legislation, the delegation is void & the

Act is, or may be void as a whole. A decision which, in my opinion, is more in point is 'Archibald G. Hodge v. The Queen', (1883) 9 A C 117. That decision is, I think, more directly applicable because there was in it a real delegation of legislative power, that is, of a power to make rules which should have the force of law, & not merely a power to decide when, or in what local areas, an Act should come into operation. The validity of the delegation in that case was challenged on the ground that the Ontario legislature was a creation of the British Parliament, & the maxim 'delegatus non potest delegare' applied. In repelling this contention Sir Barnes Peacock made the following observations:

"It appears to their Lordships, however, that the objection thus raised by the applts. is founded on an entire misconception of the true character & position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, & that its legislative assembly should have exclusive authority to make laws for the Province & for provincial purposes in relation to the matters enumerated in S. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary & as ample within the limits prescribed by S. 92 as the Imperial Parliament in the plenitude of its power possessed & could bestow. Within these limits of subjects & area the local legislature is supreme, & has the same authority as the Imperial Parliament, or the Parliament of the Dominion would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make bye laws or resolutions as to subjects specified in the enactment, & within the object of carrying the enactment, into operation & effect."

There is clearly no room for the application of the maxim 'delegatus non potest delegare' under the Indian Constitution. If a delegation of legislative power is prohibited, it must be prohibited on quite another ground, namely, that in the Constitution, as indeed perhaps in every written Constitution, there is, to some extent, a separation of governmental powers, that is, of the legislature, the executive & the judiciary. The preamble to the Constitution no doubt states: "We the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic..... do hereby adopt, enact & give to ourselves this Constitution" in the same way as the preamble to the American Constitution states that "We the people of the United States.....:do ordain & establish this Constitution for the United States of America". But the Indian Constitution, like the Constitution of Canada, which in its preamble contains a recital that the "Provinces.....have expressed their desire to be federally united into one Dominion.....with a Constitution similar in principle to that of the United Kingdom" sets up a system of Parliamentary Cabinet Govt. as opposed to the system of Presidential Govt. in the United States. The contention has been put forward in several cases in the H. C. of Australia that the separation of governmental powers under the Australian Constitution imposes limitations on the power of the Legislature to delegate legislative power. The leading decision is the 'Victorial Stevedoring & General Contracting Co. Ltd. v. Dignan', (46 C L R 73), in which very elaborate judgments were delivered by Dixon, J. & Evatt, J. It will serve no useful purpose for me to add to the length of this judgment by referring in detail to the grounds on which the decision was based. The conclusion arrived at may be succinctly stated in the language used by Dixon, J. (p. 101 of the report) that

"a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject & a distribution of legislative, executive & judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law."

The power to delegate legislative power, it has been said, is implied in the idea of parliamentary sovereignty itself. As at present advise, I am not prepared to say that such restrictions as may exist on this power under the constitution are greater than the very limited restriction which, in the opinion of the H. C. of Australia, exists on the Australian Legislatures. The impugned Act is an Act on a subject within the legislative jurisdiction of the Bihar Legislature, & the provisions which are now assailed must be regarded as containing merely a delegation of a power to legislate on what the legislature considered were points of detail relating to the scheme embodied in the impugned Act. It may have been unwise of the Legislature to delegate so wide a power to the executive without imposing some restriction, so as itself to be able to control the exercise of the power as, for instance, by providing that any rules made should be laid before the Legislature & should not become operative unless & until they were confirmed by resolution. That, however, is a political matter, & not a matter for the Cts.

(14) I come now to what is the real crux of these cases, namely, the scope & the effect of Cl. (4), Art. 31 of the Constitution. It is easy enough to understand why Cl. (4) & also Cl. (6) were inserted in Art. 31. The reasons were substantially the reasons which had led the British Parliament, in enacting the Govt. of India Act, 1935, to deal in one way with land reform schemes which involved the payment of compensation & in another way with the acquisition of land for public purposes. It is a matter of the very greatest difficulty to assess the market-value of zamindari property which is extensive & which contains a great deal of standing timber or mineral deposits. The Cts. have found an almost insuperable difficulty in dealing with cases of this kind arising under the Bihar Money-lenders' Act. Again, in carrying out a scheme of land reform, such as is embodied in the impugned Act, it is, or may be, impracticable to give compensation in money or to give compensation which represents the market-value of the property taken over. Indeed, there may be valid reasons for giving compensation which does not represent by any means so much as the market-value, & is not in law an exact equivalent. It is obvious that if Cls. (4) & (6) had not been inserted in Art. 31, there would have been almost endless litigation. Mr. P. R. Das for the pltfs contends that the real object of the Constituent Assembly was to prevent such litigation, & that it was intended that the compensation which was to be given should be something which could fairly be described as compensation by any reasonable layman, although not perhaps by a lawyer applying the principles embodied in the Land Acquisition Act. It cannot possibly, it is said, have been intended that certain persons affected by the Act should receive nothing or practically nothing at all. Nor can it have been intended that one co-owner of a property should receive three-twentieths of the compensation given to another co-owner whose interest in the property was exactly the same as his. Mr. Das went on to contend that, in so far as the impugned Act purported to lay down prin-

ciples of compensation & yet produced results so palpably inequitable, it amounted to a fraud on the Constitution, & that this Ct. was not merely entitled but was bound to declare it to be unconstitutional. In putting forward this argument Mr. Das appears to have had in mind certain observations made by prominent members of the Constituent Assembly in the debate which took place when Art. 31 was adopted. But we are not entitled to turn to these debates in order to discover what the language used by the Constituent Assembly in enacting Cl. (4), Art. 31 means. As Latham C. J. observed in 'the State of South Australia v. The Commonwealth', (1941) 65 C L R 373.

"Members of Parliament frequently have differing opinions, not only as to the merits & real objects of Bills presented, but as to their meaning. Neither the validity nor the interpretation of a statute passed by Parliament can be allowed to depend upon what members, whether Ministers or not, choose to say in parliamentary debate."

Quite apart from this, this Ct. is, under the Constitution, either under a duty to interfere or under a duty to refrain from interfering. It has no discretion whatever in the matter. Mr. Das was on somewhat firmer ground when he contended that it was the duty of the advisors of the President to examine a land reform bill, or indeed any reserved bill from certain standpoints, & that, in this particular case, either there had been no such examination, or the President had been wrongly advised to give his assent. In so far as the assent of the President had been wrongly & improperly obtained, a fraud had, Mr. Das again said been committed on the Constitution, & this Ct., as the upholder of the Constitution, was bound to interfere. The reservation of bills for the assent of a higher authority is not a mere matter of procedure. It is an essential & important part of the law-making machinery set up by the Constitution. It is a device which has been used for many decades in the Constitutions of the colonies & dominions of the British Commonwealth & was used in the Constitution embodied in the Govt. of India Act, 1935. The position under the Indian Constitution is exactly the same as under the Canadian Constitution, the reason, no doubt, being that in India, as in Canada, the States & the Union have, in an extensive field, concurrent powers of legislation. From a very early period in the development of the Canadian Constitution it was recognised that when a bill was reserved for the consideration of the Governor General, it was the duty of the Law Officers of the Dominion to examine it with a view to ascertaining whether, in the first place, it was unconstitutional in whole or in part, &, secondly, whether, if assent was given to the bill the differences between the law obtaining in the province, to which the bill applied, & the law obtaining in other provinces would be merely differences in point of detail rather than in principle. (See Egerton's Federations & Unions in the British Empire, Foot-note 2 at p. 145). It may, I think, safely be assumed that, when bills are reserved by the Governors of the States in India for the consideration of the President, they are intended to be examined by the Law Officers of the Union from that standpoint. It is obviously desirable that, in matters over which the Union & the States alike have legislative jurisdiction, there should be a certain degree of uniformity in legislation & also that assent should not be given to a bill if there is any serious probability of its being eventually pronounced to be unconstitutional by the Cts. Cl. (3), Art. 31 suggests that bills relating to the acquisition of property for public purposes are intended to be subjected to a more than ordinarily careful scrutiny of this kind. Bills on other subjects in the Concurrent List, if assented to by the Governor, take effect, & if they do not conflict with provisions contained in an Act of Parliament, are constitutional. Bills relating to the acquisition of property for public purposes are, however, to be wholly inoperative unless & until they have been assented to by the President. The President, Mr. Das says, has given his assent to three land reform bills passed by three State Legislatures. There is no uniformity in this legislation, & so far as the impugned Act is concerned, it, in certain cases at least, provides for no compensation at all. Mr. Das concedes that a certain latitude was intended to be given to the President, as, for instance, if the provisions relating to compensation were such that a reasonable man untrammelled by considerations which would, or might, weigh with a lawyer, could, or might, consider them as fair to the zamindars & also to the State. But, Mr. Das contends, the latitude given has been greatly exceeded. The assent given to the bill has not been given in a proper exercise of the President's discretion in accordance with the principles which underlie the provisions of the Constitution relating to the reservation of bills.

(15) In this part of his argument Mr. Das refd. to 'Maharaja Luchmeswar Singh v. Chairman of the Darbhanga Municipality', 17 I A 90: (18 Cal 99 P C), & 'Mayor of Westminster v. L & N W Rly. Co.', (1905) A C 426 at p. 430 & 439. The former decision is not in point, & the question that arose in the latter was whether or not a statutory body has exceeded the limits of the authority conferred on it. There is a palpable difficulty in the way of applying that decision in the present case. The broad principles on which assent is intended to be given to, or withheld from, a reserved bill may be easily deducible, but they are not specifically laid down in the Constitution. The result of this is that it is not open to the Cts. to question the propriety of the President's action. Even under the pre-1947 Constitution, in which the Govenor-General was bound by his Instrument of Instructions to withhold his assent from certain bills, a bill assented to in contravention of these instructions could not be challenged in the Cts. as unconstitutional on that ground. (Vide S. 13 (2), Govt. of India Act, 1935). Again, whatever may have been said in the debates in the Constituent Assembly, I am unable to accept the contention that, when anything in the nature of a fraud has been committed on the Constitution, there is some inherent power in the Cts. to interpose & prevent the fraud taking effect. As I said a moment ago, this Ct. is under a duty either to pronounce the impugned Act as unconstitutional, or is, by reason of what is contained in Art. 31 (2), under a duty to refrain from doing so. It is, I think, clear that the Cts. were not intended to obey & enforce this Act in precisely the same manner as the Cts. in England are bound to obey & enforce any Act of Parliament. Before the Constitution was adopted the Legislature of the United Provinces had enacted a similar statute which, under the Constitution in force during the interregnum between 15-8-1947, & 26-1-1950, it undoubtedly had power to enact. Nevertheless, the Constituent Assembly, instead of inserting a proviso to Art. 13 (1) of the Constitution that the statute should not be void when the Constitution came into operation chose instead to enact Cl. (6), Art. 31. Even if it had been intended that the Act should be subjected to scrutiny by the Law Officers of the Union, still, if it was intended wholly to oust the jurisdiction of the Cts., one would expect provision to have been made in Art. 13 (1). On the other hand, it is equally clear that it was intended to

take away from the Cts. the power to pronounce that Act & also the impugned Act to be void on the ground that they do not "specify the principles on which, & the manner in which, compensation is to be determined & given". It may be said that a power conferred on the President to assent to & thereby render non-justiciable a bill which does not provide for compensation, or provides for wholly inadequate compensation, necessarily involves a power to assent to & thereby render non-justiciable a bill which gives relatively large compensation to one set of persons affected by it & little or no compensation to another set of persons. Art. 31 (4) does not, however, in terms, confer a power on the President, what it does is to take away a right of action from the citizen. The pltfs. may not be entitled to ask for relief on the ground that the principles of compensation specified in the impugned Act are such that they will, in fact, receive no compensation at all, nor on the ground that the impugned Act does not specify how payment is to be made to them of the amount which is euphemistically described as compensation. They ask, however, in the alternative, for relief on the ground that the impugned Act specifies different principles of compensation for different categories of persons affected by the Act, the subdivision of such persons into categories being wholly artificial or irrational one. They are not raising a purely technical point, but are complaining of a serious grievance. If the impugned Act had specified one set of principles of compensation applicable to all persons affected by the Act, & not different sets of principles, the pltfs. would have received much more & numerous other persons would have received much less. The bigger 'zamindars' are to be given little or no compensation in order that the smaller 'zamindars' may be given adequate compensation. That is an invasion of the pltfs' right to equality as that right has been interpreted by the S. C. I had occasion to point out earlier in this judgment that the basic principle on which compensation is given when land is compulsorily acquired for purposes of the State is that the owner shall not be compelled indirectly to contribute more than any other citizen to the expenditure incurred. There is nothing in Art. 31 (4) to suggest that the Constituent Assembly intended that in a scheme of land reforms involving the payment of compensation this basic principle might be completely ignored. If the State is prevented from invading the pltfs' right to equality, is it material that the State is indirectly prevented from invading their right to property which it could have invaded if it had not, in doing so, also invaded their right to equality? In my opinion, it is not. The one fundamental right cannot be said to be merely a part of the other; they are separate & distinct. It has also to be remembered that the impugned Act is not an Act which thet Legislature has made & the President has assented to in the belief that it is a constitutional law. It is an unconstitutional law enacted in the belief that the right of the pltfs. to challenge it & ask for relief from its operation has been taken away. The onus was on the State to show that this was so, & this onus has not been satisfactorily discharged.

(16) In the result, then, I would answer the issues which have been raised in the following manner:

"Issue No. 1: The subject-matter of the Bihar Land Reforms Act XXX (30) of 1950 is a subject-matter within the legislative jurisdiction of the Bihar Legislature.

Issue Nos. 2 & 4: The said Act is unconstitutional on the ground that it transgresses Art. 14 of the Constitution & on no other ground. Cl. (4), Art. 31 does not debar the Ct. from entering into the question of compensation in order to decide whether or not the impugned Act offends against Art. 14.

Issues 3 & 5: As the impugned Act is an unconstitutional Act, the properties of the pltfs. have not vested in the State of Bihar. The pltfs. are entitled to decrees declaring that the Act is unconstitutional & to an injunction restraining the defendants from taking possession of their properties. They are also entitled to their costs.

(17) In the Miscellaneous judicial Cases which have been heard along with the suits the 'ad-interim' injunctions which have already been issued, will be made permanent. The petnrs. in each of these cases are also entitled to their costs. The hearing fee is assessed at ten gold mohurs in each case.

(18) REUBEN, J.: I have had the advantage of perusing the judgment prepared by my learned brother Shearer, J. & agree with the conclusion at which he has arrived but, in view of the importance of the issues involved, I shall give my reasons separately.

(19) The points urged before us may most conveniently be dealt with under the following heads:

(1) What is the effect of the assent of the President under Art. 31, Cl. (4), Const. Ind.? Is the impugned Act entitled to protection by reason of such assent?
(2) Is the impugned Act void for an absolute want of legislative power?
(3) Is the impugned Act void as contravening the Fundamental Right guaranteed by Cl. (1), Art. 31 of the Constitution?
(4) Is the impugned Act void as contravening Cl. (2), Art. 31 by making no provision for compensation?
(5) Is the impugned Act void as contravening Cl. (2), Art. 31 by the absence of public purpose?
(6) Is the impugned Act void as contravening Art. 19, Cl. (1) (f) of the Constitution?
(7) Is the impugned Act void as contravening Art. 14 of the Constitution?
(8) Is the impugned Act void by reason of the delegation of legislative power?
(9) Is the impugned Act void as being a fraud on the Constitution?
(10) Is the impugned Act void as being unenforceable?

(20) Point No. 1: Cl. 4, Art. 31 provides that, if a bill pending in the Legislature of a State at the Commencement of the Constitution has been reserved, after it has been passed by the Legislature, for the consideration of the President & received his assent, then

"notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any Ct. on the ground that it contravenes the provisions of Cl. (2)."

The protection given by the assent under this clause is similar to that given by a certificate under Cl. (6), Art. 31 to a law of a State enacted not more than 18 months before the commencement of the Constitution, namely that it shall not be called in question in any Ct. on the ground that

"It contravenes the provisions of Cl. (2) of this Article or has contravened the provisions of Sub-s. (2), C. 299, Govt. of India Act, 1935."

The words "notwithstanding anything in this Constitution" do not appear in Cl. (6), for the purposes of this case it is not necessary to consider if the omission is intentional & what is the effect of it. Cl. (2), Art. 31 reproduces with modifications sub-s. (2), S. 299 & for convenience of comparison I place them side by side:

"Section 299 (2): Neither the Dominion Legislature nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any Co. owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired & either fixes the amount of the compensation, or specifies the principles on which, & the manner in which, it is to be determined.

Art. 31 (2): No property, moveable or immovable, including any interest in, or in any Co. owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired & either fixes the amount of the compensation, or specifies the principles on which & the manner in which, the compensation is to be determined & given."

Cl. (2) is wider in its application than sub-s. (2) in so far as it extends to property, movable & immovable, & to the requisitioning of property as well as to the acquisition thereof; this difference is irrelevant for the present enquiry. We are concerned with the two requirements which according to these enactments are essential for the validity of legislation of the type contemplated, namely (1) the acquisition or taking possession must be "for public purposes", & (2) the law must provide for compensation for the property taken & either fix the amount of compensation or specify the principles on which & the manner in which the compensation is to be determined & given. Are both these requirements "provisions" within the meaning of Cls. (4) & (6), Art. 31? This question was recently before a S. B. of this Ct. in 'Kameshwar Singh v. Province of Bihar', AIR (37) 1950 Pat 392: (29 Pat 790) & B. P. Sinha & Das, JJ. held that only the latter requirement is a "provision" of sub-s. (2), S. 299 within the meaning of Cl. (6), Art. 31. According to both these learned Judges the requirement of a public purpose is assumed by the sub-section to be inherent in compulsory acquisition &, therefore, the certificate under Cl. (6) protects only against a contravention of the second requirement. The position is exactly the same in Cl. (2), Art. 31, a conclusion in which I am supported by the observation of Mukherjee, J. in 'Charanjit Lal v. Union of India', AIR (38) 1951 S C 41 at p. 54: (1950 S C R 869):

"One limitation imposed upon acquisition or taking possession of private property which is implied in the clause is that such taking must be for public purpose."

Hence, the protection under Cl. (4), Art. 31 extends only to contraventions of the provision relating to compensation. Its operation even to this limited extent &, if it operates, the extent of its operation have been challenged before us; I will deal with the challenge in the appropriate place in my judgment.

(21) On behalf of the Govt., it has been urged by the learned Attorney-General that the question of public purpose & compensation does not arise & no protection under Art. 31, Cl. (6) is necessary. According to him, the impugned Act has been enacted not under Entry 36 of List II & Entry 42 of List III, but under Entry 18 of List II:

"Land, that is to say, rights in & over land, land tenures including the relation of landlord & tenant, & the collection of rents; transfer & alienation of agricultural land; land improvement & agricultural loans; colonization."

It is true that in 'Megh Raj v. Allah Rakhia', 74 I A 12: (AIR (34) 1947 P C 72), Lord Wright held that the corresponding Item No. 21 in List II, Govt. of India Act, 1935 should be interpreted in the widest sense & includes mtges. of land as an incidental & auxiliary subject, but he qualified his observation about wide construction by adding

"unless for some reason it is cut down either by the terms of item 21 itself or by other bars of the Constitution which has to be read as a whole."

In that case there was no express provision in the Constitution relating to mtges. Here, on the contrary, we have special items relating to acquisition of property both in the Union List & in the List relating to the State. Similarly, Guyer, C. J. in 'United Provinces v. Atiya Begum', 1940 F C R 110 at p. 134: (A I R (28) 1941 F C 16), observed that the subjects dealt within the three legislative Lists of the Govt. of India Act, 1935 are not "always" set out with scientific definition, & observed that

"each general word should be held to extend to all ancillary or subsidiary matters 'which can fairly & reasonably be said to be comprehended in it'."

We have, therefore, to read the Constitution as a whole & to take the entry in question along with the other entries. Doing so, what we find is a comprehensive entry under the main head "land" with sub-heads indicating what that main heading is intended to cover. Side by side with this we have special entries in all the three Lists relating to the acquisition or requisitioning of property. Similarly, in the Govt. of India Act, 1935, which immediately preceded the present Constitution, we find an entry for acquisition of land in addition to the entry "Land". Going further back to the earliest delimitation of Legislative powers between the Central & the Provincial Legislatures contained in the Devolution Rules, 1920, we find:

"Part I. CENTRAL SUBJECTS.

16. Civil law, including laws regarding status, property, civil rights & liabilities, & civil procedure.

44. Immovable property acquired by, & maintained at the cost of, the Governor-General in Council.

Part II. PROVINCIAL SUBJECTS.

8. Land revenue administration, as described under the following heads, namely:

(a) assessment & collection of land revenue;

(b) maintenance of land records, survey for revenue purposes, records of rights;

(c) laws regarding land tenures, relations of landlords & tenants, collection of rents;

(d) Courts of Wards, incumbered & attached estates;

(e) land improvement & agricultural loans;

(f) colonisation & disposal of Crown lands & alienation of land revenue; &

(g) management of Govt. estates.

15. Land acquisition: subject to legislation by the Indian Legisature."

Considering all this, the conclusion is irresistible that legislation regarding land acquisition does not come within the general Entry 18 of List II.

(22) Like the learned Attorney-General, Mr. N. C. Chatterji has argued that Art. 31 (4) has no application to the impugned Act but with the opposite result namely that protection necessary but it is not afforded by this provision. He relies on the fact that there are certain differences between the bill which was pending in the Bihar Legislature at the commencement of the Constitution & the bill as passed by the Legislature & assented to by the President. He has drawn our attention to four such differences. Cl. (3), Sub-cl. (1) of the bill then

pending included a proviso which required the Provincial Govt. when issuing a notfn. in respect of the estates or tenures of a proprietor tenure-holder, to issue simultaneously such notfn. in respect of the estates or tenures of all other proprietors or tenure-holders falling within that income group. There is no such proviso in the corresponding provision S. 3, sub-s. (1) of the Act. Secondly, the proviso to S. 13 of the Act empowers the State Govt. to entrust the management of the expropriated estates & tenures to a 'gram panchayat'. Under the corresponding proviso in the bill, the management could also be entrusted to a co-operative society. Thirdly, Cl. 32, Sub-cl. (2) of the bill made the compensation payable in bonds of guaranteed face value at maturity carrying interest at 2½ per cent, per annum with effect from a date to be prescribed by the State Govt. The corresponding provision of the Act makes the compensation payable in forty equal instalments & the interest runs from the date of issue. Fourthly, S. 33 of the Act & the corresponding provision in the bill fix different dates up to which 'ad interim' interest will run. Art. 31, Cl. (4) of the Constitution protects "any bill pending at the commencement of this Constitution 'which' has, after it has been passed....., been reserved for the consideration of the President & has received his assent". I do not see anything in this which requires that the Act as passed must be identical with the bill that was pending at the commencement of the Constitution. The alterations to which Mr. Chatterji has drawn our attention are not such, in my opinion, as to make the Act that was passed distinguishable from the bill which was pending.

(23) Point No. 2: According to Mr. P. R. Das, the legislative heads which cover legislation of this kind are Entry 36 of List II & Entry 42 of List III. I reproduce them below:

"LIST II — STATE LIST.

36. Acquisition or requisitioning of property except for the purposes of the Union, subject to the provisions of Entry 42 of List III.

LIST III — CONCURRENT LIST.

42. Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, & the form & the manner in which such compensation is to be given."

He urges that these two entries taken together make the existence of a public purpose & the payment of compensation for the property acquired the basis & foundation of the power of legislation given under these entries. He would interpret the words "subject to the provisions of Entry 42 of List III" as imposing upon legislation in exercise of the power conferred by Entry 36 the necessity of making a provision for compensation. On this line of reasoning, he contends, the existence of a public purpose & the necessity for provision regarding compensation are requirements imposed on such legislation by the legislative heads & any contravention of these requirements is open to challenge in spite of the President's assent under Cl. (4). He has, therefore, invited us to an examination of the question as to whether these ingredients are present in the case before us & has contended that both these ingredients being absent, there was no jurisdiction to legislate.

(24) Doubt is thrown upon Mr. Das's interpretation by Entry 33 of the Union List which is:

"Acquisition or requisitioning of property for the purposes of the Union."

Had the words on which Mr. Das has laid stress in Entry 36 of the State List been intended to impose the restriction suggested, we would have expected to find a similar provision in Entry 33 of the Union List. It has been suggested that the difference between Entry 33 of the Union List & Entry 36 of the State List is due to bad drafting & oversight, but this is not borne out by the Draft Constitution prepared by the Drafting Committee of the Constituent Assembly in 1948. This shows two entries in the original draft:

"UNION LIST No. 43: Acquisition or requisitioning of property for the purposes of the Union."

"STATE LIST, Entry No. 9: Compulsory acquisition of land except for the purpose of the Union."

there was no separate entry in the legislative Lists relating to compensation & the necessity of providing for compensation was imposed by Draft Art. 24, Cl. (2), which is substantially in the same terms as C. (2), Art. 31 of the Constitution. The Drafting Committee inserted draft Entry 35 in the Concurrent List:

"The principles on which compensation is to be determined for property acquired or requisitioned for the purpose of the Union or a State."

& recommended the addition to the entries in the Union & the State Lists of the words:

"Subject to the provisions of List III with respect to regulation of the principles on which compensation is to be determined for property acquired or requisitioned for the purposes of thte Union/a State."

The debates in the Constituent Assembly when these three entries in the Legislative Lists were considered & took their final form do not show why the suggested qualification of the entry in the Union List was dropped though the modification was made in the entry in the State List. A little consideration, however, makes the reason clear. The entries in the original form in which they came up to the Drafting Committee spoke only of "acquisition or requisitioning of property". The payment of compensation for property acquired would necessarily come under this entry. As the entries stood, it would have been open to the State Legislature legislating under the entry in the State List to provide for compensation for the property acquired &, the legislation being on a matter in the exclusive list appertaining to the State, the State Legislature would be free of control by the Indian Parliament. It was felt that this was not desirable &, therefore, the modification suggested by the Drafting Committee in the State Legislative List was accepted. On the other hand, the modification was not necessary in the entry in the Union List, since it would make no difference whether the Indian Parliament legislates regarding compensation in respect of acquisition for the purposes of the Union in the Union List or in the Concurrent List.

(25) On my construction of the entry in the State List, the words "subject to" have the effect of excluding from the legislative power under Entry 36 of the State List, matters covered by Entry 42 of the Concurrent List. This interpretation is consistent with the meaning of this term in Entries 17, 22, 23, 24 & 33 of the State List & a similar limitation on the powers of the State Legislature seems to be imposed in Entries Nos. 11, 26, 27 & 57 of the State List.

(26) Under the Govt. of India Act, 1935, the power to legislate in respect of acquisition was vested entirely in the Provincial Legislature under item 9 of the Provincial List: "Compulsory acquisition of land", the Dominion being given power u/s 127 of the Act to require the Province to acquire land on behalf of the Dominion for the purposes of the Dominion. Control over the Provincial Legislature was, however, retained by Sub-s. (3), S. 299, requiring sanction for introduction of the bill in the legislature, by the provisions in Ss. 75 & 76 for assent to bills & in S. 77 for the disallowing of acts & by directions to Governors &

the Governor-General in their Instruments of Instruction.

(27) Mr. Das approaches the interpretation of the qualifying clause in Entry 36 in another way. He points out that, whereas S. 299, Sub-s. (2) expressly related to legislative power & provided that the Legislature "shall not have power to make any law" for compulsory acquisition without complying with certain requirements, Cl. (2), Art. 31 provides that without such a provision no property "shall be taken possession of or acquired", words affecting the operation of the law. Therefore, he urges, Art. 31 merely lays down a fundamental right of a citizen of India & it is Entry 42 of the Concurrent List which places a limitation on the legislative power of the State Legislature. According to him, the fundamental right guaranteed by this clause, that no person shall be deprived of his property save by authority of law, assumes the existence of an authority to make such a law & that authority is to be sought for in Entry 36 of the State List read with Entry 42 of the Concurrent List. I am not impressed with the distinction pointed out between S. 299 & Art. 31. Art. 31 occurs in Part III of the Constitution dealing with Fundamental Rights & Art. 13, Cl. (2) in this Part provides that

"The State shall not make any law which takes away or abridges the rights conferred by this Part & any law made in contravention of this clause shall to the extent of the contravention be void." Reading this provision with the provisions of Art. 31, there is a clear limitation on the legislative powers of the State Legislature, & it is not necessary to derive this limitation from the entries in the legislative lists.

(28) An attempt has been made to distinguish between the expression "subject to" as occurring in Entries 11 & 26 of the State List & the same words in Entry 36. It is argued that in the case of the former two entries the field of legislation is narrowed down by the exclusion of certain subjects from that field, but there is no such subtraction in the case of Entry 36 & the power of the State under this entry to acquire or requisition property extends to all properties within the State. The legislative field, however, must not be considered as extending only in the dimension of space. The legislative field under a particular entry extends to different topics ancillary or cognate to the subject-matter named. Thus, in the case of acquisition under Entry 9 of the Provincial List under the Govt. of India Act, 1935, it would extend to provision for giving compensation for the land acquired. The qualification of the corresponding entry in the present Constitution excludes from the field of legislation the topic of compensation & there is a cutting down as in the case of Entries 11 & 26.

(29) In my opinion, the legislative heads contained in Entry 36 of the State List & Entry 42 of the Concurrent List empower the Legislature to pass laws relating to the subject-matter contained therein without placing any restrictions on the powers of the Legislature within the limits of those heads. As these entries stand, it would be open to the Legislature to legislate for acquisition without at the same time legislating about compensation. The limitation which makes provision about compensation essential is imposed by Cl. (2) of Art. 31 read with Cl. (2); Art. 13. This requirement is, therefore, a "provision" of Cl. (2), Art. 31.

(30) Another approach to the same conclusion, namely that there is no legislative authority for this Act, was attempted by way of Arts. 245 & 13 of the Constitution. Art. 245 provides that, subject to the provisions of the Constitution, the Legislature of a State may make laws for the whole or any part of the State, & Cl. (2), Art. 13 that all laws of the State which take away or abridge the Fundamental Rights conferred by Part III shall to the extent of the contravention be void. The argument is that the impugned Act is void because it contravenes the Fundamental Right to property under Cl. (2), Art. 31. The answer to the contention is that a limitation on the Fundamental Right is imposed by Cl. (4), Art. 31 & legislation will not be open to attack under Art. 13 if it keeps within that limitation.

(31) Yet another line of attack is that the Act is purely confiscatory & not covered by any entry in the Legislative Lists. In support of this contention reliance has been placed on an observation of Shearer, J. in 'Kameshwar Singh v. Province of Bihar', AIR (37) 1950 Pat 392 at p. 398: (29 Pat 790). That was a decision under the Govt. of India Act of 1935, the relevant legislative entry in which was: "Compulsory acquisition of land" (Entry 9 in List II) & the Act impugned was not in the nature of acquisition but merely sought to place 'zamindaris' under state management for a period of time. The Act with which we are concerned, on the other hand, is for the nationalisation of land. It seeks to put the Govt. in the place of the present owners of the land. It transfers to Govt. the rights of the proprietors & tenure-holders. Even where lands in their immediate possession are left with them the nature of their rights in the lands are altered; such rights as they had are transferred to the State Govt. & they become tenants under the Govt. The transaction, therefore, even in respect of these lands is an acquisition of their interests with a re-letting of the property to them. In my view, what is done by this Act clearly comes within Entry 36 of List II of the Constitution. Two bills with similar objects were before the State legislatures at the time when the Constituent Assembly considered & passed Art. 31, one in Madras & the other in the United Provinces. Besides this, in Bihar, the Bihar Abolition of Zamindaris Act, 1948 had received the assent of the Governor-General in July 1948. It was to protect these pieces of legislation that safeguards were provided in Cls. (4) & (6), Art. 31. The legislation in question was of a type new to this country but it was not of a type that had not been thought of previously. Provision relating to such legislation is contained in Sub-s. (3), S. 299 of the Govt. of India Act, 1935, & the limitation placed by this sub-section on the power of passing such legislation assumed that there was power to pass such legislation. The Constituent Assembly similarly placed restrictions on such legislation in Art. 31 & made provision to protect certain legislation of this kind. In these circumstances, I find it difficult to hold that the Constituent Assembly did not provide any legislative head within which such legislation is included.

(32) Point No. 3: Mr. Das formulated a ground which, he urged, goes to the root of the impugned legislation. The Constituent Assembly, he urges, in enacting in Art. 31 that no person shall be deprived of his property save by authority of "law" meant by that word not the particular statute enacted to make the acquisition but the general law of the land, the 'lex terrae' of the Magna Charta, the common law of England as introduced into India in the guise of rules of equity, justice & good conscience; the impugned Act is contrary to the law in this sense & hence it is void under Art. 31, Cl. (1). In view of the S. C. having repelled a similar contention regarding the word

"law" in Art. 21 of the Constitution in 'A. K. Gopalan v. State of Madras', A I R (37) 1950 S C 27 at pp. 39, 72, 103 & 114: (51 Cr L J 1383), Mr. Das did not press his contention in this Ct. but reserved his right to press the point at a later stage if necessity arises.

(33) He contended, however, that the word "law" in this provision must at least mean a valid law, for

"An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no offence; it is in legal contemplation, as inoperative as though it had never been passed." ('Norton v. Shelby County', (1886) 30 Law Ed 178 at p. 186: (118 U S 425).

Under the Constitution, he contends, there is no power to legislate for acquisition without a public purpose. Hence, if the Ct. is satisfied that there is no public purpose in the present case, the assent of the President cannot save the legislation. To this extent, I accept the contention & it will be necessary in the proper place to consider whether a public purpose has been made out.

(34) Point No. 4: The contention is that the word "law" in Art. 31, Cl. (4) means a valid law & that where the bill that was passed by the Legislature offends against Cl. (2) of that Article it is not a "law" at all & therefore cannot be saved by the assent of the President; Cl. (4) assumes the existence of a law which can be saved by his assent whereas, if Cl. (2) is contravened, there is no law to be saved. This interpretation would have the effect of making Cl. (4) nugatory. From the context it is clear that the word cannot be read in this strict sense, for the protection given by Cl. (4) assumes that the "law" is open to attack & therefore is not law in the strict sense. The word seems to have been used as a compendious way of describing legislation which has passed through the legislature of a State & has not yet received assent. A similar use of the word "law" is to be found in the Govt. of India Act, 1915, S. 80 A, Sub-s. (3), which provides that the local legislature shall not without the previous consent of the Governor-General consider any "law" relating to any of the subjects detailed in the sub-section. In Cl. (3), Art. 31 also, we find "law" being used in this sense for this clause speaks of a law being reserved for the consideration of the President & receiving his assent though it does not become a "law" in the strict sense till it has received his assent. I may also mention Art. 13, Cl. (2) of the Constitution which speaks of a "law" made in contravention of the clause as being "void".

(35) Point No. 5: I have held above that the assent of the President under Art. 31, Cl. (4) does not protect the Act against attack on the ground that there is no public purpose. It is, therefore, necessary to enquire if there was a public purpose. The proper attitude of the Cts. in such an investigation has been considered frequently by the American Cts. & may be taken as well established. Every intendment is in favour of the Constitutionality of the impugned Act; it will be presumed to be valid unless its invalidity is plain & apparent ('United States v. Gattysburg Electric Rly. Co.', (1896) 40 Law Ed 576 at p. 581: (160 U S 669)). Where the Legislature has declared the purpose to be a public one by implication, if not by express words, its decision is entitled to deference unless it is shown to involve an impossibility. ('Old Dominion Land Co. v. United States of America', 70 U S Law Ed 162 at p. 165). Any departure from this judicial restraint would result in Cts., deciding on what is & is not a governmental function & in their validating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields ('United States Ex. Rel. T. V. A. v. Welch', 90 U S Law Ed 843 at p. 848), Weaver sums up the position thus:

"What constitutes a public use is largely a question for the legislature & the Cts. will not interfere except to enquire whether the legislature could reasonably have considered the use a public one." (S. P. Weaver's Constitutional Law & its Administration.)

(36) The first question is: What is a public purpose? The position is well illustrated by the words of Batchelor J. approved by Lord Dunedin in 'Hamabai Framjee v. Secy. of State', 42 I A 44: (A I R (1) 1914 P C 20):

"General definitions are, I think, rather to be avoided where the avoidance is possible, & I make no attempt to define precisely the extent of the phrase 'public purposes' in the lease; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly & vitally concerned."

I accept Mr. Das's contention that the acquisition of private property to increase public revenues is not acquisition for a public purpose (Willis on Constitutional Law, p. 817); that is a matter in the domain of taxation & legislation for that purpose would come under other legislative entries. This does not affect the impugned Act, the effect of which may be to increase public revenues but only incidentally, the real object of the Act being the nationalisation of the land. Continuing, Mr. Das has stressed that "public purpose" must be something definite & specific & drew our attention to several American authorities in support of this contention, of which I need refer only to Weaver:

"Eminent domain is generally defined as the right or power of a sovereign state to condemn private property for 'some particular public use' for the purpose of promoting the general welfare & to appropriate the ownership or possession of such property for such use upon paying the owner due compensation. It embraces all cases where, by the authority of the state, the property of the individual is appropriated for public good without the consent of the owner for the purpose of 'devoting it to some particular use' either by the state itself or by a corporation, public or private, or by an individual". (P. 541).

"The Cts., however, require that the use shall be fixed & definite." (P. 546).

"The extent of the power is limited by the necessities of the 'particular public purpose or use' in the land sought to be condemned." (P. 549).

The italics (here in quotations) are mine. Mr. Das has particularly stressed that mere state policy does not constitute a public purpose:

"The purpose must be public, & must have reference to the needs or convenience of the public, & no reason of general public policy will be sufficient to validate other transfers when they concern existing vested rights" (Cooley's Constitutional Limitations, p. 744).

In connection with the authorities cited it is well to keep in mind the words of the learned author of Cooley's Constitutional Limitations prefacing his investigation of the meaning of "public use" in the sphere of eminent domain:

"We find ourselves somewhat at sea, however, when we undertake to define, in the light of the judicial decisions, what constitutes a public use." (P. 1129).

He appropriately ends his investigation with a judicial pronouncement from Missouri, that

"no satisfactory definition of the term 'public use' has ever been achieved by the Cts." (P. 1139).

(37) In applying these citations it is necessary to remember that they relate to the exercise of the right of eminent domain in a setting of political ideas very different from those which lie behind the impugned Act. They relate to ordinary cases of compulsory acquisition of land such as we have known in this country ever since Bengal Regulation I of 1824, that is, the acquisition of particular land for a particular public purpose. The legislation now before us is of an entirely different type. It aims at the nationalization of land & at bringing Govt. face to face with the cultivator or the person in direct occupation of land. The authorities cited, therefore, will not furnish any real guidance in deciding whether there is a "public purpose" in the present case & we have to proceed primarily on the provisions of the Constitution. Some idea of the meaning of this expression is furnished by the legislative heads relating to acquisition in Sch. 7, to the Constitution. Entries 33 of the Union List & 36 of the State List speak of "purpose of the Union" & Entry 42 of the Concurrent List speaks of "purposes of the Union, or of a State or.....any other public purpose". Therefore, acquisition for a purpose of the Union or for a purpose of a State is acquisition for a public purpose. The intention appears to be to give the term "public purpose" a wide & comprehensive meaning. Another indication of the extent of that meaning is given by Cl. (5), Art. 19 which empowers a State to make laws imposing reasonable restriction on the exercise of the right of acquiring, holding & disposing of property "either for the interests of the general public or for the protection of the interests of any Scheduled Tribe". Cl. (2), Art. 23 uses the expression "public purposes" in connection with the imposition of compulsory service by the State, thus applying the term to the domain of police power as the American jurists call it. Hence, the investigation should be on the lines whether the legislation is designed for the performance of any functions of the State or of the Union & whether it aims at the securing of benefit to the general public of the State.

(38) The expression "public use" in the 5th amendment to the American Constitution has given rise to divergent views in that country. According to the earlier view, there must be a use by the public. The later & more liberal view takes it as sufficient if there is a general benefit to the public. The adoption by our Constituent Assembly of the expression "public purpose" points to a preference for the later view. The word "purpose" is wider in its connotation than the word "use". It is connected with the intention of the Legislature whereas "use" points to the result of the legislation. We have seen that even when the Cts. had to interpret the words "public use" they have taken the attitude that the Ct. must defer to the judgment of the Legislature unless it is shown to involve an impossibility. The use of the word "purpose" has a similar effect. Hence, I do not think that the authority of the Cts. extends to determining whether the legislation will achieve the end intended.

(39) The impugned Act does not speak in express terms of any public purpose. The Preamble & the Long Title merely recite the necessity for providing for the transference to the State of the interests of proprietors & tenure-holders in land & of the mtgees. & lessees of such interests including interests in trees, forests, etc., & to provide for the constitution of a Land Commission for the State of Bihar with powers to advice the State Govt. on the agrarian policy to be pursued consequent on such transference. The Act took the place of the Bihar Abolition of Zamindaris Act, & the bill by which it was introduced into the Legislature was prefaced by a Statement of Objects & Reasons explaining only why the proposed substitution was to be made, namely, the necessity for providing for the collection of rents in the acquired 'zamindaris' by 'gram panchayats' & co-operative societies & for the establishment of a body of officials & non-officials to advise the State Govt. in matters of land administration. For the objects & reasons underlying the Act, therefore, we have to go back to the bill by which the Bihar Abolitions of Zamindaris Act was introduced in 1947. This states:

"It is the policy of Govt. in the interest of the 'raiyats' & for the general material & social advancement of the province to remove all intermediaries between Govt. & 'raiyats'. Without a radical change in the system of land tenure no co-ordinated plan of agricultural reconstruction can be undertaken with a fair rent, fixity of tenure, proper maintenance of local irrigation systems & consequent increase of crop yield & extension of cultivation. It is essential for the good of the inhabitants of the Province that the maximum result from planned exploitation of the land & water resources of Bihar should be obtained. For this purpose it is essential to get rid of the middleman & to bring Govt. into direct touch with the 'raiyat'. For this reason Govt. have decided that the time has come to do away with the existing outmoded agricultural frame-work known as the zamindari system & to replace it by a 'raiyatwari' system analogous to that of Bombay & Madras Provinces."

The idea in short is to remove the middleman. In the Act, apart from the establishment of the Land Commission whose functions are purely advisory & a provision for the making over of collection of rent to 'grampanchayats', there is no express provision for the other reforms mentioned.

(40) Looking at the terms of the Act, therefore, it appears that all that the Act provides for is the transference of the interests of proprietors & tenure-holders to the Govt. with the underlying idea that the Govt. will thereby be able to provide better conditions under which the cultivators & other direct occupiers of the land may use the land & thus contribute to the general welfare of the State. The question whether this merely amounts to a public policy & not to a public purpose has been answered by the Constituent Assembly itself. Legislation of the type which we are considering, namely, the Bihar Abolition of Zamindaris Act, 1948, was before the Constituent Assembly at the time when the Constitution was being framed. Bills relating to such legislation were pending in the Legislatures of the Provinces of Madras & United Provinces. The Constituent Assembly provided protection for both these classes of legislation by means of Cls. (4) & (6), Art. 31. From Art. 31, Cl. (2), it is clear that the Constituent Assembly considered two requirements as essential for compulsory acquisition, namely, a public purpose & provision for compensation. The protection which the Constituent Assembly gave under Cls. (4) & (6) was confined to the latter requirement. Evidently, therefore, the Constituent Assembly thought that protection was not required under the other head, that is to say, the Constituent Assembly regarded the nationalization of land as itself constituting a public purpose. I would, therefore, hold that there is a public purpose for the impugned Act within the meaning of Cl. (2), Art. 31.

(41) Point No. 6: It is urged that under Art. 19 (1) (f) all citizens have the Fundamental Right

to acquire, hold & dispose of property & that a State can only impose reasonable restrictions on that Right within the meaning of Cl. (5) of that Article. In view of the decision of the S. C. in the 'case of A. K. Gopalan', A I R (37) 1950 S C 27: (51 Cr L J 1383) regarding the relation between Art. 21 of the Constitution & the Fundamental Right of free movement guaranteed by Art. 19 (1) (d), there appears to be no substance in this point. Under the impugned legislation what is being done is that the property of the zamindars, tenure-holders & other persons is being taken away & is being vested in the State. No question therefore, arises of placing restrictions on the right of any subject to hold that property. The impugned legislation must stand or fall on the provisions of Art. 31.

(42) Point No. 7: Art. 14 of the Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The meaning & effect of the guarantee of equal protection of the laws is thus set out by Willis in his work on Constitutional Law:

"The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances & conditions both in the privileges conferred & in the liabilities imposed.' 'The inhibition of the amendment.....was designed to prevent any person or class of persons from being singled out as a special subject for discriminating & hostile legislation'. It does not take from the States the powers to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, & nullifies what they do only when it is without any reasonable basis. Mathematical nicety & perfect equality are not required. Similarly, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."

This passage has been approved by Fazl Ali, J. as a correct exposition of the principles underlying this guarantee in the 'case of Charanjit Lal', A I R (38) 1951 S C 41 at p. 44: (1950 S C R 869). His Lordship laid particular emphasis on the principle that

"a proper classification must always rest upon some difference & must bear a reasonable & just relation to the things in respect of which it is proposed."

Mukherjee, J., with whom Kania, C. J. agreed, took substantially the same view. According to him, classification

"must always rest on some real & substantial distinction bearing a reasonable & just relation to the things in respect to which the classification is made; & classification made without any substantial basis should be regarded as invalid."

Patanjali Sastri, J. similarly emphasised that the basis of the classification must have

"a just & reasonable relation to the object which the legislature has in view."

(43) Mr. Das would have us go further & hold as unconstitutional the conferring of an arbitrary & unguided discretion by S. 3 of the impugned Act on the State Govt., giving it absolute discretion whenever it pleases to take action under the Act against whichever proprietor or tenure-holder it selects. In the opinion of the Ct. delivered by Matthews, J. in 'Yick Wo v. Hopkins', (1886) 118 U S 356: (30 Law Ed 220), there is more than one passage which supports the contention of Mr. Das, but the case was one, not merely of a grant of unguided discretion but also of an unjust & discriminatory exercise of that discretion against the petnrs. in error, & it is on these facts that the petnrs. in error were discharged from custody. Our attention was drawn to 'Homer Adolph Plassy v. John H. Ferguson', (1896) 41 Law Ed 256 at p. 260: (163 U S 537), in which Brown J. spoke of the decision in 'Yick Wo v. Hopkins', (1886) 118 U S 365: (30 Law Ed 220), as holding that the impugned Ordinance was unconstitutional if it gave the municipal authorities an arbitrary discretion. His Lordship's observation was 'obiter', as he was concerned not with the grant of an arbitrary discretion but with a discrimination alleged to be made by the impugned statute itself. Further, his Lordship's observation should be read with the passage that immediately precedes:

"The reply to all this is that every exercise of the police power must be reasonable, & extend only to such laws as are enacted in good faith for the promotion of the public good, & not for the annoyance or oppression of a particular class". Also, his Lordship pointed out that in that case the impugned Ordinance was held to be a covert attempt on the part of the municipality to make an arbitrary & unjust discrimination against the Chinese race. A different view of the decision in 'Yick Wo v. Hopkins', (1886) 118 U S 356: (30 Law Ed 220), was taken in 'New York ex rel. Lieberman v. Van De Carr', (1905) 50 Law Ed 305 at p. 311: (199 U S 552):

"These cases leave in no doubt the proposition ,that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the 14th Amendment. There is no presumption that the power will be arbitrarily exercised, & when it is shown to be thus exercised against the individual, under sanction of state authority this Ct. has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorise the interference of a F. C. 'Yick Wo v. Hopkins', (1886) 118 U S 356: (30 Law Ed 220), 6 Sup. Ct. Rep. 1064."

This is in agreement with the observation of Kania, C. J. with whom Fazl Ali & Patanjali Sastri, JJ. agreed, in the case of 'N. B. Khare v. State of Delhi', A I R (37) 1950 S C 211 at p. 214: (1950 S C R 519):

"Moreover, this whole argument is based on the assumption that the Provincial Govt. when making the order will not perform its duty & may abuse the provisions of the section. In my opinion it is improper to start with such an assumption & decide the legality of an Act on that basis. Abuse of the power given by a law sometimes occurs; but that validity of the law cannot be contested because of such an apprehension."

B. K. Mukherjee & Mahajan, JJ., though they disagreed with the learned Chief Justice & the other two learned Judges regarding the reasonableness of the discretionary power given to the State Govt. by the impugned Act, proceeded on an examination whether the circumstances justified the conferring of such a power of restricting the liberty of free movement & not on the basis that the conferring of unguided discretion is by itself unconstitutional

(44) Applying the principle to the present case I am not prepared to say that the conferring of this power on the State Govt. was unreasonable. There is a large number of estates & tenures in the State & it is impossible for the State to acquire all of them at one time. Nor was it possible for the Legislature to lay down any order in which the estates & tenures should be acquired. An attempt was made to regulate this & S. 3 of the Bihar Abolition of Zamindaris Act, 1948 contained a proviso inserted at the instance of the President:

"Provided that where the Provincial Govt. proposes to issue such notfn. in respect of the estates or tenures of a proprietor or tenure-holder whose gross annual income in the opinion of the Collector exceeds a particular amount, the Provincial Govt. shall issue simultaneously such notfn. in respect of the estates or tenures of all other proprietors or tenure-holders falling within that income group."

This proviso was included in the Bihar Land Reforms Bill of 1949 when it was first introduced into the Assembly on 30-12-1949 but was omitted by the Assembly & does not appear in the bill passed on 20-4-1950. The reasons for which the proviso was omitted do nōt appear but the omission does not affect the validity of the discretion vested in the Govt. The restriction imposed by the proviso was merely a rough attempt to ensure equality of treatment by insisting that, when the property of a particular proprietor or tenure-holder is acquired, the property of all other proprietors or tenure-holders having an equal or greater gross annual income must be acquired also. The result of such a provision might well be extremely inconvenient for administrative reasons. If the object of the Act was to be attained, namely, to bring the State Govt. into direct touch with the occupiers of the land, it would be necessary in respect of each estate acquired to acquire at one time all the intermediate interests therein. Under the operation of the proviso, however, such action in one estate would necessitate the immediate acquisition of the intermediate interests of the same standing throughout the State of Bihar. In other words, the proviso, if retained, would have meant that in order to effect the object of the Legislature the State would have to acquire all intermediate interests in the land at one time throughout the State, thus defeating the object of the discretionary power given to the Govt.

(45) It has been suggested that here we have a case not merely of a delegation of absolute discretion but also of an exercise of arbitrary & unfair discrimination inasmuch as action under the Act has been taken only in respect of the zamindari properties & tenures held by the three pltfs. in the suits before us. I was at first impressed by this argument. For instance in notfn. No. 5068 L. R. Act T. R. D. 20 dated the 25-9-1950 relating to the Maharajadhiraj of Darbhanga we find that his proprietary interest in a large number of estates, extending to a fractional share in one instance as small as 2 gandas 2 kauris, has been acquired & yet the interests of his co-sharers have been left untouched. But it must be remembered that the notfns. in respect of these three persons were the very first steps taken by the State Govt. in administering the Act. It was necessary that the Govt. should begin somewhere &, after taking stock of the situation, proceed gradually to acquire other properties in accordance with administrative convenience. The notfn. relating to the Darbhanga Raj shows that the immediate effect would have been to put the Govt. in the place of the Maharajadhiraj in a large number of estates in which he was the sole proprietor. It would only be after getting into this position that the Govt. would be able to ascertain the nature & particulars of the subordinate tenures therein & to acquire them. It may be that similar considerations influenced the Govt. in their choice of the other two persons in respect of whom they have proceeded. The Ct. must presume that the action of the Govt. was constitutional & if unfair discrimination is alleged it is for the persons alleging it to establish the fact.

(46) The pltfs. are on a stronger ground when they attack the constitutionality of the classification made in Ss. 23 & 24 of the Act, relating to the computation of the net income & the compensation respectively.

(47) According to S. 22, "gross assets" of a proprietor means the aggregate of the rent including cesses which were payable in respect of the estate to such proprietor for the previous agricultural year by the tenure-holders & 'raiyats' holding immediately under him. The term includes certain notional sums in respect of lands left in the possession of the proprietor, 'gair mazrua malik, zamindari' offices, etc. S. 23 provides for the computation of a net income by the deduction from the gross assets of certain amounts as representing expenditure necessary to be met by the proprietor in the ordinary course, for example, land revenue, agricultural income-tax, income-tax in respect of non-agricultural income & so on. Among other items to be deducted are the cost of management at the following rate:

"Amount of gross asset —	Rate.
(i) where the gross asset does not exceed Rs. 2,000	5 per centum of such gross asset ;
(ii) where the gross asset exceeds Rs. 2,000 but does not exceed Rs. 5,000	7½ per centum of such asset ;
(iii) where the gross asset exceeds Rs. 5,000 but does not exceed Rs. 10,000	10 per centum of such gross asset ;
(iv) where the gross asset exceeds Rs. 10,000 but does not exceed Rs. 15,000	12½ per centum of such gross asset ;
(v) where the gross asset exceeds Rs. 15,000	not less than 15 and not more than 20 per centum of such gross asset,"

& the cost of works of benefit to the 'raiyats' of such estate or tenure at the following rates:

"Amount of gross asset —	Rate.
(i) where the gross asset does not exceed Rs. 5 000	4 per centum of such gross asset ;
(ii) where the gross asset exceeds Rs. 5,000 but does not exceed Rs. 10,000	6 per centum of such gross asset ;
(iii) where the gross asset exceeds Rs. 10,000 but does not exceed Rs. 15,000	8 per centum of such gross asset ;
(iv) where the gross asset exceeds Rs. 15,000 but does not exceed Rs. 20,000	10 per centum of such gross asset ;
(v) where the gross asset exceeds Rs. 20,000	12½ per centum of such gross asset."

(48) The small proprietors & tenure-holders may be assumed to be managing their properties personally or with the help of the members of their families, & their wealthier fellows to employ low paid or highly paid staff according to their means. This will explain the graded rates at which the cost of management is to be assessed on estates according to their gross assets, though it is debatable whether as the size of the estate increases the proportion which the cost of management will bear to the gross assets of the estate will continue to increase. I fail, however, to see any obvious connection between the costs of works of benefit to the 'raiyats' & the amount of the gross assets of the estate. The term "works of benefit" is vague & I find it difficult to understand what it is intended to mean. In this State it is not usual for agricultural tenants to enter into agreements with their landlords requiring the latter to provide for beneficial works & it is only in districts like Gaya, where a complicated system of irrigation is necessary, that a custom prevails under which the landlords become responsible for maintaining works of irrigation. That the landlord discharged this duty was ensured in the old days by making the rent payable for the land a produce rent, thus giving him a direct interest in keeping up the irrigation works. There is now the Bihar & Orissa Private Irrigation Works Act, 1922 (Bihar & Orissa Act V of 1922), under which the duty can be enforced by proper action. Anything that may be done by the landlord for the 'raiyats' beyond the maintenance of works of irrigation is largely a matter of charity & good feeling. The monetary value of such work as the landlord may do for the benefit of his 'raiyats' would, therefore, depend not on the gross assets of his estate but on his generosity & on the income available to him after meeting his necessary expenses. The provision made in S. 23 is not a case of enforced charity. The deductions proposed to be made are not deductions of money intended to be applied to works of benefit to the 'raiyats'; they are deductions by which the net income of the proprietor, which is to be the basis of calculating the compensation payable to him, is to be reduced. The effect of the provision is that the deduction under this head from the gross assets will vary from 4 per cent in the case of small proprietors to 12½ per cent in the case of the large proprietors. The conclusion is forced on one that these deductions are provided for reducing the amount of the compensation that the State will have to pay for the property acquired, & that the classification has been so made that the reduction will be proportionally greater in the case of the big proprietors than in the case of the small proprietors.

(49) The inequality between the two classes of proprietors will be further swelled by the appln. of the rates prescribed in S. 24 to which I now proceed. This section deals with the computation of the compensation to be paid for the property acquired. It prescribes that after the net income has been computed u/s 23 the compensation Officer shall prepare a compensation roll determining the amount of compensation in respect of each proprietor or tenure-holder, as the case may be, at certain multiples of the net income specified in the section. The multiples vary from twenty times where the net income does not exceed 500 rupees; to three times where the net income exceeds one lac of rupees. I can see no reasonable basis on which this application of different multiples to net incomes of differing amounts can be justified. The learned Attorney-General has made an attempt to support it by reliance on a principle which has been applied to progressive taxation vide (Will's Constitutional Law, p. 597), a principle that is commonly applied in India in the sphere of income-tax. He points out that unlike the American Constitution, the Const. Ind. provides for "compensation", not for "just compensation". It is not possible, he urges, for the States to pay full compensation & the Constituent Assembly deliberately avoided the use of the word "just". He urges that, this being so, the Legislature was justified in distributing the loss between the expropriated proprietors & tenure-holders according to the rule obtaining for progressive taxation, namely that a person better able to pay should pay in a larger proportion than a person with smaller means.

(50) I cannot agree that the omission of the word "just" has the effect contended for. The word "compensation" in respect of compulsory acquisition of property had a well accepted legal significance at the time when the Constituent Assembly framed the Const. Ind. In 'Lucas & Chesterfield Gas & Water In re', (1909) 1 K B 16: (77 L J K B 1009), Fletcher Moulton, L. J. defined it as the equivalent of the lands acquired i.e. "that which they were worth to him (the expropriated owner) in money". This definition is accepted by the P. C. ('Cedar Rapids Manufacturing Co. v. Lacoste', (1914) A C 569: (A I R (1) 1914 P C 199), though it does not agree with Fletcher Moulton, L. J. as to the principles on which the monetary value is to be computed 'Narayana Gajapatiraju v. Revenue Divisional Officer', A I R (26) 1939 P C 98: (I L R (1939) Mad 532). According to the Judicial Committee in 'Fraser v. City of Fraserville', (1917) A C 187: (86 L J P C 91), the compensation payable is to be based on

"the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages & with all its possibilities but excluding any advantages due to the carrying out of the scheme for which the property is compulsorily acquired."

The principles according to which the compensation was to be assessed in India were set out in the Land Acquisition Act, 1894 (Act I of 1894), & it has always been well understood that the compensation represents the money value of the property acquired. In fact, it is usual to give the owner something more than the value of the property by way of a solatium for the compulsory nature of the acquisition. When the Constituent Assembly used the word "compensation", it must be taken to have used it in the accepted sense as representing the money value of the property. The giving of compensation for property compulsorily acquired was considered to be of sufficient importance to be guaranteed by a provision in the Part of the Constitution dealing with Fundamental Rights. It does not appear likely that the Constituent Assembly would by that very provision empower the legislature to give as compensation such amount as it thinks proper without any reference to the real value of the property acquired.

(51) We have been invited by the learned Advocate-General of Bihar to hold that the power given to the Legislature to legislate with regard to the principles on which compensation for the property acquired is to be determined makes the matter of compensation non-justiciable. The very fact that this matter has been included in Part III of the Constitution & that it has been thought necessary to provide protection to such legislation under Cls. (4) & (6), Art. 31 shows that the matter was intended to be justiciable. What Cl. (2) requires is provision for compensation & the Cts. are entitled to enquire, subject to Cl. (4), whether the payment for which the impugned legislation provides is "compensation" within the meaning of this clause. I cannot accept the conten-

tion that by reason of the omission of the word "just" the State Legislature is entitled to provide for payment to the expropriated proprietors & tenure-holders of "compensation" less in value than the monetary equivalent of the expropriated properties, & therefore to distribute the loss between the expropriated proprietors & tenure-holders in accordance with their respective abilities to bear the loss. It seems to me that the insertion of the word "just" in Cl. (2), Art. 31 would not have any difference. In support of my conclusion I cite the words of Brewer, J. in 'Monongahela Navigation Co. v. United States', (1893) 37 Law Ed 463 at p. 468: (148 U S 312):

"The noun 'compensation', standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, & the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, & the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just'."

To the same effect is this passage from Nichols on Eminent Domain, Volume III, at p. 29:

"Many of the State constitutions require that the compensation shall be 'just' 'reasonable' or 'adequate', but these words are mere epithets rather than qualfications & add nothing to the meaning. The phrase 'just compensation' means the value of the land taken & the damage, if any, to land not taken. More than this it does not imply. The adjective 'just' only emphasizes what would be true if omitted, — namely, that the compensation should be the equivalent of the property. It has been said in this regard that it is difficult to imagine an 'unjust compensation'. The word 'just' is used evidently to intensify the meaning of the word 'compensation', to convey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, & ample, & that 'no legislature can diminish by one jot the rotund expression of the constitution'. Substantially the same meaning is attributed to the term 'due compensation' and 'adequate compensation'."

(52) Our attention has been drawn to the following observation about the corresponding expression "just terms" in the Constitution of the Australian Commonwealth:

"It is submitted that the view that a Commonwealth Act authorising acquisition of property & fixing a nominal sum for compensation would be a valid enactment, is correct. No measure of justice is laid down in the Constitution & it is not conceivable that the Ct. would question the judgment of Parliament on this matter. But if the Commonwealth passed an Act seizing property without fixing or referring to compensation or terms at all, this would undoubtedly be 'ultra vires', for such an Act could not be described as a law with respect to 'the acquisition of property on just terms' at all; it would require no investigation by the Ct. into questions of policy to see that such an enactment was not within the Commonwealth legislative power." (Wynes's Legislative & Executive Powers in Australia, p. 248).

This is merely a submission of the learned author & is not supported by any authority. On the contrary, the majority of the Judges in 'The Minister of State for the Army v. Dalziel', (68 Commonwealth L R 261), consd. & answered in the negative the question whether the compensation provided for by Reg. 60 H of the National Security (General) Regulations was "just terms" within the meaning of the Constitution of that Commonwealth.

(53) Willis in his book of Constitutional Law of the United States notes that in the sphere of eminent domain the problem of classification is not so important as in the spheres of police power & taxation & that as between the latter two spheres a wider discretion is allowed by the S. C. under taxation than is given under police power. The extent of the discretion permitted is indicated by the following passage occurring at pp. 802, 803 of this book:

"Taxation is reasonable when it is for a public purpose. Nothing else is required to make it reasonable. For taxation to be due process of law as a matter of substance, it does not have to be levied on the theory of protection, or benefits, or ability to pay, or public need, or physical power, but only for a public purpose. Ability to pay, or special benefits, may be sufficient basis for classification, but neither is required for due process of law. It is not essential to the validity of taxation that taxes be levied according to rules of abstract justice. Neither strict justice nor absolute equality is attainable. It is impossible to prevent the escape of some property from taxation while other property is being taxed twice. Owners may be taxed on property which has ceased to exist or which they have ceased to own. This cannot be prevented. All that the Constitution requires is that taxes shall be for a public purpose."

Nevertheless, in the very passage relied on by the learned Attorney-General, Willis mentions the existence of a doubt as to whether a progressive property tax would be constitutional or not. It will, therefore, be relevant to consider some cases of this nature. In 'Cumberland Coal Co. v. Board of Revision', (76 U S Law Ed 146), it was held that the deliberate & systematic assessment for taxation of all the coal lands in a township at the same sum per acre, notwithstanding differences in actual & market-value due to distances from transportation facilities & other factors was a contravention of the right of equal treatment under Amendment xiv inasmuch as some owners were assessed on the full value of their properties & others at a smaller value. In 'Stewart Dry Goods Co. v. Lewis', (79 U S Law Ed 1054), a gross sales tax which classified vendors for the imposition of a varying rate of taxation solely by reference to the volume of their transactions was held to violate the equality clause. In 'Cotting v. Godard', (1901) 46 Law Ed 92: (183 U S 79), the impugned Ordinance fixed the charges which could be made by stock-yard operators whose volumes of business exceeded certain limits. It was held that this was a contravention of the equality clause as the relation of the operator's charges was not to be measured by the aggregate of his profits but by the value to the person charged of the service rendered. The principle underlying these cases is the principle emphasized by the S. C. in 'the case of Charanjit Lal' (AIR (38) 1951 S C 41), namely that classification is permissible but it must be on a principle which bears some relation to the object sought to be attained. The object of the legislation here impugned is the giving of compensation, that is, something which will represent the value in money of the property that is being acquired. It cannot be said to be a reasonable classification which assesses that value at twenty times the net income in the case of the poor man & three times in the case of the rich man. The difference between taxation & eminent domain is thus defined by Weaver at pp. 543-544 of his Constitutional Law & Its Administration:

"Under Taxation the individual is required to make an enforced contribution of money or property as his share of the burden for the support

of the Govt. Property taken under eminent domain is so much beyond the owner's share of the burden of govt., & for this reason he is entitled to compensation."
This explains why the principle of progressive taxation does not apply to compensation for land acquired. In my opinion, therefore, the objection that this provision contravenes the equality clause must be allowed.

(54) It has been suggested that the assent of the President under Cl. (4) of Art. 31 precludes the Ct. from going into the question of compensation &, therefore, from considering whether the provision regarding compensation contravenes Art. 14. I do not think the assent has this effect. The protection afforded by this clause is strictly confined to the ground that the impugned legislation "contravenes the provisions of Cl. (2)." The only "provision" of Cl. (2) is that the impugned law must provide for compensation for the property taken possession of or acquired & either fix the amount of compensation or specify the principles on which & the manner in which the compensation is to be determined & given. It is not for the absence of any of these essentials that the impugned Act is here being questioned.

(55) Another line of approach on the point of inequality is suggested by the following observation of Brewar, J. in 'Reagan v. Farmer Loan & Trust Co.', (1894) 38 Law Ed 1014 at p. 1024: (154 U S 362), John H.:

"The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been often observed, is a Govt. of law, & not a govt. of men, & it must never be forgotten that under such Govt., with its constitutional limitations & guarantees, the forms of law & the machinery of Govt., with all their breach & power, must in their actual workings stop on the hither side of the unnecessary & uncompensated taking or destruction of any private property, legally acquired & legally held."
On this line of reasoning, it may be contended that, if the Ct. on an examination of the terms of the impugned statute considers that the payment provided for by that statute is not compensation, the statute is void on the ground of discrimination. I shall not follow up this line, as it was not taken in the arguments before us. Also, I am doubtful whether, in view of the President's assent under Cl. (4), Art. 31, this Ct., can enquire whether the payment provided for is compensation.

(56) For the reasons I have given above, I hold that there is a contravention of the Fundamental Right under Art. 14.

(57) The question then arises what is the effect of the conclusion I have come to. Does it invalidate only the particular provision in which the contravention occurs? Or, does it invalidate the Act as a whole? In my opinion, it has the latter effect. The contravention which I have found relates to the determination & payment of compensation. The entire scheme of the Act is that the property of the landlords & tenure-holders is to be acquired & in exchange therefor they are to get compensation either in cash or in bonds payable in forty equal instalments. On my finding, the provisions relating to the determination of the amount of compensation are void. Therefore, an essential element of the Act disappears & the remainder cannot survive. I do not think that the assent of the President under Art. 31 (4) helps to save the Act, for I cannot take the view that the assent covers a case in which the provisions relating to compensation are found to be void. I have two reasons for this view. Firstly, I rely on the importance which the Constituent Assembly evidently attached to the giving of compensation in payment for property acquired. The eixstence of such a provision & of a public purpose were regarded by the Constituent Assembly as essential for a compulsory acquisition by law. It is not conceivable that the Constituent Assembly could have intended by Cls. (4) & (6), Art. 31 to protect a total absence of provision for compensation. This is corroborated by the fact that in the bills & in the Act which these two clauses were designed to protect there was provision for compensation. All that Cls. (4) & (6) do is to empower the President to decide whether the sum so provided is compensation or not & to this extent these two clauses make his decision non-justiciable. This is why I have refrained, except so far as was necessary for determining the point of inequality, from considering whether the sum to be determined according to the principles provided in the Act is compensation, as that term is understood in law. My second reason is allied to my first reason. The Constituent Assembly, as I have said, attached great importance to the provision for compensation but instead of making it justiciable, entrusted to the President the power to decide finally whether it is compensation. The President, by giving his assent under Cl. (4) or the certificate under Cl. (6), gives his approval to that provision. If, however, it is found that, for some reason unconnected with Cl. (2), Art. 31, the provision is void, an essential part of the Act has gone & the statute is no longer "the law" assented to or certified by the President.

(58) Point No. 8: Sub-s. (2), S. 32 provides:

"The amount of compensation so payable in terms of a Compensation Assessment-roll as finally published shall be paid in cash or in bonds or partly in cash & partly in bonds. The bonds shall be either negotiable or non-negotiable & non-transferable & be payable in forty equal instalments to the person named therein & shall carry interest at two & a half per centum per annum with effect from the date of issue."
The corresponding provision in the rule-making section is S. 43 (2):

"In particular & without prejudice to the generality of the foregoing power ,such rules may provide for all or any of the following matters, namely:

* * * * *

(p) the proportion in which compensation shall be payable in cash & in bonds & the manner of payment of such compensation under Sub-ss. (2) & (3), S. 32."
It is contended that this provision amounts to a delegation of legislative power to the State Govt. An objection on this ground was dealt with by the S. C. in 'State of Bombay v. Narottamdas', A I R (38) 1951 S C 69: (1951 S C J 103). Their Lordships were considering the Bombay City Civil Act, 1948, which empowered the Bomaby City civil Ct. to entertain suits & proceedings of a value up to Rs. 10,000. The point at issue was the validity of S. 4 of the Act, which empowered the Provincial Govt. to invest the City Civil Ct. with jurisdiction to receive, try & dispose of all suits & other proceedings of a civil nature arising within Greater Bombay & of such value not exceeding Rs. 25,000 as might be specified in the notfn. Mukherjea J. observed:

"I have no hesitation in holding that the Legislature in empowering the Provincial Govt. to invest the City Ct., by notfn., with jurisdiction of such value not exceeding Rs. 25,000 as may be specified

in the notfn., has not delegated its legislative authority to the Provincial Govt. The provision relates only to the enforcement of the policy which the legislature itself has laid down. The law was full & complete when it left the legislative Chamber permitting the Provincial Govt. to increase the pecuniary jurisdiction of the City Ct. up to a certain amount which was specified in the statute itself. What the Provincial Govt. is to do is not to make any law; it has to execute the will of the Legislature by determining the time at which & the extent to which within the limits fixed by the legislature, the jurisdiction of the Ct. should be extended. This is a species of conditional legislation which comes directly within the principle enunciated by the Judicial Committee in 'The Empress v. Burrah', 5 I A 178: (4 Cal 172 P C) where the taking effect of a particular provision of law is made to depend upon determination of certain facts & conditions by an outside authority."

Mahajan, J. with whom Fazl Ali, J. substantially agreed pointed out that the Bombay Legislature must have applied its mind to the question of extending the City Civil Ct's pecuniary jurisdiction up to Rs. 25,000 when it fixed that limit, by limiting the jurisdiction initially to Rs. 10,000 & empowering the Provincial Govt. to increase that jurisdiction, it merely gave the Provincial Govt. power to determine the circumstances under which the enhanced powers should be given to the City Civil Ct.:

"The vital matters of policy having been determined, the actual execution of that policy was left to the Provincial Govt."

Similarly, Das, J. with whom Patanjali Sastri, J. agreed, observed that in enacting S. 4, the Legislature itself decided that it is fit & proper to extend the pecuniary jurisdiction of the new Ct., not necessarily & at all events or all at once but if & when the Provincial Govt. should think it desirable to do so; it was wrong to say that the legislature had not applied its mind or laid down any policy & the very fact that the extension of pecuniary jurisdiction should not exceed Rs. 25,000 indicated a decision that the jurisdiction of the Ct. should be limited to this extent.

(59) The test applied was: Was the legislation full & complete when it left the legislative Chamber? Did the Legislature apply its mind to the subject-matter of the legislation & lay down a policy, merely leaving duties of an executive character to the State Govt? The legislative powers vested in the State Legislature were to make provisions relating 'inter alia' to "the form & manner" in which compensation is to be given. The impugned sub-section relates to "the form & manner" in which compensation is to be given. The Act provides that compensation may be given in cash or by deferred payment or partly in cash & partly by deferred payment. These are not the only forms in which compensation can be given. Thus under Sub-s. (3), S. 31 of the Land Acquisition Act, 1894 (Act 1 of 1894) other property may be given in exchange, or there may be a remission of Govt. dues on other lands. In deciding on the particular forms between which the State Govt. may choose the legislature has applied its mind to the question & has prescribed the limits within which the State Govt. may exercise the discretion vested in it. So also as regards the manner in which compensation shall be given the Act contains elaborate directions regarding payment. The term payment & its derivatives have been used widely & seem to cover the delivery of cash as well as the making over of the bonds, if any. It is further provided that, if there are bonds they will be redeemed in 40 equal instalments, but it is left to the State Govt. to determine the intervals between the instalmnts. That is to say, the legislature has determined that the bonds must be redeemable, & that the instalments should be of a particular size. It has left it to the legislature (sic) to decide when those instalments will be paid. Further, the legislature has provided that the bonds shall "carry" interest at 2½ per cent 'per annum' leaving it to the legislature (sic) to decide when & at what intervals the interest will be paid. Finally, it has provided that if bonds are issued they may be negotiable or non-negotiable, as the State Govt. may decide. The matters left to the discretion of the State are matters dependent on the condition of the State finances & on political & economic considerations of which the State Govt. may be taken to be a proper Judge. The discretion given is very wide & at first I was inclined to doubt its constitutionality but, on a careful examination, I think that it satisfies the test in 'Narottamdas's case', (A I R (38) 1951 S C 69: 1951 S C J 103). In these circumstances, it is not necessary to consider the wider question as to the power of the legisature to authorise the executive to perform "a function which, if not subordinate, would be essentially legislative" 'Victoria Stevedoring & General Contracting Co. Proprietary, Ltd. & Meakes v. Dignam', (46 C L R 73 at p. 100).

(60) Point No. 9: The argument is that the Bihar Legislature committed a fraud on the Constitution by pretending to comply with Cl. (2), Art. 31 & to provide for compensation, although in fact the sums determined by those principles as payable to the expropriated proprietors & tenure-holders are not compensation. This point necessarily involves an investigation of the question whether the sums determined by the principles laid down in the Act are compensation or not, an investigation which I have held that the Ct. is precluded from making by reason of the assent under Cl. (4), Art. 31 of the Constitution. Apart from this consideration, I think there is no substance in the contention. There is no fraud on the Constitution because the Bihar Legislature had done exactly what the Constituent Assembly intended. The Constituent Assembly was anxious that legislation of the class to which the impugned Act belongs should be protected from challenge in the Cts. so far as provision for compensation is concerned. Therefore, it entrusted the President with the responsibility for determining whether this essential of legislation for the acquisition of property was complied with. The bill passed by the Bihar Legislature was duly submitted to the President for his scrutiny & we may take it that when the President gave his assent, he was satisfied that there was provision for compensation. That the sum determinable under the provisions of the Act might not be compensation as understood by the Ct. is irrelevant.

(61) Point No. 10: The enforceability of the Act has been attacked on the ground that Sub-s. (2), S. 32 does not fix the intervals at which the forty equal instalments become payable. The omission to fix the intervals is really relevant under point No. 8. Either this is conditional legislation & the State Govt. may lawfully determine what the period is to be or it is a delegation of legislative power. In view of the conclusion which I have arrived at there this point is of no importance.

(62) I am now in a position to record my findings on the issues framed.

Issue No. 1: Is the Bihar Land Reforms Act of 1950 (Bihar Act XXX (30) of 1950) 'ultra vires' the legislative powers of the State of Bihar?

Answer: The Act is covered by Entries 36 of List II & 42 of List III in Sch. 7 to the Constitu-

tion. It is, therefore, not 'ultra vires' of the Legislative powers of the State Legislature.

Issue No. 2: Is the said Act unconstitutional, unreasonable, inoperative & void for the reasons mentioned in para. 5 of the plaint or any of them?

Answer: The Act is void on the ground that it contravenes the provisions of Art. 14 of the Constitution.

Issue No. 3: Have the properties of the pltf. vested in the State of Bihar under the said Act? If so, have they so vested under the authority of law?

Answer: It follows from the finding on issue No. 2 that the properties of the pltfs. have not vested in the State of Bihar.

Issue No. 4: Can any question regarding compensation or principles for the determination & giving of compensation be raised in this suit in view of the assent of the President under Cl. (4), Art. 31 of the Constitution?

Answer: The assent protects the Act from challenge on the ground that it contravenes the provision of Cl. (2), Art. 31. There can be no challenge regarding the adequacy of the compensation or the correctness of the principles prescribed by the Act for determining the compensation or of the manner in which the Statute directs that the compensation is to be given. The assent does not protect the Act if there is no provision for compensation. It does not protect the Act from attack on a ground not arising under Cl. (2), Art. 31.

Issue No. 5: Is the pltf. entitled to any of the reliefs prayed for?

Answer: The pltfs. are entitled to have their suits decreed as proposed by Shearer, J.

(63) DAS J: The Act which is impugned in all these cases is the Bihar Land Reforms Act, 1950 (Bihar Act XXX (30) of 1950). For brevity & convenience, I shall hereinafter refer to it as the impugned Act. I venture to think that a brief history of the impugned legislation will not be out of place here.

(64) History of the legislation: An Act called the Bihar Abolition of Zamindaris Act, 1948 (Bihar Act XVIII (18) of 1949) was passed by the Bihar Legislature, & received the assent of the Governor-General on 6-7-1949. This assent was first published in the Bihar Gazette Extraordinary, of 22-7-1949. That Act, which was the predecessor of the impugned Act, contained provisions similar to the provisions of the impugned Act; but as the former Act was repealed by the latter, I confine myself to the impugned legislation only.

(65) On 9-12-1949, the Bihar Land Reforms Bill was published under R. 83 of the Bihar Legislative Assembly Rules. On 30-12-1949, the Bill was introduced & refd. to a Select Committee. On the 31-1-1950, the report of the Select Committee on the Bihar Land Reforms Bill, 1949, was submitted, & the same was published on 1-2-1950. On 20-4-1950, the Bill was passed by the Assembly. On 4-5-1950, the Bill was passed with certain amendments by the Council. On 9-5-1950 the Bill was finally passed by both Houses of the Bihar Legislature. On 11-9-1950, it received the assent of the President of India. On 3-10-1950, a Bill called the Bihar Land Reforms (Amendment) Bill, 1950, purporting to amend the long title of, the preamble to, & certain provisions of the impugned Act was introduced; this amending Bill was not, however, proceeded with, did not pass through all the stages of legislation, & remained a still-born child. On 25-9-1950, the impugned Act with the assent of the President of India was first published. On that date, certain other notfns. were also published; first, there was a notfn. under Sub-s. (3), S. 1 of the Act stating that the Act shall come into force on 25-9-1950; & then there were other notfns. under Sub-s. (1), S. 3 of the impugned Act stating that the estates & tenures, described in certain schedules to the notfns., belonging to some of the leading landlords of the State including the Maharajadhiraj Sir Kameshwar Singh Bahadur of Darbhanga, have with effect from 25-9-1950, passed to & become vested in the State of Bihar under the provisions of the impugned Act.

(66) A summary of the impugned Act: It is now necessary to give a summary of the provisions of the impugned Act. The Act is divided into eight chapters, & contains forty-three sections. The long title & the preamble are practically the same, & the latter reads:

"Whereas it is expedient to provide for the transference to the State of the interests of proprietors & tenure-holders in land & of the mtgees. & lessees of such interests including interests in trees, forests, fisheries, jalkars, ferries, hats, bazars, mines & minerals, & to provide for the constitution of a Land Commission for the State of Bihar with powers to advice the State Govt. on the agrarian policy to be pursued by the State Govt. consequent upon such transference & for other matters connected therewith etc."

The recital in the preamble has an important bearing on the question, to be discussed later, of the aims, objects or purposes of the Act: the two important objects for which the Act provides, as stated in the preamble, are: (1) transference to the State of the interests of proprietors & tenure-holders in land & of the mtgees. & lessees of such interests; & (2) the constitution of a Land Commission with powers to advise the State Govt. on the agrarian policy to be pursued by the State. Chapter I deals with certain preliminary matters. U/s. 1 (3), the Act comes into force on such date as the State Govt. may by notfn. appoint. S. 2 is the definition or interpretation section. According to Cl. (h) of that section, "date of vesting" means the date of publication in the official Gazette of the notfn. under Sub-s. (1), S. 3 in respect of the estate or tenure. Cl. (i) & (q) define 'state' & 'tenure', & the important point to note about them is that they include a share in or of an estate or tenure, so that transference of a share in an estate or tenure, is permissible. The expressions 'lease' (in relation to mines & minerals) & 'mine' have an artificial meaning, the former including a sub-lease, prospecting lease & even an agreement to lease & the latter meaning an excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on. It is not necessary to refer here to the other clauses of the definition section.

(67) Chap. II is headed "Vesting of an Estate or Tenure in the State & its consequence". It comprises Ss. 3 to 12, S. 3 is important. Under Sub-s. (1) of that section, the State Govt. may, from time to time, by notfn., declare that the estates or tenures of a proprietor or tenure-holder, specified in the notfn., have passed to & become vested in the State. Two points need to be stated here one is that the sub-section gives the State Govt. an unfettered discretion or power to declare that the estates or tenures of a proprietor or tenure-holder have passed & become vested in the State, so that it may pick & choose; the second is that the declaration is in respect of the estates or tenures of a proprietor or tenure-holder in other words, if the proprietor or tenure-holder has only a share in the estate or tenure, it is that share which vests in the State. If the proprietor or tenure-holder has shares in more estates or tenures

than one, all those shares pass on the making of the declaration in respect of that proprietor or tenure-holder. As the learned Advocate General of Bihar put it, the scheme in Sub-s. (1), S. 3 is that a notfn. is to be made in respect of the estates or tenures 'of a proprietor or tenure-holder' (the '.....' are mine; the transference to State-ownership is not estate by estate or tenure by tenure, but rather proprietor by proprietor or tenure-holder by tenure-holder. S. 4 states the consequences of vesting in brief, these are: (a) the entire interest of the proprietor or tenure-holder, free from incumbrance ,including sub-soil rights, etc., passes to the State; (b) all arrears of rent, royalty, etc., vest in the State; (c) the liability to pay arrears of revenue & cesses does not, however, cease, & these can be recovered from the compensation money payable. (d) all suits & proceedings to recover money, the payment of which is secured by a mtge. or charge on the estate or tenure are barred; (e) the estate or tenure is not liable to attachment or sale; (f) the Collector has the right to take charge & possession & (g) the Collector has the power to make certain enquiries, & set aside the settlement or lease of any land comprised in the estate or tenure made or created any time after 1-1-1946. Ss. 5, 6 & 7 relate to (1) homesteads, (2) lands in the 'khas' possession of the proprietor or tenure-holder for agricultural or horticultural purposes, & (3) buildings or structures together with lands on which they stand in the possession of the proprietors & tenure-holders & used as golas, factories or mills, etc. These properties the proprietor or tenure-holder is entitled to retain, homesteads free of rent, but the other properties subject to the payment of rent as may be determined by the Collector in the prescribed manner. S. 8 provides an appeal against the order of the Collector. Ss. 9, 10, 11 & 12 deal with mines & minerals. The mines which are being directly worked by the proprietor or tenure-holder shall be deemed to have been leased by the State Govt. to the proprietor or tenure-holder; the terms & conditions being settled by agreement between the parties & in the absence of any such agreement, by a Mines Tribunal appointed u/s. 12. S. 10 deals with subsisting leases of mines & minerals comprised in the estate or tenure or any part thereof. These again will be deemed to have been leased by the State Govt. to the holder of the subsisting lease, the terms & conditions being the same as the terms & conditions of the subsisting lease, subject, however, to an important condition. The condition is that the State Govt. may terminate the lease if in its opinion the holder of the lease had not done any prospecting or development work, apparently without payment of any compensation to the lessee. The holder of any subsisting lease of mines & minerals is precluded from claiming damages from the outgoing proprietor or tenure-holder. Section 11 vests in the State all buildings & lands not included in the lease but which are in the use & occupation of the lessee for purposes connected with the working or extraction of the mines & minerals comprised in the lease.

(68) Chapter III contains only one section, S. 13, which says that all estates & tenures vested in the State shall be managed according to the rules for the management of Govt. estates. In a proviso to the section, there is a reference to a Gram Panchayat, & the State Govt. may, on such terms & conditions as it may fix, entrust the management of estates & tenures to the Executive Committee of a Gram Panchayat Chap. IV which contains Ss. 14 to 18 deals with secured creditors, the determination of their claims by a claims Officer, appeal against the decision of the claims officer, & the constitution of a Board for hearing such appeals.

(69) Chap. V is important, & deals with the assessment of compensation. The assessment appears to be based primarily on income — income falling in two main categories, namely (1) income from rents, cesses, etc., & (2) income from mines & minerals. S. 19 relates to the appointment of a compensation officer who will make the assessment. S. 20 says that in preparing an assessment every proprietor or tenure-holder shall be treated separately, & for the purposes of assessment the interests of the proprietor or tenure-holder in all estates and tenures shall be treated jointly; in other words, the Act again proceeds, as I have already explained, proprietor by proprietor or tenure-holder by tenure-holder. Ss. 22 & 23 explain how the net income of a proprietor or tenure-holder in respect of rents & cesses is to be computed; S. 22 explains what is meant by "gross assets", & S. 23 explains how the net income is to be be calculated by making certain deductions from the gross assets. In the gross assets enter such items as the aggregate of rents & cesses payable by raiyats, aggregate of rents determined by the Collector for certain kinds of land, gross income from fisheries, trees, jalkars, ferries, hats, bazars & sairati interests, gross income from forests calculated on the basis of average annual income of twenty-five agricultural years, & gross annual income of the previous agricultural year from any other interest. The deductions to be made u/s. 23 are land revenue, the sum payable as agricultural income tax, any sum payable as income tax under the Indian Income Tax Act, chaukidari tax, cost of management at certain rates to be presently mentioned, & lastly cost of works of benefit to the raiyats at certain rates laid down in the section. Now, the cost of management varies according to, & is dependant on, the gross assets. There is a slab system consisting of five slabs, beginning at the lower & with a case where the gross asset does not exceed Rs. 2,000/- & ending at the upper end with the case where the gross asset exceeds Rs. 15,000/-. There is a similar (but not same) slab system with regard to the cost of works of benefit to the raiyats. The lowest slab consists of an estate or tenure where the gross asset does not exceed Rs. 5,000. The highest slab is that of an estate or tenure where the gross asset exceeds Rs. 20,000. The rates vary according to the slabs. In the highest slab, the deduction for the cost of management is not less than 15 per cent & not more than 20 per cent of the gross asset; & for the cost of works of benefit of the raiyats, the deduction is $12\frac{1}{2}$ per cent of the gross asset. Then, there is S. 24 which introduces a third slab system. When the net income computed in the manner laid down in S. 23 has been determined, the rate of compensation payable is a multiple of the net income. There are eleven slabs; in the lowest rung of the ladder is the case where the net income does not exceed Rs. 500, & in the highest rung is the case where the net income exceeds Rs. 1,00,000. The highest compensation payable is twenty times the net income, & the lowest is three times the net income; the lower the income, the higher is the compensation. With regard to arrears of rent, royalty, cess, etc. which also vest in the State, there is a provision that 50 per cent shall be paid & added to the compensation. From the compensation money are to be deducted any arrears of land revenue the amounts to be paid in satisfaction of the claims of creditors, etc. With regard to mines & minerals, a computation is to be made of the gross income & net income from royalties, & the gross income &

net income from mines worked directly by the proprietor or tenure-holder; thereafter, the amount of compensation payable shall be determined by agreement, if possible, but if no agreement is possible, then by a Tribunal. It is worthy of note that there is no provision for payment of compensation in respect of the following: (a) un-opened & un-developed mines & minerals from which there is no present income; (b) trees in the shape of standing timber which do not yield any present income, but which may be of great value when felled; & (c) half the arrears of rent which vest in & are recoverable by the State.

(70) Chapter VI deals with payment of compensation. S. 32 (2) lays down that the amount of compensation shall be paid in cash or in bonds or partly in cash & partly in bonds: the bonds shall be either negotiable or non-negotiable & non-transferable & be payable in forty equal instalments, & shall carry interest at 2½ per cent per annum with effect from the date of issue. The section does not state at what intervals of time, the forty equal instalmens shall be payable, nor does it lay down the proportion, if the compensation is to be paid partly in cash & partly in bonds. All these seem to have been left to be determined by the State Govt. by rules made u/s. 43 of the Act. S. 33 provides for making 'ad interim' payments to a proprietor or tenure-holder. Chap. VII deals with the constitution of a Binar Land Commission. The only function of the Commission will be to advise the State Govt. generally with regard to the agrarian policy which the State Govt. should follow in administering the system of land revenue in the State. The function is purely advisory, & the State Govt. will not be bound by the opinion of the Land Commission. Chap. VIII is the last chapter, which contains misc. provisions. S. 36 empowers the State Govt. to direct that any power which is conferred on it by the Act shall be exercised or discharged by any officer or authority subordinate to the State Govt. S. 43, another important section in this chapter gives the State Govt. power to make rules on many matters including the proportion in which the compensation shall be payable in cash & in bonds & the manner of payment of such compensation under Sub-ss. (2) & (3), S. 32.

(71) Legislative competence: absence of power in the Legislature which enacted the impugned Act: Now, the principal point for decision in these cases is if the impugned Act is unconstitutional. It has been contended that it is unconstitutional on various grounds. The first ground, which goes to the very root of the matter, is that the impugned Legislation is 'ultra vires' the legislature which enacted it. Mr. P. R. Das, appearing for the pltfs. in Title Suits Nos. 1 & 2 of 1951 & the petnrs. in some of the misc. Judicial cases, put his arguments on this part of his case, so far as I have been able to appreciate them, in the following way. Art. 245 of the Constitution, 'inter alia', states:

"Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, & the Legislature of a State may make laws for the whole or any part of the State."

Art. 246 & the Articles which follow that Article relate to what is known as distribution of legislative powers. Put briefly, the position is that Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I of Sch. 7 (called the Union List); Parliament, & subject to the power mentioned above, the Legislature of any State specified in Part A or Part B of Sch. 1 have power to make laws with respect to any of the matters enumerated in List III of Sch. 7 (called the Concurrent List); subject to the above powers, the Legislature of any State specified in part A or part B of Sch. 1 has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II (called the State List). For our present purpose, it is not necessary to refer to the provisions of the Articles which follow Art. 246. I go straight to Sch. 7 & the three Lists. Mr. P. R. Das has refd. to Entry 36 of the State List which reads:

"Acquisition or requisitioning of property except for the purposes of the Union, subject to the provisions of Entry 42 of List III."

Entry 42 of the Concurrent List reads:

"Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, & the form & the manner in which such compensation is to be given."

The contention of Mr. Das, stated very briefly, is that the power to make a law for acquisition of property under Entry 36 above, is subject to the provisions of Entry 42 of the Concurrent List, & the expression "subject to" means: (a) that the law so made must be for a public purpose, & (b) must determine the principles on which compensation for the property acquired is to be paid, & the form & manner in which such compensation is to be given. His argument is that the impugned Act compulsorily acquires the interests of proprietors & tenure-holders in land; but it is neither for a public purpose, nor does it lay down the principles, form & manner of "compensation", as that word is understood in law. According to him, the word 'compensation' has a known legal significance, & the Constituent Assembly must have used the term in that sense when it talked of principles, form & manner of compensation in Entry 42. He has refd. to the observations of Fletcher Moulton, L. J. 'In re an Arbitration between Lucas and the Chesterfield Gas & Water Board', (1909) 1 K B 16 at p. 28: (77 L J K B 1009). The observations are:

"The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e. that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, & not on the value to the purchaser, & hence it has from the first been recognised as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market-value of his lands as they stood before the scheme was authorised by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, & any & every element of value which they possess must be taken into consideration in so far as they increase the value to him."

This meaning of the word "compensation" was accepted in many subsequent decisions, & it is not necessary to refer to them all. What Mr. Das contends is that by reason of the use of the expression "subject to" in Entry 36 of the State List, the power to make a law by a State Legislature under that entry is subject to certain conditions or qualifications, which qualifications or conditions are stated in Entry 42 of the Concurrent List. His argument is that those conditions or qualifications not having been fulfilled, the impugned Act is 'ultra vires' the Legislature which enacted it.

(72) It would, I think, be convenient, if I state here the reply of the learned Attorney General, who appeared for the State of Bihar, with regard to this part of the case. The learned Attorney-General has based his reply primarily on two grounds: firstly, he contends that the impugned Act was made not necessarily under Entry 36 of the State List, but under Entry 18 of that List; secondly, assuming that the impugned Act was made under Entry 36, the expression "subject to" occurring in that entry has not the meaning which Mr. Das gives to it. The learned Attorney General states that the expression "subject to" merely restricts or cuts down the field of legislation, but does not import any conditions or qualifications. According to him, the idea was to put principles of compensation, etc., in the concurrent field of legislation, so as to attract the operation of Art. 254 of the Constitution & make such legislation liable to control of Parliament. He has refd. to various other entries in the three Lists where the expression "subject to" or a similar expression is used, & has contended that the expression has not the meaning suggested by Mr. P. R. Das.

(73) Having stated, in brief, the respective arguments on behalf of the parties before us, I now proceed to consider them & give my decision thereon. The Const. Ind. is an organic, basic statute, made by the Constituent Assembly representing the people of India. It constitutes India, as the preamble states, into a Sovereign Democratic Republic. It is not merely a mechanism under which laws are to be made, but is something more than that, it creates & defines the essential foundation, general framework & structure of the States & their Union, it provides the rules in accordance with which powers of sovereignty are to be exercised; it embodies the ideals & aspirations of a nation; it lays down fundamental rights, & provides remedies for enforcement of such rights; in other words, it seeks to shape & mould the growth of the political, social & economic life of the nation. It is now well-settled that such a charter or document is not to be construed in any narrow & pedantic sense. It is true that the rules which apply to the interpretation of other stautes, apply equally to the interpretation of a constitutional enactment; but the application of those rules must always have reference to the subject-matter of the enactment itself. (See the observations of Gwyer, C. J. in 'In the matter of the C. P. & Berar Sales of Motor Spirit & Lubricant Taxation Act, 1938', AIR (26) 1939 F C 1 at p. 4: (1939 F C R 18). Keeping the above rules in mind, I propose to examine the relevant provision of the Const. Ind.

(74) The power of the legislature to legislate on a subject, particularly in a written, federal constitution where there must be a nice balance of jurisdictions, can be looked at from two points of view — affirmative & negative. The conferment of the power is the affirmative aspect; a restraint or restriction on the exercise of the power is the negative aspect. It is important to remember that the restraint may be imposed in different ways — by introducing words of limitation in the very entry which confers the power, or by substantive provisions to which the power to legislate is made subject, or even by delimiting the field of legislation. This distinction between the conferment of power & the restraint on power to which I am now referring is, I think, important in dealing with the arguments of the parties on this part of the case. The contention of Mr. Das is that the entry which confers the power itself imposes limitations; the argument of the learned Attorney General is that the restrictions, if any, on the exercise of the power are to be found not in the legislative entries, but elsewhere e.g. in the chapter on fundamental rights. Ordinarily, this distinction may be of little or no importance; because whether there is absence of power or the power has been exceeded by ignoring certain restraints, the result is the same, namely, the law made is unconstitutional. But there is a meaning & purpose in making the distinction in these cases: this arises because of Cl. (4), Art. 31, Const. Ind. I shall, later on, discuss the meaning & effect of Cl. (4), Art. 31. But it is clear that Cl. (4) seeks to get over a contravention of, at least, one fundamental right, viz., that stated in Cl. (2), Art. 31. Mr. P. R. Das is naturally anxious to steer clear of Cl. (4), Art. 31, & has accordingly raised the more fundamental plea of absence of power. The learned Attorney-General is equally anxious to steer clear of that legislative entry which relates to compulsory acquisition of property by stating that the impugned Act is legislation under Entry 18 of the State List rather than Entry 36. Both, if I may say so wihout meaning any disrespect, are extreme views, though expounded with consummate skill & rare advocacy. Entry 21 of List II of Sch. 7, Govt. of India Act, 1935, which corresponded to Entry 18 of the State List of the Const. Ind., was considered by a Special Bench of this Ct., of which I was a member, in 'Kameshwar Singh v. Province of Bihar', AIR (37) 1950 Pat 392: (29 Pat 790). The decisions bearing on the interpretation of that entry were also refd. to therein, including the decision in 'Megh Raj v. Allah Rakhia', 74 I A 12: (AIR (34) 1947 P C 72). In the case of 'Jagannath Baksh v. United Provinces', AIR (33) 1946 P C 127: (I L R (1946) Kar P C 129), Lord Wright pointed out that

> "to regulate the relations of landlord & tenant & thereby diminish rights, hitherto exercised by the landlord in connection with his land, is different from compulsory acquisition of the land."

He made those observations with reference to S. 299, Govt. of India Act, 1935, which dealt with compulsory acquisition of land, etc. Ordinarily, it is not important to know whether a legislature having plenary power to legislate on more subjects than one has exercised that power under one entry or the other, because if the power is there, it does not very much matter under what head it comes. Speaking generally a comprehensive enactment like the impugned Act will probably come under several heads of legislation. If & when, however, there is a conflict of power or jurisdiction or the question of any restraint on power comes in, then it becomes important to know under what head or entry the power has been exercised. The pith & substance doctrine has often been resorted to, to resolve a conflict of jurisdiction. The true nature & scope of the enactment is, in my opinion, a relevant consideration in determining the question whether it comes under one head of legislation or the other, when the question of an absence of power or exceeding a restraint on power arises. In the classic case of 'Gallaghar v. Lynn', (1937) A C 863: (106 L J P C 161), the question that arose for consideration was whether certain limitations imposed on the power to legislate by the Parliament of Northern Ireland for the peace, order & good Govt. of Northern Ireland as were exceeded or not, one of the limitations being that the Parliament of Northern Ireland did not have power to make laws in respect of trade with any place out of the part of Ireland within their jurisdiction except so far as trade might be affected by the exercise of the powers of taxation etc. The question was answered with reference to the true nature & character of the legislation. Lord Atkin said as follows:

"If, on the view of the statute as a whole you find that the substance of the legislation is within the express powers then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field."

The following observations of Datham, C. J. in 'Bank of New South Wales v. The Commonwealth', (76 Commonwealth L R 1 at p. 186), are, I think, relevant:

"In determining the validity of a law it is in the first place obviously necessary to construe the law & to determine its operation & effect (that is, to decide what the Act actually does), & in the second place to determine the relation of that which the Act does to a subject-matter in respect of which it is contended that the relevant Parliament has power to make laws. A power to make laws with respect to a subject-matter is a power to make laws which in reality & substance are laws upon the subject-matter. It is not enough that a law should refer to the subject-matter or apply to the subject-matter: for example, income tax laws apply to clergymen & to hotel-keepers as members of the public; but no one would describe an income tax law as being, for that reason, a law with respect to clergymen or hotel-keepers. Building regulations apply to buildings erected for or by banks; but such regulations could not properly be described as laws with respect to banks or to banking."

The point which I wish to emphasise is that the limitation on the power of legislation may arise by reason of restrictions imposed within the entry which confers the powers; & when the question of exceeding such a restriction arises, it is relevant to consider the true nature & character of the legislation.

(75) In my view, in its true nature, scope & effect, the impugned Act is acquisition of property in the sense that it transfers to the State the entire or totality of interests of proprietors & tenure-holders in land & of the mtgees. & lessees of such interests, even though such transference be part of a general scheme of land reform or a stage in the evolution of a new system of land tenure: it is still acquisition of property, though different from acquisition 'simpliciter'. I think that it is no answer to say that Entry 18 of the State List is comprehensive enough to include rights in or over land; land tenures including the relation of landlord & tenant; & the collection of rents. Entry 18 is undoubtedly very comprehensive, but the different entries in the State List must be read together, in a broad & liberal spirit no doubt, but not so as to make one entry cancel or override another entry or make another entry meaningless. I am aware of the view expressed in several decisions that the entries are not mutually exclusive, & a certain amount of over-lapping is unavoidable when such a lengthy enumeration of subjects, as has been made in Sch. 7, is attempted in a constitutional enactment. But if the comprehensive entry relating to Land etc. includes compulsory acquisition of land, it was unnecessary or meaningless to have an entry for compulsory acquisition. There are other general entries, such as, "Forests", "Inns & inn-keepers". I do not think that it can be argued with any show of reason that those general entries can be called to aid in support of legislation for acquisition of private forests, private inns or other kinds of private property. As was pointed out by Spens. C. J. in 'Lal Singh v. C. P. & Berar', 1944-6 F C R 284: (A I R (31) 1944 F C 62), acquisition implies that there must be an actual transference of & it must be possible to indicate some person or body to whom is or are transferred, the land or rights in land.

(76) Compulsory acquisition or property for a public purpose has a long legislative history behind it, which goes back to more than hundred years (see Bengal Regulation I of 1824). Even when the first classification of legislative subjects was attempted under the Devolution Rules made under the Govt. of India Act, 1919, (which introduced in India provincial autonomy of a limited type, then commonly called dyarchy), 'Land Revenue Administration' including land tenures, collection of rent, etc., was distinguished & kept separate from 'Land acquisition'. Since then, compulsory acquisition of property for a public purpose has always been a separate subject of legislation, & I do not think that the Const. Ind. has made any departure from this long standing legislative practice.

(77) I think the fact that the Bill as passed by the Legislature was reserved for the consideration of the President shows that it was considered to be hit by Cl. (2), Art. 31, & the assent of the President was considered necessary under Cl. (3) of the said Article.

(78) I hold, therefore, that the impugned Act is substantially referable to Entry 36 of the State List & Entry 42 of the Concurrent List, so far as it is necessary to enquire into the legislative entries under which it is enacted, even though the compulsory acquisition authorised by it be part of a general scheme of land reform.

(79) But does that mean that the Legislature which enacted it had no power to enact it, by reason of the expression 'subject to' in Entry 36 & the provisions of Entry 42? I think that the answer must be in the negative.

(80) It is necessary to bear in mind the narrow scope of the argument of Mr. P. R. Das on this point. For his argument on the point of absence of power, he is not invoking the aid of any of the Articles in Part III (Fundamental Rights), Const. Ind., Art. 13 of the Constitution states that all laws in force immediately before the commencement of the Constitution, in so far as they are inconsistent with any of the fundamental rights shall, to the extent of such inconsistency, be void. It further states that the State shall not make any law which takes away or abridges the rights conferred by Part III & any law made in contravention of Cl. (2), Art. 13, shall, to the extent of the contravention, be void. Art. 245 which I quoted in an earlier part of this judgment, states clearly that the power to make laws is "subject to the provisions of this Constitution". Art. 31, Cls. (1) & (2) read together, guarantees a fundamental right, namely, that no person shall be deprived of his property save by authority of law & that no property, moveable or immoveable, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession unless the law provides for compensation for the property & either fixes the amount of the compensation, or specified the principles on which, & the manner in which, the compensation is to be determined & given. To me, it seems clear that the provisions of Art. 31, Cls. (1) & (2), read with Arts. 13 & 245, are a restraint on the power of law-making with regard to compulsory acquisition of property. On the question of absence of power, Mr. Das does not rely on those provisions, though I must make it clear (to avoid any misunderstanding) that Mr. Das does rely on Art. 13 & some other Arts. in Part III of the Constitution, for another branch of his argument which I shall presently consider. For his contention that the impugned legislation is 'ultra vires' the legislature which enacted it, Mr. Das

relies principally on the use of the expression 'subject to' in Entry 36, & the provisions of Entry 42 of List III.

(81) I do not think that the expression 'subject to' has the meaning sought to be given to it by Mr. Das. That expression has been used in several other entries where the meaning is not open to any doubt. Take, for example, Entry 11 of List II. It relates to education including universities, subject to the provisions of Entries 63, 64, 65 & 66 of List I. Those entries relate to the Benares Hindu University, the Aligarh Muslim University, the Delhi University, institutions for scientific or technical education, etc. The obvious meaning is that the State may make a law with respect to education including universities, but not with regard to the universities or institutions mentioned in Entries 63, 64, etc. of List I. The same meaning can be gathered from many other entries. There is, I think, intrinsic evidence in the Constitution itself to show that the expression "subject to" has not the meaning sought to be given to it by Mr. Das. Cl. (4), Art. 31 itself furnishes such evidence. If Mr. Das is right, then Cl. (4), Art. 31 becomes meaningless, as it cannot cure the defect of an initial absence of legislative power. Take again Cl. (5), Art. 31. That clause says that nothing in Cl. (2) shall affect, among other things, the provisions of any law which the State may hereafter make for the promotion of public health or the prevention of danger to life or property, etc. If there is no power to legislate by reason of the use of the expression "subject to" in Entry 36, then Cl. (5), Art. 31 becomes meaningless & cannot cure a defect of initial absence of power. Then there is another reason. Entry 33 of List I refers to acquisition of property for the purposes of the Union. There is no such expression as 'subject to' in this entry. If the contention of Mr. Das is accepted, then the position comes to this that a law made for the acquisition of property for the purposes of the Union is not subject to the provisions of Entry 42 of List III. I do not think that it was ever intended that acquisition of property for State purposes should be placed on a different footing from acquisition of property for Union purposes, in the sense suggested by Mr. Das.

(82) I think that the argument of Mr. Das has been put in rather an extreme form, & the proper answer to the question is this: all that the expression "subject to" means is that principles of compensation, etc. which have to be laid down for compulsory acquisition of property by reason of the provisions in Part III of the Constitution relate to &. are a matter within the concurrent field of legislation, & a law relating thereto made by a State will attract the operation of Art. 254 of the Constitution. I do not think that the expression "subject to" has any other meaning; nor do I agree with Mr. N. C. Chatterjee, who folld. Mr. Das in one of the cases, that the expression "subject to" should be interpreted by reference to decisions relating to ordinary commercial or contractual transactions. Therefore, the correct position is that the proper legislature enacted the impugned legislation, & there was no initial absence of power in the sense in which Mr. Das wishes to infer it from the provisions of Entry 36 of List II & Entry 42 of List III. There are restrictions on the power to make laws with regard to acquisition of property, but those restrictions are to be found elsewhere in the Constitution. The question of those restrictions & how far they or any of them have been ignored or exceeded will be considered by me when I take up the question of fundamental rights, with particular reference to Cl. (4), Art. 31.

(83) Purposes of the impugned Act: whether public purpose or not: But before I do so, there is another point which must be dealt with. Mr. Das has contended that the impugned legislation compulsorily acquires the interests of proprietors & tenure-holders in land, but envisages no public purpose for such acquisition. It is contended that in the absence of a public purpose, the law is invalid. In 'Kameshwar Singh v. Province of Bihar', AIR (37) 1950 Pat 392: (29 Pat 790), I had expressed the following views with regard to Sub-s. (2), S. 299, Govt. of India Act, 1935:

"The effect of the two parts of the sub-section read together is clearly this: it is not open to any legislature to make any law authorising the compulsory acquisition of land unless the following two conditions are fulfilled. The first or rather inherent condition is that the compulsory acquisition must be for public purpose. It is true that Sub-s. (2), S. 299, as worded, does not, strictly speaking, make 'public purpose' a condition precedent, but rather assumes that compulsory acquisition can be for public purpose only; it makes 'public purposes' inherent in compulsory acquisition."

I refd. to the history of legislation on the subject of compulsory acquisition of property, & pointed out that the principle that such acquisition is made for "purposes of general convenience to the community or arrangement of public utility" was always recognised in India. I think that the position is the same under the present Const. Ind. Entry 33 of List I talks of

"Acquisition or requisitioning of property for the purposes of the Union."

Entry 36 of List II says,

"Acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of Entry 42 of List III."

Entry 42 of List III talks of

"Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined etc."

Three purposes are mentioned in these entries: (1) purposes of the Union; (2) purposes of the State; & (3) any other public purpose. The use of the word 'other' indicates that the purposes of the Union or of a State are also public purposes. Art. 31 of the Constitution which relates to compulsory acquisition of property says in Cl. (1):

"No person shall be deprived of his property save by authority of law."

Cl. (2) reads:

"No property, moveable or immoveable, including any interest in, or in any Co. owning any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired & either fixes the amount of compensation, or specifies the principles on which, & the manner in which, the compensation is to be determined & given."

Cl. (2), strictly speaking, does not, in express words, make 'public purposes' a condition precedent to compulsory acquisition, but rather assumes that such acquisition can be for public purposes only; it does so by necessary implication. In dealing with Art. 31, his Lordship Mukherjea, J. in 'Charanjit Lal v. The Union of India', AIR (38) 1951 S C 41: (1950 S C R 869), observed as follows:

"It is a right inherent in every sovereign to take & appropriate private property belonging to individual citizens for public use. This right, which is described as 'eminent domain' in American law,

is like the power of taxation, an off-spring of political necessity, & it is supposed to be based upon an implied reservation by Govt. that private property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner. Art. 31 (2) of the Constitution prescribes a two-fold limit within which such superior right of the State should be exercised. One limitation imposed upon acquisition or taking possession of private property which is implied in the clause is that such taking must be for public purpose. The other condition is that no property can be taken, unless the law which authorises such appropriation contains a provision for payment of compensation in the manner laid down in the clause."

There is, thus, high authority for the contention of Mr. Das that an inherent condition of any legislation for compulsory acquisition of private property by the State is that it must be for a public purpose.

(84) The right of 'eminent domain' has been stated by American jurists to be the power of the sovereign to take property for public use without the owner's consent. Nichols in his Law of Eminent Domain, (Volume 1, p. 2) thus states the meaning of the power in its irreducible terms: (a) power to take; (b) without the owner's consent; & (c) for the public use. Willis has pointed out that the right of 'eminent domain' is

"an implied power of the Federal Govt., implied either from the limitation in the Fifth Amendment, or because necessary & proper to carry out other express powers of the Federal Govt., or implied from the grant of legislative power." (Willis on Constitutional Law, Chapter XXVIII, p. 814).

The Fifth Amendment to the United States Constitution contains the limitation, "nor shall private property be taken for a public use, without just compensation", & all the state constitutions in America, except three (Kansas, New Hampshire & North Carolina), contain express prohibitions against the taking of private property for public use without compensation. Willis observes:

"Since three States have no express limitation, & other States might not apply their express limitations as due process would be applied by the United States S. C., it became important to decide whether or not the due process clause as a matter of substance protects personal liberty against social control so far as concerns 'eminent domain'. The United States S. C. has definitely held that the due process clause does have this effect. It has held that it applies to State action so that States cannot take private property for a public use without compensation, & that private property cannot be taken for a private use even upon the payment of compensation either by the States or by the Federal Govt. These cases make the due process clause cover not only the scope of the express limitation in the Fifth Amendment, but everything else involved in 'eminent domain'. It is due process of law to take private property for a public use whenever just compensation is made. This is, therefore, constitutional social control". Willis on Constitutional Law, Chap. XXVIII, pp. 814-15).

Nichols has pointed out that the term "dominium eminens" (eminent domain) seems to have been originated in 1625 by Hugo Grotius, who wrote of this power in his work, 'De Jure Belli et Pacis". He has further pointed out that the definitions & discussions of this right by political writers of the seventeenth & eighteenth centuries in Europe are of great importance in determining the extent of the power of eminent domain under American constitutions, for it is known that the authors of American constitutions were familiar with those writings.

(85) I have refd. to these observations not for any academic or pedantic purpose. My purpose is to show that the idea of "public use or public purpose" as an inherent or implied condition to the compulsory acquisition of private property by the State owed its origin in America to politico-historical reasons; the idea was further developed by reason of the limitation in the Fifth Amendment & the due process clause in the American Constitutions in a way which was peculiar to America. This must be borne in mind while considering American decisions; therefore, there is a danger in following them or relying on commentaries made thereon by eminent American jurists, with regard to a constitution where the due process clause was deliberately omitted. The ideas which entered into the American political heritage of the eighteenth century exercised considerable influence over the marks of the American Constitutions, & the American decisions must be construed against the background of those ideas.

(86) The expression 'public use' or 'public purpose' has not been defined. Mr. Das has contended that it must be particular, fixed & definite. He has refd. to Weaver on Constitutional Law & its Administration", where the learned commentator has said:

"What constitutes a public use is largely a question for the legislature, & the Cts. will not interfere except to inquire whether the legislature could reasonably have considered the use a public one. Generally, the phrase is not limited to business necessity & ordinary convenience, but may extend to matters of public health, recreation & enjoyment. It may include not only the present demands of the public, but also those which may be fairly anticipated in the future. The Cts., however, require that the use shall be fixed & definite. It must be one in which the public actually has an interest, & the terms & manners of enjoyment must be within the control of the state." (Weaver on Constitutional Law & its Administration at p. 546).

Cooley in Constitutional Limitations thus summarised the position:

"No satisfactory definition of the term 'public use' has ever been achieved by the Cts. Two different theories are presented by the judicial attempts to describe the subjects to which the expression would apply. One theory of 'public use' limits the application to 'employment' 'occupation'. A more liberal & more flexible meaning makes it synonymous with 'public advantage' —'public benefit'. A little investigation will show that any definition attempted would exclude some subjects that properly should be included in, & include some subjects that must be excluded from, the operation of the words 'public use'. As might be expected, more limited application of the principle appears in the earlier cases, & the more liberal application has been rendered necessary by complex conditions due to recent development of civilization & the increasing density of population. In the very nature of the case, modern conditions & the increasing interdependence of the different human factors in the progressive complexity of a community make it necessary for the Govt. to touch upon & limit individual activities at more points than formerly." (Cooley's Constitutional Limitations, Volume II, p. 1139-40).

(87) I have already refd. to the two purposes which are mentioned in the preamble of the impugned Act. In an affidavit filed on behalf of the State of Bihar, three other objects or pur-

poses are suggested. It is alleged therein that the landlords as a class neglected to maintain the irrigation system, failed to bring to cultivation culturable waste lands & frittered away forests & mineral resources of the State. The suggestion is that when the interest of the proprietors & tenure-holders are transferred to the State, the State will be able to look after irrigation works, bring culturable waste lands to cultivation & conserve forests & mineral resources. Mr. Das has challenged the correctness of these allegations made in the affidavit refd. to above, & has drawn our attention to several affidavits filed on behalf of his clients. He has pointed out that there never was any general or absolute duty on the landlords to maintain irrigation works, but such maintenance was a matter of custom or contractual incident of the tenancy. He has also drawn our attention to the Bihar Private Irrigation Works Act under which it was open to the State Govt. to take necessary action in the matter of maintenance of works of irrigation. With regard to forest, he has drawn our attention to the affidavit of one Parmeshwar Prasad Sinha which showed how forests in possession of the State were damaged or destroyed. He has pointed out that in the Land Revenue Administration Report of 1945-46, the number of recorded proprietors of estates was 8,45,103, & the number of recorded tenure-holders was 4,90,816. He pointed out that the area of culturable waste lands was very small; & in any view, there was already in the statute book an Act called the Waste Lands Reclamation Act (Act XVI (16) of 1946) under which it was possible to take necessary action by the State. The sum & substance of Mr. Das's contention is that the transference of the interests of the proprietors & tenure-holders to the State by the impugned Act has not been shown to be for any public purpose within the meaning of that expression as understood in American decisions & in the commentaries of American jurists. He has pointed out that there is no provision in the impugned Act for an equitable distribution of land; nor for cultivation of waste lands, if any. He has stated that, in spite of the deduction for cost of works of benefit to the raiyats (which deduction, according to him, is meant only for the purpose of artificially reducing thet compensation), the impugned Act does not compel Govt. to spend a pice for the benefit of raiyats. It provides just for transference of interests, followed possibly by augmentation of public revenue. According to him, if the purpose be to augment public revenues, that would not be a public purpose within the meaning of that expression. (See Willis on Constitutional Law, p. 817, line 2).

(88) This question whether there is any public purpose for the impugned Act has caused me considerable anxiety. In 'Kameshwar Singh v. Province of Bihar', AIR (37) 1950 Pat 392: (29 Pat 790), we had occasion to deal with the Bihar State Management of Estates and Tenures Act (Act XXI (21) of 1948). I referred therein to the decision in 'Hamabhai Framjee v. Secy. of State', 42 IA 44: (AIR (1) 1914 PC 20), where it was observed:

"Whatever else the expression may mean it must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

That was a case, as has been rightly pointed out by the learned Attorney-General, regarding the meaning of the expression "public purpose" occurring in a lease by the East India Company, & not in the Act of a sovereign legislature. After referring to the various provisions of the Bihar State Management of Estates & Tenures Act, 1949, I said:

"I have very carefully considered the provisions of the impugned Act, but find it very difficult to hold that the acquisition or deprivation of rights in land therein provided was for a public purpose. No public purpose as envisaged by the tests mentioned above is apparent either from the preamble or the provisions of the impugned Act. The provisions of the impugned Act do not benefit the State pecuniarily. It is conceded by Mr. Lalnarain Sinha that the State gets no benefit. The tenants get no benefit either: the provision for irrigation costs is highly problematic or hypothetical. I can find nothing in the provisions to avoid conflicts between landlords & tenants or give larger rights to tenants. As far as one can make out, the impugned Act is intended either as an experiment, without incurring any cost, of large scale management of estates, or as a confiscation of rights in land without payment of compensation."

That Act, in the view which I held, was a mere pejorative imitation of the Chota Nagpur Encumbered Estates Act, 1876 & provided for a number of things — possession, deprivation, repudiation, etc. — without any scheme of land reform or full-scale acquisition of property for land reform. In those circumstances, I expressed the view that there was no apparent or real public purpose behind it. At the same time, I guarded myself against saying that in no circumstances could there be a public purpose in acquiring zamindaries or in acquiring the interest of intermediaries or rent collectors, either in exercise of the right of eminent domain or in exercise of the police powers of the State. I made it quite clear that all that I said in that case about a public purpose related solely to the provisions of the Act which was under consideration in that case.

(89) The learned Attorney-General has contended before us that in dealing with the Act of a sovereign legislature, the expression "public purpose" must be interpreted in a liberal & comprehensive sense. In my opinion, the learned Attorney General is right. I have already refd. to the three entries in the legislative Lists which show that purposes of the Union & purposes of the State stand on the same footing as other public purposes. This, by itself, would enlarge the meaning of the expression "public purpose"; in any case, would give it a meaning wider than what was arrived at in America by the due process clause. In the Australian Constitution the Commonwealth Parliament is empowered by S. 51 (xxxi) of the Constitution to make laws with respect to: "The acquisition of property on just terms from any State or person 'for any purpose in respect of which the Parliament has power to make laws'." I have underlined (here in inverted commas) the words which I consider to be of some importance. Union purposes or State purposes would, in my opinion, be somewhat similar to the words used in the placitum quoted above. Dealing with this power of the Commonwealth Parliament in Australia, Dr. Wynes says as follows:

"Probably, Sub-s. (xxxi) both widens & limits the conditions of exercise of the power which would otherwise come within the incidental power — enlarges it to cover cases of direct acquisition 'simpliciter' without the necessity of mere acquisition as part of a scehme, & limits the conditions of exercise to taking 'on just terms'."

"The Commonwealth power is limited in two respects: (a) the acquisition is to be 'on just terms' & (b) it must be in respect of some purpose in respect of which the Parliament has power to

make laws." (See Wynes on Legislative & Executive Powers in Australia, pp. 247-248).

On the question of the purpose of acquisition, the Commonwealth power is limited to by the provision that the acquisition must be for some purpose with respect of which Parliament has power to make laws, while in America the power of eminent domain is limited to taking for a public use (or purpose), & what is public use is a question cognizable by the Cts. in the State as well as in the United States, in accordance with a line of decisions which refined & developed the due process clause. Dr. Wynes then says:

"The suggestion that the Commonwealth power is probably limited to acquisition for public purposes, that the test of validity is whether the acquisition is for a 'public purpose' & that the American cases as to what is a public purpose may be applicable in Australia, is submitted to be clearly incorrect. The subtle refinements & distinctions which are perceptible in the numerous American cases on this matter are not applicable in this country, where the sole test is whether the property has been acquired for a purpose in respect of which the Commonwealth has legislative power."

Even without going to the length suggested by Dr. Wynes, it is permissible, I think, to hold, on the words used in Entry 33 of List I, Entry 36 of List II & Entry 42 of List III, that the connotation of the expression "public purpose" in the Indian Constitution is fairly wide & comprehensive, because it embraces all purposes of the Union or a State. It cannot, I think, be denied that acquisition of intermediate interests in land as part of a scheme of land reform is a legitimate & valid State purpose. The learned Attorney-General has drawn our attention to the use of the expression "public purpose" in other parts of the Constitution. e.g., in Art. 23 (2) of the Constitution. Cl. (2), Art. 23 is in the nature of a proviso or exception to Cl. (1), Art. 23, which prohibits traffic in human beings & 'begar' & other similar forms of forced labour. Cl. (2) states that nothing in the Article shall prevent the State from imposing compulsory service for public purposes. It is obvious that the expression "public purposes" occurring in Cl. (2) is used in a wide & comprehensive sense. Another point to be kept in mind is that "public purpose" with reference to direct acquisition 'simpliciter of the property of an individual must stand on a somewhat different footing from that of acquisition of property of a class of individuals as part of a general scheme. In the former case, the purpose must be fairly obvious to every body. In 'Province of Bombay v. Khushaldas S. Advani', AIR (37) 1950 S C 222: (1950 S C R 621), his Lordships Fazl Ali, J. made the following observations with regard to such cases:

"Indeed, it appears to me that in a large majority of cases no inquiry should be necessary as the existence of a public purpose would be seif-evident or obvious, & a mere reference to the purpose will make any one say: this is of course a public purpose."

His Lordship further pointed out that

"since the question as to whether it is necessary or expedient to acquire land (given a public purpose) has been left entirely to the satisfaction of the Provincial Govt., the opinion, formed by it, provided it was formed in good faith, cannot be questioned; but the same cannot be said with regard to the decision of the executive as to the existence of a public purpose, which is the foundation of its power & is a condition precedent to its exercise."

It is to be remembered, however, that these observations were made by his Lordship in respect of the power of the executive, with reference to the words used in S. 3, Bombay Land Acquisition Ordinance. The validity of the Ordinance itself was not the subject matter of that decision.

(90) In the class of cases where acquisition of property of a large number of individuals is being made as part of a general scheme, say, of land reform, there must necessarily be some difference of opinion as to whether the scheme is for the general benfit or not. Such a difference of opinion has existed with regard to the Permanent Settlement for a very long time. In the course of arguments before us, repeated references were made to the report of the Land Revenue Commission, Bengal (Floud Commission), & observations of learned authors who had occasion to consider the merits & demerits of the two systems of land tenure known as zamindari & raiyatwari. At pp. 41 to 43 of the Report, is set out the majority view of the Floud Commission. The majority concludes as follows:

"A majority of the Commission have also come to the conclusion that the zamindari system has developed so many defects that it has ceased to serve any national interest. No half measures will satisfactorily remedy its defects. Provided that a practicable scheme can be devised to acquire the interests of all classes of rent receivers on reasonable terms, the policy should be to aim at bringing the actual cultivators into the position of tenants holding directly under Govt."

Some of the defects of the Zamindari system were mentioned by Baden Powell in his Land Systems of British India, Vol. I, p. 407. It is I think, unnecessary to refer to all the documents which have been placed before us with regard to the history of landlordism or the merits & demerits of the two systems of land tenure. We have been refd. to the resolution of the Govt. of India dated 16-1-1902, the final report of the Famine Enquiry Commission of 1946 & various other documents. It is, I think, unnecessary to consider these documents, because I do not think that it is our duty to investigate into the question whether a particular scheme of reform is good or bad. The position, as I understand it, is that it is a question for the appropriate legislature, & the Cts. will only enquire whether the legislature could reasonably have considered such a scheme as the transference of the interests of proprietors or tenure-holders in land to the State, to be a public purpose. It is clear to me that the legislature could do so: it could take the view that such transference was necessary as part of a general schme of land reform, or as a stage in the evolution of a better system of land tenure, or even as a step towards better management & cultivation of land. Whether the legislature is right or wrong is not for us to decide; for us the test is — could the legislature reasonably take such a view?

(91) One must, I think, bear in mind that the Const. Ind. was made in 1950, by which year the conception of social control all the world over had undergone very considerable change. Even in countries other than India similar schemes of social control had raised constitutional questions. As one American author put it,

"every legal system for a living society, even when embodied in a written constitution, must itself be alive. It is not merely the imprisonment of the past; it is also the unfolding of the future." Justice Holmes declared in 1904,

"Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine." (Missouri, K. & T. K. Co. v. May', 194 U S 267: 48 Law Ed 971).

I have examined such statutes as the Bank of England Act 1946 (9 & 10 Geo. 6 Ch. 27) & the

Coal Industry Nationalisation Act, 1946 (9 & 10 Geo. 6 Ch 59), which were passed in England in recent years as part of a scheme of nationalisation, In England, there is no written constitution, & Parliament is sovereign. The public purpose for enactments of the nature refd. to above, cannot, I think, be determined in the same way as or by the same standard as the purpose of a direct acquisition 'simpliciter' of the property of an individual.

(92) There is, I think, clear indication in the Const. Ind. itself that the expression "Public purpose" is to be understood in a wide & comprehensive sense. Furthermore, there is indication that the Constituent Assembly representing the people of India which made the Constitution, was itself aware of the existence of legislation of the nature of the impugned Act. This is clear from Cl. (4), Art. 31. As a matter of fact, the Land Reforms Bill was pending at the commencement of the Constitution. The learned Attorney-General has refd. to the debates in the Constituent Assembly to show that the Bihar Abolition of Zamindari Bill, 1949 & certain other bills of a similar nature were also pending in other state Legislatures at the time when the Constituent Assembly was discussing the provisions of Art. 31. I agree that neither the validity nor the interpretation of a statute can be allowed to depend upon what members, whether Ministers or not, choose to say in Parliamentary debates. But the debates can be looked into for ascertaining historical facts, viz., that certain bills were pending at the time when Art. 31 was being considered, & that Cl. (4), Art. 31 refd. to such bills. If the legislation then pending was not for a public purpose, it was, indeed, surprising that the Constituent Assembly tried to save such legislation by means of the provisions of Cl. (4), Art. 31. One may, I think, say that there was an implied declaration by the Constituent Assembly that such legislation was for a public purpose, & such declaration will be given deference by the Cts. until it is shown to involve an impossibility. (See 'Old Dominion Land Co. v. United States of America', 269 U S 55: (70 Law Ed 162).

(93) For the reasons given above, I hold that the impugned Act does not fall for want of a public purpose.

(94) Fundamental Rights: contravention, if any, & the effect of Cl. (4) of Art. 31: I now proceed to consider if any of the provisions in Part III (Fundamental Rights) of the Const. Ind. have been contravened by the impugned Act, & if so, with what effect. I shall also consider to what extent Cl. (4), Art. 31 prevents us from calling in question the impugned Act on the ground of any such contravention.

(95) Mr. Das has contended — (1) that the impugned Act contravenes the provisions of Art. 19 (1) (f) of the Constitution, & is not saved by Cl. (5) of the said Art. (2) that it contravenes Art. 31 (1) of the Constitution, & is not saved by Cl. (4) of the said Article; & (3) that it contravenes the provisions of Art. 14 of the Constitution & is accordingly void under Art. 13 (2) of the Constitution. The first two contentions can, I think, be disposed of easily. In 'Kameshwar Singh v. Province of Bihar', AIR (37) 1950 Pat 392: (29 Pat 790). I had pointed out that when the property itself is acquired by the State, the right mentioned in Art. 19 (1) (f) can have no application; because the provisions of Art. 31 are in the nature of special provisions, & the general right to freedom must yield to the special provisions relating to acquisition of property. I still adhere to that view. Even assuming that Art. 19 refers to a matter different from the subect-matter of Art. 31, I do not think that there is any scope for the application of the provisions of Art. 19 (1) (f) in a case where the property itself has been acquired for public purposes. When the property itself has been acquired, how can the citizen say that he still has the right to acquire, hold & dispose of the property? In the view which I have taken it is unnecessary to decide whether Cl. (5), Art. 19 saves the impugned Act or not: that question does not really arise.

(96) As to Art. 31 (1), the contention of Mr. Das is that the words "by authority of law" do not mean the particular law which expropriates, but means the general law, the 'lex-terrae' of the 'Magna Charta'. Mr. Das conceded, however, that in view of the decision of the S. C. in 'Gopalan's case', AIR (37) 1950 S C 27: (51 Cr L J 1383), he was not in a position to press this contention in this Ct., but would reserve his right to press the point at a later stage if & when the occasion arises.

(97) There is one other point in this connection. If it were held that the impugned Act authorises compulsory acquisition of private property without a public purpose, the Act may be held invalid under Cl. (1), Art. 31, provided Cls. (1) & (2), Art. 31 are & can be read together. The word 'law' in Art. 31 does not appear to have been used exactly in the same sense in all the clauses; the context makes that quite clear. In Cl. (1), Art. 31, the expression 'law' must, I think, mean a valid law. If public purpose is an implied or inhrent condition to legislation on the subject of compulsory acquisition of private property by the State, then a law which is made in contravention of this implied condition, will not be a valid law within the meaning of Cl. (1), Art. 31 of the Constitution. I am further of the view that an invalidity of that nature will not be cured by the assent of the President. This point of view I explained in some detail in 'Kameshwar Singh's case', AIR (37) 1950 Pat 392: (29 Pat 790), & I have no desire to repeat what I said there. However, that question does not really arise in view of my finding on 'public purpose' & it is unnecessary to say anything more about the vexed question if Cls. (1) & (2), Art. 31 should be construed conjunctively or disjunctively, or if the expression deprived' in Cl. (1) means deprivation of a nature other than by acquisition.

(98) Now, remains the third contention, viz., whether the impugned Act contravenes Art. 14 of the Constitution, & if so, with what effect. This is the most important question in these cases, & requires a very careful consideration. Art. 14 of the Constitution appears to be based on the Fourteenth Amendment to the Constitution of the United States of America, which Amendment was adopted soon after the close of the Civil War in America, & had its origin in the purpose to secure to the people of the coloured race the full enjoyment of their civil rights. The relevant portion of the Fourteenth Amendment reads:

"No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; 'nor deny to any person within its jurisdiction the equal protection of the laws'."

In the Indian Constitution Article 14 reads:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

It has been stated that the equality of rights is a basic principle of republicanism (Weaver on Constitutional Law, p. 393). A classic exposition of the principle occurs in a judgment of justice Field, given as far back as 1884, in 'Barbier v. Con-

nolly', (1885) 113 U S 27: (28 Law Ed 923). The learned judge said:

"This clause undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection & security should be given to all under like circumstances in the enjoyment of their personal & civil rights; that all persons should be equally entitled to pursue their happiness & acquire & enjoy property; that they should have like access to the Cts. of the country for the protection of their persons & property, the prevention & redress of wrongs & the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances, that no greater burdens should be laid upon one than are laid upon others in the same calling & conditions, & in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

A large number of American decisions on the question were cited at the Bar; but we are, to some extent, relieved from the duty of considering all these decisions in detail, in view of the decision of the S. C. of India in 'Charanjit Lal Chaudhary v. Union of India', A I R (38) 1951 S. C. 41: (1950 S C R 869), where a number of the same American decisions as were cited before us, were considered, & certain principles were approved. These principles are summarized by Willis in a para. headed "Meaning & Effect of the Guaranty", at p. 579 in the Constitutional law of the United States. His Lordship Fazl Ali, J. of the S. C. of India accepted the summary as a correct statement of the law on the equal protection clause in the American Constitution (vide 'Charanjitlal v. Union of India', A I R (38) 1951 S C 41 at p. 44: (1950 S C R 869). Three of these principles refd. to by Willis have a direct bearing on the question before us. These three principles are:

"1. The guaranty of the equal protection of the laws means the protection of equal laws.

2. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction: it merely requires that all persons subjected to such legislation shall be treated alike under like circumstances & conditions both in the privileges conferred & in the liabilities imposed.

3. Mathematical nicety & perfect equality are not required, & one who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."

(99) I now proceed to consider the arguments advanced before us on this part of the case in the light of the principles stated above. Mr. Das has contended that S. 3 of the impugned Act gives an arbitrary & naked power to the State Govt., untrammelled by any considerations, to pick & choose estates or tenures of any particular proprietor or tenure-holder & say that they have passed to & become vested in the State, while no action is taken against other proprietors or tenure-holders standing in like circumstances & conditions. It is stated that, as a matter of fact, the estates & tenures of some of the big landlords have only been notified so far. Mr. Das has refd. to certain affidavits filed on behalf of his clients. In one of the affidavits (that of Lakshman Nidhi), a statement of the gross income, etc., has been made, & the statement shows that the net income from the estates & tenures of the Maharajadhiraj, calculated under the provisions of the impugned Act, will be in the neighbourhood of three lakhs only. On that basis, the compensation payable to him will be about ten lakhs. A statement of the arrears of rent payable to the Maharajadhiraj, the estimated value of the standing timber in the estates of the Maharajadhiraj, a statement showing details of land settlement from 2-1-1946, etc., have also been put in. The statement of arrears shows that the balance outstanding at the end of 1357 Fasli was in the neighbourhood of thirty lakhs. It is stated that even deducting fifty per cent the State Government will get from arrears of rent more than what it will have to pay as compensation in other words, half the arrears of rent are made to pay for all the estates & tenures of the Maharajadhiraj Bahadur. In Misc. Judicial Case No. 239 of 1950 of which the petnr. is Raja Prithichand Lal Chaudhury, an affidavit discloses that the gross assets amount to Rs. 10 lakhs & odd, whereas the deductions as per the impugned Act will exceed the gross assets. These statements have not been controverted, & Mr. Das contends that they show how section 3 will operate in practice. He states that the State Govt. will take, at the beginning, the estates & tenures of such landlords only to whom very little compensation is to be made or to whom the payment can be made from the arrears of rent or other accumulated resources; thus, the estates of these big landlords will be made to pay for other smaller estates where the scale of compensation payable is higher & there are no arrears of rent or other resources. The contention of Mr. Das is that the effect of S. 3 has to be considered in the light of these facts & circumstances & if so considered, the effect is to give arbitrary power to the State Govt., to pick & choose a power which is not a reasonable discretion, but which clearly contravenes the equality provision of the Indian Constitution. Mr. Das placed strong reliance on the decision in 'Yick Wo v. Peter Hopkins', (1886) 118 U S 356: 30 Law Ed 220), where the pltf. in error was a native of China who had been found guilty of a violation of certain ordinances, which made it unlawful for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the City & County of San Francisco without having first obtained the consent of a board of supervisors, except the same be located in a building constructed either of brick or stone, etc. The S. C. of California considered the ordinance as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. The S. C. of America held otherwise, & Matthews, J. who delivered the opinion of the Ct., said as follows:

"We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping & conducting laundries. They seem intended to confer, & actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked & arbitrary power to give or withhold consent, not only as to places, but as to persons."

(100) The learned Attorney-General sought to distinguish this decision on the footing that Matthews, J. based his decision not on the invalidity of the ordinances, but on the ground of discrimination in actual operation of the ordinances. It is true that Matthews, J. said:

"In the present case, we are not obliged to reason from the probable to the actual & pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford of unequal & unjust discrimination in their administration. For the cases present the

ordinances in actual operation, & the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant & require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, & thus representing the State itself, with a mind so unequal & oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petnrs., as to all other persons, by the broad & benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face & impartial in appearance, yet, if it is applied & administered by public authority with an evil eye & an unequal hand, so as practically to make unjust & illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

But if the judgment is read as a whole, it would appear that the ordinances themselves were held to be invalid, & Matthews, J. refd. with approval to the decision in 'Baltimore v. Redecke', (49 Md 217), which held that where the legislature commits to the unrestrained will of a single public officer the power to notify every person who employs a steam engine in the prosecution of any business in the City of Baltimore, to cease to do so, & by providing compulsory fines for every day's disobedience of such notice & order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether, the legislature practically gives a single individual uncontrolled power, & thus violates the principle that equal protection of the laws is a pledge of the protection of equal laws. The decision was so understood by the S. C. itself in 'Homer Adolph Plessy v. John H. Furguson', (1896) 163 U S 538: (41 Law Ed 256), where it was observed:

"Thus in 'Yick Wo v. Hopkins', (1886) 118 U S 256: (30 Law Ed 220), it was held by this Ct. that a municipal ordinance of the City of San Francisco to regulate the carrying on of public laundries within the limits of the municipality violated the provisions of the Constitution if it conferred upon the municipal authorities arbitrary power, at their own will & without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places without regard to the competency of persons applying, or propriety of the places selected for the carrying on of the business."

(101) The learned Attorney-General has sought to justify S. 3 on the ground of administrative convenience, & has relied on the decision 'in people of the State of New York ex rel. Simon Lieberman v. John E. Van De Carr, Warden', (1905) 199 U S 552: (50 Law Ed 305). I do not think that that decision really helps the learned Attorney-General. The question in that case was the validity of S. 66, Sanitary Code of New York. The section was as follows:

"S. 66. No milk shall be received, held, kept, either for sale or delivered in the city of New York, without a permit in writing from the board of health, & subject to the conditions thereof."

The conteniton of Counsel for the pltf. in error was not that a business so directly affecting the health of the inhabitants of the city as the furnishing of milk might not be the subject of regulation under the authority of the state, but that the Ct. of appeals of New York had sustained this right of regulation to the extent of authorizing the board of health to exercise arbitrary power in the selection of those it might see fit to permit to sell milk under the section quoted; &, thus construed, it worked the depriviation of the pltf. in error's liberty & property without due process of law. This contention was repelled, & Day, J. who delivered the opinion of the Ct. said:

"We do not so understand the decision of the highest Ct. of New York. As we read it, the authority sustained is the grant of power to issue or withhold permits in the honest exercise of a reasonable discretion. In the opinion of the appellate division, whose judgment was affirmed in the Ct. of appeals, it was said: "such regulations, however, should be uniform, & the board should not act arbitrarily; & if this section of the sanitary code vested in them arbitrary power to license one dealer (in a lawful commodity) & refuse a license to another similarly situated, undoubtedly it would be invalid ('Yick Wo v. Hopkins', (1886) 118 U S 356: 30 Law Ed 220); but such was not its purpose, nor is that its fair construction."

It appears to me that there is no real conflict between the decision in 'Yick Wo's case', (1886) 118 U S 356: (30 Law Ed 220), & the decisioin which Day, J. gave in 'People of the State of New York Ex rel. Simon Lieberman's case', (1905) 199 U S 552: (50 Law Ed 305). The question was really one of construction of S. 66 of the Sanitary Code of the City of New York, & it was held that all that S. 66 did was to authorise the exercise of a reasonable discretion.

(102) In the case before us, the positon is different. I agree that with the best of intentions, it would be impossible for the State Govt. to take over all the estates & tenures at the same time, nor do they propose to do so. The process of taking over will undoubtedly spread over a number of years. In the meantime there is bound to be unequal treatment. The impugned Act does not prescribe any safeguards or rules, nor does it lay down any stages, indicative of how the process is to be worked out. On the contrary, it leaves the whole matter to the unfettered discretion of the State Govt. Even in respect of the same estate or tenure, the operation of S. 3 will result in an invidious distinction; the interest of one co-sharer will be taken while the interest of other co-sharers will remain intact, because the scheme of S. 3 is to take not estate by estate but proprietor by proprietor. On what reasonable basis can such a distinction be supported? I can find none. In the estates & tenures of the pltf. Maharajadhiraj, there are, it is stated, several co-sharers who have been left unaffected. The affidavits of thirteen such co-sharers have been filed before us. I should have thought that, administratively, it would be more convenient to acquire the entire interests in one estate before proceeding to take another. It should be made clear that some of these co-sharers are co-sharers in the parent estate of tenure & not in subordinate tenures, so that the argument that unless the parent estate is taken subordinate tenure cannot be taken will not hold water. If there were anything in the impugned Act to show that S. 3 was meant to get over or adjust administrative inconvenience or that in actual operation it would have that effect, one might hold that the discretion given by S. 3 was a reasonable discretion. I am aware that every fact which it is possible for us to assume, must be assumed in favour of the constitutionality of an enactment; but giving my best consideration to all the facts & circumstances, I am of the view that it is not possible to sustain S. 3 on the ground that it gives a reasonable discretion to the State Govt. On the contrary, it seems to me that, having regard to the scheme of operation of S. 3, it gives such an unrestrained power that it is bound to result in discrimination bet-

ween members of the same class standing in like circumstances & condition; in other words, it denies the protection of equal laws.

(103) The other ground of inequality which Mr. P. R. Das has urged, relates primarily to the three slab systems in Ss. 23 & 24 of the impugned Act. That ground has been so fully covered by my learned brother Reuben, J. that I shall not be justified in repeating all that he has said, except to state that I respectfully agree with him on this point & make a few additional observations. The three slabs work unequally in various ways, & it is difficult to justify them on the principle of reasonable classification, as was sought to be done by the learned Attorney-General. Take, for example, the deduction in clause (f) of S. 23, viz. "cost of works of benefit to the raiyats of the estate or tenure". The impugned Act does not contain any provision for spending any amount for the benefit of the raiyats, & it is difficult to avoid the inference, contended for by Mr. Das, that the deduction is an arbitrary one made solely for the purpose of artificially reducing the amount of compensation. There are some big estates in Bihar where a substantial part of the value or wealth of the estate lies in unworked mineral deposits or in forests consisting of standing timber from which there is very little present income. Two such estates are the estates of the Maharaja of Chotanagpur & the Raja of Ramgarh. Affidavits have been filed on behalf of one of these estates to show the value of its unworked mineral deposits. It is well known that there are very few raiyats in forest lands or on land under which there are mineral deposits; yet these proprietors will have to submit to a heavy deduction on account of the "cost of works of benefit to the raiyats", though there may be fewer raiyats in their estates than in other estates of thickly populated areas. I agree that proprietors & tenure-holders may be treated as a class, but within the class itself the impugned Act authorises grossly unequal treatment. It is well settled that the principle of classification must have some reference to the purpose or object of the legislation. The legislature has, indeed, a wide discretion in the matter of distinctions to be made, & the members of legislature know the needs of the public for which the distinctions are to be made. But the legislature is not entitled to make a distinction or classification which is clearly unreasonable & arbitrary. The purpose or object of the slab system, I take it, is to give some equivalent in money (be it adequate or inadequate) for the property which is being acquired; that equivalent, according to the object of the legislation, should bear some relation to the 'value' of the property taken; but it is based on 'income' artificially & arbitrarily arrived at, resulting in unequal treatment of persons standing in like conditions & circumstances except in the matter of largeness or smallness of their interest. One typical example of the inequality is in the deduction of income-tax. All through the impugned Act, the assumption is as if income-tax is a tax on property instead of being a tax on income. In S. 25 (2) the net income from royalties is to be calculated by deducting from gross income (sic) income-tax paid 'thereon', though income-tax is paid on total income & not on income from a particular source only; the result of this Provision will again be unequal treatment.

(104) Therefore, it would be wrong to draw an analogy between the impugned Act & a tax law which imposes a tax on income on a progressive basis. Our attention has been drawn to some of the American decisions on inheritance tax law. In some of which a distinction was made between blood relations & strangers; 'Cornelius K. G. Billings v. People of the State of Illinois', (1903) 188 U S 98: (47 Law Ed 400), 'Jessie Norton Torrence Magoun v. Illinois Trust & Savings Bank', (1898) 170 U S 283: (42 Law Ed 1037). The distinction was upheld on the ground that the tax was not on money, but on the right to inherit, & might be graded according to the value of the inheritance or according to the relation of the person, who was inheriting, to the deceased holder of the property. In effect, it was held that such tax was not property tax at all. There is one other decision which, I think, is important — 'Cumberland Coal Co. v. Board of Revn. of Tax Assessments in Greene Country Pennsylvania', 284 U S 23: (76 Law Ed 146). The decision was given in seven cases which related to assessment for taxation of the coal lands in several townships. It appears that the commissioners assessed all coal in the same township at the same valuation, regardless of the remoteness or accessibility of the said coal to the market, cost of operation, means of transportation, etc., it was held that a system was deliberately adopted which ignored differences in actual values so that property in the same class as that of the complaining tax payer was valued at the same figure as the property of other owners which had an actual value admittedly higher. The decision in 'Carles U. Cotting & Francis Lee Higginson v. A. A. Godard', (1901) 183 U S 79: (46 Law Ed 92), is important in the sense that it affirmed the principle earlier laid down that an arbitrary selection can never be justified by calling it classification. It was observed:

"But while recognising to the full extent the impossibility of an imposition of duties & obligations mathematically equal upon all, & also recognizing the right of classification of industries & occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, & that such equal protection is denied when upon one of two parties engaged in the same kind of business & under the same conditions burdens are cast which are not cast upon the other. There can be no pretence that a stockyard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, & the only difference is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost" These observations apply with equal force to the impugned Act.

(105) Apart from the slab systems, there are other instances of unequal treatment in the impugned Act. A proprietor or tenure-holder whose estate consists mostly of undeveloped or unworked mines is treated differently from other proprietors or tenure-holders, because he gets no compensation whatsoever for unworked or undeveloped mines. There is similar inequality of treatment with regard to standing timber. Even in the matter of arrears of rent, the proprietors of larger estates & tenures are put in a different position from the proprietors or tenure-holders of smaller estates. In the same estate or tenure, one co-sharer may be put in a different position from another, at the unrestrained will of the executive. S. 10 (2) authorises the State Govt. to terminate leases, apparently without payment of compensation, when

the lessee has not done any prospecting or development work before the date of the commencemnt of the Act. This is, clearly enough, an arbitrary distinction between one set of lessees & another, based on no reasonable classification. Even amongst secured creditors whose claims are to be paid out of compensation money, there is distinction; see Cl. (5) of S. 24

(106) For all these various reasons, I hold that the impugned Act contravenes the provisions of Art. 14, Const. Ind., & is accordingly void. In my opinion, the whole Act is void, because the provisions which contravene the fundamental right guaranteed under Art. 14 cannot be extricated from other provisions of the impugned Act.

(107) I now turn to Cl. (4), Art. 31 of the Constitution to consider the question whether that clause prevents us from calling the impugned Act in question. Cl. (4) reads as follows:

"If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legisature, been reserved for the consideration of the President & has received his assent, then, notwithstanding anything in this constitution, the law so assented to shall not be called in question in any Ct. on the ground that it contravenes the provisions of Cl. (2)."

It is not disputed that the Bihar Land Reforms Bill which ripened into the impugned Act was pending at the commencement of the Constitution in the legislature of Bihar. It is not also disputed that the Bill was reserved for the consideration of the President & received his assent. Mr. Das has urged two points: firstly, he has emphasised the word 'law' occurring in Cl. (4), & has contended that the impugned Act, not being valid law for one reason or another, does not come within the meaning of the expression 'law' occurring in Cl. (4); secondly, he has contended that the only ground on which the impugned Act cannot be called in question under Cl. (4) is that it contravenes the provisions of Cl. (2). According to him, the assent of the President will not save the impugned Act if it contravenes some provisions other than those of Cl. (2), Art. 31. I do not think that his first contention is correct. I have already stated that the word 'law' has been used in different senses in the different clauses of Art. 31, & the context makes that quite clear. The second contention of Mr. Das, however, appears to me to be correct. In express terms, Cl. (4), Art. 31 says that "the law so assented to shall not be called in question in any Ct. on the ground that it contravenes the provisions of Cl. (2)". If the intention were that the law so assented to shall not be called in question on any ground whatsoever, the Constituent Assembly could have easily said so. On the contrary, they seemed to have deliberately confined the clause to one & one ground only, viz., that the law contravenes the provisions of Cl. (2). The effect of the assent of the President, therefore, is nothing more than this that the impugned Act cannot be called in question on the ground that it contravenes Cl. (2), Art. 31, if, however, the impugned Act contravenes, as I have found that it does, the provisions of Art. 14 of the Constitution, the assent of the President does not prohibit us from calling the impugned Act in question on that ground. It has been contended before us on behalf of the State of Bihar that the inequality, if any, relates to the matter of compensation only, & if Constituent Assembly intended to save the impugned Act from being called in question on the ground of inadequacy of compensation it must follow, by necessary implication, that the Constituent Assembly intended to save the impugned Act from any inequality in the matter of compensation. In my view, which I have already explained, the inequality is not confined to the matter of compensation only. Even if I were to hold that the inequality relates only to the matter of compensation, I do not think that that would prevent us from calling the impugned Act in question on the ground that it contravenes the fundamental right guaranteed by the provisions of Art. 14. Cl. (4)., Art. 31 seeks to [redacted] a fundamental right & must, in my opinion, be construed strictly. The learned Advocate General of Bihar, who followed the learned Attorney-General, for the State of Bihar, drew our attention to the word "notwithstanding anything in this Constitution" occurring in Cl. (4), Art. 31, but which did not occur in Cl. (6), & contended that those words enlarged the effect of the operative portion of the clause. He contended that the meaning of those words was that notwithstanding the provisions of Art. 14, the law assented to by the President could not be called in question. I am not prepared to accept this argument as correct. The words "notwithstanding anything in this Constitution" cannot have the effect of enlarging the operative portion of the clause which, in clear terms, mentions one & one ground only, namely, the ground arising out of the contravention of the provisions of Cl. (2), Art. 31.

(108) The learned Advocate-General of Bihar also contended that, apart from Cl. (4) altogether, Cl. (2), Art. 31 read with Entry 42 of List III showed that it was open to the legislature to specify whatever principles it chose to specify for determining the compensation; the legislature has, in its wisdom, chosen to fix certain principles, & it is not open to the Ct. to sit in judgment over the legislature. He states that in the matter of compensation, there is a difference between the American Constitution & the Indian Constitution, & except on the ground of fraud, it is not open to the Ct. to adjudicate on the reasonableness or otherwise of the principles specified for compensation. There is some difference in the wording of Entry 42 of List III & that of Cl. (2), Art. 31, which is not material for the purpose of this argument. But I think that there are two good reasons why the contention of the learned Advocate-General of Bihar cannot be accepted. Firstly, the word 'compensation' has a legal significance which cannot be ignored. It is to be remembered that Art. 31 (2) is a guaranteed fundamental right for the enforcement of which a remedy is provided. It can hardly have been the intention of the Constituent Assembly that a fundamental right guaranteed by the Constitution shall not be justiciable. (For this part of the argument I am ignoring Cl. (4), which does make one ground of contravention non-justiciable). Secondly, it is, no doubt, correct to say that the legislature can specify the principles on which compensation is to be given, but in specifying those principles, the legislature must obey the other provisions in Part III of the Constitution. It is not open to the legislature to say that I have been given the right to specify the principles, & therefore, it is open to me to fix principles in contravention of Art. 14 of the Constitution. If that were the view to be accepted, then the fundamental rights guaranteed by the provisions in Part III of the Constitution would be utterly meaningless. As stated in Art. 245 of the Constitution, which I have earlier quoted, the power to make laws by the legislature of a State is "subject to the provisions of this Constitution". It is, I think, correct that Cl. (4), Art. 31 was enacted to save certain Bills relating to compulsory acquisition of property as part of a general scheme of land reform, from being later called in question on the ground of inadequacy of compen-

sation. But I do not think that there was any intention to save such Bills from contraventions other than the particular contravention refd. to in the operative portion of Cl. (4). In any view, the intention as expressed in the words used in Cl. (4), is clear enough. It prevents the Ct. from calling in question the impugned Act on the ground that it contravenes the provisions of Cl. (2), Art. 31, it does not prevent the Ct. from calling in question the impugned Act on any other ground. Therefore, my view is that Cl. (4), Art. 31 does not save the impugned Act.

(109) Delegated Legislation: Mr. Das has raised the further contention that the impugned Act is bad by reason of a delegation of legislative power. He has refd. particularly to S. 32 (2) & Cl. (p), Sub-s. (2), S. 43, Impugned Act. His contention may be briefly summarised thus: under Entry 42 of List III, the State Legislature can make a law with respect to, 'inter alia', "the form & the manner" in which compensation for property acquired for the purpose of a State is to be given; in the Impugned Act, particularly in the sections refd. to above, the State Legislature has not itself made a law with respect to "the form & the manner" in which compensation is to be given, but has left the law making entirely, or in substance, to the State Govt. It is contended that this is delegation of legislative power. It must be made clear here that the argument of Mr. Das on this point has no reference to Cl. (2), Art. 31 which requires, 'inter alia', that the 'law must provide' the manner in which compensation is to be given. It is one thing to say that the Impugned Act contravenes Cl. (2), Art. 31; but it is quite a different thing to say that the Impugned Act is bad by reason of a delegation of legislative power. Therefore, we have to consider this question of delegation of legislative power, irrespective of Cl. (2), Art. 31.

(110) This question of delegated legislation is a question of some complexity, & not always easy to answer. I am constrained to admit that I have veered from one point of view to another on this question, & have made up mind after a good deal of hesitation. If I had felt that our decision in these cases was final, I would have been content to rest my decision on the other findings which I have given; but as our decision is subject to appeal, it is desirable that I should record my finding on this question as well.

(111) For facility of understanding, I am placing below, side by side under two heads, what the legislature has itself determined & what it has left to the State Govt. in the matter of "the form & manner" of the compensation to be given under the Impugned Act:

"What the Legislature has itself determined.

1. The amount of compensation shall be paid in one of three alternatives forms:
(a) in cash, or
(b) in bonds, or
(c) partly in cash and partly in bonds.
2. The bonds shall be either negotiable, or non-negotiable & non-transferable.
3. The bonds shall be payable in forty equal instalments.
4. The bonds shall carry interest at 2½ per centum per annum.

What the Legislature has left to the Executive.

1. The State Govt. is to decide which of the three alternative forms to adopt, & if alternative (c) is adopted, to determine the proportion.
2. The State Govt. is to decide which of the two alternatives (as to the nature of the bonds) to adopt.
3. The State Govt. is to fix the period of the instalments.
4. The state Govt. is to determine at what periods the payment of interest will be made."

It would, I think, be wrong to say that the legislature has not, at all, applied its mind or has left the exercise of the legislative power entirely to the executive. It has given the executive (meaning the State Govt.) a somewhat unusual & wide discretion; but wide though the discretion is, it still has limits which have been fixed by the legislature, & those limits cannot be transgressed by the State Govt. In other words, the discretion or power given to the State Govt. is not an unlimited discretion or power. It may well be that the legislature thought fit to leave that discretion to the State Govt., because the State Govt. would be in the best position to know in what shape & to what extent the financial resources of the State would be able to bear the burden of compensation ,if & when it falls on the State Govt. to bear that burden.

(112) This question of delegated legislation has been the subject of many judicial decisions, which were considered by a S. B. of this Ct. in 'Kishorilal v. Debi Prasad', 29 Pat 71: (A I R (37) 1950 Pat 50). I do not propose to refer them all. I shall refer to only two decisions; one is the decision of the S. C. of India in the 'State of Bombay v. Narottamdas Jethabhai', Case No. 10 of 1950, D/- 20-12-1950: (A I R (38) 1951 S C 69), in which their Lordships distinguished the earlier decision of the F. C. in 'Jatindra Nath v. Province of Bihar', A I R (36) 1949 F C 175: (50 Cr L J 897), & reaffirmed the principles laid down in 'Empress v. Baruah', 5 I A 178: (4 Cal 172 P C). The other decision is the Australian case of 'Victorian Stevedoring & General Contracting Co. Proprietary Ltd. v. Dignan', (46 C L R 73), which was relied on in the F. B. decision refd. to above. If I may say so with respect, a very lucid exposition of the doctrine of delegated legislation will be found in the judgment of Dixon, J. in the Australian case refd. to above. Dixon, J. traced the origin of the doctrine from (a) the theory of 'separation of powers' in a written constitution, & (b) the well-known maxim 'delegata potestas non potest delegari'. I think that it is well-settled that the maxim refd. to above has no application to sovereign legislative bodies under the Indian Constitution. The P. C. has said in a number of cases that within the limits of their jurisdictions, the State (previously provincial) legislatures have plenary power. This view was expressed in 'Burah's case', 5 I A 178: (4 Cal 172 P C), as far back as 1878, & has now been re-affirmed by the S. C. of India. With regard to the doctrine of "the separation of powers', it has always been a difficult task to make a distinction between a law requiring compliance with directions upon some specified subject which the administration thinks proper to give, & a law investing the administration with authority, to legislate upon the same subject. In 'Field & Co. v. Clark', (1891) 143 U S 649: (36 Law Ed 294), Judge Ranney was quoted as stating the distinction thus:

"The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, & conferring an authority or discretion as to its execution, to be exercised under & in pursuance of the law. The first cannot be done; to the latter no valid objection be made."

The matter has been put somewhat differently in English decisions where it has been held that

"a general power of legislation belonging to a legislature constituted under a rigid constitution does not enable it by any form of enactment to create & arm with 'general' legislative authority a new legislative power not created or authorised by the instrument by which it is established." (See R. v. Burah, 5 Indian Appeals 178, at p. 194; &

In re, The Initiative & Referendum Act—(1919) A C 935 at p. 945).

Perhaps, the truth of the matter is that the doctrine of the separation of powers & its logical consequences were not accepted in the British Colonial legislative theory & practice to the extent to which they were accepted in America, even though some of the colonies (or dominions) had written constitutions with a separation of powers. In the Australian decision refd. to above, Dixon, J. said:

"I, therefore, retain the opinion which I expressed in the earlier case (Huddart Parkar Ltd., 44 C L R 492) that 'Roche v. Kronheimer', (29 C L R 329), did decide that a statute conferring upon the Executive a power to legislate upon some matters contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, & that the distribution of legislative, executive & judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law. This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject-matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power."

Evatt, J. put the matter still more succinctly in the following observations:

"On final analysis, therefore, the Parliament of the Commonwealth is not competent to 'abdicate' its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; & not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws & thereby exercise legislative power, for it does so in almost every statute; but because each & every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject-matters stated in the Constitution. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned."

In the case of our S. C. refd. to above ('The State of Bombay v. Narottamdas', (A I R (38) 1951 S C 69), the broad question whether it is permissible for the Legislatures, Central or Provincial, while acting within their legislative fields, to delegate their legislative powers was raised but not decided. It is, therefore, still an open question if we can go as far as Dixon & Evatt JJ. went in the Australian case. But it is clear that our S. C. re-affirmed the principles of 'Burah's case', 5 I A 178: (4 Cal 172 P C). His Lordship Das, J. analysed the principles in 'Burha's case', (5 I A 178: 4 Cal 172 P C) with reference to the various Ss. of Act XXII of 1869. Ss. 1 & 8 came under one head; S. 9 said:

"The said Lieutenant-Governor may from time to time, by notfn. in the Calcutta Gazette, extend 'mutatis mutandis' all or any of the provisions contained in the other sections of this Act to the Jaintia Hills, the Naga Hills, & to such portion of the Khasi Hills as for the time being forms part of British India. Every such notfn. shall specify the boundaries of the territories to which it applies."

Referring to this section, Lord Selborne observed:

"The legislature decided that it was fit & proper that the adjoining district of the Khasi & Jaintia Hills should also be removed from the jurisdiction of the existing Cts., & brought under the same provisions with the Garo Hills, not necessarily & at all events, but if & when the Lieutenant-Governor should think it desirable to do so; & that it was also possible that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district. And accordingly the Legislature entrusted, for these purposes also, a discretionary power to the Lieutenant-Governor."

If it was open to the legislature to entrust a discretionary power to the Lieutenant-Governor in such wide terms as to extend 'mutatis mutandis' all or any of the provisions contained in other sections of the Act to certain areas, I do not see why such discretionary power as has been left by the impugned Act to the State Govt. should be held bad on the ground of delegated legislation. Other instances of a still wider discretion left to the executive can be given, but I do not think it necessary to multiply instances (see 'Powell v. Apollo Candle Co. Ltd.', (1885) 10 A C 282; (54 L J P C 7); 'Archibald G. Hodge v. The Queen', (1883) 9 A C 117.

(113) Applying the principles laid down in these decisions, I would hold that the impugned Act, though it leaves a fairly wide discretionary power to the State Govt. in the matter of the form & manner of compensation, settles the legislative policy, lays down the limits of the discretion but confides to the State Govt. certain powers to carry out the details of the objects of the enactment; therefore, it is not invalid on the ground of delegated legislation. I must, however, express my feeling that if the principle of the doctrine of separation of powers as explained & accepted in some of the American decisions were to be applied with all its logical rigour to the legislatures under the Indian Constitution, it would be difficult to uphold the impugned legislation or other legislation of a similar nature.

(114) Mr. Das has commented that some of the provisions are so drafted that they are unworkable, & has particularly refd. to sub-s. (2), S. 32 which does not fix the intervals at which the forty equal instalments become payable. It appears that the matter has been left to the rule-making power of the State Govt. the validity of which has already been discussed on the question of delegated legislation. There are probably other drafting defects; but the question which we are now considering is whether the impugned Act is unconstitutional, & the criticism that a particular provision may be unworkable has no direct bearing on the constitutionality of the enactment.

(115) Fraud on the Constitution: Lastly, it was contended that the Impugned Act & the assent of the President were a fraud on the Constitution. This point has been effectively dealt with by my learned brother Reuben, J. & I have nothing further to add.

(116) Conclusion: For the reasons given above, I have arrived at the same conclusion as my learned brethren that the Bihar Land Reforms Act, 1950 (Bihar Act XXX (30) of 1950) is unconstitutional, though not for identical reasons. I have attempted to set out above the reasons which have led me to the conclusion at which I have arrived, & also answered the issues raised in these cases. Accordingly, I agree to the orders proposed by my learned brother Shearer, J.

V.S.B. *Suit decreed.*

✻ A. I. R. (38) 1951 Patna 130 [C. N. 16.]

SPECIAL BENCH

REUBEN, IMAM & RAMASWAMI JJ.

Liakat Mian—*Applt.* v. *Padampat Singhania & others*—*Resps.*

A. F. A. D. No. 537 of 1950 D/- 18-4 1951.

✠Civil P. C. (1908), O. 41, R. 5 — Stay of execution of decree—Order made by appellate Ct. when becomes operative.

Per *Reuben & Ramaswami JJ.* — An order of stay under O. 41, R. 5 passed by an appellate Ct. staying execution of the decree appealed from becomes operative the moment it is made & not after communication to the subordinate Ct. It follows that from the moment the stay order is passed the executing Ct. is deprived of the power of executing the decree & any action taken by it in execution of the decree would be without jurisdiction: 33 Cal. 927 ; A. I. R. (36) 1949 Lah. 108 (F. B.) ; (1862) 45 E. R. 1261 and (1862) 31 L. J. Ch. 429, *Rel. on*; 1 C. W. N. 226 ; A. I. R. (5) 1918 Mad. 391 (F.B.) & A. I. R. (14) 1927 All 401 (F.B.), *Not foll.* [Paras 5, 13]

Per *Iman J.* — An order passed by an appellate Ct. under O. 41, R. 5 staying execution of decree, being in the nature of a prohibitory order, must be communicated to the executing Ct. which will then cease to proceed with the execution of the decree : A. I. R. (5) 1918 Mad. 391 (F.B.), *Rel. on* ; 33 Cal. 927, *Not foll.* [Para 11]

Anno. C. P. C , O. 41, R. 5, N. 17.

S. C. Sinha—for Applt. ; *T. K. Nath—for Resps.*

Reuben J.—The case has been refd. to a Special Bench for a decision as to when an order under O. 41, R. 5, Civil P. C. passed by an appellate Ct. becomes operative, whether it operates from the moment when it is passed or only after communication to the Subordinate Ct.

[2] This appeal, which is directed against a decree for the recovery of possession of certain property, was filed on 13-4 1950. On the 14th of April by an order under O. 41, R. 5, an order for ad interim stay of delivery of possession was passed. The necessary requisites were filed on the 17th of April & the order was issued for communication to the subordinate Ct. By some mischance the applt. made an error in naming the subordinate Ct. & the communication was addressed to the Permanent Munsif of Araria instead of the Addl. Munsif of Araria. It reached the Permanent Munsif on the 25th of April & was given effect to in execution case No. 8 of 1949 of his Ct. instead of being given effect to in the execution case of the same number in the Ct. of the Addl. Munsif in which the decree under appeal was being executed. In consequence, the Addl. Munsif delivered possession of the property in suit to the D. H. in June 1950.

[3] The question at issue has come under the consideration of the Cts. in several reported decisions. The earliest of these is *Bessesswari* v. *Horro Sundar*, 1 C. W. N. 226, in which property was sold in execution of a decree & purchased by a third party subsequent to a stay order u/s- 545, Civil P. C. of 1882. Their Lordships held that the stay order was in the nature of a prohibition to the executing Ct. & would, therefore, take effect only when communicated. The executing Ct. therefore, had jurisdiction to sell the property & the sale was a valid one. Exactly the opposite view was taken by Woodroffe & Mookerjee JJ. in *Hukum Chand* v. *Kamalanand*, 33 Cal. 927 : (3 C. L. J. 67), in which the decree, as here, was for recovery of possession. While distinguishing *the case of Bessesswari*, (1 C. W. N. 226), on that ground that the question arose between the J. D. & a third party purchaser, their Lordships went on expressly to dissent from the decision in that case. They agreed that a prohibitory order, for instance an injunction, will operate as a prohibition only from the moment of communication but took the view that an order of stay is not such an order &, from the moment when it is made, suspends the power of the subordinate Ct. to carry on further execution proceedings. In *Muthukumarasami* v. *Kuppusami*, 33 Mad. 74 : (3 I. C. 82), a case of an execution sale, their Lordships folld. the *case of Bessesswari*, (1. C.W.N. 226), in preference to that of *Hukum Chand* v. *Kamalanand*, (33 Cal. 927 : 3 C. L. J. 67), but without any discussion. In *Ramanathan* v. *Arunachellam*, 38 Mad. 766 : (A. I. R. (1) 1914 Mad. 261), another case of execution sale, Sadasiva Ayyar J. expressly differed from the decision in *Muthukumarsami Rowther's case*, (33 Mad. 74 : 3 I. C. 82), and expressed the view that unless otherwise provided in the order itself the order operates immediately & suspends from that moment the jurisdiction of the Subordinate Ct. to proceed with the execution of the decree under appeal. The facts of the case were that a telegram was sent to the Vakil at Madura informing him of the order of stay & the Subordinate Ct. of Ramnad was moved by a petn. accompanied by an affidavit to stay the sale but it refused to act on the telegram in the absence of an official communication. Spencer J. made this a ground for distinguishing the *case of Muthukumarsami Rowther*, (33 Mad. 74 : 3 I. C 82). In his opinion, the Subordinate Ct. acted injudiciously in not postponing the sale in order to ascertain the truth of the information received & he treated this as a reason for setting aside the sale. At the same time he observed that there was much force in the observation of Woodroffe J. in *Hukum Chand* v. *Kamalanand*, (33 Cal. 927 : 3 C. L. J. 67) :

> "That there is no reason why the operation of an order of the H. C. should be made contingent, say, upon the due performance of the duties of the post office."

The matter next came before a F. B. in *K. Venkatachalapati* v *Kameswaramma*, 41 Mad. 151 : (A. I. R. (5) 1918 Mad. 391 F.B.), in respect of an attachment in execution of a decree made after the passing of an order of stay. Their Lordships accepted the view in *Bessesswari's case*, 1 C.W.N. 226. According to Ayling J., the order of the appellate Ct. is in the nature of a prohibition & therefore, operates only from communication. Seshagiri J. refd. to the provisions of O. 41, R. 5 & argued that the Ct. of first instance retains

jurisdiction to execute a decree in spite of the filing of an appeal & therefore, the power can only be taken away by communication made to it.

[4] The view in *Bessesswari's case*, (1 C. W. N. 226), was next taken by a F. B. of the Allahabad H. C. in *Parsotam* v. *Barhma Nand*, 50 ALL 41: (A. I. R. (14) 1927 ALL 401 F B.). Mukerji J , who delivered the leading judgment, regarded the order of stay as a "direction to somebody" & therefore, dependent on communication. He took the analogy of a principal directing his agent to purchase a ton of wheat & then countermanding his order by a direction received by his agent only after the completion of the purchase. He pointed out that by the sale proclamation the public are invited by the Ct. to come & bid for the property & asked whether there would be any moral justification for subsequently informing an innocent third party purchaser that the sale was void by reason of an uncommunicated order of stay. With respect, I would submit that analogy is not a safe guide & that moral considerations are irrelevant in a matter of interpretation. The case before their Lordships was one of a stranger purchaser & his Lordship held that the sale was a valid sale. He drew a distinction between such a case & that of a D. H. purchaser, observing :

"The D. H. cannot shake off his character as such merely by reason of his auction-purchase, & he is bound by all orders passed in the case. A stay order, therefore, will operate against him & it may be that a purchase by a D. H. will be set aside on the mere ground of the passing of a stay order."

The point was next consd. but not decided in *Jatis Chandra* v. *Kshirode Kumar*, A. I. R. (30) 1943 Cal. 319 : (I. L. R. (1943) 1 Cal. 274). Premising that *Hukum Chand Boid's case*, (33 Cal. 927 : 3 C. L. J. 67) merely disapproved the reasoning in *the case of Bessesswari*, (1 C. W. N. 226) & not the decision therein, their Lordships proceeded on the assumption that a stay order made by the appellate Ct. operates from the time when it is passed. They took the view that the Subordinate Ct. nevertheless did not lose jurisdiction over the execution proceedings & the order passed by it in contravention of the stay order might be irregular or even illegal but was still an act done in exercise of jurisdiction, to be set aside by appropriate proceedings. They observed :

"The Ct. which passed the order or did the act may itself recall it, & ought to do so, when it is later on apprised of the stay order."

Apparently, they contemplated that on the attention of the executing Ct. being drawn to the existence of the stay order the executing Ct. will automatically restore the *status quo ante* the passing of the order of stay. The reason for this view is explained immediately after, namely that, if the action taken contrary to the stay order be regarded as without jurisdiction the discovery that this was so might be made so late that injustice might result to an innocent party. Finally, the question came before a F. B. of the Lahore H. C. in *Karam Ali* v. *Raja*, A. I. R. (36) 1949 Lah. 108 : (Pak. L. R. 1949 Lah. 83 F.B.). The F. B. on a detailed discussion of the authorities came to the conclusion that the order of stay operates from the moment when it is passed & has the effect from that moment of depriving the subordinate Ct. of its jurisdiction to execute the decree. Munir, Ag. C. J., who delivered the leading judgment, proceeded on an interpretation of O. 41, R. 5 & observed that any consideration of inconvenience or hardship is irrelevant, as, in his opinion, the meaning of the rule is plain, an opinion with which I respectfully agree.

[5] The provision which we have to interpret is:

"An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Ct. may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Ct may for sufficient cause order stay of execution of such decree."

It is noticeable that this rule does not provide for an order directed to anybody. It empowers the appellate Ct in absolute terms to stay execution. It does not specify any person or Ct. to whom the order is to be communicated. In the absence of any provision or direction to the contrary an order of a Ct. must be taken to operate from the moment when it is made :

"The theory of judicial procedure is that the cogent & binding effect of the order begins immediately from the time when the order is pronounced by the lips of the Judge, & if that could be done physically which legally is supposed to be done, & which one would desire to be done if it were possible, every order would be completed on the spot, written out by the judicial officer & *in curia* before the Ct. rises, & delivered to the parties." [Lord Westbury, L. C. in *Ex parte Hookey*, (1862) 45 E R 1261 : (4 De G. F. & J. 456). *Vide*, also *Jones* v. *Roberts*, (1825) 148 E R 538 : (M'Cl & Yo 567) and *Verlander* v. *Codd*, (1822) 57 E R 37 : (1 Sim. & St. 93)].

On its terms, the rule directs that proceedings in execution may not be taken contrary to an order of stay passed by the appellate Ct. It follows that from the moment the stay order is passed the executing Ct. is deprived of the power of executing the decree & any action taken by it in execution of the decree would be without jurisdiction.

[6] An interpretation which makes the operation of the order depend upon communication is open to the objection that it introduces into the rule something which is not to be found there. Also, far from making for certainty such a rule would make for uncertainty. It raises at once the question as to what is to be consd. as communication. Will a statement from the Bar made to the executing Ct. or an affidavit from a party informing the Ct. of the passing of such an order be "communication" ? Or, supposing that the copy of the order issued by the Ct. is received in the executing Ct. but owing to some cause is not brought to the notice of the presiding officer, is it to be taken that there is "communication" ? Or, if the decree has been transferred to another Ct. for execution, will "communication" to the Ct. which passed the decree be sufficient ? It also

makes the date of the operation of the order depend on the efficiency & honesty of the officers responsible for transmitting the order & on possible sharp practice on the part of persons interested in delaying it. The importance that there should be certainty as to the date from which an order of a Ct. operates is well expressed by Lord Westbury L. C. (*ibid*) in words which will bear repetition :

"The greatest possible confusion would arise were it otherwise. In fact, all persons dating their rights from the time of the order being pronounced would be thrown into a state of most inconvenient uncertainty, if they could not exhibit to another Ct. or produce for the purpose of any legal inquiry the order containing the directions of the Ct. with the date, in the certainty that that date will be accepted as the time when the order is made. There would be no possible mode by which the application of Acts of Parliament & the limitation of time could be regulated, unless the Ct. abides by a general principle of interpretation".

On the score of injustice also, I do not agree that the balance is in favour of the view take in *Bessesswari's case*, (1 C. W. N. 226). If a Ct. has acted without jurisdiction & a person has entered into possession of property to which he is not entitled in law, he cannot complain if the person entitled thereto gets the property back. I have no doubt that the hands of the Cts. however, are sufficiently long to enable the person thus dispossessed to get any equitable relief to which he may be justly entitled.

[7] For these reasons, I hold that the delivery of possession in this case was without jurisdiction. In the circumstances of the case, however, I do not think it is necessary to direct a restitution of possession. The property is a small area of *Parti* land on which some huts stood & have been removed. The valuation as given in suit is only Rs. 45. I propose to follow the course adopted in *Hukum Chand Boid's case*, 33 Cal. 927 : (3 C.L.J. 67) namely that the resps. will remain in possession of the property subject to making a deposit of Rs. 400 as security for costs & compensation recoverable by the appellant in the case of his success in this appeal The deposit should be made in the Ct. below within one month from today. On the making of the deposit, the *ad interim* stay order will stand discharged. Failing compliance, the *ad interim* stay order will be made absolute & the executing Ct. will restore possession to the applt. As the applt's own mistake led to this confusion it is fair that the parties should bear their own costs:

[8] **Imam J** — This is an appln. by the deft. J. D. under O. 41, R. 5, Civil P. C. for stay of execution proceedings in the Ct. below pending the hearing of the second appeal in this Ct. The pltfs. had instituted a suit for declaration of their title over & for recovery of possession of a very small piece of land upon which the appct. had wrongly erected a structure. The whole suit was valued at Rs 45. The Ct. of first instance & the lower appellate Ct had decreed the pltfs' suit. A second appeal was filed by the appct. in this Ct. on 13-4-1950. On 14-4-1950, the Registrar of this Ct. ordered *ad interim* stay while admitting the appln. under O. 41, R. 5 of the Code. The Second Appeal was admitted on 25 7 1950. An appln. for delivery of possession was filed by the pltfs. D Hs on 31-5 1950, in the Ct. of the Addl. Munsif of Araria. In June 1950, delivery of possession was made by the said Ct. to the D. Hs. Owing to the appct. wrongly stating that the execution proceedings were pending in the Ct. of the Munsif at Araria, the order of *ad interim* stay of this Ct. was communicated to that Ct. & not to the Ct. of the Addl. Munsif of Araria, on 25-4 1950. Later on the mistake was discovered, but delivery of possession had already taken place.

[9] The report of the Nazir dated 4-6-1950, shows that delivery of possession was made that day & the two thatched houses on the land in dispute were demolished. It may be mentioned that the decree had directed the appct. to remove the houses within one month from the date of the judgment of the Ct. of first instance, otherwise the pltfs. would be entitled to get it done through the Ct.

[10] The real question before this Ct. is whether the rule obtained in the appln. under O. 41, R. 5 of the Code should be made absolute or discharged, that is to say, whether the appln. under O. 41, R. 5 of the Code should be dismissed or allowed & the execution proceedings in the Ct. below should be stayed until the second appeal in this Ct. filed by the appct. is disposed of. O. 41, R. 5 of the Code expressly prohibits the stay of execution unless the appellate Ct. is satisfied (a) that substantial loss may result to the party applying for stay of execution unless the order is made (b) that the appln. has been made without unreasonable delay & (c) that security has been given by the appct. for the due performance of such decree or order as may ultimately be binding on him. In the present case, the land in dispute is of a very small area & the whole appeal has been valued at Rs. 45 only. The thatched houses erected by the appct. on the land have already been demolished on 4-6 1950, when delivery of possession was made to the D. H. In my opinion, having regard to all the circumstances this is not a case where substantial loss will be suffered by the appct. if stay of execution proceedings is not ordered. The houses having been demolished, there is nothing more for the appct. to suffer, & the land is parti land, not culturable. If the appct. succeeds in his appeal & the decree of the Cts. below is reversed, he can always apply for restitution u/s. 144 of the Code. The Ct. has ample powers under the said section to order mesne profits, damages & compensation. In my opinion, the appln. under O. 41, R. 5 of the Code filed by the appct. must be dismissed, & the *ad interim* order of stay must be vacated.

[11] I have had the advantage of perusing the judgment of my learned brother, Reuben J. Having regard to the view I take on the merits of

the appln. under O. 41, R. 5 of the Code, I am of the opinion that it is not really necessary to decide in this case which view is the more correct one, that taken by the learned Judges of the Calcutta H. C. in *Hukum Chand* v. *Kamalanand*, 33 Cal. 927: (3 C. L. J. 67) or the view taken by the learned Judges of the Madras H. C. in *Venkatachalapati* v. *Kameswaramma*, 41 Mad 151: (A I.R. (5) 1918 Mad. 391 F. B.) As my learned brother, however, has taken, the view that the decision of the learned Judges of the Calcutta H. C. in *Hukum Chand Boid's case*, (33 Cal. 927 : 3 C.L.J. 67) is the correct view, I must express my own opinion. In my opinion, the decision of the learned Judges of the Madras H. C. in *Venkatachalapati Rao's case*, 41 Mad. 151: (A. I. R. (5) 1918 Mad. 391 F. B.) is more acceptable to me than the view of the learned Judges of the Calcutta H. C. in *Hukum Chand Boid's case*: (33 Cal 927 : 3 C. L. J 67). O. XLI, R. 5 of the Code expressly states that an appeal shall not operate as a stay of proceedings except so far as the appellate Ct. may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the appellate Ct. may, for sufficient cause, order stay of execution of such decree; that is to say, if an execution proceeding is pending in the executing Ct such proceeding shall continue although an appeal has been filed against the decree, unless the appellate Ct. orders stay of execution of the decree. When an appellate Ct. orders stay of execution of the decree, such an order must be regarded as one which prohibits the executing Ct. to proceed with the execution of the decree. The order being in the nature of a prohibitory order must be communicated to the executing Ct. which will then cease to proceed with the execution of the decree. Although R. 5 of O. XLI of the Code does not speak of the stay order of the appellate Ct. being communicated to the executing Ct. I think a reasonable reading of the rule indicates that where an appellate Ct. has ordered stay of execution of the decree, such an order must be communicated to the executing Ct. otherwise the executing Ct. being ignorant of the order of stay, would be justified in proceeding with the execution proceedings. I do not think that any real practical difficulty can arise in interpreting R. 5 of O XLI in the way the learned Judges of the Madras H. C. have done in *Venkatachalapati Rao's case*, (41 Mad, 151: A. I. R. (5) 1918 Mad. 391 F. B.). To hold that every thing done by the executing Ct. after the date of the order of stay of the appellate Ct., & in ignorance of it, is without jurisdiction, would, in my opinion, raise many practical difficulties I think, it would be more reasonable to say that such acts of the executing Cts. though done with jurisdiction, are voidable but not void. I think the provisions of S. 151 of the Code are sufficiently wide to cover a case where the executing Ct. has done certain things, in ignorance of the stay order of the appellate Ct. & such acts cannot be allowed to stand for the ends of justice, or to prevent abuse of process of the Ct. The observations of Lord Westbury in *Ex parte Hookey*, (1862) 45 E. R 1261: (4 De G. F. & J. 456) must be read in connection with the facts of that case. The point which his Lordship was determining was as to what is the date from which limitation should be calculated under the provisions of a certain statute & he was of the opinion that the date from which such calculation should be made is the date on which the order is pronounced & not the date on which the order is drawn up. I think, there can be little room for doubt that the date of the order of a Ct. is the date on which it is pronounced. It is, however, quite a different matter as to whether the stay order of an appellate Ct. given on a particular date makes all proceedings before the executing Ct. without jurisdiction when that Ct. was ignorant of the order of the appellate Ct. I have merely in a short compass expressed my agreement with the view taken by the learned Judges of the Madras H C. in *Venkatachalapati Rao's case*, (41 Mad. 151: A.I.R. (5) 1918 Mad. 391 F.B.) out of deference to the view of my learned brother, Reuben J. although I think in this case it is not necessary to decide the point at all as the circumstances in the present case do not establish grounds for allowing the appln. under O. XLI, R. 5 of the Code.

[12] I would accordingly dismiss this appln. with costs. Hearing fee, one gold mohur.

[13] **Ramaswami J.**—The terms of the statutory rule—O. 41, R 5 are absolute, & as a matter of construction I hold that the jurisdiction of the Ct. executing the decree is superseded from the moment the stay order is passed by the appellate Ct. I can see no reason in principle why the operation of the order of the appellate Ct. should be made conditional on its being communicated to the executing Ct. It is no doubt true that if proceedings have to be taken against a person for contempt of the authority of the Ct. in proceeding with execution after the order of stay has been made, it is essential to prove that such person has disobeyed or acted in contravention of the order with knowledge that it had been made; but the operation of the order is not postponed till it has been communicated to the subordinate Ct. or the party intended to be affected by it. The reason is that the order of the appellate Ct. for stay has direct effect upon the execution proceeding itself, although if the proceedings are taken to punish the person who has carried on the execution after it had been stayed, it is necessary to show that he had notice of the order because it is only after such notice & his act would be in defiance of law & in contempt of Ct. In *Buffandeau* v. *Edmondson*, (17 California 436), an American case, it was pointed out by the S. C. that injunction by an appellate Court for stay of execution operates as a supersedeas to the execution as soon as it is made.

The legal authority to proceed with the execution is withdrawn by the act of a competent Ct. & there is no more legal justification for the execution after the order for stay than there would be for execution after the proceedings have been quashed. In this context the observations of Lord Westbury *In re The Risca Coal & Iron Co.* (1862) 31 L. J. Ch. 429: (45 E. R. 1261) are important. The question in that case was whether u/s. 33 of the statute, 12 & 13 Vict. c. 108, which provided

"that no notice of motion for a rehearing before the Lord Chancellor of Great Britain or Ireland respectively, of any order of the Master of the Rolls in England or Ireland, or of any of the Vice-Chancellors in England under the said Act or in this Act, shall be given after the expiration of three weeks after the order complained of shall have been made"

Time for the notice began to run from the date the order was pronounced or from the date when the order was drawn up. Dealing with the question of inconvenience that would arise if time began to run only from the date the order was drawn up, the Lord Chancellor observed:

"I think, therefore, I shall abide by a rule of convenience: certainty in the matter is convenience, certainty you attain by abiding by the date of the order; uncertainty you introduce when you depart from that date. A variation from the common rule of abiding by the record is introduced by a departure from that date. Great laxity of practice would be introduced & encouraged by a departure from that date."

To the same effect is *Holtby* v. *Hodgson*, (1890) 24 Q B. D. 103: (59 L J. Q. B. 46) in which judgment having been signed in an action against a married woman, execution upon which was limited to her separate estate not subject to any restraint upon anticipation, it was sought to attach in execution a sum of money recovered by her as damages in an action against the garnishee, & for which the Judge at the trial had directed judgment to be entered for her. It was held by the Ct. of Appeal that the money could be attached & further that the fact that judgment in the action against the garnishee was not in fact entered until after the commencement of the garnishee proceedings did not affect the right of the pltf. to garnishee order.

[14] For these reasons, I hold that delivery of possession made to the respondent in this case was without jurisdiction & I agree to the order which my learned brother Reuben has proposed,

V.S.B. *Order accordingly.*

A. I. R. (38) 1951 Patna 134 *[C. N. 17.]*

FULL BENCH

SHEARER, IMAM & JAMUAR JJ.

Misrilal & others — Petnrs. v. *The State.*

Cr. Misc. Nos. 581, 614 & 619 of 1950, D/- 9-4-1951.

(a) Public Safety—Preventive Detention Act (1950), S. 3 (1) (a) (iii)—"Maintenance of supplies & services essential to the community" —Adulteration of foodstuffs.

The plain duty of the Ct is to consider the words in the Act as they stand & give to them their ordinary meaning. The words "maintenance of supplies & services essential to the community" themselves have to be construed independently of what is stated in items 3 & 18 in the Concurrent List of Sch. VII of the Constitution & what is contained in R. 81 of the Defence of India Rules. The words cannot reasonably carry the meaning that any one who adulterated foodstuffs would be acting in a manner prejudicial to the maintenance of supplies or the continuity of supplies.

Where the facts stated in the orders of detention were that one *R* manufactured flour in a Mill, one *B* stored stone powder & mixing was done at the house of one *M* & that these persons entered into a conspiracy to profiteer by sale of flour at the expense of the health of the community:

Held that the conduct of the persons did not come within the meaning of the words in S. 3 (1) (a) (iii), & the detention must be held to be illegal. [Paras 7, 9, 10]

(b) Public Safety—Preventive Detention Act (1950), S. 3—Power of Ct. to question facts.

It is not open to the H. C. to question the facts stated in the grounds of detention, or whether those facts were sufficient to satisfy the detaining authority to order the detention of the detenu. [Para 4]

Gopal Prasad & Gokulnand Prasad (in No. 581), Baldeo Sahai, Kailash Rai, B. K. Sharma & K. Dayal (in No. 614) & Ram Jatan Singh & Kanhaiyaji (in No. 619)—for Petnrs.; Govt. Advocate — for the State.

Case referred to:

('50) A. I. R. (37) 1950 S. C. 27 : (51 Cr. L. J. 1383).

[Pr. 6]

Imam J.—These three cases have been refd. to us under Cl. 28, Letters Patent of this Ct. on a difference of opinion between my brethren Das & Narayan JJ. The point refd. to us for our consideration has been stated by them as follows :

"The point is if on the grounds of detention stated by the State Govt. to pass (sic) the orders of detention against the three petnrs. under Cl. (iii) of sub s. 1 (a) of S. 3, Preventive Detention Act, (Act IV [4] of 1950). One of us held that on his interpretation of the expression 'maintenance of supplies & services essential to the community', occurring in the said clause, the orders of detention were legal; another of us held that on his interpretation of the said expression, the orders of detention were not legal. This is the point on which we differed. The reasons for the different views on the point formulated above were fully stated by us previously. To those views we still adhere."

[2] The three persons concerned in these applns. are Raghunandan Prasad in Cr. Misc. No. 614 of 1950, Biswanath Prasad in Cr. Misc. No. 619 of 1950, & Misri Lal, Tailor, in Cr. Misc. No. 581 of 1950. The grounds of detention served upon Raghunandan Prasad state the following facts. Raghunandan Prasad of Shankar Flour Mills & Biswanath Prasad, cycle-repairer, have their shops adjacent to each other. Misri Lal, Tailor, lives at the back of this block of shops. A back door of the shop of Bishwanath Prasad opens in the house of Misri Lal. The Sub-divisional Officer of Patna Sadar on receiving information that stone powder was being mixed with *Ata* (flour), made a surprise raid on 22-9-1950, in the aforesaid three buildings. Thirty-five bags of stone powder were found in the premises occupied by Bishwanath Prasad. A trail of stone powder was noticed going in the direction of the house of Misri Lal, & in that house one bag of stone powder was recovered. Some adulterated *Ata* was also recovered, & the sample on examination by public analyst was found to be highly adulterated. The aforementioned three per-

sons were apparently in conspiracy of profiteering in sale of flour at the expense of the health of the community. Raghunandan Prasad manufactured the flour, Bishwanath Prasad stored the powder, & the mixing was done in the house of Misri Lal. The grounds of detention of Bishwanath Prasad & Misri Lal state the same facts. In the opinion of the detaining authority, the above mentioned circumstances satisfied the State Govt. that if these persons were allowed to remain at large, they would indulge in activities to the prejudice of the maintenance of supplies & services essential to the community. For prevention of such activities, the State Govt. consd. their detention necessary. The grounds of detention at the commencement refer to the deficit of food grains in the State of Bihar owing to various causes, such as the failure of the autumn crop caused by drought & excessive rain & floods, subsequent drought in October causing enormous damage to the winter crop. It then refers to the way the price of rice has shot up between the periods 7-6-1950 to 18-10-1950, & that blackmarketing & hoarding by anti-social elements contributed to a great extent in this acute & sudden rise in the prices of food grains which, if unchecked, might even bring about famine conditions. Taking advantage of the food shortage, unscrupulous dealers have started adulterating food stuffs which would bring them ill-gotten gains at the risk of even causing epidemic among the consumers. Unwholesome food "thrown into the rationing system is likely to cause serious difficulties in the distribution of food stuff," is also stated at the commencement of the grounds of detention. Although the paper book placed before us does not disclose specifically this passage in the grounds of detention of Bishwanath Prasad & Misri Lal, yet I think we may keep in mind that has been stated in the grounds of detention of Raghunandan Prasad when considering the case of all the three persons, particularly when they are accused of having entered into a conspiracy to profiteer by the sale of flour at the expense of the health of the community.

[3] In the case of Misri Lal, the learned Advocate appearing for him wished to show that from the search list it was not apparent that a bag of stone powder was recovered from the house of Misri Lal. On behalf of Bishwanath Prasad it was argued, in addition to the general arguments which were made by Mr. Baldeva Sahay on behalf of Raghunandan Prasad, that para. 7 of the grounds merely stated that these three persons were apparently in conspiracy of profiteering in sale of flour at the expense of the health of the community, which could not be said to be any ground for detention having regard to the provisions of the Preventive Detention Act (Act IV [4] of 1950) herinafter refd. to as the Act.

[4] I do not think that it is possible to accede to the argument on behalf of Misri Lal that in fact a bag of stone powder was not recovered from his house, for the reference made to us is on the grounds of detention stated by the State Govt. It is not open to this Ct. to question the facts stated in the grounds of detention, or whether those facts were sufficient to satisfy the detaining authority to order the detention of the detenu. We must, therefore, proceed on the facts stated in the grounds of detention against Misri Lal & the other two persons & decide whether on the grounds stated, the detention of these persons was legal under cl. (iii) of Sub-S. 1 (a) of S. 3 of the Act.

[5] Before I deal with the contention of Mr. Baldeva Sahay, it is necessary to set out the relevant portions of S. 3 of the Act with which we are concerned in this reference. Sub-cl. (1) of S. 3 of the Act states:

"The Central Govt. or the State Govt. may: (a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to—
(iii) the maintenance of supplies & services essential to the community,
it is necessary so to do, make an order directing that such person be detained."

[6] The Act in its original form was declared *intra vires* except for S. 14 by the Supreme Ct. in *Gopalan* v. *State of Madras*, A. I. R. (37) 1950 S. C. 27. In my opinion, it is these words of the section which have to be construed & not items 3 & 18 in the Concurrent List of Sch. VII, Const. Ind.

[7] Mr. Baldeva Sahay refd. to items 3 & 18 in the Concurrent List of Sch. VII, of the Constitution & pointed out that adulteration of foodstuffs and other goods was a distinct item from the maintenance of supplies & services essential to the community as stated in item 3 of the said List. He also refd. to R. 81, Defence of India Rules, where in sub-cl. (2) the expression "for maintaining supplies & services essential to the life of the community" is stated, & yet throughout R. 81, Sub-cl. (2) there was no mention of adulteration of foodstuffs & other goods. He argued from this that the various legislative authorities never contemplated that adulteration of foodstuffs & other goods would come under the expression "maintenance of supplies & services essential to the community" as to be found in S. 3 (1) (a) (iii) of the Act. It seems to me, however, that the plain duty of the Ct. is to consider the words in the Act as they stand & give to them their ordinary meaning. The words themselves have to be construed independently of what is stated in items 3 & 18 in the Concurrent List of Sch. VII of the Constitution & what is contained in R. 81, Defence of India Rules.

[8] The facts stated in the orders of detention may be summed up as follows. The detenu Raghunandan Prasad manufactured flour at Shankar Flour Mills, the detenu Bishwanath Prasad stored stone powder & mixing was done at the house of the detenu Misri Lal, & that these persons entered into a conspiracy to profiteer by sale of flour at the expense of the health of the community.

In a raid upon the premises of these detenus, thirty-five bags of stone powder were found in the premises of Bishwanath Prasad & one bag of stone powder was found in the house of Misri Lal, & some adulterated *ata* was also recovered, a sample of which on examination by the public analyst was found to be highly adulterated. Do these facts stated in the grounds of detention come within the purview of S. 3 (1) (a) (iii) of the Act is what I have to consider. There can be no question that the conduct of the detenus stated in the grounds of detention was highly reprehensible particularly in these days of food shortage & economic difficulties which the State is facing. I have, however, to consider the case of the detenus not on moral grounds but on legal grounds, & if their conduct comes within the meaning of the words in S. 3 (1) (a) (iii) of the Act, then the detention must be held to be valid. On the other hand, if on a fair & reasonable reading of the words in S. 3 (1) (a) (iii) of the Act, the act of the detenus as stated in the grounds of detention cannot be included within the meaning of those words, then the detention must be held to be illegal, no matter how gross & anti-social the act of the detenus may be.

[9] According to Webster's Dictionary, the word "maintain" has various meanings including "to support, to sustain, to keep up; not to suffer to fail or decline." The word "maintain," & (*sic*) according to Webster it means "support & up-keep of property, machinery, equipment etc." According to Webster, the word "supply" has amongst various meaning the meaning "to fill the needs of or to furnish with supplies, provisions, equipment or the like, as well as filling a want, a need." The word "supplies" therefore, carries with it, to my mind, the meaning to fill the needs of or to supply provisions to a community. The meaning of the words "the maintenance of supplies & services essential to the community," therefore, must be up-keep of the needs & the provisions essential to the community. These may be of various kinds impossible to define, but so long as they are essential to the community, their up-keep would be essential for the purpose of the Act. As I read these words, I think the true meaning to be given to them is to prevent any person from doing an act in any manner prejudicial to the up-keep of the needs, the provisions & the services essential to the community, that is to say, the flow of supplies & services essential to the community must be continued to be maintained in the interest of the community & any one who did any act to prejudice it was liable to be detained by the detaining authority under the Act. I do not think that the words "maintenance of supplies & services essential to the community" could reasonably carry the meaning that any one who adulterated foodstuffs would be acting in a manner prejudicial to the maintenance of supplies or the continuity of supplies. It is true that adulterated foodstuff supplied to the community may be harmful to its health, but supplying such adulterated foodstuff would not be prejudicing the maintenance of supplies. The Act does not speak of profiteering, much less profiteering at the expense of the health of the community. I think it would be straining the language of S. 3 (1) (a) (iii) of the Act to apply it to acts such as are stated in the grounds of detention served on the petnrs. in these cases. I can quite conceive of the position where hoarding done on a large scale affects the flow, continuity & the up-keep of supplies essential to the community, attracting the provisions of the Act. I can also conceive of the position where by acts of sabotage production of supplies essential to the community is disturbed & enough supplies are not manufactured or produced to meet the needs of the community coming within the purview of the Act. Conceivably where certain persons persuade the cultivators not to grow any food or that if they grow any food they should conceal their produce, the act may also come within the purview of the Act because if such instigation was successful, then the produce of the land would not be available for distribution to the community, & thus the up-keep, the continuity, the flow, or the maintenance of supplies essential to the community would be affected. The facts alleged against the detenus in these cases, however, do not disclose any such thing. They merely disclose that these individuals are guilty of a very grave anti-social conduct & that by selling spurious foodstuff they are making a profit & also endangering the health of the community. Such conduct, in my opinion, is not covered by the words of the Act "maintenance of supplies & services essential to the community."

[10] In my opinion, therefore, the detention of the detenus was illegal on the grounds stated in the grounds of detention, & I would answer the point stated by my brethren Das & Narayan JJ. in the negative. The applns. therefore, should be allowed & it must be held that the detention of the detenus is illegal. In my opinion the petnrs. should be released forthwith.

[11] **Shearer J.**—I entirely agree. The language used in S. 3 (1) (a) (ii) & (iii), Preventive Detention Act, 1950, reproduces the language used in Item 3 of the Concurrent List. In view of this too narrow or forced a construction is not to be put on the words "acting in any manner prejudicial to . . . . . the maintenance of supplies & services essential to the community." The expression "maintenance of supplies . . . . . essential to the community" are, in my opinion, to be construed on the *ejusdem generis* principle along with the expressions "the security of the State" & "the maintenance of public order." In order to justify the making of an order of detention u/s. 3 (1) (a) (iii) it must, in my opinion, be shown that a reasonable apprehension exists that, if the person against whom the order is made, is permitted to remain at large, he will do something which is calcula-

ted to reduce the quantity of supplies available to the public residing in some particular locality & so cause harm to the community. It appears to me quite impossible to say that the owner of a mill, such as the mill belonging to one of the petnrs. who undertakes, on payment, to convert *ata* into flour & misappropriates part of the *ata* entrusted to him, &, in order to cover up the misappropriation, supplies his customers with adulterated flour, is guilty of conduct of that kind. It is, I think, a pity that, instead of raiding the premises of the petnrs. immediately, the Subdivisional Mag. did not attempt to lay a trap for them. It ought to have been possible to prove that an agent had handed over a quantity of *ata* & received back a quantity of adulterated flour, & if immediately after the agent had received back the flour, the premises had been raided & a quantity of soap stone had been discovered on them, could not the owner of the mill at least have been prosecuted to conviction? The maxim *respondeat superior* would, I think have applied. A short period of preventive detention is not suitable in a case of this kind. Owners of mills, who do this sort of thing, ought to be kept in prison for a longer period, & when in prison, ought to be put to hard labour.

[12] **Jamuar J.**—I have had the advantage of perusing the judgments prepared by my brethren Shearer & Imam JJ. I have also come to the same conclusion as they have.

[13] The three petnrs. are said to have been in conspiracy to adulterate flour. But, in my opinion, their activities cannot be said to come within the purview of acts prejudicial to the "maintenance of supplies & services" essential to the community within the meaning of S. 3, sub-s. (1) (a), cl. (iii), Preventive Detention Act (Act IV [4] of 1950). In these circumstances, the answer to the reference, in my opinion, should be in the negative; & I would allow the applns. holding that the detention of the petnrs. is illegal.

D.H. *Answer in the negative.*

A. I. R. (38) 1951 Patna 137 *[C. N. 18.]*

(FULL BENCH)

REUBEN, IMAM & RAMASWAMI JJ.

Kameshwar Prasad Singh—Applt. v. *Meghan Garain & others—Resps.*

A. F. A. D. No. 2088 of 1947, D/-16-4-1951.

† (a) Civil P. C. (1908), O. 6, R. 2—Variance between pleading & proof.

The pltf. had alleged in his plaint that there was an oral ijara in 1320 fasli by the pltf's. predecessor in favour of the defts., that on 12th Jeth 1348 the pltf. repaid the ijara money & came in possession of the land, that on 20-8-1941 the defts. illegally dispossessed the pltf. The pltf. therefore asked for a declaration that the ijara was redeemed, prayed that a decree for possession & mesne profits should be passed in his favour. The main ground of defence was that the defts. had not taken any oral ijara but they had purchased the land by an unregistered sale deed from the pltf's. predecessor. There was an alternative plea that even if the case of oral ijara was true such oral ijara was void & inoperative & the defts. were in adverse possession for the statutory period & had acquired absolute title to the land.

Held that upon the pleadings of the parties & the issues framed in the case, it was impossible to grant a decree for redemption to the pltf. on the ground that the defts. had prescribed for the limited title of a mtgee by remaining in possession for over 12 years. In view of the findings of fact of the lower Ct. that the pltf. had not repaid the money due on the ijara, that he did not obtain possession after the alleged redemption nor was he dispossessed on the dates alleged the suit must wholly fail. 2 Cal. 418, 8 Cal. 975 and 11 M. I. A. 7 (P. C.), *Rel. on*:

Held that it was not necessary to consider the correctness or otherwise of the observations in A. I. R. (25) 1938 Pat. 479, (Per *Ramaswami J.* These observations were obiter). [Paras 8, 12, 16]

Anno. C. P. C., O. 6, R. 2, N. 9.

(b) Judicial Precedents—Obiter dictum—Civil P. C. (1908), Pre.

(Per *Ramaswami J.*)—An opinion given in Ct. if not necessary to the judgment is no judicial opinion. Vaugh 360, *Rel. on.* [Para 16]

Anno. C. P. C., Pre. N. 15.

Lalnarain Sinha, Ishwarinandan Pd. Singh & L. M. Sharma — for Applt.; Mahabir Pd. & Sidheshwar Pd. Singh — for Resps.

Cases referred to:

('66) 11 M. I. A. 7: (6 W. R. 57 P. C.) [Pr. 11]
('81) 3 All. 24 (F. B.) [Pr. 14]
('76-77) 2 Cal. 418. [Pr. 9]
('82) 8 Cal. 975: (11 C. L. R. 399). [Pr. 10]
('38) 19 P. L. T. 439: (A. I. R. (25) 1938 Pat. 479). [Prs. 6, 14, 23]
Vaugh 360: (124 E. R. 1113). [Pr 16]

Ramaswami J.—The question to be determined in this appeal is whether the pltf. ought to be granted a decree for redemption with respect to an area of 19 bighas & odd located in Mohiudinpore Khasiawan of which the defts. are said to have taken usufructuary mtge.

[2] The pltf. brought the suit on the allegation that in Jeth 1320 Fasli Banke Bihari Singh had given the land by an oral ijara for a sum of Rs. 216 to four sets of defts., viz., defts. 1 to 5, defts. 6 to 10, defts. 11 to 14 & defts. 15 to 21. The pltf. alleged that as successor-in-interest of Banke Bihari Singh he repaid the ijara money to the defts. & after redeeming the mtge. obtained possession of the land. There was a subsequent dispute u/s. 144, Cr. P. C. between the parties & the Subdivisional Mag. issued a warning notice against the pltf. The pltf. asserted that on 20-8-1941 the defts. dispossessed him from the land illegally. The pltf. therefore asked (1) for

"a declaration that the defts. came in possession by virtue of the ijara of Jeth 1320 fasli & the said ijara was redeemed on 12th Jeth 1348 fasli by the pltf. & the possession of defts. thereafter was illegal, (2) that a decree for possession may be passed in favour of the pltf against the defts. (3) that a decree for mesne profits be granted from date of dispossession till the date of the suit & thereafter till the recovery of possession by the pltf."

The main ground of defence was that the defts. had not taken any oral ijara but they had purchased the land by an unregistered sale deed from Banke Bihari Singh. There was an alternative plea that even if the case of oral ijara was true such oral ijara was void & inoperative & the defts. were in

adverse possession for the statutory period & had acquired absolute title to the land.

[3] The Subordinate Judge held that the oral ijara was invalid, that the defts. had been in adverse possession of the land for over 12 years & had acquired absolute title. He disbelieved the defts.' case that Rambabu, the maternal uncle of Bankey Bihari Singh had executed any unregistered sale deed in their favour. The Subordinate Judge disbelieved the story of the pltf. that he had repaid the ijara money on 12th Jeth 1348, that he had obtained possession of the land or that the defts. had dispossessed him on 20-8-1941. On these findings, the Subordinate Judge dismissed the suit. The decree of the learned Subordinate Judge has been affirmed by the Dist. J. in appeal.

[4] When the second appeal first came for hearing it was argued by Mr. Lalnarain Sinha on behalf of the pltf. that possession of the defts. as mtgees since 1320 fasli could in no way extinguish the title of the mtgor. when he sued for possession after repayment of the mtge. money. Impressed by this argument, the H. C. remanded the case to the Dist. J. for a finding whether the defts. were in possession of the properties as mtgees or as purchasers. The H. C. ordered that the unregistered sale deed relied upon by the defts. should be taken into evidence for the collateral purpose of showing the nature of the possession asserted.

[5] The Dist. J. thereafter examined the evidence & recorded the finding that the defendants were in possession as mtgees. of the land, that they continued to be in possession as mtgee. from 1320 Fasli till the year 1941 when they asserted for the first time their rights as purchasers of the land.

[6] When the appeal was heard after remand, Sinha & Rai JJ. refd. the whole appeal for decision by a larger bench since they doubted the authority of the ruling in *Bhukhan Mian* v. *Radhika Kumari Debi*, 19 P. L. T. 489.

[7] Before the F. B. two questions were mainly argued (1) whether it is open to the pltf. to claim a decree for redemption despite the fact that the plea of adverse possession was not distinctly raised in the plaint & it has not formed the subject-matter of an issue before the Subordinate Judge, & (2) whether the pltf. could be granted such a decree on the ground that the defts. had acquired only the right of mtgee. by adverse possession for more than 12 years.

[8] As regards the first question it is of importance to notice that the pltf. had alleged that there was an oral ijara in 1320 Fasli by Banke Bihari Singh in favour of the defts. that on 12th Jeth 1348 the pltf. repaid the ijara money & came in possession of the land, that on 20-8-1941 the defts. illegally dispossessed the pltf. The pltf. therefore asked for a declaration that the ijara was redeemed, that a decree for possession & mesne profits should be passed in his favour. The lower Cts. have found that the story of payment was not true, that the oral ijara was not redeemed & that the pltfs. did not obtain possession of the land, that he was not dispossessed by the defts. in the manner alleged in the plaint. For the applt. Mr. Lalnarain Sinha pointed out that in Para. 16 of the written statement defts. stated that the oral ijara was inoperative, that the defts. had been in adverse possession of the land & had acquired absolute title. But it is nowhere stated in the pleadings either in the plaint or the written statement that the defts. had asserted only the limited interest of the mtgee. & that they had acquired such limited interest by adverse possession for more than 12 years. In the lower appellate Ct. an argument was addressed on behalf of the pltf. that possession of the defts. was permissive & that they had acquired title of mtgee. The argument was rejected by the lower appellate Ct. on the ground that no case of permissive possession was disclosed in the plaint or in the evidence of the witnesses examined on pltf's. behalf & that pltf. could not be permitted to make out a new case in appeal. The lower appellate Ct. added that the point was not even mentioned in the grounds of appeal. The question was again raised when the appeal was argued in the H. C. before the order of remand was passed. Upon the pleadings of the parties & the issues framed in the present case, it, is, in my opinion, impossible to grant a decree for redemption to the pltf. on the ground that the defts. had prescribed for the limited title of a mortgagee by remaining in possession for over 12 years. If the pltf. had intended to rely upon the plea that the defts. had prescribed only for the limited interest of a mtgee. he should have distinctly stated so in the plaint or raised it in the issue framed by the trial Ct. There is much force in the contention of the learned Advocate-General that the defts. had no proper notice that such a point was going to be raised. In view of the findings of fact, that the pltf. has not repaid the money due on the ijara, that he did not obtain possession after the alleged redemption nor was he dispossessed on the dates alleged, it is manifest that the suit must wholly fail.

[9] This opinion is supported by *Shiro Kumari Debi* v. *Govind Shaw Tanti*, 2 Cal. 418 in which the plaint stated that the land in dispute had been purchased by the pltf. from one Lochunkali under a kebala & the pltf. had been in possession of the said land through bhag tenants. One of the issues framed was "Is the disputed land held by the pltf. as alleged by him". The Munsif granted a decree but the lower appellate Ct. was not satisfied that the pltf. had established the precise title which he had set up though it was satisfied that he had been in possession for 12 years & upon that ground he gave the pltf. a decree. In second appeal, the H. C. held that the question of adverse possession had not been properly raised either in the plaint or in the issues in this case & the defts.

had no proper notice that such a point was going to be raised; & that the suit brought by the pltf. should be dismissed.

[10] To the same effect is the decision *Joytara Dassee* v. *Mohamed Mobaruck*, 8 Cal. 975 in which Field J. States :

"Then, as to the second point, we think there can be no doubt, & indeed the learned counsel, Mr. Bell, in his argument, very properly admitted, that the plfs. did not make in their plaint any alternative title based upon a twelve years possession. They do, indeed, say that they were in possession of the land, but they do not say that they were in possession for twelve years, or 'from before', or 'for a long time;' nor do they use any of those other general expressions which are to be found in plaints in this country, & which are at times argued to convey to the party, on the other side, the meaning that the pltf. relies upon an undisturbed possession for more than 12 years. This being so, it appears to us that it is impossible to uphold a decree which is based upon a title not stated by the pltfs. in their plaint, & as to which no issue was framed for trial in the Ct. below. Cases must be tried & determined *secundum allegate et probata*, & it is contrary to this principle, & may be fraught with injustice, to decide a cause upon a point not raised in the pleadings, nor embodied in an issue, & to which in consequence, the attention of the parties was not directed at the trial so as to enabl. them to produce all the evidence relevant thereto which was available to them."

[11] In this context reference should be made to *Eshenchunder Singh* v. *Shamachurn Bhutto*, 11 M. I. A. 7 in which Lord Westbury pointed out the absolute necessity that determination of a cause should be founded upon a case either to be found in the pleadings involved or consistent with the case thereby made :

"It is obvious that every one of these propositions of fact is a statement which it was incumbent on the pltf. to have distinctly alleged, in order that it might be the subject of direct testimony. It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the deft. has to meet, but which are in reality contradictory of the case made by the pltf. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the pltf. has pleaded, &, by joining issue in the cause, has undertaken to prove."

[12] In view of these authorities, I am of opinion that the pltf. in the present case ought not to be granted a decree for redemption on the ground that the defts. continued in possession of the land asserting themselves to be mtgees. for the period required by the statute. It follows that the decree of the lower Cts. is right & the second appeal must fail.

[13] If this conclusion is correct, it is not necessary to examine the second question whether the defts. had acquired limited title of a mtgee. upon the evidence recorded by the Dist. J. on remand.

[14] In the order of reference the learned Judges state that *Bhukan Mian* v. *Radhika Devi*, 19 P. L. T. 489 required reconsideration if that case was an authority for the proposition that the possession of one who came over the property as a mtgee. in possession becomes adverse not only to the extent of the mtgee.'s rights but completely in respect of absolute title. At p. 494 of the report, Wort A. C. J. says :

"I am aware of a number of cases in India which appear to have the effect of holding that a person can prescribe for a limited interest but I must say that I always fail to understand them as both a tenancy & mtge. are creatures of contract, & on fundamental principles I find it difficult to hold the view that a contract can be brought into existence by prescription. The view that I hold of the matter is best expressed by the Allahabad H. C. in *Umr-un-nissa* v. *Muhammad Yar Khan*, 3 All. 24. Pearson J. in delivering one of the judgments of the F. B. of that Ct. made this observation : 'In my opinion in order to bar the suit under Art 144 of the Act of 1877 the adverse possession of the defts. must be of the same nature as that sought by the pltf.'"

At p. 498, Manohar Lall J. states :

"In this view I do not think it is necessary to consider whether the deft. can ever be held in law to be able to prescribe against a true owner his rights as a mtge. but if it were necessary to decide this matter I would have respectfully agreed with the observations which have fallen from my Lord the Chief Justice on this point in the judgment just delivered by him."

[16] But it is right to point out that the question whether there could be a prescription of a limited right of mtgee. was not really in issue in that case, & the passages from the judgments of Wort A. C. J., & Manohar Lall J. were mere obiter dicta. It is not necessary to examine the correctness of these dicta in the present appeal. In his concurring judgment, Manohar Lall J. concedes that no question of prescription arose in that case for the deft. never asserted that he had prescribed a mtge. nor did the pltf. make out such a case either in the pleading or in the evidence nor was any issue raised as to when the deft. began to prescribe & further the period of twelve years did not expire from the date of entry in the Record of Rights relied upon by the defence. As no adverse possession was pleaded or established, the remarks of Wort A. C. J. & Manohar Lall J. were not necessary for the decision of the case. As suggested by Vaughan C. J. in *Bole* v. *Horton*, vaugh 360, 382 :

"An opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary opinion, had been broached is no judicial opinion, no more than a *gratis dictum*."

[17] For the reasons already assigned, I hold that this appeal must be dismissed with costs.

[18] **Reuben J.**—I agree.

[19] Regarding the contention that the defts. by prescription had acquired the title of usufructuary mtgees., it has been contended by Mr. Lal Narain Sinha that all the necessary facts have been pleaded. He points out that the plaint states that the defts. entered in 1320 under an oral mtge. & that the pltfs. redeemed the mtge. in 1348, that is to say, the defts. were in possession as mtgees. for the statutory period of prescription. On these pleadings, however, the acquisition of mtgee.'s rights by prescription was irrelevant. The defts. were being sought to be evicted as trespassers, & were concerned only to prove their case of purchase. Hence, they cannot be treated as having

had sufficient notice of a plea of title by adverse possession.

[20] **Imam J.**—I agree that the appeal be dismissed.

[21] The pltf.'s suit was in ejectment. On the allegations in the plaint, there can be no question that the suit was for recovery of possession from the defts. who had dispossessed the pltf. without any title or right on a particular date. In a suit for ejectment, the pltf. has to prove not only his title but also his possession within twelve years of the suit. The finding is that the story of the pltf. that he was dispossessed on a particular date after he had come into possession on redeeming the ijara was found to be false. On the contrary, it was found that the defts. were in possession since the year 1320 Fasli. On these findings, there could be no other course for a Ct. of law to take than to dismiss the pltf.'s suit.

[22] The argument now made that the defts. had acquired a limited interest by prescription cannot be entertained in the present suit. No such plea had been taken in the plaint, nor was there any issue framed in this respect. No such thing was argued before the trial Ct. or before the appellate Ct. what had been argued was that even if there could be no legal mtge. by way of an oral ijara, the defts'. possession would not be that of trespassers, but they must be deemed to have been in possession on pltf.'s behalf & such possession was permissive possession.

[23] In my opinion, it becomes quite unnecessary in the present case to discuss the case of *Bhukan Mian* v. *Radhika Devi*, 19 P. L. T. 489 or to say one word whether that decision was or was not rightly decided.

D.H. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 140 *[C. N. 19.]*

DAS & SARJOO PROSAD JJ.

A. Hasan—Petitioner v. *Mohammad Shamsuddin & another—Oppo. Party.*

Civil Revn. No. 774 of 1950, D/- 26-4-1951.

† (a) Civil P. C. (1908), S. 115—Prescribed Authority under Payment of Wages Act, 1936—Whether Court subordinate to High Court—Revision lies against his order.

A review of the provisions of the Payment of Wages Act, 1936, very clearly establishes that the Authority under S. 15 of the Act acts as a Court. He is bound to decide judicially the matter in dispute before him. He has to give his decision or 'direction' as it is called after hearing the parties, & on the evidence or materials produced before him, according to certain definite & specified rules of procedure laid down under the Act as also supplemented by statutory rules framed thereunder for his guidance, & his decision, is, subject to appeal to the District Court binding on the parties. He is thus a civil Court subordinate to the High Court & revision lies against his Order under S. 115, Civil P. C. : A. I. R. (28) 1941 Pat. 65 (F B) & A. I. R. (33) 1946 Lah. 316 (F B), *Rel. on* ; A. I. R. (37) 1950 Nag. 14 & A. I. R. (36) 1949 Bom. 188, *Diss.* ; *Case law discussed.* [Paras 20, 28]

Anno. Civil P. C., S. 115, N. 6, Pt. 23a.

(b) Payment of Wages Act (1936), S. 15—Application under—Manager whether necessary party.

S. 15 does not speak of the manager being a necessary party to such an application. Therefore, it cannot be assumed that failure to implead him would result in the dismissal of the application & make the application inherently defective. No doubt the 'direction mentioned in the S. 15 should, in the first instance, be made against the manager if he is found to have made the illegal deductions & the payment should be sought to be recovered from him, & it is only where it cannot be so recovered that it should be recovered from the employer. This follows from a perusal of the provisions of S. 3 & S. 19 of the Act. But it does not follow that the application also in the first instance or rather primarily should be made against the manager, & that if it is not so made the application should be held to be untenable so as to give no jurisdiction to the Authority to act upon it : A. I. R. (27) 1940 Bom. 87, *Diss.* [Para 43]

Anno. P. of W. Act, S. 15, N. 1, Pt. 4.

Mohammad Ayub — for Petitioner ; *T. K. Prasad — for Oppo. Party.*

Cases referred to:—

('83) 9 I. A. 174 : (9 Cal. 295 P. C.) [Pr. 23]
('50) A. I. R. (37) 1950 S. C. 188 : (1950 S. C. R. 459) [Pr. 40]
('13) 37 Bom. 114 : (17 I. C. 676) [Pr. 24]
('40) A.I.R. (27) 1940 Bom. 87 : (I. L. R. (1940) Bom. 96) [Pr. 42]
('49) A. I. R. (36) 1949 Bom. 188 : (I. L. R. (1948) Bom. 863) [Pr. 30]
('13) 40 Cal. 477 : (14 Cr. L. J. 197 F. B.) [Pr. 23]
('22) 49 Cal. 931 : (A. I. R. (10) 1923 Cal. 169) [Prs. 23, 24]
('46) A. I. R. (33) 1946 Lah. 316 : (I. L. R. (1947) Lah. 1 F.B.) [Pr. 27]
('24) 47 Mad. 369 : (A. I. R. (11) 1924 Mad. 561 F. B.) [Pr. 26]
('50) A. I. R. (37) 1950 Nag. 14: (I. L. R. (1949) Nag. 905) [Prs. 30, 47]
('40) 19 Pat. 321 : (A. I. R. (27) 1940 Pat. 102 S. B) [Pr. 38]
('41) 20 Pat. 373 : (A. I. R. (28) 1941 Pat. 65 F. B.) [Prs. 5, 20, 26, 27, 35, 47]
('42) 21 Pat. 173 : (A. I. R. (29) 1942 Pat. 33) [Pr. 11]
('42) 21 Pat. 1 : (A. I. R. (29) 1942 Pat. 1 F. B.) [Prs. 21, 26, 33, 47]
('43) 22 Pat. 577 : (A. I. R. (31) 1944 Pat. 147) [Prs. 26, 47]
('51) 29 Pat. 851 : (A. I. R. (38) 1951 Pat. 209) [Pr. 26]
(1910) 2 K. B. 859 : (80 L. J. K. B. 185) [Prs. 26, 37]
(1913) A. C. 546 : (82 L. J. K. B. 1197) [Pr. 26]

Sarjoo Prosad J.—This petition in revision has been presented by one A. Hasan, proprietor & director of the Sasamoosa Sugar Works Limited. It arises out of a proceeding under the Payment of Wages Act (IV [4] of 1936). The opposite party to the petition are the General Secretary of the Sasamoosa Workers' Union representing the daily coolies of the Sugar Works Limited and one Dhunmun.

[2] The facts are briefly these : On the 12th of April, 1950, a number of workers of the Sugar Works presented several petitions before the District Magistrate of Saran, who is the prescribed Authority within the meaning of the Act claiming that a deduction of wages had been made without any legal justification during specified periods for which they had been working, and that accordingly these amounts which were justly due to them should be realised from the Sugar Works concerned. Another such petition was also pre-

sented to the same Authority on the 25th of August, 1950, by another set of workers. The Authority concerned admitted the applications and issued notice against the petitioner and one S. M. Zaki, described at one place in the petition as the General Secretary and at another place as the General Manager of the Sasamoosa Sugar Works Limited. When the case was taken up on the 6th of October, 1950, the petitioner who appeared on the date seems to have raised preliminary objections that the application under the Act (section 15) was not maintainable as proper persons were not parties to the applications and further that the application was time-barred. The Prescribed Authority aforesaid disallowed these objections. The petitioner then wanted time to examine accounts and to produce witnesses, and the said Authority adjourned the case to be put up on the 2nd of November, 1950. It may be observed that the two objections on the date in question were raised orally without any regular petition stating all the material facts bearing on them. The applicants, who are opposite party here, filed in reply a petition praying that Mohammad Qasim Lari may be made a party to the applications to avoid any technical objection. Later, on 12-10-1950, after the above order had been passed, a written petition was actually filed before the Authority mentioning the particulars on which the preliminary objections were based. The allegation in this petition is that one Mohammad Qasim Lari had been named as the manager of the factory under Cl. (c) of sub-s. (1) of S. 9, Factories Act (XXV [25] of 1935) corresponding to S. 7 of the Act of 1948, & that the said Qasim Lari, was responsible for payment of wages to the persons employed in the factory. Therefore, it stated that the said Qasim Lari should have been made a party to the applications filed by the workers, & he being not a party, the applications could not be entertained. It was also alleged that the applications were barred by limitation within the proviso to sub-s. (2) of S. 15, Payment of Wages Act. This petition the Authority directed to be put up for hearing in the presence of the parties on the date fixed, that is, 2-11-1950, & the application has not yet been disposed of. Before the application could be taken up, on 1-11-1950, the petitioner moved this Court & obtained a rule as also an order for stay of further proceedings.

[3] It would thus appear from the facts stated above that the petition filed on 12-10-1950, containing the preliminary objections is still pending, & it was, therefore, premature on the part of the petitioner to rush up to this Court & obtain a rule as also a stay of further proceedings without disclosing the fact that a regular petition containing the objections aforesaid was still pending consideration by the Authority competent to hear & decide the matter. It is pointed out that under S. 15, sub-s. (3), Payment of Wages Act, it is not necessary that the objections should be raised in the form of a regular petition & the preliminary objections having been raised & disallowed by the order, dated 6-10-1950, the petitioner was entitled to move this Court against the aforesaid order. It is true that a petition in writing is not necessarily required under the Act in order to raise such objections but the order complained against does not indicate what the two preliminary objections were; & at any rate, unless the full particulars had been given, this Court was not in a position to know what were the actual arguments advanced before the said Authority, & whether or not all the relevant materials were placed before him. The fact that subsequently such a regular petition was filed containing the particulars indicates that at the earliest stage the Authority was not presumably apprised of the details & the matter is still pending consideration by him. The grounds of objection may be tenable or untenable ; it is for the Authority to pronounce upon the validity of those grounds. But before the Authority does so, it must have all the facts on which the objections are founded. In the absence of those facts, it was impossible for the Authority to entertain the objections. It appears to me, therefore, that the present application filed by the petitioner is premature & the proper course for the petitioner was to wait until the petitition filed by him on the 12th of October last had been heard & disposed of on the date fixed by the Authority.

[4] It has, however, been urged on behalf of the petitioner that now that the matter has attracted the attention of this Court, & the questions involved being purely questions of law affecting the jurisdiction of the Authority to entertain the applications filed by the workers, this Court should finally decide the matter & give appropriate directions to the Authority concerned. This undoubtedly opens out a wide vista of controversial questions which arise for our determination. The case, therefore, had to be heard on various dates & we had to devote much more time & attention to the matter than what the merit of the case actually demanded. Before I take up the question whether applications were not maintainable on account of the alleged absence of a necessary party, there are various preliminary questions which have to be met & answered. The questions are : (1) whether the Authority competent to hear & decide all claims under the Payment of Wages Act is a 'Court' with the meaning of S. 115, Civil P. C. In this connection an incidental question has also been raised, namely, whether it is a 'Civil Court' ; (2) whether if it is a 'Court', it is Subordinate to the High Court, & (3) whether, if it is a Court subordinate to the High Court, its order is revisable by this Court when under the provisions of the said statute the directions given by the Authority are final subject to appeal as specified therein. These questions, in my opinion, have been more than adequately considered in several impor-

tant decisions of this Court as also of other High Courts.

[5] The word 'Court' has not been defined & the definition given to it in the Indian Evidence Act is obviously not exhaustive. We have, however, to find out the salient attributes or characteristics of a 'Court' which means a place where justice is administered or a person who administers justice. In *Mt. Dirji* v. *Goalin*, 20 Pat. 373 which is a Special Bench decision of this Court, Fazl Ali, J. (as he then was) laid down certain tests for determining whether a certain person or authority is a 'Court'.

[6] He points out that

"in order to be a Court the person or persons who may be said to constitute it must be entrusted with judicial functions. Judicial function means the function of 'deciding litigated questions according to law' deciding them not arbitrarily but on evidence & according to certain rules of procedure which ensure that the person, who is called upon to decide them, acts with fairness & impartiality."

[7] This evidently implies that the judicial function of a Court comprehends three factors (i) the presence of litigated questions (ii) the decision of those questions according to law, that is, not arbitrarily but on evidence, (iii) the observance of certain rules of procedure so as to ensure fairness & impartiality in giving those decisions.

[8] The other attribute which the learned Judge postulates is that a 'Court' must have not only judicial functions but it should possess 'judicial powers';

"such as the power to receive evidence bearing on the matter which it is called upon to decide, the power to enforce the attendance of witnesses & the production of documents & material objects before it & the power to pronounce judgment & carry it into effect between the person & parties who bring a case before it for decision."

[9] The third important feature to which the learned Judge refers is that a 'Court' exercises jurisdiction over persons by reason of the sanction of the law & not merely by reason of voluntary submission to such jurisdiction & that the proceedings before it are public.

[10] His Lordship also deals with the meaning of the expression 'persons designata' used with reference to certain persons or officials discharging certain duties under particular statutes, & he observes:

"there is no real antithesis between the expressions 'persona designata' & 'Court' or in other words, given a persona designata may be a Court. Whether he is a Court or not depends upon his powers & the functions which he has to discharge. It is not inconceivable that in some cases when an officer of the Court, say the District Judge, is called upon to decide a certain matter not as a District Judge, but as a persona designata, he may still be a Court by reason of some special provision in the Statute which authorises him to decide the matter. The Statute may expressly say that he will be deemed to be a Court or that his decision will be subject to appeal or revision by a superior Court."

The real question which is to be enquired into in such cases is whether the person so designated has been invested with the powers of a Court. If he is so invested with the powers of a Court, the necessary implication in such a case would be that the jurisdiction of the Court is enlarged, & its decision is subject to all the incidents of such jurisdiction.

[11] In the case in question the learned Judges were dealing with the position of the Commissioner appointed under the Workmen's Compensation Act, & the question which they had to answer was whether such a person answered the description of a 'Court'. They found upon a review of the various provisions of the Act that the function of the Commissioner under the Act was not merely to enquire & advise but to judge & decide the matters before him, & in doing so, had to proceed judicially & not arbitrarily. They, therefore, held that having regard to the tests laid down by them the Commissioner satisfied the requirements of a 'Court'. The Special Bench of course left the question open as to whether the Commissioner was a 'Court subordinate to the High Court' in the sense in which the expression is used in S. 115, Civil P. C. But when the matter went back to the Division Bench after the point had been answered by the Special Bench, namely, that the Commissioner under the Workmen's Compensation Act was a 'Court', the Division Bench found that the Commissioner was a Court subordinate to the High Court within the meaning of S. 115 of the Code, & as such, the order of the Commissioner could be revised. The reason which has been given for coming to the conclusion that the Commissioner was a Court subordinate to the High Court is that the Act provided for an appeal to the High Court from the order of the Commissioner where the amount in dispute was over Rs. 300. The Commissioner was, therefore, held subject to the appellate jurisdiction of the Court, & as such, a Court subordinate to the High Court: (vide *Mt. Dirji* v. *Sm. Goalin*, 21 Pat. 173).

[12] If the provisions of the Payment of Wages Act are examined in the light of the tests formulated above, I feel no hesitation in coming to the conclusion that the Authority acting under S. 15 of this Act acts as a Court.

[13] Section 15 enacts that the Provincial Govt. may, by notification appoint any Commissioner for Workmen's Compensation or other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the authority to hear & decide for any specified area all claims arising out of deductions from the wages, or delay in payment of the wages of persons employed or paid in that area. Sub-s. (2) of the same sections says:

"Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been delayed, such person himself, or any legal practitioner or any official of a registered trade union authorized in writing to act on his behalf, ... or any other person acting with the permission of the authority appointed under Sub-s. (1), may apply to such authority for a direction under Sub-s. (3)".

Then comes a proviso to sub-s. (2) & this proviso embodies a period of limitation for presenting such applications which period is six months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made, as the case may be; & it further provides that any application may be admitted after the said period of six months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period. Then follows the other significant provision of S. 15, namely, sub-s. (3) of that section. It lays down the broad heads of the procedure which is to be followed by the authority when an application has been presented & entertained. It provides that the authority shall hear the applicant & the employer or other person responsible for the payment of wages under S. 3, or give them an opportunity of being heard, & after such further inquiry (if any) as may be necessary, may, direct the refund to the employee of the amount deducted, or the payment of the delayed wages together with such compensation as the authority may deem fit & exceeding a certain amount.

[14] It follows from the above that the authority has to decide certain litigated questions according to law. The question in dispute relates to unauthorised deduction in wages or delay in payment of wages. The petition before him has to be filed within a period of limitation & if not so filed, it is for him to condon the delay & entertain the application on sufficient cause shown. After he has entertained the application, he must hear the applicant & the employer or any other person responsible for the payment of wages, & after such further enquiry give a direction for refunding the amount to the employee-applicant together with appropriate compensation.

[15] The authority may under sub-s. (4) of the same section in case it finds that the application was malicious or vexatious, impose a penalty on the employee to be paid to the employer or other persons responsible for the payment of wages, & these refunds, compensation or penalty are liable to be recovered as fines imposed by a Magistrate under sub-s. (5) of the same section.

[16] S. 16 of the Act then lays down a procedure for filing a single application in respect of claims of a person or persons belonging to the same unpaid group under given circumstances. Then there is another important provision in S. 17 of the Act which enacts that an appeal against a direction made under sub-s. (3) or sub-s. (4) of S. 15 may be preferred, within thirty days of the date on which the direction was made, in a Presidency-town before the Court of Small Causes & elsewhere before the District Court by the person aggrieved under the direction given by the authority whether it is a case of refund or a case of penalty; & sub-s. (2) of S. 17 postulates that subject to the above right of appeal any direction given by the authority under S. 15 shall be final. The decision of the authority, evidently, therefore, cannot be an arbitrary decision but has to be based on evidence & appropriate materials because the party aggrieved by his direction has been given a right of appeal under the Act.

[17] In exercising his judicial functions he is also given certain judicial rights ; for instance, under S. 18 of the Act it is provided that the authority appointed under sub-s. (1) of S. 15 shall have all the powers of a civil Court under Civil P C., 1908, for the purpose of taking evidence & of enforcing the attendance of witnesses & compelling the production of documents, & every such authority shall be deemed to be a civil Court for all the purposes of S. 195 of Chap. XXXV, Criminal P. C., 1898.

[18] The authority can also enforce the directions given by him as provided by S. 19 of the Act which says that in case the authority or the Court referred to in S. 17 is unable to recover from any person responsible under S. 3 for the payment of wages any amount directed by such authority under S. 15 or S. 17 to be paid by such person, the authority shall recover the amount from the employer of the employed person concerned. The orders of the authority are thus *ex-proprio vigore* binding on the parties & determine their rights & obligations.

[19] I need not refer to some of the other provisions of the enactment expect Ss. 22 & 26. Section 22 provides for a bar to the entertainment of any suit for recovery of wages or of any deduction from wages in so far as the sum so claimed forms the subject of an application under S. 15 which has been presented by the pltf. & which is pending before the authority appointed under the section or an appeal under S. 17 or has formed the subject of a direction under S. 15 in favour of the pltf. or has been adjudged, in any proceeding under S. 15. Then S. 26 provides for certain rule-making powers. Under the section the Governor-General was empowered to make rules to regulate the procedure to be followed by the authorities & Courts referred to in Ss. 15 & 17, but by the Adaptation of Indian Laws Order, 1937, the Provincial Govt. has since been authorised to make such rules in order to give effect to the provisions of this Act. The section further shows that the rules so framed may relate to various matters, namely, the maintenance of records, registers, returns & notices; the display in a conspicuous place & premises of notices sent; the imposition of fines; the scales of costs allowed & various other matters relating to such proceedings. In the rules framed under the authority of this section it appears that the rules lay down almost a complete & self-contained set of procedure & do not leave it to the discretion of the authority to evolve a procedure of his own. The rules, for instance, provide for the form of the application, the nature of the authority for re-

presentation; the presentation of documents; the refusal to entertain applications under certain circumstances; & then most important of all is R. 8 relating to appearance of parties. This rule I am referring to in particular because it proves that if the application is entertained the Authority shall call upon the employer by a notice in form E to appear before him on a specified date together with all relevant documents & witnesses & shall inform the applicant of the date so specified & if the employer or his representative fails to appear on the specified date, the Authority shall proceed to hear & determine the application *ex parte*. Similarly, if the applicant fails to appear on that date the authority may dismiss the application, & the authority may in certain cases set aside these orders & re-hear the matter on good cause being shown within one month from the date of the order. Then another important rule is R. 9. Under this rule, the authority shall in all cases enter the particulars indicated in Form F & at the time of passing orders shall sign & date the Form. In case where no appeal lies, no further record shall be necessary. In a case where an appeal lies, the authority shall record the substance of the evidence & shall append it under his signature to the record of direction in Form F. Then R. 12 provides for the manner in which the appeal is to be preferred.

[20] A review of these provisions very clearly establishes that the authority acting under S. 15 of the Act acts as a Court. He is bound to decide judicially the matter in dispute before him. He has to give his decision or 'direction' as it is called after hearing the parties, & on the evidence or materials produced before him, according to certain definite & specified rules of procedure laid down under the Act as also supplemented by statutory rules framed thereunder for his guidance, & his decision is, subject to appeal to the District Court, binding on the parties. It is true that at places in the Act a distinction has been made between the authority & the Court but that distinction is really without any difference because in the context the word 'Court' has been used to denote the Court to which an appeal lies against the directions or the orders passed by the authority. The real point is to see whether the authority is acting as a Court, & I have already indicated that keeping in view the important tests laid down in the decision of *Mt. Dhirji* v. *Sm. Goalin*, mentioned above, there seems to be little doubt that the authority is acting as a Court.

[21] The above tests were applied & followed in another Full Bench case of this Court in *Arjun* v. *Krishna Chandra*, 21 Pat. 1 which arose under the Orissa Tenancy Act, 1913 (B. & O. Act II (2) of 1913). The questions in that case were whether the Court of the Collector acting under the provisions of the Act was of a grade inferior to that of a District Court, there being definite provisions providing for an appeal from the decision of the Collector to the District Judge, & also whether the orders of the Collector passed under the Act, though final in such cases, could be revisable by the High Court under S. 115, Civil P. C. The majority Judges were of the opinion that the Court of the Collector being subordinate to the appellate jurisdiction of the District Court (which, in other words, mean the Court of the District Judge which is the principal Civil Court of the district) the former was obviously inferior to the latter, & this inferiority would continue to subsist even in case of such orders of the Collector as were not by reason of their pettiness appealable to the District Judge. It was accordingly held that although in certain cases there may be a finality to the order of the Collector, still the Court of the Collector was a Court subordinate to this Court within the meaning of S. 115, Civil P. C. inasmuch as the section confers the power of revision, precisely in those cases decided by a subordinate Court in which no appeal lies to the High Court. The power of revision is, therefore, not excluded merely because the subordinate Court is empowered to pass an original order which is declared final, or an appellate order from which there is no appeal to the High Court. The separate judgments delivered in the case by the three learned Judges constituting the Bench are very comprehensive & furnish a very interesting reading for their wealth of details in tracing the development of the revisional powers of the High Court. Meredith J., after an exhaustive review of the decisions of various High Courts bearing on the point, summed up as follows :

"Having examined the views of the various High Courts in so far as they have been expressed in reported decisions, let us now turn to an examination of the question itself. It is unnecessary in the present case finally to decide whether the Court of the Collector is subordinate to the High Court within the meaning of S. 115, Civil P. C. in a case where an appeal lies under the statute to the Commissioner. I will only say, first, that, in my view, it would be an anomaly for subordination to depend upon a mere question of valuation; the Collector's Court to be subordinate when dealing with a case valued at over Rs. 100, but to escape that subordination merely because the case of a lower valuation. The pettiness of a case may be a good reason for providing that there shall be no appeal; it can surely be no reason for providing that the Court shall escape subordination & be free from all supervision in regard to questions of jurisdiction, so as to be able to act without jurisdiction, or to refuse to exercise jurisdiction. It is difficult to imagine that the legislature could ever have intended that....."

[22] He thereafter considers the argument that a Revenue Court cannot at the same time be a Civil Court as if the two are mutually exclusive. He observes that the assumption is quite a wrong assumption, & he holds that where the Revenue Courts exercise judicial functions & decide ordinary civil disputes which have been specially assigned to them, they are nonetheless civil suits & the Courts that decide them are, therefore, Civil Courts. These Revenue Courts in such cases are merely one species of the genus Civil Court. They are a subdivision of Civil Courts in the general

sense & the fact that there are special provisions regarding these Revenue Courts, as in S. 5, Civil P. C. & that they are specially defined in particular statutes & special legislations did not legally affect the position because to define the species did not exclude it from the genus. The learned Judge also held :

"Where one Court is made subject to the appellate jurisdiction of another, the former is obviously thereby made inferior to the latter, & plainly that inferiority must still subsist where by reason of the pettiness of the cause no appeal is provided for. Otherwise the absurd result would follow that the Court rises in grade in inverse ratio to the importance of the case."

[23] It is of importance to mention in this context that Meredith J. in his decision refers to a Full Bench decision of the Calcutta High Court of five Judges in *Emperor* v. *Har Prasad Das*, 40 Cal. 477, in which it was held that in the case of an order passed by a civil Court or Revenue Court under S. 476, Criminal P. C., S. 439 of the Code had no application, but the High Court could exercise the powers vested in it by S. 115, Civil P. C. or S. 15, High Courts Act. This was equally applicable to a case where action is taken by a Revenue Court under S. 476, the proceeding before it being not a proceeding before an inferior criminal Court, the order in the proceeding was revisable under S. 115, being made by a Revenue-authority as a Court in course of a judicial proceeding before it, & with reference to such judicial proceedings the Revenue Court being a Court subordinate to the High Court within the meaning of S. 115, as being a Court subject to the appellate jurisdiction of the High Court. He also relied upon a decision of the Privy Council in *Rajah Nilmoni Singh* v. *Taranath*, 9 I. A. 17. It was held by the Privy Council in that case that the Rent Courts established by Act X [10] of 1859 were civil Courts within the meaning of Act VIII [8] of 1859, the Code of Civil Procedure as it then was, in other words, in the case of Revenue Courts in regard to which the provisions were even more special & exclusive than in the case of Revenue Courts under the Orissa Tenancy Act, his Lordship observed that the Privy Council held them to be civil Courts within the meaning of the Code of Civil Procedure, so as to make S. 284 of the old Code, relating to transfer of decree for execution to another district applicable to those Courts, & he argued that "if S. 284, then why not S. 115 & S. 3 of the present corresponding Act." Meredith J. was then confronted with the observations of Rankin J. (as he then was) in *Allen Brothers & Co.* v. *Bando & Co.*, 49 Cal. 931. Rankin J. in that case is reported to have observed that the expression "civil Court" as used in the Code of Civil Procedure containing the new provisions of Ss. 3, 4 & 5 which were not in the earlier Code of 1859 was not used in the general sense to connote the genus, but only in reference to that particular species of civil Court, which had full powers of original jurisdiction within the meaning of S. 9. Meredith J., observed that although the point was an arguable one, yet in view of the Privy Council decision referred to above much could not be said in support of it, & he finally disposed of the argument in these words :

"To my mind it is a construction impossible to square with the decision of the Privy Council with which I have just dealt. There is no getting over the fact that, where in the corresponding Code of 1859 the same expression is used in, generally speaking, the same contexts, the Privy Council has said that the rent Courts established by the Rent Act of 1859 must be held to fall within S. 284 of Act VIII [8] of 1859, the expression used in S. 284 being simply 'Civil Court'. So far as I can see by comparing the two Codes the expression 'Civil Court' is used in exactly the same sense in both the Code of 1859 & that of 1908, & it is to be noted that in both cases the preamble describes the Act as relating to 'Courts of Civil Judicature'."

[24] Dhavle J. does not appear to have altogether accepted the position that a Revenue Court was a civil Court when exercising judicial functions & deciding ordinary civil disputes assigned to them but he also by another line of reasoning comes to the same conclusion that such Courts were amenable to the revisional jurisdiction of the High Court as provided by S. 115 of the Code. To quote his own language, he says as follows :

"This distinction between Civil & Revenue Courts in S. 5 of the Code is not without a bearing on S. 3, & in my opinion, the Civil Courts contemplated in S. 3 are, to use the words of Rankin J. in *Allen Brothers & Co.* v. *Bando & Co.*, 49 Cal. 931, 'Civil Courts exercising all the powers of Civil Courts as distinct from Courts which only exercise powers over civil matters of a special class or classes, e. g., the rent Courts under Act X [10] of 1859 & the Land Acquisition Judge.' This, however, does not affect the subordination of our Revenue Court to the High Court for the purposes of S. 115, Civil P. C. because as the same learned Judge, also observed in the same case, "the word 'subordinate' is not defined by the Code because S. 3 is not a definition. This section does not claim to be, & is not intended to be, exhaustive ; *Purshottam* v. *Mahadev*, 37 Bom. 114." S. 115, Civil P. C. does not require the subordinate Court to be a Civil Court within S. 3, & the Orissa Tenancy Act definitely involves the subordination of the Revenue Court to the High Court [by way of appeal under sub-s. (3) of S. 204], & thus, through the general provision contained in S. 192 (2), attracts the operation of S. 115, Civil P. C., giving the High Court a power of revision free (so far as I can gather) from the limitations to which its appellate powers are subject."

It would thus appear that the two learned Judges, though for different reasons, both agreed in holding that the Court of the Collector which was subordinate to the appellate jurisdiction of the District Court was a Court subordinate to the High Court within the meaning of S. 115 of the Code; & what is more significant that in dealing with S. 3 of the present Civil P. C., Dhavle J., opines in concurrence with Rankin J., that the word 'subordinate' had not been defined in the Code & S. 3 of the Code was not a definition clause. I need not refer to other parts of the judgment which, as I have already observed, will repay perusal for its wealth of detail & exhaustive treatment of the law on the points.

[25] Manohar Lall J., the dissentient Judge appears to have been of the view that in petty cases where the Collector had jurisdiction to call for the record of a case in which an appeal would lie to him & where no question of title was involved, & Collector's order was final. But where the Deputy Collector & the Collector tried suits under S. 204 (5), Orissa Tenancy Act, of over Rs. 100 in value, they became subject to the appellate jurisdiction of the High Court, because appeals lay in the first instance to the Dist. J. or to the High Court as the case may be, & that being so any orders passed by these Revenue Courts in such cases become revisable by the High Court under S. 115, Civil P. C., but that jurisdiction was limited to such cases only. The conclusion, therefore, is that all the three learned Judges were of the view that in cases where an appeal lay to the Dist. J. from the orders of the Collector or Deputy Collector, the Court of the Collector or Deputy Collector was subordinate to the High Court & their orders were revisable under S. 115 of the Code by this Court.

[26] The question again arose in connection with the proceedings of an Election Commissioner under the Bihar Election Petitions Rules, 1939, in *Abdul Razak* v. *Kuldip Narain*, 22 Pat. 577, & all the three learned Judges concerned therein were unanimously of the view that the Election Commissioner referred to in the Bihar District Board Election Petitions Rules, 1939, is a Court & a Court subordinate to the High Court within the meaning of S. 115, Civil P. C. I will refer to a few pertinent passages from the respective judgments of Chatterji & Meredith JJ. Chatterji J. observed as follows:

"On the question whether the Election Commissioner is a Court, I think that the decision of the Full Bench of this Court in *Mt. Dirji* v. *Sm. Goalin*, 20 Pat. 373 affords a complete answer. In that case it was held that a Commissioner under the Workmen's Compensation Act (VIII [8] of 1923) is a Court. The tests laid down there are fully satisfied in the present case. To use the words of Fazl Ali J., who delivered the judgment (Harries C. J. & Manohar Lall J. agreeing), the Election Commissioner 'constitutes an independent tribunal & his function is to judge & decide & not merely to enquire & advise, & in judging or deciding the matters before him he has to proceed judicially & not arbitrarily.' The procedure to be followed by the Election Commissioner is, as nearly as may be, the procedure applicable under the Code of Civil Procedure to the trial of suits (see R. 11 (2)); he has also in respect of certain matters, such as, enforcing the attendance of witnesses, compelling the production of documents, examining witnesses on oath, etc., the powers which are vested in a Court under the Code of Civil Procedure when trying a suit (see R. 23). Rule 23 also provides that he shall be deemed to be a Civil Court for the purposes specified therein. There can, therefore, be no doubt that he is a Court.

As regards his subordination to the High Court, the very definition of Election Commissioner given in the Rules makes the position clear. According to R. 2 (g) "Election Commissioner" means the Dist. J. or the Judicial Commissioner exercising jurisdiction over the area in which the election, in respect of which an election petition under these rules is filed, was held. In other words, the Dist. J. or the Judicial Commissioner is given the powers of an Election Commissioner. Undoubtely the Dist. J. is subordinate to the High Court. Necessarily the Election Commissioner as a Court is subordinate to the High Court.

This view is supported by the Full Bench decision of the Madras High Court in *Parthasarthy Naidu* v. *Chintlacharvu Rao*, 47 Mad. 369. In that case their Lordships had to consider the following rule framed under the Madras Local Boards Act of 1920: 'No election of a member or of a President of a District, Taluk, or Union Board shall be called in question except by an election petition, presented in accordance with these rules to the District or Subordinate Judge having jurisdiction.' They held that 'A District or Subordinate Judge, in deciding an election petition presented before him under the rules issued by the Local Govt. under the Local Boards Act, 1920, is acting not merely as a persona designata, but as a Court in the exercise of its ordinary jurisdiction extended for that purpose; consequently, the High Court is competent to exercise its powers of revision over decisions in election petitions'."

Meredith, J. was equally emphatic on the point (*vide* p. 589 of the report):

"A further question, however, now arises. Has this Court any power under S 115, Civil P. C., to interfere in revision with the Election Commissioner's orders? That depends upon whether the Election Commissioner is a Court; & if so, a Court subordinate to the High Court.

The question whether Election Commissioner is a Court presents no real difficulty. The material considerations in determining such a question are clearly set out in the Full Bench case of this Court, *Mt. Dirji* v. *Sm. Goalin*. 20 Pat 373. Applying the tests there specified, there can be no doubt about the matter. The Election Commissioner acts judicially; he follows the procedure of the Code of Civil Procedure, & has the powers which are vested in a Court under the Code of Civil Procedure when trying a suit. Finally, he has the power to grant a declaration.

The question of subordination too presents no real difficulty. Upon this point there is a significant Full Bench decision of the Madras High Court in *Parthasarathy Naidu* v. *Chintlacharvu*, 47 Mad 369, where a quotation is made from *Rex* v. *Shoredith Assessment Committee*, (1910) 2 K. B. 859 at p. 880 wherein it was pointed out that subjection to the High Court is a necessary & inseparable incident to all tribunals of limited jurisdiction. The existence of the limit presupposes a higher authority to determine & enforce it. Any inferior tribunal cannot be permitted to determine the limits of its own jurisdiction, or to trespass beyond those limits without some power of check. That would be intolerable. In this country, in the absence of anything to the contrary, it is the High Court to which such a tribunal will be subordinate.

I have myself examined the position at length with regard to subordination in *Arjun* v. *Krishna Chandra*, 21 Pat. 1, & it is necessary to repeat here what I said there. There also I referred to the very relevant observations in *Rex* v. *Shoredith Assesement Committee*. (1910) 2 K. B. 859. *National Telephone Co., Ltd.* v. *Post Master, General*, 1913 A. C. 546 is another decision relevant in this connection.

* * * *

The Election Commissioner, & a fortiori an Additional Election Commissioner is clearly a Court subordinate to the High Court within the meaning of S. 115, Civil P. C., & it is open to the High Court to interfere in revision in a proper case."

This decision, I may incidentally observe was followed recently by this very Bench in *Jaswant* v. *Jogendra*, 29 Pat. 851.

[27] The cases in which I have referred above were cases undoubtedly arising under different

statutes. But it would not be correct to say that the decisions under those statutes are not helpful in considering the constitution & functions of the Authority constituted under the present enactment. If the tests laid down in those cases are applicable to the Authority constituted under the Payment of Wages Act, there is no reason why the question could not be answered on the application of those principles even in the present case, & I fail to see how such an argument would be misleading unless of course it was pointed out that there was some fundamental difference in the present case from the constitution & functions of the Courts dealt with in the cases discussed above. I find, however, that there is a Full Bench decision of the Lahore High Court in *Works Manager Carriage Wagon Shops Mohalpura* v. *K. G. Hashmat*, A. I. R. (33) 1946 Lah. 316:I. L. R. (1947) Lah. 1 precisely in point & arose under the Payment of Wages Act with which we are concerned now. In that case the Judges who decided it held that the Authority appointed under S. 15 of this Act was a civil Court & was subject to the revisional jurisdiction of the High Court under S. 115, Civil P. C. They pointed out that one of the fundamental tests as to whether a certain Tribunal was a Court or not was whether it exercised jurisdiction by reason of the sanction of law or whether jurisdiction had been conceded to it by voluntary submission of the parties to the dispute. They also pointed out that the other important test was whether it could take cognizance of a 'lis' & whether in exercising its functions it proceeded to act in a judicial manner. The learned Judges found on a scrutiny of the provisions of the Payment of Wages Act, 1936, & the rules thereunder that it was perfectly obvious that the 'Authority' appointed under the Act performed a delegated judicial function of the State & in exercising those functions it proceeded in a judicial manner. The mere fact that the amounts awarded by the 'Authority' were described in the enactment as directions rather than decrees, & that the 'Authority' as such could not execute its own decrees were not such determining factors as to affect his position as a Court. They, therefore, decided that the 'Authority' must be regarded as civil Court & a Court subordinate to the High Court, within the purview of S. 115, Civil P. C. In dealing with the question whether the authority was or was not a Court, their Lordships followed the Full Bench decision of this Court in *Mt. Dirji's case*.

[28] These decisions, with which I respectfully agree, leave no doubt in my mind that the questions raised above should be answered in favour of the petitioner in this Court & the preliminary points about the maintainability of this application should be disposed of accordingly.

[29] Before, however, I conclude this judgment, I must deal with a few of the cases which have taken a contrary view of the matter. In particular, I will have to refer to a decision of the Nagpur High Court on which great reliance has been placed for the opposite party.

[30] The decision of the Nagpur High Court is in *Sawatram Ramprasad Mills Co. Ltd.* v. *Vishnu Pandurang*, A. I. R. (37) 1950 Nag. 14. The importance of this decision arises from the fact that it deals with the very same questions arising under the very same Act, & although it is a Division Bench judgment, it has thought fit to disagree with the Full Bench of the Lahore High Court, already discussed by me, & appears to rely upon another Division Bench decision of the Bombay High Court in *The Spring Mills Ltd.* v. *G. D. Ambekar*, A. I. R. (36) 1949 Bom. 188. The question there involved was whether a revision under S. 115, Civil P. C. lay to the High Court against an order of the Authority appointed by the Provincial Govt. under S. 15, Payment of Wages Act, or, in other words, whether the Authority could be said to be a 'Court' which was 'subordinate to the High Court.'

[31] The opinion in the Nagpur High Court appears to have been divided on the point. Bose J. (as he then was) had held that the Authority was a 'Court' but not a 'Court subordinate to the High Court,' while Bobde J. had expressed a contrary opinion. In view of that conflict the point came to be decided by a Division Bench. The learned Judges broadly observed that the opinion of Bose J. had found favour with the Bombay & the Allahabad High Court, & that of Bobde J. in Lahore & Patna. To be more accurate, even Bose J. had held that the 'Authority' mentioned in the Act was a 'Court' though of course on the other point, whether it was subordinate to the High Court, Bose J. held that it was not. The Division Bench, however, seems to have held that the 'Authority' under the Act was not a 'Court' at all. Their Lordships observed as follows:

"With the growth of administrative institutions a large number of administrative tribunals has come into existence which perform functions analogous to those of Courts but are not 'Courts' in the strict sense. Some of these authorities pronounce upon valuable rights, act in a judicial manner & even take evidence on oath but they are not 'Civil Courts' because their decisions implement some administrative policy or determine controversies not related to matters present generally before the ordinary Civil Courts. The dividing line between administrative tribunals & Courts of civil judicature is always very difficult to define."

Yet this dividing line, in my opinion, had to be defined by reference to certain positive tests.

[32] I do not find, if I may say so with great respect, any material assistance from the judgment as to in what manner the Authority under the Act should not be held to be a Court except the suggestion that with the development of political, social & economic ideas many valuable rights have come to be recognised which were not before the subject-matter of 'lis' in the conventional sense & in their enforcement the policy of the State had been to create special Tribunals with exclusive jurisdiction & to make them in my

cases self-contained. This obviously does not take us very far. As I have pointed out above, the 'lis' here is generally between the party in whom the right subsits, namely, the workers & the party who is guilty of the infringement of that right, namely, the employer or the person responsible for the payment of wages. Such a right, in my opinion, was a contractual right & could be enforced in a civil Court subject to the bar provided by S. 22 of the Act, & I see no reason to think that the 'lis' here did not relate to a civil right between two private parties which could otherwise be enforced by a civil Court.

[33] The learned Judges seem to be also of the opinion that where a Tribunal exercises an exclusive & special jurisdiction, it would be wrong to call it a Court of 'civil judicature'. This opinion they formed from their reading of the preamble & S. 9, Civil P. C. as also the provisions of Ss. 3 & 4 of the Code, & they, therefore, held that S. 115 can have no application to Courts which have been given exclusive jurisdiction by express provision of law or by necessary implication but must be confined only to those Courts which are mentioned in S. 3 of the Act. If I may say so with great respect, I do not agree with this view of the law. As I have already pointed out, the word 'subordinate' has not been defined in S. 3 of the Code, & the reference to subordinate Courts in S. 3 is not exhaustive. I am supported in this view of Rankin J. (as he then was), who said that S. 3 "does not claim to be & is not intended to be exhaustive" & Dhavle J. took the same view in the case of *Arjun Routara* discussed above. Therefore, S. 115, Civil P. C., does not require that the subordinate Court must be a Court of civil jurisdiction within the meaning of S. 3 of the Code.

[34] The reasons given by the learned Judges for holding that the 'Authority' mentioned in S. 15 is not a Court appear to be mainly two-fold; firstly, that the 'Authority' is designated as an 'Authority' & not a Judge & it is mere by an accident that under the notification of the Provincial Govt. the Authority in our Province is a Civil Judge. It could be a mere 'nobody' with experience as a Judge or Magistrate". They also observed that the Authority could be moved not only by a person aggrieved but even by an Inspector under S. 14 of the Act or even by a stranger with the permission of the Authority, & this they regard as a very significant difference. The other reason which has been given by them is that there would be no need to give powers under the Civil Procedure Code for the purpose of taking evidence & of enforcing the attendance of witnesses & compelling production of documents if the Authority was a Civil Court. This they point out with reference to S. 18, Payment of Wages Act.

[35] In my opinion, the fact that a third party could also move the Authority on behalf of the party aggrieved & with the permission of the Authority does not detract from its position as a Court & is not such a material difference as to affect that status if otherwise it answers to all the attributes of a Court. We know in certain cases even under the Code of Civil Procedure that a Court of civil jurisdiction can be moved by a person who is not strictly speaking the party aggrived; for instance, the Advocate General in certain cases may move the Court. In regard to the second reasoning, I cannot do better than refer to the observation of this Court in the Full Bench case of 20 Pat. 373, where the learned Judges repelled the contention thus :

"The provisions made in S. 23 may have been made either *ex abundanti cautela* or to avoid the necessity of incorporating in the Act a large number of provisions like those to be found in the Civil Procedure Code or because the framers of the Act wanted to emphasise that for the purpose mentioned in the section the Commissioner shall be regarded as a Civil Court. However that may be, the mere fact that it has been expressly stated that the Commissioner will have the powers of a civil Court, cannot by itself justify the inference that he is not a Court."

I may mention here that S. 23, Workmen's Compensation Act, referred to in the above quotation, is a provision analogous to that of S. 18 of the Act with which we are concerned in the present case.

[36] It is fortunate that the learned Judges of the Nagpur High Court who decided the case under reference did not condescend to pay due attention to the important decisions of our own Court which throw a good deal of light on the points in controversy. These learned Judges appear to have brushed aside those decisions with the observation :

"Nor is it helpful to consider those cases in which the constitution & functions of other tribunals have been examined to see whether they are subordinate to the High Court in its revisional jurisdiction under S. 115, Civil P. C. Nothing is likely to be more misleading than an argument based upon certain resemblances which, though apparently there, may not be fundamental to this issue. What we have to do is to find out the points on which particular tribunal either resembles the ordinary civil Courts differs from them."

But the fundamental differences, if any, unfortunately have not been pointed out. The learned Judges only proceed to observe that mere presence of certain attributes do not constitute the Authority a 'Court' subordinate to the High Court but they do not, if I may respectfully suggest, refer to any positive tests, except those I have discussed above, from which it could be definitely ascertained as to what would be attributes of a 'Court.' I, therefore, cannot find my way to accept the correctness of that decision & to depart from the wholesome view repeatedly expressed in the several decisions of this Court & rightly followed by the Full Bench of the Lahore High Court.

[37] The decision of the Bombay High Court on which reliance has been placed on behalf of the petitioner & which has been approved by the above Nagpur decision does not require any elaborate consideration. The learned Judges there took the view that the mere fact that a statute pro-

vides an appeal to a Court from a particular body does not necessarily make that body a Court. They, therefore, opined that the Authority under the Payment of Wages Act is not a Court within the meaning of S. 115 & the High Court has no revisional jurisdiction over the orders of that Authority. In the view which I have taken of the matter & which has been consistently taken by this Court, I am unable to extend my approval to this decision for the reasons already given by me. It is quite unnecessary to dilate upon the negative tests & then hold that a particular tribunal or authority is not a Court. What is required is to determine the essential positive tests & see if those tests are satisfied. In answer to the view taken by the Bombay High Court on the question of subordination of a Court, I may quote for my authority, what has been so often quoted, the pertinent observations in *Rex* v. *Shoredith Assessment Committee*, (1910 2 K. B 859 at p. 880 :

"subjection to the High Court is a necessary & inseparable incident to all tribunals of limited jurisdiction ; for the existence of the limit necessitates an authority to determine & enforce it."

[38] The opposite party has also sought to rely upon a Special Bench decision of this Court in *Jagernath* v. *Land Acquisition Collector, Patna*, 19 Pat. 321. The case arose under the Land Acquisition Act. The decision does not help the contention of the petitioner because their Lordships held that :

"Even assuming the Collector acts judicially in making or declining to make a reference under S. 18 of the Act, it is extremely doubtful whether he can be regarded as a Court."

That being so, they could not but hold that he was not a Court subordinate to the High Court.

[39] I am not unmindful of the fact that there may be certain Courts, Authorities or Tribunals which may have functions & duties like those of a body discharging judicial functions, yet they may not be 'Courts' in the technical sense of the word ; for instance, the Industrial Tribunal set up under S. 7, Industrial Disputes Act, 1947.

[40] In *Bharat Bank* v. *Employees of Bharat Bank*, A. I. R. (37) 1950 S. C. 188, the Supreme Court held that such a Tribunal was not a Court even though it had all the trappings of a Court exercising judicial functions. In that case the point to remember is that the decision of the Tribunal could not *ex proprio vigore* bind the parties without the aid & instrumentality of some other authority or power viz., a notification by Govt. This distinction was very clearly pointed out by Mukherjea J. as also by the other learned Judges. His Lordship observed thus :

"What is necessary is that the determination by its own force & without the aid or instrumentality of any other authority or power must affect the rights & obligations of the parties ; or in other words, the decision itself irrespective of the facts decided, must create rights & impose obligations ; & it should be enforceable as such under the ordinary law of the land. This undoubtedly is one of the fundamental tests which distinguishes a judicial body from one which exercises administrative or quasi-judicial functions."

The other fundamental test which distinguishes judicial or quasi-judicial administrative body, as pointed out by His Lordship, is that the former decides controversies according to law, while the latter is not bound to follow the law for its decision. It is for these reasons that their Lordships held that the Labour Tribunal in question was not a Court though it exercised quasi-judicial functions & had the power of giving decisions on question of differences of an administrative & not justiciable character which cannot be determined by reference to any fixed law or principle of law but were really matters of administrative discretion & judgment.

[41] I must, therefore, hold that the preliminary objections raised on behalf of the opposite party could not be sustained & that this Court had ample power to revise the order of the Authority constituted under the Payment of Wages Act.

[42] The question then is whether on merits we should interfere with this order. As I have already observed in the bringing of this judgment, the two objections raised in regard to the maintainability of the application filed on behalf of the workers are still pending decision by the Authority concerned. The petitioner, however, contends that the manager, Mr. Qasim Lari, appointed under S. 3 of the Act was a necessary party to the application, & he being not a party, the application should have been dismissed *in limine*. On his behalf reliance is placed upon a decision of the Bombay High Court in *P. M. Dixit* v. *Senior Inspector of Factories*, A. I. R. (27) 1940 Bom. 87 which is a single Judge decision of that Court. The learned Judge, of course, has not considered the question whether a revision did or did not lie to the High Court, & in a later case, as I have shown, the same Court has taken the view that the order of the 'Authority' was not revisable. In any case I should examine the reasoning on which the decision proceeds to hold that the manager is a necessary party to the application, & in the absence of such a party the application should not proceed. There the Dist. J. who heard the appeal himself felt some difficulty in maintaining the order as originally passed against the employer in view of the fact that a manager who was responsible for the payment of wages within the meaning of S. 3 of the Act had been appointed. That being so, the view taken by the learned Judge was that the direction should not have been given against the employer but against the manager, except where the amount could not be recovered in the first instance from the manager himself. This to some extent influenced the learned Judge of the Bombay High Court in dealing with the matter & in holding that where a manager is appointed the proceedings should be against the manager

alone but if no manager is appointed, they should be against the employer. He supports this view on his reading of S. 15 of the Act & says:

"I think the use of the word 'or' instead of 'and' clearly shows that the proceedings under S. 15 are to be instituted against only one person, whether he is the manager as in this case, or the employer, but not against both."

[43] In my opinion, S. 15 of the Act does not bear the interpretation which has been sought to be put upon it. S. 15 nowhere speaks of the parties to the proceeding. It only says that where the contigency has happened, namely, that there has been deduction from wages or delay in payment of wages contrary to the provisions of the Act, the person aggrieved may apply to the authority for a direction under Sub-s. (3) of the section subject to certain limitations. Sub-s. (3) does not lay down who the opposite party to the application should be. It mainly provides *inter alia* that where the application is entertained under Sub-s. (2), the Authority shall hear the applicant & the employer or other person responsible for the payment of wages under S. 3 or give them an opportunity of being heard etc. & thereafter direct the refund to the employed person of the amount deducted. Apparently it presumes that in the first instance the name of the employer must be there though it does not definitely say so. R. 8, however, of the rules framed under the Act quite clearly shows that the notice of the application shall be sent to the employer. R. 8 (1) is worded thus:

"If the application is entertained, the Authority shall call upon the employer by a notice in Form E to appear before him on a specified date together with all relevant documents & witnesses, if any, & shall inform the applicant of the date so specified."

The rule, therefore, definitely contemplates that the notice should go to the employer, R. 8 does not speak of any notice to the manager or any other person working under the employer. For obvious reasons it would be so, because if the employer on service of notice appears & accepts the claim, then the necessary directions can be at once given, but if the employer pleads that some other person is responsible for the payment of wages, & satisfies the authority that it is so, the Authority may under those circumstances issue citations upon that person & hear him before giving directions against the latter. If at the same time it is assumed that the word 'employer' used in R. 8 of the statutory rules includes also the manager or other person responsible for the payment of wages under S. 3, even then it makes no difference; because in that case it provides for issue of notice apparently to the employer as also, if necessary, to the person responsible for the payment of wages under S. 3. But as to whether there is such a person responsible for the payment of wages under S. 3 & if so, whether he is actually responsible for making the payment can be only discovered :by the Authority after the employer has appeared in pursuance of the notice & placed the materials. The liability of the employer for the payment illegally deducted from the wages or for the payment of the wages unlawfully detained has never ceased; though it may be that for the time being under S. 3 of the Act the employer has made an officer under him responsible for the payment of wages. That person acts under the employer & inevitably subject to his authority :& control. Therefore, it would be wrong to assume that the application would be held to be not maintainable because the employer has been made a party to the application & not the manager named in S. 3. As I have said, S. 15 does not speak of the manager being a necessary party to such an application. Therefore, it cannot be assumed that failure to implead him would result in the dismissal of the application & make the application inherently defective. I agree that the 'direction' mentioned in the section should in the first instance be made against the manager if he is found to have made the illegal deductions & the payment should be sought to be recovered from him, & it is only where it cannot be so recovered that it should be recovered from the employer. This follows from a perusal of the provisions of Ss. 3 & 19 of the Act. But it does not follow that the application also in the first instance or rather primarily should be made against the manager, & if it is not so made the application should be held to be untenable so as to give no jurisdiction to the Authority to act upon it Such an interpretation, in my opinion, is not at all warranted by the provisions of the Act.

[44] On behalf of the opposite party it has been also argued that this is not merely a 'factory' but an 'industrial establishment', & in the case of an 'industrial establishment' the question of making the manager a party does not arise. The expression 'industrial establishment' has been defined in S. 2 of the Act to mean any workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale. It is pointed out that in this establishment sugar is manufactured & produced for transport & sale. In the case of industrial establishments S. 3 (b) of the Act provided that if there is a person responsible to the employer for the supervision & control of the industrial establishment, then that person shall be responsible for the payment of wages to the persons employed. It appears that in this case there is a general manager of the Sasamoosa Sugar Works who has been made a party to the application. This question if at all relevant is really a matter for investigation by the Authority concerned as all the materials on the point are not before us. But as I have held in any event even if the manager appointed under S. 3 (a) of the Act has not been made a party to the applications, that would not affect the maintainability of the same. The workers opposite party have already filed an application

for making the alleged manager, Qasim Lari, a party to the applications & that matter may have to be dealt with by the Authority himself as also the question of limitation which is entirely within his purview. He may in appropriate cases on sufficient cause shown condone the delay, if any.

[45] For the above reasons, I consider that the application fails & must be dismissed with costs; hearing fee five gold mohurs.

[46] I should, however, make it clear that the Authority should write out a self-contained order dealing specifically with the points raised. I have no doubt that if the learned officer had devoted little attention to the matter, much of the wastage of time & inconvenience could have been avoided.

[47] **Das J.**—I agree with my learned brother as to the order proposed to be passed by him. I also agree generally with him as to the reasons for the conclusions he has come to, on the questions involved in this case. I do not, therefore, propose to say anything more than this that in view of the decisions of this Court in *Mt. Dirji* v. *Sm. Goalin*, 20 Pat. 373, *Arjun Rautara* v. *Maharaja Krishna Chandra Gajapati Narayan Deo*, 21 Pat. 1 & *Abdul Razak* v. *Kuldip Narain*, 21 Pat. 577, it must be held (1) that the prescribed authority under the relevant sections of the Payment of Wages Act is a Court: & (2) that it is a civil Court, subordinate to this Court within the meaning of S. 115, Civil P. C. I think that the aforesaid decisions are binding on us, & it is not open to us to follow the Nagpur decision *Sawatram Ramprasad Mills Co. Ltd.* v. *Vishnu Pandurang Hingnekar*, A. I. R. (37) 1950 Nag. 14. I must, however, make it clear that, as at present advised, I consider that the reasons on which the above decisions of this Court are based are good reasons the validity of which does not appear to me to have been shaken by the Nagpur decision.

[48] I am in entire agreement with my learned brother that the failure to make Mr. Lari a party at the first instance did not make the applications incompetent, & there can be no objection to adding Mr. Lari as a party at a subsequent stage.

D.R.R. *Application dismissed.*

A. I. R. (38) 1951 Patna 151 *[C. N. 20.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Kali Pd. Singh — *Petnr.* v. *Commr. of Income-tax, B. & O.*—*Opposite Party.*

Misc. Judicial Case No. 227 of 1949, D/- 2-3-1951.

Income-tax Act (1922), S. 4 — Salami paid to landholder when not assessable to tax,

Prima facie salami is not income unless the income-tax authorities show that there are circumstances to indicate that it is so. Where, therefore, there is no such circumstance indicated by the authorities, but on the contrary the evidence on the record indicates that the salami was not in payment of advance rent, the salami is not assessable to tax : A.I.R. (28) 1941 Pat. 289, (S.B.) & A.I.R. (34) 1947 Pat. 252, *Foll.* [Para 3]

During the year of accounting the assessee leased out a large area of land to the lessee for the purpose of enabling him to extract mica therefrom. The lease was for a term of years on an annual rental of Rs. 153. In connection with this lease a salami of Rs. 4000 was paid by the lessee for obtaining the lease. The assessee contended that the sum of Rs. 4000 was a capital receipt in connection with the transfer of prospective mineral rights in the land :

Held that the salami in the present case could not be assessed as revenue & therefore had to be excluded from the assessment. [Para 3]

Anno. I. T. Act, S. 4, N. 10 Pts. 8, 9.

S. K. Majumdar & P. K. Bose—for Petnr.; *S. N. Dutt—for Opp. Party.*

Cases referred to.—

('41) 9 I.T.R. 313:(A.I.R. (28) 1941 Pat. 289 S.B.). [Pr. 3]

('47) A I.R. (34) 1947 Pat. 252 : (14 I.T.R. 738). [Pr. 3]

Sarjoo Prasad J.—In this Income-tax reference made by the Income-tax Appellate Taibunal the dispute relates to two items, viz., a sum of Rs. 4000 which was paid to the assessee by way of salami by one Dwarka Prasad Agarwala for obtaining a lease & also another sum of Rs. 351 paid by another person, viz., one Amin Ahmed Khan for obtaining settlement of fireclay land from the assessee.

[2] The assessee is a zamindar & within the abmit of his zamindari there are tracts of various mineral & mica lands. During the year of accounting i.e. 1943-44, the applicant leased out an area of 3071 acres of land to one Dwarka Prasad Agarwala for the purpose of enabling him to extract mica therefrom. The lease was for a term of 9 years on an annual rental of Rs. 153. It was in connection with this lease that a salami of Rs. 4000 was paid by the said Dwarka Prasad Agarwala for obtaining the lease. The assessee contended that this 4000 rupees was a capital receipt in connection with the transfer of the prospective mineral rights in the land. The claim of the assessee was not entertained by the revenue authorities & the salami of Rs. 4000 was taxed as a revenue receipt & not as capital receipt. In regard to the other sum it has been found that this sum was received by the assessee as salami or premium for settlement of fireclay land measuring about 51.6 acres for a period of 9 years. The two leases, one in favour of Amin Ahmed Khan, are both annexures to the reference made by the Tribunal & the two points which have been formulated for decision by this Court are :

"(1) Whether on the facts & in the circumstances of this case the Tribunal was right in holding that the sum of Rs. 4000 received from Dwarka Prasad Agarwala was a revenue receipt &, therefore, taxable under the Income-tax Act ? & (2) whether on the facts & circumstances of this case the Tribunal was right in holding that the sum of Rs. 351 received by the applicant for settlement of fireclay land from one Amin Ahmed Khan was a revenue receipt &, therefore, taxable under the Income-tax Act ?"

[3] These two points, in my opinion, have to be answered in favour of the assessee in view of a number of judicial decisions upon the point which conclude the matter, the latest of those

being the decision of this Court in *Commissioner of Income-tax, B. & O.* v. *Kamakshya Narain Singh*, A. I. R. (34) 1947 Pat. 252, corresponding to 14 I. T. R. 738 at page 746. In the case in question the point was whether a sum of Rs. 5,25,000 received as salami by the assessee was taxable as income. In dealing with this point their Lordships relied upon a Special Bench decision of this Court reported in *Province of Bihar* v. *Pratap Udainath Sahi Deo*, 1941 I. T. R. 313, where it was held that

"salami could not be regarded as income as a matter of law. It may in certain cases be regarded as payment of rent in advance & in such cases it could rightly be regarded as income. Where, however, salami could not be regarded as a payment of rent in advance, it could not be regarded as income & would, therefore, not be taxable. Prima facie, salami is not income & it is for the Income-tax authorities to show that there do exist facts which would make the salami income."

In answering the reference their Lordships pointed out that the question whether salami was or was not assessable as income was largely a question of fact which had to depend upon the investigation of the circumstances of the case; but where the facts found indicate that it could not be regarded as income the inference would be one of law. As already observed above, prima facie, salami was not income unless the income-tax authorities show that there were circumstances to indicate that it was so. In the present case no such circumstance has been indicated by the revenue authorities. On the contrary, the indentures which are on the record indicate that the salami was not in payment of advance rent. In my opinion, therefore, the two items of salami in the present case could not be assessed as revenue & therefore, had to be excluded from the assessment. For these reasons the questions formulated have to be answered in favour of the assessee and are answered accordingly. The assessee is entitled to his costs of this reference. Hearing fee, in the circumstances of the case, is assessed at Rs. 100 only.

[4] **Ramaswami J.**—I agree.

V.S.B. *Answer for assessee.*

A. I. R. (38) 1951 Patna 152 *[C. N. 21.]*

RAMASWAMI & SARJOO PRASAD JJ.

Md. Amin Brothers—Petitioners v. *State of Bihar.*

Misc. Judicial Case Nos. 46 & 47 of 1949, D/-7-3-1951.

Sales Tax — Bihar Sales Tax Act (XIX [19] of 1947), S. 20 (2)—Bihar Sales Tax Rules, 1949, R. 58 —Determination—Meaning—Appeal fixed for hearing —Order of dismissal for default—Validity.

The word 'determination' in S. 20 (2) must be construed to mean a decision on the point raised in the case & not merly an order of dismissal for default. Where, therefore, an appeal is not dismissed summarily & is fixed for hearing under R. 58 of the Bihar Sales Tax Rules, it should be decided on merits. But if the appeal is dismissed for default & the assessment is confirmed without giving any reasons in support of the order, the order is illegal. (1950) 18 I. T. R. 928 (All.), *Rel. on.* [Para 3]

S. N. Dutta & S. C. Sinha — for Petitioners; Govt. Advocate—for the State.

Case referred to:—

('50) 18 I. T. R. 928 (All.) [Pr. 3]

Ramaswami J.—These cases are stated by the Board of Revenue under S. 21 (3), Bihar Sales Tax Act.

[2] The following question of law has been referred in both the statements:

"Whether in order dated 30-4-48 dismissing the appeal for default without deciding the question raised by the appellant in his memo. of appeal to the Commissioner is *intra vires* & in accordance with law."

[3] On behalf of the assessee, Mr. S. N. Dutt cited S. 20 of the Act which provides that within sixty days from the passing of an order of assessment, with or without penalty, under S. 10, any dealer may, in the prescribed manner, appeal to the prescribed authority against such assessment or penalty for both. Under S. 20 (2) the appellate authority, in disposing of any appeal under sub-s. (1), may confirm, reduce, enhance or annul the assessment or penalty, if any, or both, "subject to such rules as have been prescribed." Reference was made to R. 57, Bihar Sales Tax Rules, which is to the following effect:

"*Summary rejection of appeal.*—If the memo. of appeal is not in Form XXIV or if all the requirements of the form are not duly complied with, the appeal may be summarily rejected after giving the appellant such opportunity as the appellate officer thinks fit to amend such memo. The appeal may also be summarily rejected on other grounds which should be reduced to writing by the appellate officer:

Provided that before an order rejecting the appeal is passed, the appellant shall be given a reasonable opportunity of being heard."

It was argued on behalf of the assessee that in this case the Commissioner has not purported to act under R. 57 of the Rules but instead fixed a date for hearing under R. 58 which states:

"If the appellate officer does not reject the appeal summarily, he shall fix a date for hearing the appellant or his agent."

From the order sheet of the Commissioner printed at p. 6 of the paper-book it appears that on 9-2-1948 after the memo. of appeal was presented the Commissioner fixed 12-4-1948 for hearing. On the same date he called for a report & asked the Sales Tax Officer to inform the parties of the date fixed. The order sheet dated 29-4-1948 shows that on that date no lawyer appeared for the appellant but a petition for time was presented on the ground that certain documents were filed before the High Court & they had not yet been returned. Thereupon the Commissioner dismissed the appeal for default on the ground that the lawyer should have been present to show "how he was justified in asking for time." It was contended by the learned counsel that since the commissioner did not summarily reject the appeal under R. 57, but had fixed a date for hearing under R. 58 the appeal should have been decided upon merits & the Commissioner ought to have given reasons for confirming the assessment made by the Sales Tax Officer. Since no reasons have been given by the Commissioner it was argued that the order of dismissal for default was *ultra vires* & not in accordance with

law. In this context reference should be made to *M. X. De Nornha & Sons, Kanpur* v. *Commissioner of Income-tax, U. P.*, 18 I. T. R. 928, in which a notice fixing the date of hearing of a appeal was sent by the Appellate Tribunal by registered post to the address given by the assessee firm. The notice was received by an employee of the firm, who used the seal of the firm, on its behalf. On the day fixed for hearing of the appeal & on the next day to which the case was adjourned by the Appellate Tribunal, the assessee did not appear & the Tribunal dismissed the appeal for default. On these facts it was held by the Allahabad High Court that the Tribunal should have decided the case on merits & the dismissal of the appeal for default could not be said to be hearing of the appeal & its determination. The provisions of S. 20, Bihar Sales Tax Act, are *in pari materia* with S. 31, Income-tax Act. In my opinion the word "determination" in S. 20 (2), Bihar Sales Tax Act, must be construed to mean a decision on the point raised in the case & not merely an order of dismissal for default. It is clear that the Commissioner acted illegally in dismissing the appeal for default & confirming the assessment without giving reasons in support of this order. For these reasons I would answer the question referred to the High Court in negative. There will be no order for costs.

[4] **Sarjoo Prasad J.**—I agree. The reference in both the cases should be answered in the manner indicated & for the reasons stated by my learned brother.

D.R.R. *Reference answered.*

A. I. R. (38) 1951 Patna 153 *[C. N. 22.]*

DAS & NARAYAN JJ.

Madan Lal—*Petitioner* v. *The State of Bihar & others*—*Oppo. Party.*

Cri. Misc. Nos. 623, 624, 636, 652, 661, 663, 664, 669 & 687 of 1950, D/- 12-1-1951.

†(a) Public Safety — Preventive Detention Act (1950), S. 3 (1) (a) (iii)—Blackmarketing & hoarding whether affect maintenance of essential supplies & service.

In S. 3 (1) (a) (iii) not only the word "supplies" but also the word "services" has been used. A supply of food or cloth which is essential to the community has a service aspect as well. The use of the word "maintenance" has also to be appreciated. Hence, the acts of blackmarketing or hoarding must affect the maintenance of supply & service essential to the community. A. I. R. (38) 1951 Pat. 47, *Foll.* [Para 2]

The words 'hoarding' & 'blackmarketing' have a definite meaning in the context of a system of controls, such as will be found in the Foodgrains Control Order, the Cloth & Yarn Control Order & other Control Orders of a similar nature. The maintenance of supplies of food & cloth depends on this system of controls & anybody who evades the Control Orders by hoarding (e. g. secreting part of the stock by making false entries in the stock register, or showing fictitious sales, etc., or blackmarketing (e. g. selling at a rate higher than the controlled rate) clearly acts in a manner which directly jeopardises the maintenance of supplies & services essential to the community. [Para 7]

†(b) Public Safety—Preventive Detention Act (1950), S 3(1)—Two courses, prosecution and detention, open to Govt.—Power of Govt. to choose one.

It is not a rule of law that when a person is accused of an offence the only alternative is to prosecute him, & there is no legal authority to detain him. Public safety & the maintenance of public order are the paramount concern of the Govt., & the power of the State Govt. to order the detention of a man is not lost if the Govt. are not in possession of sufficient evidence to secure his conviction. It is not necessary for the executive authority to make a choice between prosecution & detention at the earliest stage & it is not the law that unless such a choice is made the order of detention should be regarded as invalid. What is required is that the executive authority should act according to law, reasonably & in good faith. In all cases it is a question of fact whether the order of detention is mala fide or not. A. I. R. (38) 1951 Pat. 68, *Foll.*; A. I. R. (31) 1944 Pat. 354, *Expl.* [Para 3]

(c) Public Safety — Preventive Detention Act (1950). S. 3 (1)—Satisfaction of executive authority —High Court cannot question.

Where two inferences including the one that was drawn by the State Govt. are possible on the facts mentioned in the grounds supplied to the detenu it is not open to the High Court to say that that particular inference should not have been drawn by the State Govt. The High Court cannot undertake an investigation as to the truth or otherwise of the materials on which the satisfaction of the executive authority is grounded. The facts alleged have to be taken to be correct & it will not be a ground for interference if the detenu merely puts forward a counter version. Putting a counter-version is not the same thing as placing circumstances which can go to establish that the alleged facts or grounds are *non est*. A. I. R. (17) 1930 F. C. 129, *Ref.* [Para 5]

(d) Public Safety — Preventive Detention Act (1950), S. 3 (1)—Extent of power of High Court to examine grounds supplied to detenu.

The grounds supplied to the detenu can be examined by the High Court to see if the mandatory provisions of Cl. (5) of Art. 22 of the Constitution have been complied with, viz. (1) that they have been communicated as soon as may be; & (2) they give definite & enough information so as to afford an opportunity of making a representation to the detenu. Secondly, the grounds or facts (materials on which the detaining authority says it has acted) can be examined to see if they are relevant to the object of detention & have a rationally probative value. They can also be examined, if the question of *mala fides* is raised, the onus on that question being heavy on the detenu. The detenu may, possibly in rare cases, show that the order of detention was made not on the grounds given, but for some other purpose. [Para 8]

The statement that the High Court cannot question the correctness of the grounds means that an investigation into the correctness or otherwise of the grounds, depending as it does on the believability of evidence, cannot be undertaken by the High Court because it is not the satisfaction of the High Court which is a condition precedent to the validity of the order but the satisfaction of the State Govt. In such cases, whether there is an affidavit in reply or not the High Court is powerless to interfere. [Para 9]

(e) Public Safety — Preventive Detention Act (1950), S. 3 (1)—High Court when will interfere.

Affidavits filed on behalf of the detenus may generally be divided into three classes—(i) those that consist of a mere denial of the grounds or facts alleged; (ii) those that consist of an attempted explanation of the fact alleged, the truth of the explanation depending on credibility of evidence; & (iii) those that disclose circumstances which render the grounds or the facts on

which the grounds are founded completely non-existent, that is, inaccurate on the face of them, without the necessity & independent of the question, of any evidence. It is in the last class of cases the High Court can interfere on the ground that the order is not bona fide. The first two classes of cases are those in which the Advisory Board is the proper authority to consider the denial or the explanation. [Para 9]

Baldeo Sahay & Nandlal Untwalia—for Petitioner; *Govt. Advocate—for Oppo. Party.*

Cases referred to:—

('45) 1945 7 F.C.R. 81: (A.I.R. (32) 1945 F. C. 18) [Para 3]
('49) 1949-11 F. C. R. 827: (A. I. R. (37) 1950 F. C. 129: 51 Cr. L. J. 1480). [Pr. 5]
('50) 13 S. C. J. 174: (A. I. R. (37) 1950 S. C. 27: 51 Cr. L. J. 1383). [Prs. 3, 5]
('45) A.I.R. (32) 1945 Bom. 533: (47 Cr. L. J. 297) [Pr. 3]
('44) 23 Pat. 252: (A. I. R. (31) 1944 Pat. 354) [Pr. 3]
('50) Cri. Misc. Nos. 626 & 627 of 1950: (A. I. R. (38) 1951. Pat. 68: 52 Cr. L. J. 603). [Pr. 3]
('51) *Dayanand Modi* v. *State of Bihar*, (A. I. R. (38) 1951 Pat. 47: 52 Cr. L. J. 406). [Prs. 2, 3, 6]
(1917) 1917 A. C. 260: (86 L. J. K. B. 1119). [Pr. 5]

Narayan J. — These are applications under S. 491, Criminal P. C. for securing the release of persons who have been detained under orders which purport to be orders under Cl. (iii) of S. 3 (1) (a), Preventive Detention Act, 1950 (Act IV [4] of 1950). With regard to each of the detenus by or on whose behalf these applications have been filed the State Govt. feel satisfied that if he is allowed to remain at large, he will indulge in activities to the prejudice of the maintenance of supplies & services essential to the community & it is therefore that their detention has been ordered. The case of each of these detenus will be separately dealt with, & we have to examine the grounds of detention served on each of them. But before I take up the case of each & every detenu for a separate treatment it is necessary for me to refer to the questions of law that are common to all or some of these applications. The first important contention is that the alleged activities of these applicants do not attract the operation of Cl. (iii) of Sub-s. (1) (a) of S. 3, Preventive Detention Act, & that this provision of law was not intended to cover a case of this nature. The second important contention which has been urged on behalf of those detenus against whom prosecutions were started under S. 7, Essential Supplies (Temporary Powers) Act, 1946, is that their detentions are *mala fide* inasmuch as the State Govt. having found that the evidence against them was too weak to support a prosecution passed orders for their detention applying Cl. (iii) of S. 3 (1) (a), Preventive Detention Act. On behalf of those detenus against whom no prosecutions were started it is contended that when they could be prosecuted on the facts alleged it was not open to the State Govt. to detain them according to the provisions of the Preventive Detention Act on those very facts. And on behalf of those detenus against whom prosecutions were pending on the day the orders for their detention were passed, it is contended that it was wrong for the State Govt. to detain them while the prosecutions were pending.

[2] So far as this Court is concerned, the first point now stands concluded by our recent decision in *Dayanand Modi* v. *State of Bihar*, the judgment of which was delivered on 5-1-1951. My learned brother has exhaustively dealt with the question, & I have agreed with him in overruling the contention that such activities do not attract the operation of Cl. (iii) of S. 3 (1) (a), Preventive Detention Act. In S. 3 not only the word "supplies" but also the word "services" has been used, & as pointed out by my learned brother in his judgment in the cases of *Dayanand Modi & others*, a supply of food or cloth which is essential to the community has a service aspect as well. In my opinion, the learned counsel were wrong in interpreting the word "service" so narrowly as they did. The dictionary meaning of the word "service" has to be appreciated, & according to the New English Dictionary, edited by Sir James Murray, LL. D., (Oxford publication), one of the meanings given to the word "service" is the act of waiting at table or dishing of food & also the manner in which this is done. The use of the word "maintenance" in Cl. (iii) of S. 3 (1) (a) of the Act has also to be appreciated, & it need hardly be pointed out that acts of blackmarketing or hoarding must affect the maintenance of supply & service essential to the community. The several entries in the Legislative List have never been regarded as water-tight compartments, & a particular act can be covered by more than one item in those lists. The first important contention on behalf of these detenus must, therefore, be now rejected as untenable.

[3] The second point is also now concluded because of our decision in the case of *Dayanand Modi & others* & also in the cases of *Subodh Kumar Singh & Kishori Prasanna Sinha*, Cri. Misc. Nos. 626 & 627 of 1950 decided by us on 21-12-1950. It is not a rule of law that when a person is accused of an offence the only alternative is to prosecute him, & there is no legal authority to detain him. As was pointed out by Lokur J. in *Gajanan Krishna* v. *Emperor*, A. I. R. (32) 1945 Bom. 533 at p. 536:

"for conviction the Court has to be convinced of the guilt of the accused, & the benefit of a reasonable doubt goes to the accused. But for the purpose of detention it is enough if the Govt. or any officer duly empowered is reasonably satisfied of the necessity of his detention."

Public safety & the maintence of public order are the paramount concern of a civilised Govt. & the power of the State Govt. to order the detention of a man is not lost if the Govt. are not in possession of sufficient evidence to secure his conviction. As was pointed out by his Lordship the Chief Justice of the Supreme Court in *A. K. Gopalan* v. *State of Madras*, (1950-13 S. C. J. 174), for preventive detention action can be taken on good suspicion, & that it is a subjective test based on cumulative effect of different actions, perhaps spread over a considerable period. His Lordship further pointed out that the very purpose of pre-

ventive detention is to prevent the individual from acting in a particular way & for achieving a particular object. In *Basant Chandra Ghose* v. *Emperor* (1945-7 F. C. R. 81), Sir Patrick Spens C. J. who delivered the judgment of the Federal Court pointed out that the decision of this Court in *Kamla Kant* v. *Emperor*, 23 Pat. 252—a decision on which reliance has been placed before us by the appellants' counsel—cannot be understood as laying down any general proposition of law that when a man is accused on some definite & specific charge, there cannot be any order of detention passed against him before he is tried of a charge & his guilt or innocence finally determind. Even in that case Shearer J. had observed that he should not be understood to say that where a man has been acquitted, there cannot be an order of detention against him. It is not necessary for the executive authority to make a choice between prosecution & detention at the earliest stage, & it is not the law that unless such a choice is made the order of detention should be regarded as invalid. What is required is that the executive authority should act according to law, reasonably & in good faith, & as pointed out by my learned brother in the cases of *Subodh Kumar Singh & Kishori Prasanna Sinha*, Cri. Misc Nos. 626 and 627 of 1950 in all cases it is a question of fact whether the order of detention is *mala fide* or not.

[4] I would now deal with each of these cases separately.

[5] *Criminal Misc. No. 623 of 1950*—The applicant of this case is the sole proprietor of a firm known as Jagarnath Madanlal which carries on cloth business in the town of Muzaffarpur. On 4-10-1950 the petitioner's shop was raided by police officers & there was a check & verification of the stock kept in the shop with the help of the entries in the stock register. A shortage of 56½ pairs of dhotis & saris was found, & it was further found that the stock register contained no entry with regard to 5 bales of cloth each containing 190 pairs. The Sub-Inspector in charge of the Muzafferpur town police station submitted a report against this detenu on 10-10-1950 & the first information report was instituted on the basis of that report. The petitioner was arrested on that very date. He was refused bail by the Magistrate as well as by the Ses. J. This Court by its order dated 3-11-1950 granted him bail, but on 4-11-1950 & before he could be released on bail, he was served with an order of the State Govt. dated 31-10-1950 which directed that he be detained for having acted in a manner prejudicial to the maintenance of supplies & services essential to the community. The grounds of detention were served on the detenu on 17-11-1950. The special grounds mentioned in the order of the Govt. dated 15-11-1950, in which the grounds have been disclosed, are that when the accounts & the stock of this detenu were checked on 4-10-1951, 5 bales of saris & dhotis were found in excess, & that the account further disclosed a shortage of 56½ pairs of saris & dhotis. It is further stated in the grounds that though from the accounts it appears that on 9 9-1950 762 pairs of dhotis & saris had been sold, there was an entry of that date indicating the sale of 808 pairs of saris & dhotis. The explanation offered by the detenu with regard to the excess of 5 bales is that these bales of cloth had been sold though they could not be removed from the premises of the petitioner, because the purchasers had not made payment & transport facilities were not available to them. And the explanation offered for the other discrepancy is that clerical mistakes had been made in making the entries. It is stated that on 9-9-1950 & 30-9-1950 there were sales of 762 pairs & 891 pairs, respectively, but by mistake an entry indicating the sale of 808 pairs was made on the former date & an entry indicating the sale of 791 pairs was made on the latter date. And in this way the detenu explains the shortage of 54 pairs. The explanations, in my opinion, are not such as can be easily accepted. If the 5 bales of cloth had been sold on credit, an entry with regard to these sales could be made in the stock register, & it could be noted in the stock register that these sales had not been made for cash price. Even in the affidavit that has been filed by the detenu, it is stated that one of the credit memo. had not been signed. The facts mentioned in the grounds did exist, & if two inferences including the one that was drawn by the State Govt. are possible on those facts, it is not open to us to say that that particular inference should not have been drawn by the State Govt. This is not a case in which it can be held that the affidavit filed by the detenu discloses such strong circumstances as can show that the alleged facts or grounds are not in existence. It was pointed out by the Federal Court in *Machindar Shivaji* v. *The King*, (1949) 11 F. C. R. 827, that the responsibility for making a detention order rests on the provincial executive & that it would be a serious derogation from that responsibility if the Court were to substitute its judgment for the satisfaction of the executive authority &, to that end, undertake an investigation of the sufficiency of the materials on which such satisfaction was grounded. A preventive detention as pointed out by his Lordship Patanjali Sastri J. in *A. K. Gopalan* v. *State of Madras*, 1950 13 S. C. J. 174, is a purely precautionary measure which must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof (per Lord Atkinson in *Rex* v. *Halliday*, (1917) A. C. 260. We can in no case undertake an investigation as to the truth or otherwise of the materials on which the satisfaction of the executive authority is grounded. The facts alleged have to be taken to be correct & it will not be a ground for interference if the detenu merely puts forward a counter-version. Putting a counter-version is not

the same thing as placing circumstances which can go to establish that the alleged facts or grounds are *non est*. And it cannot be said in this case that the affidavit discloses circumstances which go to indicate, beyond any reasonable doubt, that the alleged facts or grounds are *non est*. This is certainly a case in which it can be said on behalf of the State Govt. that their satisfaction is grounded on materials which are of rationally probative value. In this case some explanations have been offered, which cannot be taken to be correct without a proper enquiry, & no enquiry by us is possible or permissible. I, therefore, see no reason to interfere with the detention order in this case. The case started against him under S. 7, Essential Supplies Act, has now been withdrawn. [Then his Lordship considered the cases of detenus separately & in detail in Cri. Misc. Nos. 624, 652, 661, 669, 663, 664, 636 & 687 of 1950 & came to the conclusion that the orders of detention passed cannot be interfered with.] My conclusion, therefore, is that these applications are not fit to succeed. The applications are dismissed.

[6] **Das J.** — *(Cri. Misc. No. 623 of 1950 & batch.)* I agree to the orders proposed by my learned brother in these cases. I wish to add a few words only.

[7] First, as to the question whether activity like hoarding or black-marketing comes within Cl. (iii) of S. 3 (1) (a), Preventive Detention Act, I expressed myself fully in the judgment delivered on 5-1-1951, referred to by my learned brother. The words 'hoarding' & 'black-marketing' have a definite meaning in the context of a system of controls, such as will be found in the Foodgrains Control Order, the Cloth & Yarn Control Order & other Control Orders of a similar nature. The maintenance of supplies of food & cloth depends on this system of controls, & anybody who evades the Control Orders by hoarding (e. g. secreting part of the stock by making false entries in the stock register, or showing fictitious sales, etc.) or black-marketing (e. g. selling at a rate higher than the controlled rate) clearly acts in a manner which directly jeopardises the maintenance of supplies & services essential to the community. If the State Govt. have materials of a rationally probative value on which they are satisfied that a person is likely to act in that manner & to prevent him from acting in that manner it is necessary to pass an order of detention, they have the power to make the order under S. 3 (1) (a) (iii), Detention Act. Therefore, it is necessary to explain clearly, & thereby avoid the possibility of any misunderstanding, as to why we have interfered in some cases & not in others. The orders of detention are made on certain grounds, which must be communicated to the detenus (Cl. (5) of Art. 22 of the Constitution). The grounds, again, may be based on facts, which may or may not be disclosed, it being open to the detaining authority not to disclose facts which it considers to be against the public interest to disclose (Cl. (6) of Art. 22 of the Constitution). But I take it that the facts, so far as they are disclosed, must relate to & be the foundation on which the grounds rest.

[8] Now, the question is how far these grounds or facts can be examined by us. It is, I think, well settled that the grounds can be examined to see if the mandatory provisions of Cl. (5) of Art. 22 of the Constitution have been complied with, viz. (1) that they have been communicated as soon as may be; & (2) they give definite & enough information so as to afford an opportunity of making a representation to the detenu. Secondly, the grounds or facts (materials on which the detaining authority says it has acted) can be examined to see if they are relevant to the object of detention & have a rationally probative value. They can also be examined, if the question of *mala fides* is raised, the onus on that question being heavy on the detenu. The detenu may, possibly in rare cases, show that the order of detention was made not on the grounds given, but for some other purpose.

[9] We have had three kinds of affidavits filed on behalf of the detenus: one kind consisted of a mere denial of the grounds or facts alleged; the second kind consisted of an attempted explanation of the facts alleged, the truth of the explanation depending on credibility of evidence; & the third kind disclosed circumstances which rendered the grounds, or the facts on which the grounds were founded, completely non-existent; that is, inaccurate on the face of them, without the necessity, & independent of the question, of any evidence. It is in this last kind of cases that we have interfered, on the ground that the order is not *bona fide*. The first two kinds of cases are those in which, I think, the Advisory Board is the proper authority to consider the denial or the explanation. It is not always easy to appreciate the distinction between the second & third class of cases: the distinction appears to be very thin sometimes, but all the same it is appreciable. Take, for example, the cases where a detenu says that there was no shortage; or that there was miscalculation; or that he has nothing to do with the firm. But the grounds state that there was shortage; or that there was verification or that the detenu was one of the proprietors or partners of the firm. We have taken these to be cases where the truth or otherwise of the explanation given depends on credibility of evidence—a matter not for us to consider & determine. But where the detenu shows that the stock register was not with him but with an officer of the State & yet the ground given is that the register was not duly entered or that there was a discrepancy between the stock as shown in the register & as verified, we held that the ground was inaccurate on the face of it, &, therefore, had no existence in fact. How can a register be entered, if it is in possession of somebody else? Clearly enough, no evidence is requir-

ed in such a case. Therefore, when it is stated that this Court cannot question the correctness of the grounds, & there are decisions which have said that, the point to be remembered is that an investigation into the correctness or otherwise of the grounds, depending as it does on the believability of evidence, cannot be undertaken by us; because it is not our satisfaction which is a condition precedent to the validity of the order but the satisfaction of the State Govt. In such cases, whether there is an affidavit in reply or not we are powerless to interfere.

[10] It is on this basis that we have declined to interfere in these cases, though in the case of the firm of Bindri Lal Mahabir Prasad all the four brothers have been detained for the activities of the firm. In some of these cases, the explanations given may turn out to be true, if an investigation is made. In Criminal Misc. No. 624 of 1950 there is, I think, room for some doubt—firstly, because the Magistrate checking the stock himself made an error & secondly, there was very little shortage if the method of calculation (one pair as one unit) was as alleged. But these are matters to be considered more properly by the Advisory Board, & however much one may wish to do so, it is clear that we cannot investigate into the truth or otherwise of these explanations in the way desired by the petitioners.

V.S.B. *Applications dismissed.*

A. I. R. (38) 1951 Patna 157 *[C. N. 23.]*

RAMASWAMI & RAI JJ.

State of Bihar — Defendant — Appellant v. *Gaya Electric Supply Co. Ltd. — Plaintiff — Respondent.*

A. F. O. O. No. 19 of 1951, D/- 30-3-1951.

Arbitration Act (1940), S. 34—Contract containing arbitration clause — Breach of contract by deft. — Rescission of contract & suit by pltf. — Stay of suit.

Where a contract contains an arbitration clause, & one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself. Where, however, a party seeks to avoid the contract for reasons dehors it, the arbitration clause cannot be resorted to, since the whole contract including the arbitration clause is set aside. [Para 8]

An agreement between the pltf., an Electric Supply Co. & the Govt. was as follows: (1) The State of Bihar would make an advance payment of Rs. 5 lakhs to the pltf. but simultaneously the pltf. should formally hand over the possession of the undertaking to an authorised officer of the Govt. & (2) that both the pltf. & the Govt. will make their respective valuation within three months of taking over the undertaking & (3) in the case of any difference or dispute between the parties over the payment of balance which may be found due after valuation such dispute shall be submitted to arbitration. The pltf. brought a suit against the Govt. for recovery of possession alleging that the deft. had failed to make valuation or payment within the period of three months & committed the breach of contract & that by reason of the breach the contract stood rescinded:

Held, that the arbitration clause was still effective, the dispute was a matter within the scope of the arbitration agreement, and the suit instituted by the pltf. ought to be stayed. [Para 10]

Anno. Arbitration Act, S. 34, N. 10.

Advocate General & Bindeshwari Pd. Sinha — for Appellant; Sir Sultan Ahmad & S. Sarwar Ali — for Respondent.

Cases referred to:—

('37) 41 C. W. N. 563. [Pr. 7]
('48) A. I. R. (35) 1948 Cal. 230: (I. L. R. (1948) 1 Cal. 161). [Pr. 7]
('48) 27 Pat. 930. [Pr. 7]
(1922) 1922 S C. (H. L.) 117: (91 L. J. P. C. 167). [Pr. 9]
(1928) 1 Ch. 17: (96 L. J. Ch. 446). [Pr. 8]
(1942) 1 All E. R. 337: (111 L. J. K. B. 241). [Pr. 9]

Ramaswami J.—This appeal is presented by the deft. against an order of the Subordinate Judge of Gaya refusing to stay Title Suit No. 83 of 1950 under the provisions of S. 34, Arbitration Act.

[2] The pltf. Gaya Electric Supply Co. Ltd., had obtained a license for the supply of electric energy in the town of Gaya under the Electricity Act. On 23-6-1949 the Govt. revoked the license by a notification. Thereupon the pltf. instituted a suit against the State of Bihar for a declaration that the revocation of the license was *mala fide & ultra vires*. Subsequent negotiation took place & as a result, the parties entered into an agreement to the effect (1) that the pltf. would withdraw the suit on 25-10-1949, (2) that within 3 days of the withdrawal of the suit the State of Bihar would make an advance payment of Rs. 5 lakhs to the pltf. but simultaneously the pltf. should formally hand over the possession of the undertaking to an authorised officer of the Govt. & (3) that both the pltf. & the Govt. will make their respective valuation within three months of taking over the undertaking & (4) "in the case of any difference or dispute between the parties over the payment of balance which may be found due after valuation, such dispute shall be submitted to the sole arbitration of a single arbitrator who should be a high Govt. officer of the Provincial Govt. of rank equal to or higher than a Divisional Commissioner & his award shall be final & binding on both parties." The arbitration clause was contained in a letter dated 13-10-1949 from the Chief Electrical Engineer Bihar & was accepted by the pltff in its letter dated 17-10-1949.

[3] On 19-1-1950 the pltf. informed the Chief Electrical Engineer, Bihar, that the value of the undertaking was Rs. 22,06,072-2-0. In his reply dated 28-1-1950 the Chief Electrical Engineer characterised the estimate as fantastic & stated that the Govt. estimate "could not be finalised for want of certain details of some of the plant & machineries which had not been supplied by the pltf." The Chief Electrical Engineer added that according to the rough valuation of the Govt. the estimate was something in the neighbourhood of what had already been paid. In reply to this letter the pltf. did not furnish the necessary details but demanded that the valuation should be

completed & the balance of the amount should be paid to him within a fortnight. On the basis of such particulars as were available the Govt. proceeded to determine the valuation. The estimate was prepared at the request of the State Govt. by an officer deputed by the Central Electricity Commission, Simla. The estimate of Rs. 5,56,221-4-10 was duly communicated to the pltf. on 6-4-1950 by the Chief Electrical Engineer Bihar. As pltf. sent no reply the Government, Bihar, referred the dispute to Mr. M. S. Rao, I. C. S., Commissioner of Chota Nagpore, who was appointed as sole arbitrator to decide the matter. On 19-5 1950 Mr. M. S. Rao was informed by the Govt. that he was appointed as sole arbitrator to decide dispute regarding valuation of the assets of the undertaking. Thereafter the pltf. issued notice under S. 80, Civil P. C., to the Govt. alleging that there was breach of contract since the Govt. did not make valuation within the time stipulated, that the agreement stood cancelled, that a suit would be instituted for recovery of possession of the undertaking or in the alternative for specific performance of contract.

[4] On 28-9-1950 the pltf. commenced the present suit alleging that the Govt. had committed breach of contract, that by reason of the breach the contract stood rescinded & that the pltf. was entitled to be restored to possession of the undertaking & also to forfeit the amount of Rs. 5 lakhs paid by the Govt. in deposit. The State of Bihar appeared & filed an application that the suit should be stayed pending the decision of Mr. M S. Rao who had been appointed as sole arbitrator to decide the dispute as to question of valuation. The Subordinate Judge rejected the application on the ground that the subject-matter of the suit was not within the arbitration clause.

[5] The question to be decided in this appeal is whether the dispute in the suit is within the scope of the arbitration clause and whether the suit should be stayed under S. 34, Arbitration Act.

[6] On behalf of the pltf. Dr. Sultan Ahmad contended that the question raised in the suit was not in respect of any matter agreed to be referred in the arbitration clause. Learned counsel pointed out that the pltf. alleged in para. 17 that the deft. had failed to make valuation or to make payment upto 15-3-1950 & so committed breach of contract, that "by reason of the deft's breach of the contract the pltf. has rescinded the said agreement." The pltf. claimed as reliefs that possession of the electrical undertaking should be restored to it, that damages should be awarded from 16-3-1950 till possession was delivered & that the sum of Rs. 5 lakhs should be forfeited to pltf. But in order to ascertain the real nature of the dispute it is necessary to consider not only the plaint but the allegations of the deft. & the letters that were exchanged between the parties. Para. 1 of the agreement (printed at p. 17 of the case) stipulates that upon receipt of payment of Rs. 5 lakhs by cheque the company shall hand over

"formal possession of the undertaking to the Govt. through on instrument of conveyance making transfer of the property unconditional leaving only its valuation open for settlement by arbitration."

Para. 2 states that Govt. will make the valuation within three months of taking over the undertaking & any balance of money found due to the company as per Govt. valuation will be paid to the company & in case of over payment the excess paid should be refunded to Govt. Para. 3 is the arbitration clause which has been already quoted. The company's letter dated 17th of October is also important in this connection. In this letter the company suggested that

"both the company & the Govt. will make respective valuation within the time mentioned & in case there be no amicable settlement between the parties as to valuation the matter should be referred to arbitration of a single arbitrator whose award shall be final & binding on both parties."

Upon a perusal of the terms of contract & of the correspondence which form part of the contract, it is obvious that no stipulation was made that the compensation money should be paid within the period of three months. On the contrary the intention of the parties was that the Govt. would pay compensation money only after the award had been made by the arbitrator. The only question then at issue between the parties was the matter of valuation of the undertaking. According to the contract the valuation was to be made by the Govt., & if the pltf. did not accept such valuation the matter was to be decided by the arbitrator whose decision was to be final between the parties. In the plaint the allegation is that the Govt. of Bihar had neglected to perform the contract by failing to complete the valuation or to make payment to the pltf. within the period of three months or within the extended time granted by the pltf. In essence the pltf.'s claim is that Govt. did not make valuation or make payment & pltf. claims to have rescinded the contract on that ground. In my opinion the dispute is one arising out of or "in respect of" the agreement. For the question of payment necessarily depends on the valuation of the undertaking. The question is directly within the scope of the arbitration clause which states that

"if any difference or dispute between the parties *over the payment of* the balance arises such dispute should be submitted to the solem arbitration of a single arbitrator & his award shall be final & binding on both the parties."

The arbitration clause must be construed according to its language & in the light of the circumstances in which it was made. I hold that the suit instituted by the pltf. refers to a matter within the scope of the arbitration clause & since the deft. is ready & willing to do everything necessary for the proper conduct of the arbitration, the suit ought to be stayed under S. 34, Arbitration Act.

[7] This opinion is supported by *Harinagar Sugar Mills Ltd* v. *Skoda (India) Ltd.*, 41 C. W. N. 568, in which there was a contract between the parties for supply of machinery which contained the following clause relating to payment :

"*Cl. 3.* The payment shall be made as follows : 30% cash with orders against vendors giving Bank guarantee, 60% against shipping documents, 10% at the end of 1935-36 Season with Bank guarantee of vendees."

The pltf. alleged that the deft. had committed breach of these provisions as regards payment &, therefore, cancelled the contract. The pltf. then brought a suit for declaration that the contract had been rescinded & did not subsist & for an injunction restraining the deft. from referring the dispute to arbitration in accordance with the arbitration clause in the contract. It was held by Panckridge J., that the dispute was one arising out of the agreement & that the deft. was entitled to an order under S. 19, Arbitration Act, staying the suit. The same view was taken in *Governor-General in Council* v. *Associated Livestock Farm (India) Ltd.*, A. I. R. (35) 1948 Cal. 230, in which the pltf. made a tender for supply of meat for troops in a certain area in Eastern Command subject to the conditions & stipulations specified in the said tender & in the "instructions to tenderers." The tender was duly accepted & the contract was sanctioned by the Q. M. G. in India. There was an arbitration clause in the contract to the effect that

"any dispute or difference arising out of the contract shall be referred to the arbitration of the officer sanctioning the contract whose decision shall be final & binding."

It was alleged by the pltf. that there was a breach of contract since the demand was "far above the local requirements of the army," the deft. "wrongfully employed other contractors at much higher rates" & that the supplies were "taken wrongfully." It was held by the High Court that the dispute between the parties arose out of the contract & that the suit ought to be stayed under the Arbitration Act. On behalf of the pltf., Dr. Sultan Ahmad placed reliance on *N. K. Jain* v. *S. B. Sugar Mills, Ltd.*, 27 Pat. 930. But the facts of that case are widely different from those of the present case. An unregistered lease was executed by S on the one side & N on the other by which S gave in lease to N a sugar factory for a term of five years. It was stipulated in the lease that in default of the lease money by the lessee or in the event of a breach of any of the terms & conditions embodied in the lease the lessor shall be entitled to terminate the lease & re-enter upon the premises demised & it was also stipulated that all disputes between the lessor & the lessee shall be decided by an arbitrator. The lessee defaulted in payment of the lease money & the lessor instituted a suit for ejectment of the lessee on the ground that the lessee was a mere trespasser & not on the ground of any breach of any of the terms of the lease. On an application by the lessee under S. 34, Arbitration Act, to stay the suit it was held that the dispute in the suit was independent of the contract & was outside the ambit of the arbitration clause in the lease The true nature of the dispute in that case was not whether there had been any breach, all or partial, of the substantive stipulation of the contract but whether the defts. were in possession as trespassers. Upon this ground the High Court held that S. 34, Arbitration Act, was not applicable & the suit could not be stayed.

[8] The next question is whether the arbitration clause is effective, whether the arbitration clause can still be invoked in spite of the repudiation by the plff. The principle is clear. Where a contract contains an arbitration clause, & one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself. Where, however, a party seeks to avoid the contract for reasons *dehors* it, the arbitration clause cannot be resorted to, since the whole contract including the arbitration clause is set aside. In other words, a party cannot rely on a term of the contract to repudiate it & still say the arbitration clause should not apply. In *De La Gards* v. *Worsnop & Co.*, (1928) 1 Ch. 17, there was an agreement in writing for the sale of a business subject to certain conditions. The pltf. refused to complete the purchase owing to non-fulfilment of one of the conditions, the effect of which, he contended, was that he was no longer bound by the agreement. The defts. insisted that the condition was satisfied & went to arbitration. The pltf. issued a writ claiming a declaration that the agreement was determined, & the arbitration clause was not effective. Clausen J. rejected the argument as fallacious :

"If it be the fact that the condition has not been fulfilled, the result, no doubt, is this, that the obligation of the pltf. to purchase has come to an end & cannot be enforced against him; but it has come to an end, not by reason of the occurrence of some event outside the consideration of the contracting parties, but by reason of certain events which have occurred & which by reason of the non-fulfilment of a condition, namely, the condition stated in Cl. 5, subject to which the contract was expressly made, have resulted in his no longer being under an obligation to purchase."

[9] To a similar effect is the important case *Heyman* v. *Darwins, Ltd.*, (1942) 1 ALL E. R. 337, in which the respondents contracted with the appellants, an American firm, whereby the latter were to act as their selling agents over a wide area. The agreement contained an arbitration clause in these terms:

"If any dispute shall arise between the parties thereto in respect of this agreement or any of the provisions herein contained or anything arising thereout the same shall be referred for arbitration. . . . . "

A dispute arose between the parties & the appellants, having intimated to the respondents that their letters showed that they had repudiated the agreement, issued a writ against them,

claiming a declaration that the respondents had repudiated the agreement & damages under a number of heads. The respondents claimed that the action should be stayed pursuant to the Arbitration Act, 1889, S. 4, in order that the matters in dispute might be referred under the arbitration clause. The appellants contended that the respondents having repudiated the agreement as a whole & the appellants, by the issue of the writ, having accepted that repudiation the contract had ceased to exist for all purposes & the respondents could not afterwards rely on the arbitration clause. It was held by the House of Lords that the dispute between the parties was a dispute within the arbitration clause & the appellants' action ought to be stayed. At page. 341 Lord Viscount Simon states:

"Even so, I do not see how this claim, however expressed, together with the other claims in the writ, can be regarded otherwise as than involving a dispute 'in respect of the agreement' & in respect of something out of it. The fallacy of the other view arises from supposing that, if the respondents have so acted as to refuse further performance of the agreement, this amounts to saying that they deny that the agreement ever existed. If the respondents were denying that the contract had ever bound them at all, such an attitude would disentitle them from relying on the arbitration clause which it contains; but that is not the position they take up. They admit the contract, & deny that they have repudiated it. Whether they have, or have not, is one of the disputes arising out of the agreement ..... As Viscount Finlay said. in *Sanderson & Son v. Armour & Co.*, (1922) S. C. (H. L.) 117, at page 121: "The proposition that the mere allegation by one party of repudiation of the contract by the other deprives the latter of the right to take advantage of an arbitration clause is unreasonable in itself, & there is no authority to support it'."

In his speech Lord Macmillan also states:

"Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligation thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. Even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, & the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach, or a breach going to the root of the contract, & this relieves the other party of any further obligation to perform what he for his part has undertaken. Now, in this state of matters why should it be said that the arbitration clause, if the contract contains one, is no longer operative or effective?"

[10] Applying these principles to the present case I hold that the arbitration clause is still effective, that the dispute about the payment of compensation is a matter within the scope of the arbitration agreement, that the suit instituted by the pltf. ought to be stayed.

[11] Upon these grounds I would set aside the order of the learned Subordinate Judge dated 18-12-1950, & direct that the suit instituted by the pltf. should be stayed under S. 34, Arbitration Act.

[12] I should allow the appeal with costs. Hearing fee ten gold mohars.

G.M.J. *Appeal allowed.*

A. I. R. (38) 1951 Patna 160 *[C. N. 24.]*

DAS & SINHA JJ.

Hari Prosad Agarwalla & another — *Appellants* v. *Abdul Haq & others*—*Respondents.*

A. F. A. D. No. 1273 of 1948, D/- 1-3-1951.

(a) T. P. Act (1882). Ss. 107 & 116 — Registered instrument of lease falling under para. 1 of S. 107 not executed in manner specified under para. 3 of that section — Lease if can be construed as one by oral agreement for one year — Subsequent possession if holding over.

A lease of immovable property purported to be made by a registered instrument for a term exceeding one year or from year to year but not executed in the manner specified in the third para of S. 107 is invalid & its invalidity cannot be cured by construing it as a lease for a term of one year made by oral agreement accompanied by delivery of possession & thereafter to be a case of holding over under S. 116 : *Case law considered.* [Para. 8]

Anno. T. P. Act, S. 107 N. 8, 10.

(b) T. P. Act (1882), Ss. 105 & 107 — Invalid lease —Possession of part of leasehold — Doctrine of constructive possession of entire leasehold—Applicability — Nature of possession—Lim. Act (1908), Arts. 142 & 144.

The doctrine of constructive possession of the entire lands in the leasehold by proving possession of a part can be pressed in aid by a person who has the legal title vested in him in the leasehold. A person in possession under an invalid lease is a mere trespasser & it is well settled that a trespasser cannot invoke the aid of the principle of constructive possession. The possession of a trespasser is limited to the lands which are actually in his physical possession : *Case law referred.* [Para 9]

Anno. T. P. Act, S. 105 N 19; Lim. Act, Arts. 142 & 144 N. 12, 53.

(c) T. P. Act (1882), S. 53A—Scope—If gives right to transferee to enforce his right in Ct.

Per *Sinha J.*—S. 53A gives no right to a transferee to come to Ct. as a pltf. either to maintain his possession or to recover possession, if dispossessed, after having been put in possession in pursuance of the contract. A transferee who is not clothed with title in the manner recognised by law, cannot be said to be a person having a valid title in law &, therefore, Cts. of law cannot recognise such a title. The Ct. on grounds of equity alone can refuse to enforce the rights of the transferor except so far as those rights are expressly mentioned in the contract in writing & the equitable right in favour of the transferee has been embodied in S. 53A : A. I. R. (27) 1940 P. C. 1, *Ref.*; A. I. R. (26) 1939 All. 611, *Dissent.* [Para 10]

Anno. T. P. Act, S. 53A N. 13.

N. N. Sen & S. C. Majumdar — for Appellants; B. Mukherji & B. C. De—for Respondents.

Cases referred to :—

('39) 66 I. A. 293 : (A. I. R. (27) 1940 P. C. 1). [Pr. 10]
('39) A. I. R. (26) 1939 All. 504 : (184 I. C. 233). [Pr. 9]
('39) A. I. R. (26) 1939 All. 611 : (I. L. R. (1939) All. 809). [Pr. 10]
('40) A.I.R. (27) 1940 Cal. 89: (I. L. R. (1939) 2 Cal. 254). [Pr. 13]
('43) I.L.R. (1943) 1 Cal. 34 : (A.I.R. (30) 1943 Cal. 474). [Pr. 13]
('43) A. I. R. (30) 1943 Lah. 127 : (I. L. R. (1943) Lah. 695 F. B.). [Prs. 8, 13]
('21) 44 Mad. 253 : (A.I.R. (8) 1921 Mad. 82). [Pr. 9]
('25) A. I. R. (12) 1925 Pat. 787: (4 Pat. 394). [Pr. 9]
('33) A.I.R. (20) 1933 Pat. 485: (144 I.C. 788). [Prs. 8, 13]

('31) A.I.R. (21) 1934 Pat. 369: (148 I C 684). [Prs 8, 13]
('33) 19 P. L T. 499: (A I R (35) 1938 Pat. 479). [Pr 9]
('41) A I R. (28) 1941 Pat. 244 : (191 I C. 686). [Pr. 13]
('47) A. I. R. (34) 1947 Pat. 73: (229 I.C. 394). [Pr. 8]
(1879) 4 A C. 324 : (48 L. J. Ch. 579). [Pr. 9]

Sinha J. — This appeal has been filed by the pltf. They had filed the suit for declarations that the lands described in schedule A to the plaint belonged to them; that they were in possession as *maiyaddi* lessees; that the defts. had no right, title or interest in the same; & for permanent injunction restraining the defts. from working the fire-clay in the aforesaid lands & from removing the fire-clay therefrom & also for damages against the defts.

[2] The pltfs.' case is that they had taken a lease for 21 years for extracting fire-clay in seven villages, including village Mandra, the village in suit, from one Shrimati Hirakumari Debi by a registered lease dated 20-1 1934 & that since then they have been in possession by extracting fire-clay in village Mandra & other villages. They alleged that since January 1945 the defts., in collusion with one another, have been illegally extracting fire clay from that village without any right or title to do so.

[3] The suit was contested by deft. 1 alone, although written statements were filed by the other defts. as well. The contesting deft. pleaded that the pltfs. had no valid lease & that they acquired no right or title to village Mandra by virtue of the said lease. He alleged that the lease in favour of the pltfs. was merely a paper transaction & had never been acted upon & the pltfs. were never in possession of village Mandra. He also alleged that Hirakumari Debi had no right to execute the lease in favour of the pltfs., as she was not the owner of the village. But later on he had to admit that he had himself taken a lease of the fire-clay right of village Mandra from the said Shrimati Hirakumari Debi. His lease is dated 5 10-1943 & his allegation is that even before the execution of the registered lease he was extracting fire-clay from that village under an unregistered *Hukumnama* dated 5-10 1939.

[4] The pltfs'. suit was decreed by the trial Court, but, on appeal, the judgment & the decree of the first Court were reversed. Hence this appeal by the pltfs.

[5] The Court below has come to the following findings:

(1) that Hirakumari Debi was the owner & proprietress of the village; (2) that the pltfs'. lease is only a *patta* executed by Hira Kumari Debi alone, & the deft's. lease relates to the same right of extracting fire-clay from village Mandra only for a period of 25 years; (3) that the lease in favour of the pltfs. was invalid, because of the provisions contained in S. 107, T. P. Act; (4) that the pltfs. were not in possession of the village in suit & there is no evidence worth reliance that they had ever extracted fire-clay from village Mandra, although the pltfs. were in possession by extracting fire-clay in village Bahira Dih, one of the seven villages mentioned in the patta in their favour; & (5) that the pltfs. were not entitled to invoke in their aid the provisions of S. 53A, T. P. Act, because those provisions are available only to a deft. in an action & not to the pltf.

[6] The learned counsel appearing on behalf of the appellants has urged three points in support of the appeal: (1) that although the lease in favour of his clients was not executed in the manner prescribed by S. 107, T. P. Act, the written document, namely, the *patta*, can be construed to embody an oral agreement accompanied by delivery of possession, &, therefore, such a lease would be valid for one year & thereafter the pltfs-appellants should be held to have been in possession of the leasehold by holding over under S. 116, T. P. Act; (2) that the pltfs-appellants having been found to be in possession of Bahira Dih, one of the villages included in their lease, they must be deemed to be in constructive possession of the other villages including the village in suit; & (3) that the provisions of S. 53A, T. P. Act, are available to the appellants although they are the pltfs. to the action, & they are, therefore, entitled to maintain their possession under that section.

[7] The relevant portion of S. 107, T. P. Act runs as follows:

"A lease of immovable property from year to year or for any term exceeding one year, or reserving an yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immovable property is made by a registered instrument, such instrument, or where there are more instruments than one, each such instrument shall be executed by both the lessor & the lessee....."

[8] The contention of Mr. Sen, the learned counsel for the appellants, is that the document in question should be considered as a lease of immovable property for a term not exceeding one year made by an oral agreement accompanied by delivery of possession. In my opinion, this contention is not well-founded. Once there is a lease of immovable property for a term exceeding one year & the lease is made by more than one instrument, each of such instruments must be registered & executed by both the lessor & the lessee, & such lease cannot be construed as a lease for a term of one year made by oral agreement accompanied by delivery of possession. If the section is construed in the manner suggested by the learned counsel, it will make the provisions of S. 107 absolutely nugatory & nullify the statute itself. The first part of the section lays down that there must be a registered instrument for a lease of immovable property from year to year or for any term exceeding one year or reserving an yearly rent, & the next para of the section says that leases other than those mentioned in the preceding para can be made by registered instrument or by oral agreement accompanied by delivery of possession That is to say, if there is a lease which is not covered

by the first para of the section, such lease can be made by a registered instrument or by oral agreement accompanied by delivery of possession. If a lease has, in fact, been made by a registered instrument, such instrument, & if there are more than one, then, in my opinion, each of such instruments must be executed by both the parties to the lease. In the present case, the lease in favour of the pltfs. was for 21 years & the instrument creating the lease was a registered instrument. It follows, therefore, that such instrument should have been executed by both the lessor & the lessee & that not having been done, it neither constitutes nor creates any valid lease. The contention of the learned counsel supposes that there has been a delivery of possession to the pltfs; but the finding of the final Court of fact is to the contrary. However, I will consider this aspect of the matter later on. Mr. Sen has cited the cases of *Aziz Ahmad* v. *Alauddin Ahmad*, A. I. R. (20) 1933 Pat. 485 and *Alaudin Ahmad* v. *Aziz Ahmad*, A I.R. (21) 1934 Pat. 369. The judgment in A. I. R. (20) 1933 Pat. 485 was confirmed in the Letters Patent appeal reported in A. I. R. (21) 1934 Pat. 369. The facts of that case were quite simple. That was a suit for arrears of rent against the defts. who had taken verbal leases for the years 1321 to 1327 Fs. After the leases expired in 1327, there were fresh verbal leases granted by the predecessor-in-interest of the pltfs. & the suit was for recovery of arrears of rent for the years 1331 to 1334 Fs. The finding was that the defts. were in possession, but the suit was dismissed because the lower Court held that the leases were hit by S. 107, T. P. Act, & on the facts of that case Khwaja Mohammad Noor, J., relying upon a Calcutta decision, held that a verbal lease accompanied by delivery of possession was valid for one year & thereater if the deft-lessee continued in possession, his continuance in possession could not be otherwise than by holding over & the provision of S. 116, T. P. Act, was attracted & upon that footing his Lordship held that the defts. were tenants of the pltfs. for the subsequent years also & decreed the suit for rent. This decision was upheld in the Letters Patent Appeal & Courtney-Terrell, C. J., with whom Kulwant Sahay, J., concurred, came to the following finding :

"In my opinion, on these facts the defts. are estopped by their conduct from denying the relationship of landlord & tenant. It is perfectly true that the pltf. cannot set up the verbal lease for the specified period. But I agree with Noor J., that a verbal lease for more than one year accompanied by delivery of possession is valid for the first year 1328. There was no fresh lease & the defts. continue in possession after its termination (admittedly as tenants) for successive years, by holding over & S. 116, T. P. Act, applies."

It is quite clear, therefore, that that was an entirely different case from the one we have to deal with in this appeal & that gives no support to the contention of the appellants to the effect that a registered lease, because it does not fulfil the conditions prescribed by S. 107, T. P. Act, could be construed as a lease by oral agreement accompanied by delivery of possession. The other case relied upon by the learned counsel in the case of *Mohan Lal* v. *Ganga Singh*, A. I. R. (30) 1943 Lah. 127. In this case, there was a lease by the usufructuary mortgagee to the mortgagor of a house on a monthly rental. This document was unregistered & was not, under law, required to be registered. A suit was filed for arrears of rent as also for the ejectment of the deft. from the house. It was held in that case that a lease could only be created in the manner stated in S. 107, T. P. Act, & it was further held that the document in that case, a kabuliyat, could be locked at as an admission or an acknowledgment by the person attempted to be made liable & that would furnish the best evidence as to the oral agreement between the parties. In that view of the matter, their Lordships held that the pltf's. suit could be decreed. This case also, in my opinion, is of no help to the appellants the facts being entirely different. The view which I have taken finds support from a Division Bench decision of this Court in *Budhan Mahton* v. *Ramanugrah Singh*, A. I. R. (34) 1947 Pat. 78. In this case, the pltfs. had brought a suit for recovery of possession of a certain share in a village & for mesne profits, or in the alternative, for damages. The pltfs. claimed title under a thicca lease date 28-6-1940 granted by deft. 2 of that case for the period 1348 to 1354 Fs. The same share in the village had been given by deft. 2 in *zarpeshgi* lease to deft. 1 under a patta dated 13-10-1939 for 1341 to 1347 Fs. The deft. took the defence that there was no valid title created in favour of the pltfs. under their alleged lease. One of the points taken in second appeal was that as the documents of lease, namely, the patta & the kabuliyat. had not been executed by both the parties to the documents, the lease was bad & it was dealt with by Chatterji J., with whom Pande J., concurred, as follows :

"Lastly, it is urged by Mr. Dasu Sinha that even though the patta Ex. 3 may not create a valid lease, the lease may be operative as a lease for one year, inasmuch as it was accompanied by delivery of possession. According to S. 107, T. P. Act, a lease for one year may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. The argument of Mr. Dasu Sinha cannot succeed, unless it be held that the lease was treated by oral argument accompanied by delivery of possession. The pltfs. never made out a case that the lease was created by an oral agreement. Their definite case was that the lease was created by the registered patta Ex. 3."

In that case, their Lordships did not accept the contention of Mr. Dasu Sinha that although the lease purported to be made by an agreement in writing & registered, it could be construed as an oral agreement for one year & thereafter it could be a case of holding over. Their Lordships' view lends support to my opinion that if a lease is purported to be made by a written & registered agreement for a period exceeding one year; on

from year to year, it cannot be construed to be an oral agreement of lease for one year & thus defeat the provisions of S. 107 of the Act. I would, therefore hold that in the present case the lease is within the mischief of S. 107, T. P. Act, & the lease is invalid & its invalidity cannot be cured by construing it to be a lease by oral agreement accompanied by delivery of possession. I would, therefore, reject this contention of the appellants.

[9] The next point that has been urged is that possession of a portion of the leasehold should be construed to be possession of the other portions of the lands comprised in the leasehold. This argument is founded upon the finding that the pltfs. were in possession of village Bahira Dih, one of the seven villages covered by their lease, & it is said that if the pltfs. were in possession of Bahira Dih, they must be held to be in constructive possession of village Mandra, the village in suit, although the pltfs. might have failed to prove their actual physical possession of this village. In my view, this contention is also without merit. The doctrine of constructive possession of the entire lands in the leasehold by proving possession of a part can be pressed in aid by a person who has the legal title vested in him in the leasehold. If his lease is invalid, because it is not in accordance with the provisions of the law, then he cannot be held to be in possession of the entire leasehold by showing that he was in possession of a portion of it. A person in possession under an invalid lease is a mere trespasser & it is well settled that a trespasser cannot invoke the aid of the principle of constructive possession. The possession of a trespasser is limited to the lands which are actually in his physical possession. The finding in this case is that the appellants have failed to prove their possession of the village in suit. Their lease not having been made in accordance with the provisions of S. 107, T.P. Act, the lease must be held to be an invalid lease & their possession of village Bahira Dih, one of the villages covered by the lease, must be held to be that of trespassers as the legal title did not vest in them by the lease in question. Mr. Sen has drawn our attention to a portion of a sentence at p. 1271 of 'Wood on Limitations', 4th Edn. which runs as follows :

"……..while he is in possession of a part of the premises, his possession is entitled to the benefit of the constructive possession, & can only be ousted by, & to the extent of, the actual occupation of a mere intruder."

Mr. Sen has not referred to the earlier part of the sentence which runs as follows :

'The rule is well settled that *title* draws to it the possession, & it remains with the *owner of the legal title* until he is divested of it by an actual adverse possession;"

I have underlined (here italicised) the important words in this quotation & Mr. Sen only relies on what follows this part of the sentence & it is quite clear that the benefit of constructive possession is to go to the owner of the legal title & not to a person who has got no legal title. This quotation from 'Wood on Limitations' does not support Mr. Sen, but is against him. That a person in possession under an invalid lease is in possession as a trespasser, is established now beyond doubt. In the case of *President & Governors of the Magdalen Hospital* v. *Alfred Knotts*, (1879) 4 A C. 324 it has been held that a lease which was against the provision of law was an absolutely void lease from its very inception & that if the lessee was put in possession under that invalid lease, the right of the lessor to re-enter on the land existed from the moment of the execution of that lease & that right not having been sought to be enforced within limitation, was barred. This case was followed in our Court in *Bhukhan Mian* v. *Radhika Kunari Debi*, 19 P. L. T. 489. This was a case of mortgage which had not been registered as was required by law & Manohar Lall J. made the following observation :

"The pltf., therefore, all the time was entitled to institute a suit for recovery of possession of his lands within 12 years of the date of the invalid mortgage—invalid in the sense that it could not be enforced owing to the absence of registration; the possession of the deft. became adverse to the plf. from the very date of the invalid mortgage."

His Lordship relied upon the aforesaid case of *the President & Governor of the Magdalen Hospital*. In *Mt. Jasoda Kuar* v. *Janak Missir*, A. I. R. (12) 1925 Pat. 787, the observations of Jwala Prasad J., with whom Adami J., agreed, lend support to the view that if a person is in possession under an invalid title for more than 12 years, he gets absolute title to the property by adverse possession, that is to say, the person holding under an invalid title is a trespasser & can get his title perfected by adverse possession if he remains on the land for 12 years. In that case, the pltf. had brought a suit for ejectment on the ground of dispossession, the pltf's. title being founded upon a deed of sale. The defence was that the sale-deed was not a valid one & was not executed by the vendors. The other defence was that the deed of sale was not validly registered because the registration was invalid. Their Lordships held that the execution of the document by the vendors had been proved, there was no fraud & that the registration was also valid. But their Lordships held that even if the registration of the document was illegal, the pltf. having remained in possession for over 12 years, had acquired absolute title to the property by adverse possession. This observation of their Lordships may be an *obiter dictum*, but that shows the view of their Lordships in regard to the possession of a person under an invalid deed. This judgment of their Lordships was followed by the Allahabad High Court in *Kashi Nath* v. *Makchhed*, A. I. R. (26) 1939 ALL. 504 This view also finds support from the case of *Kandasami Pillai* v. *Chhinnabha*, 44 Mad. 253, where their Lordships made the following observation :

"An unregistered sale cannot be set up as a transaction having effect of itself to transfer any interest in the property; but it is permissible to consider it, as showing the nature of the transferee's subsequent possession, that is, when the sale is of mortgaged property to the mortgagee that it was not as a mortgagee, but as a full owner. That being established it would after the expiry of 12 years ripen into full title & bar mortgagor's right of redemption."

I would, therefore, hold that the possession of the pltfs. of village Bahira Dih does not prove constructive possession by the plts of village Mandra, the village in suit, &, therefore, it must be held, as has been held by the lower appellate Court, that the pltfs. were not in possession of village Mandra. This finding alone is sufficient to dispose of the whole appeal; but as arguments were addressed to us at length, I have thought it fit to consider the other argument as well.

[10] The last point contended for by the appellants was that under the provisions of S. 53A, T. P. Act, the pltfs. were entitled to maintain their possession. Upon the finding that the pltfs. are not in possession, the question does not fall to be decided; but as Mr. Sen has argued this point at length, I would briefly give my opinion on this point. In my judgment, the provisions of S. 53A do not create a right in the transferee to go to Court for the redress of his grievances. It imposes a bar on the exercise of some of the legal rights of the transferor in a Court of law. The relevant portion of the section runs as follows :

"..... Notwithstanding that the contract, though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the *transferor* or any person claiming under him shall be *debarred from* enforcing against the transferee & persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract."

I have underlined (here italicised) the important words in the extract from the section & it is clear to me that the transferor or persons claiming under him cannot enforce any right in respect of, the property which the transferee has been put in possession of, other than a right reserved expressly in the contract. No right to enforce his right in Court has been given to the transferee. If the transferor or a person claiming under him desires to evict a transferee or a person claiming under him from the land of which the transferee had taken or continued in possession in the absence of any express agreement to the contrary, the transferor or a person claiming under him cannot do so & the transferee or a person claiming under him can successfully raise the plea of part performance, that is to say, of having been put in possession of the property in pursuance of the contract. In other words, this provision contained in S. 53A, does not give any active right to the transferee & it has, therefore, been held by their Lordships of the Judicial Committee in *Probodh Kumar* v. *Dantmara Tea Co. Ltd.* 66 I. A. 293, that the amendment of the law effected by the enactment of S. 53A. conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mitter J., in the High Court that "the right conferred by S. 53A is a right available only to the deft. to protect his possession ..... The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee."

It must, therefore, be held that the provisions of S. 53A, T. P. Act, give no right to a transferee to come to Court as a pltf. either to maintain his possession or to recover possession, if dispossessed, after having been put in possession in pursuance of the contract. Mr. Sen has placed before us a case of the Allahabad High Court in *Ram Chander* v. *Maharaj Kunwar*, A. I. R. (26) 1939 ALL. 611. This case, no doubt, supports his contention. But with very great respect to their Lordships, I do not feel bound to accept their interpretation of the section specially in view of the construction put upon this section by the Privy Council Mr. Sen argues that it looks anomalous that a transferee who was put in possession cannot come to a Court of law as a pltf for declaration of his possession, or, in the alternative, for recovery of possession in pursuance of a contract between him & the transferor. I do not think there is any anomaly. A Court of law can only recognise or give effect to a title which is made perfect in law & if any of the legal formalities is wanting to make a title good in law that title is an imperfect title & the Court will not help a person who has an imperfect title in law. A transferee who is not clothed with title in the manner recognised by law, cannot be said to be a person having a valid title in law & therefore, Courts of law can not recognise such a title. If the transferee though not clothed with a perfect legal title has been put in possession or continued in possession, the Court on grounds of equity alone can refuse to enforce the rights of the transferor except so far as those rights are expressly mentioned in the contract in writing & the equitable right in favour of the transferee has been embodied in S. 53A. In that view of the matter the provisions of S. 53A cannot be brought to the aid of the pltfs.

[11] I would, therefore, dismiss this appeal with costs.

[12] **Das J** —I agree with my learned brother on points (1) & (2), but would like to add a few observations.

[13] There is no doubt that the document which purported to create a lease in favour of the appellants in this case came under para. 1 of S. 107, Transfer of Property Act. It is equally clear that the document was *not* executed in the manner required by para 3 of the said section; therefore, it did not create nor constitute a valid lease. Now, the question is — can this document be so construed as to spell out the creation of a lease by oral agreement accompanied by delivery

of possession of the kind mentioned in the second para. of S 107, T. P. Act ? In my opinion, the answer must be in the negative, & for those reasons. Firstly, the appellants never set up a case of a lease by oral agreement accompanied by delivery of possession, independent of the document, for which the document could be a piece of evidence. Secondly, I do not think that the document can be used so as to create by an indirect or back-door method what the statute says can be done in a particular way only. I emphasise the word *only* in para. 1 of S. 107, S.105 defines a lease, which is a transfer of the right to enjoy immovable properties, i. e., a right in rem; it must be made for "a certain time expressed or implied", which may be (1) less than a year, (2) more than a year. Section 9, T. P. Act, lays down that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. Section 107, provides that a lease of immovable property from year to year or for any term exceeding one year or reserving yearly rent can be made *only* by registered instrument. The transfer of a right to enjoy immovable property in consideration of rent for a year or less than a year can be made without any writing. Thus. there are decisions which say that an oral lease, purporting to be for more than a year, accompanied by delivery of possession is good, at least for the first year. If after the first year, the lessor accepts rent from the lessee & assents to his continuing in possession, the lease by reason of S. 16, T. P. Act, is renewed from year to year or month to month according to the purpose for which the property is leased as specified in S. 106, T. P Act. (See *Adi Nath* v. *Krishna Chandra*, I. L. R. (1943) 1 Cal. 34; *Anwarali Bepari* v. *Jamini Lal*, A. I. R. (27) 1940 Cal. 89; *Naim Sahib* v. *Tata Iron & Steel Co. Ltd.* A. I. R. (28) 1941 Pat. 244; *Aziz Ahmad* v. *Alauddin Ahmad* A. I. R. (20) 1933 Pat. 485, confirmed in Letters Patent Appeal in *Alauddin Ahmad* v. *Aziz Ahmed*, A. I. R. (21) 1934 Pat. 369). But no decision has been brought to our notice, except, perhaps, a Lahore decision to which I shall presently refer, which has held that a registered document purporting to create a lease but not executed in the manner required by law can be construed so as to create a lease by oral agreement accompained by delivery of possession The Lahore decision (*Mohan Lal* v. *Ganda Singh*, A. I. R. (30) 1943 Lah. 127) related to a *kabuliyat*, which it was stated, was *not* a lease within the meaning of S. 107 & which did not require registration; this kabuliyat was looked at as evidence of an admission or acknowledgment of an oral agreement. The position in the case before us is quite different. No case of an oral agreement of lease having been pleaded, there is no question of looking at the document as evidence of such an agreement. I do not wish to make any observations regarding a hypothetical case where the lease is effected by an an oral agreement accompanied by delivery of possession & there is also an unregistered instrument evidencing it. In such a case the question may arise if the existence of the unregistered instrument prevents the passing of title by delivery. If and when such a question arises, the answer may have to be given with reference to S. 49, Registration Act, 1908, after its amendment in 1929

[14] On the question of possession, it was argued that the position of the appellants was that of licensees & not trespassers. Assuming that contention to be correct, though I doubt its correctness, the appellants can be licensees only with regard to Bahira Dih. I do not understand how they can be licensees in respect of property which was in somebody else's possession.

[15] As to the provisions of S. 53A, T. P. Act, it is really unnecessary to express any final opinion on the distinction which has been made in some reported decisions between *defending* possession & *recovering* possession & the view (based on that distinction) that a transferee may come to Court to defend his possession against acts of aggression on the part of the transferor or his representative, though he cannot ask for recovery of possession for want of a perfect title. As the question does not arise in the view which I take on the other two points, I express no opinion on it.

[16] I agree that the appeal be dismissed with costs.

G.M.J. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 165 *[C. N. 25.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Nilkantha Narayan Singh — Petitioner v. *Commr. of Income-tax B & O—Oppo. Party.*

Misc. Judicial Case No. 231 of 1949 and 49 of 1950 D/- 10-4-1951.

(a) Income tax Act (1922), S. 4 — Taxable nature of transaction—How to determine.

In the application of the law relating to income-tax the principle is well established that the name given to a transaction by the parties does not necessarily decide the nature of the transaction. It is the substance & not the form of the contract that would be regarded. In analysing the transaction, it is not necessary that the documents should be construed from the purely legal aspect. It is open to the High Court not merely to look at the documents but consider the surrounding circumstances so as to conclude what is the real character of the transaction. [Para 7]

(b) Income tax Act (1922), Ss. 4, 12 — Lease of right to receive royalties & rents from lessees of coalfields—Certain lump sum received as salami & nominal amount reserved as annual rent—Lump sum held taxable.

A, an assessee, who was entitled to receive Rs. 50,000 annually as royalties & rents from three leases of coalfields, executed three documents styled as 'Indentures of lease' in favour of *B*, conveying thereby his right to collect royalties & rents from the lessees of the coalfields. As consideration for the transfers *A* was to receive an immediate payment in a lump sum Rs. 1,00,000, Rs. 40,000 and Rs. 60,000 as salami & an annual rent of Rs. 10 Rs. 5 & Rs. 5 respectively. The terms of the

leases were 11 years, 10 years & 15 years respectively & *A*'s right to collect the royalties & rents was to receive after the expiry of these periods. The question was whether the lump sum of Rs. 2 lacs received by *A* as salami under these leases was taxable:

Held (1) that the transaction, though in form a sub-lease, was in substance an assignment by the assessee of his right to realise royalties & rents for a term of 10 to 15 years receiving as consideration for the contract a lump sum of Rs. 2 lacs, which was nothing but advance payment of royalty. [Para 10]

(2) that even though the amount was paid in a lump sum, it could be classed as taxable as there was no magic in the distinction between a lump sum & a periodical sum & the only material question in the case was what was the true nature of the sum. [Para 13]

(3) that the question whether a lump sum payment was a capital payment or income payment was a question of fact to be determined in the context of each particular case. [Para 17]

(4) that, in the circumstances of this case, the amount was taxable. (1948) 16 I. T. R. Sup. 57, (1935) 19 Tax Cas. 390 and (1927) 11 Tax Cas. 730, *Relied on*; *Case law referred.* [Para 20]

Anno. I.-T, Act. S. 4 N. 4; S. 12 N. 1.

(c) Income-tax Act (1922), S. 12—Income or capital receipt—Question should be decided on facts.

Per *Sarjoo Prasad J.*—The question whether a certain amount is *capital receipt* or income has always to be decided on the facts & circumstances of each case, & no hard & fast rule can be laid down for the purpose. [Para 34]

Anno. I.-T. Act S. 12 N. 1.

Mahabir Prasad; *S. K. Mazumdar & J. M. Ghose*—*for Petitioner*; *S. N. Dutta*—*for Oppo. Party.*

Cases referred to:—

('32) 59 I. A. 206: 59 Cal 1343. (A. I. R. (19) 1932 P. C. 138.) [Prs. 12, 32]
('35) 62 I. A. 207 : (A.I.R. (22) 1935 P. C. 143) [Pr. 33]
('36) 63 I. A. 408: (A. I. R. (23) 1936 P. C. 269). [Pr. 23]
('43) 22 Pat. 713 : (A. I. R. (30) 1943 P. C. 153). [Prs. 12, 33]
('25) 4 Pat. 73: (A. I. R. (11) 1924 Pat. 679). [Prs. 6, 29]
('39) 18 Pat. 805: (A. I. R. (27) 1940 Pat. 24). [Prs. 6, 29, 31]
(1854) *Hadley* v. *Baxendale*, (9 Ex. 341: 23 L. J. Ex. 179). [Pr. 19a]
(1875) 10 Q. B. 111: (44 L. J. Q. B. 49). [Pr. 19a]
(1927) 11 Tax Cas. 730. [Prs. 15, 16, 17]
(1928) 12 Tax Cas. 1102. [Pr. 14]
(1929) 14 Tax Cas. 69: (142 L. T. 337). [Prs. 16, 17]
(1935) 19 Tax Cas. 390: (1935 A C. 431). [Pr. 14]
(1938) 22 Tax Cas. 29: (1938-2 K. B. 482). [Prs. 17, 19, 31]
(1940) 22 Tax Cas. 175. [Pr. 11]
(1944) 26 Tax Cas. 86. (1944-1 All E. R. 535) [Pr. 18]
(1944) 25 Tax Cas 173. [Pr. 8]
(1948) 16 I. T. R. Sup. 57. [Prs. 13, 19]

Ramaswami J.—These references are made by the Income tax Appellate Tribunal under S. 66, Income-tax Act.

[2] The assessee Raja Nilkantha Narain Singh of Nowagarh is proprietor of a big zamindari within the ambit of which coal fields are situated. The predecessor of the assessee had leased out the coal fields on long terms basis to three different parties. The average annual income of royalty & rents from these lessees was about Rs. 50, 000 a year. The accounting year is 1352 Bengal Sambat which ends with the corresponding English date of 14-4-1946. In the accounting year the assessee had executed three documents termed "indenture of lease" in favour of Bengal Discount Co. Ltd. conveying his right to collect royalties & rents from these three lessees. In lieu of this the assessee was paid an immediate amount of Rs. 1,00,000, Rs. 40,000 & Rs. 60,000 for the three "indenture of lease". The annual rent reserved was Rs. 10, Rs. 5 & Rs. 5. In the first case the term of the lease was 11 years, in second case 10 years & in third case 15 years. It was stipulated that after the expiry of the period the right of the assessee will be revived in each case & the assessee would be entitled to collect from the original lessees the amount of royalties & rent as before.

[3] The amount of Rs. 2,00,000 which the assessee received from the Bengal Discount Co. was taxed by the Income-tax officer assessable income. On appeal the Appellate Assistant Commissioner maintained the order of the Income-tax Officer. In second appeal the Appellate Tribunal held that the sum of Rs. 2,00,000 was advance receipt of royalty was therefore assessable to income-tax.

[4] Another question was also debated before Appellate Tribunal, viz, whether the sum of Rs. 84,000 in possession of the assessee on account of the encashment of high-denomination notes. On the same date the assessee encashed notes to the extent of Rs. 95,000. The Income-tax officer assessed the whole amount as the income of the assessee from undisclosed sources. On appeal the Appellate Assistant Commissioner was satisfied that notes to the extent of Rs. 11,000 were included in the amount of Rs. 2 lakhs which the Bengal Discount Co. had paid to the assessee. He therefore reduced the taxable amount to Rs. 84,000. It was argued before the appellate Tribunal that this amount too ought not to be taxed as it was saving of the assessee from the amount he had withdrawn for his personal expense. The Appellate Tribunal held that the explanation was not acceptable & the amount of Rs. 84,000 ought to be assessed to income tax.

[5] The following questions have been formulated by the Appellate Tribunal for the determination of the High Court.

"(1) Whether on the facts & in the circumstances of this case, the Tribunal was right in holding that the sum of Rs. 2 lakhs received from Bengal Discount Co. Ltd. was taxable income, & (2) whether there is any material to justify the assessment of Rs. 84,000 representing the value of high denomination notes which were encashed on 21-1-1946?"

[6] As regards the first question it was argued by the learned Advocate-General on behalf of the assessee that the documents executed in favour of the Bengal Discount Co., were "indentures of leases" in which the outright payment of Rs. 2 lakhs has been shown as salami & the annual rent reserved has been fixed at a small amount. Learned counsel maintained that salami was a capital receipt & was not liable to income-tax

18 Pat. 805 & contended that the premium or salami represented whole or part of the price for the lease executed in favour of the Bengal Discount Co. and so was a capital receipt & ought not to be taxed. Learned Counsel also referred to *Shiva Pd. Singh* v. *Emperor*, 4 Pat. 73 in which the question was whether a sum of money received by the assessee by way of salami or premium for granting a mining lease was taxable. It was held by Sir Dawson-Miller that the salami was the price for parting with the direct enjoyment of the property & was not taxable. But in my opinion the material facts of both the cases ought to be distinguished from those of the present case. In 4 Pat. 73 the lease was for a period of 999 years. The amount of salami was Rs. 3 lakhs & odd. In 18 Pat. 805 the settlement was made for an indefinite period & the salami was Rs. 1800 for 4½ bighas of land. Upon the interpretation of the transaction in each case, the High Court held that the salami represented the price for parting with the land & was not advance rent. In 18 Pat. 805 Manohar Lal J. indeed observed that it was impossible to lay down a hard & fast rule that salami can in no case be taxable, that the question would depend on the facts & circumstances of each case.

[7] In the present case, the problem is to determine what is the real nature of the transaction between the assessee & the Bengal Discount Company. It is true that the parties have described the contract as "indentures of leases", the lump sum payment of Rs. 2 lakhs as "salami" & the small annual payment of Rs. 10 or Rs. 15 as "rent". But in the application of the law relating to income-tax the principle is well established that the name given to a transaction by the parties does not necessarily decide the nature of the transaction. It is the substance & not the form of the contract that should be regarded. In analysing the transaction, it is not necessary that the documents should be construed from the purely legal aspect. It is open to the High Court not merely to look at the documents but consider the surrounding circumstances so as to conclude what is the real character of the transaction.

[8] The principle is stated by Lord Greene in *Commissioners of Inland Revenue* v. *36/49 Holdings, Ltd.*, (1944), 25 Tax Cas 173 :

"The true nature of the sum is not necessarily its nature in law, but its nature in business or in accountancy which ever way one likes to put it, because from the legal point of view there may be no difference whatsoever as between the parties between a capital & an income sum. It may be totally irrelevant to the legal relationships into which they are proposing to enter. When, however, the *tartius gaudens*, in the shape of the Revenue, appears on the scene, that matter which as between the parties may have been a matter of not the slightest importance becomes immediately a matter of very great importance, & it is necessary to examine the circumstances of each individual case, including any documents which require to be construed, in order to ascertain what is the character to be attributed to the payment."

[9] The documents must therefore be examined in the light of this principle. Ext. D/1 is described as indenture of sub leases granted by the Raja in favour of the Bengal Discount Co., for a period of 11 years, Cls. 1 & 2 state that the premium of Rs. 1 lakh has been paid, that the rent of the land is fixed at Rs. 10 per year. Cl. 4 recites that by virtue of the deed the company will be entitled to realise all the royalties & commission payable by the lessee Rai Sahib Chandanmal Indrakumar by suit or amicably & the company will have the same right as the first party in respect thereof. Cl. 5 empowers the Bengal Discount Co. to realise the surface rent from Rai Sahib Chandanmal Indrakumar. But there is an exception that besides surface land required for colliery the Bengal Discount Co. will have absolutely no claim to the remaining surface land. Cl. 5 also states that the assessee was giving notice to Rai Sahib Chandanmal Indrakumar to pay royalty & commission to the Bengal Discount Co , for the period of the lease. The other documents, Exs. D/2 & D/3. are couched in similar terms. But in Ex. D/5 there is the important recital that the Raja was not able to pay income-tax & road cess & was in need of further money & on this account was giving the lease in respect of his right created by the registered patta dated 9-3-1900 from Messrs Nowagarh Properties limited.

[10] It is manifest that the transaction, though in form a sub-lease, was in substance an assignment by the Raja of his right to realise royalties & rents for a term of 10 to 15 years. As consideration for the contract the Raja received a lump sum of Rs. 2 lacks, which it is plain is nothing but advance payment of royalty. No other right except the right to collect royalty & rent from the original lessees is transferred by the assessee to the Bengal Discount Co. The assessee has not parted with any interest in the land but has merely assigned his contractual right.

[11] Reference may be made in this context to *Commissioners of Inland Revenue* v. *Thomas Nelson & sons* (1940) 22 Tax Cas 175 in which the assessee company had lent a sum of money to an Indian company under an agreement which provided that interest was to be paid at 3 per cent. per annum & that on repayment of the principal sum or any part thereof there should also be paid a premium varying with the date of repayment. The premiums prescribed by the agreement for each of the ten years of the currency of the loan are set out in the agreement, the first of them is at the rate of 2 per cent., the second is at 4 per cent, in each of the next five years there is an increase of 2½ per cent. in arithmetical progression & for the last three years of the ten the rate of increase per annum is 3 per cent. The full amount of the loan was ultimately repaid to the assessee together with the accrued interest & the

premiums payable under the agreement. The contention raised by the assessee was that the premiums were part of the principal sums repaid & were capital payments. The Lord President decided the question as a question posed on the particular terms of the contract. In his opinion the premiums were in the nature of annual profits or gains being part of the consideration given by the borrowers for the use of the capital lent to them, & part of the creditor's share of the profit which the borrower is presumed to make from the use of the money & he observed :

"It is not irrelevant to notice that the agreement provides for a payment by way of premium which may be made in each year of the currency of the loan, & that, taken along with the stipulated interest, the effect of this provision is to give the lender a return on their capital varying between 5 per cent. in the earlier years & something over 5½ per cent. in later years, a rate which can only be regarded as a reasonable return for the use of their capital & not as to any extent an accretion to it."

It was, however, pointed out that

"the fact that the borrowers would, under the contract, pay a premium only when they chose to make a capital payment does not necessarily have the effect of making the premium a capital payment, any more than the lenders' waiver of their right to exact payment of interest each year as the effect of converting the payment of arrears of interest into a capital payment."

[12] On behalf of the assessee the argument was addressed that income connoted a periodical monetary return, that in the present case the amount of Rs. 2 lacs being a lump sum payment cannot be classed as income. Reference was made to *Income-tax Commissioner* v. *Shaw, Wallace & Co.*, 59 I. A. 206 in which at p. 212 Sir George Lowndes observed :

"The object of the Indian Act is to tax 'income', a term which it does not define. It is expanded, no doubt, into 'income, profits & gains', but the expansion is more a matter of words than of substance. Income, their Lordships think in this Act connotes a periodical monetary return, "coming in" with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is often loosely spoken of as 'capital'. But capital, though possibly the source in the case of income from securities is in most cases hardly more than an element in the process of production."

But this passage must be read in the context of the material facts of that case. The question before the Judicial Committee was not whether there was a periodical monetary return but whether the sums received by the respondent were taxable income under S. 6 (4), Income tax Act. It was held by the Judicial Committee that the fundamental idea of "business" as a source of taxable income under S. 6 (iv) was the continuous exercise of an activity that there must be a business "carried on" by the assessee & that the sums received by the respondents in the case were not the produce nor the result of carrying on the agencies of the oil companies in the year in which the sums were received & so the sums were not liable to be taxed. The authority of the definition given by Sir George Lowndes is shaken by the subsequent decision of the Judicial Committee in *Kamakshya Narain Singh* v *Commissioner of Income-tax* 22 Pat. 713 in which Lord Wright held that mine royalties were clearly income & not capital & were assessable to income-tax. At p. 723 Lord Wright criticised the definition of Sir George Lowndes in the Shaw Wallace case :

"It is not in their Lordships' opinion correct to regard as an essential element in any of these or like definitions a reference to the analogy of fruit or increase or sowing or reaping of periodical harvests. Lord Cairns (loc-cit) used these expressions because he was distinguishing mineral leases from capital leases. Sir George Lowndes (loc.cit) speaks of income' being likened pictorially to the fruit of a tree or the crop of a field. But it is clear that such picturesque similies cannot be used to limit the true character of income in general, & particularly when it is constituted by mining rent or royalties. These are periodical payments, to be made by the lessees under his covenants in consideration of the benefits which he is granted by the lessor".

At p. 724 Lord Wright states :

"There is therefore in their Lordships' judgment, no real justification for treating the royalties as capital payments. They think that they are 'income' within the meaning of the Act, whatever may be the exact definition of that word in the Act. Its applicability may in particular cases differ because the circumstances, though similar in some respects, may be different in others. Thus the profit realised on a sale of shares may be capital if the seller is an ordinary investor changing his securities, but in some instances at any rate it may be income if the seller of the shares is an investment or any insurance company. Income is not necessarily the recurrent return from a definite source, though it is generally of that character. Income again may consist of a series of separate receipts, as it generally does in the case of professional earnings. The multiplicity of forms which 'income' may assume is beyond enumeration".

[13] On behalf of the assessee, the argument was stressed that the payment of Rs. 2 lakhs was made to assessee in a lump sum & so the amount ought not to be classed as taxable income. But there is no magic in the distinction between a lump sum & a periodical sum & the only material question in the case is what is the true nature of the sum In *Rust Proof Metal Window Co. Ltd.* v. *Inland Revenue Commissioner*, (1948) 16 I. T. R. Sup. 57, a patentee entered into a contract conferring on a licensee the right to manufacture up to a stated number of articles in accordance with the patent on condition that the licensee paid a lump sum down & a royalty of so much per article. It was held by Lord Greens M. R. that the lump sum payment was an income, & not a capital receipt, & so was liable to excess profits tax & that the division of the price into separate elements did not by itself have the effect of turning the lump sum into a capital receipt.

[14] The observation of Lord Macmillan in *Van den Berghs Ltd.* v. *Clark*, (1935) 19 Tax Cas. 390, is apposite :

"Now what were the appellants giving up ? They gave up their whole rights under the agreements for 13 years ahead. These agreements are called in the stated case

"pooling agreements," but that is a very inadequate description of them, for they did much more than merely embody a system of pooling & sharing profits. If the appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years, the lump sum might be regarded as of the same nature as the ingredients of which it was composed."

Again, in *North Fleet Coal & Ballast Company's case*, (1928) 12 Tax Cas. 1102 there was contract, subsisting for ten years for the sale of chalk & also for the building of wharf. It was agreed between the quarry company & the purchaser that in consideration of the payment of £900 yearly for the remaining four years of the term the purchaser should be relieved of his liability ; subsequently the company accepted a lump sum payment of £3000 in lieu of the annual payments. Rowlatt J., held that the payment of £3000 was chargeable to excess profits duty as a trading profit as it represented profits in a new form & it was tantamount to income.

[15] The case of *Constantinesco* v. *Rex*, (1927) 11 Tax Cas. 730, is materially in point. In that case an award of £70,000 was made by the Royal Commission on Awards to Inventors in respect of the user by the British Govt. during the war of certain gear invented by the assessee for enabling a bullet to be fired between the propeller of an aeroplane. It was held by the Commissioner of Income-tax that the lump sum payment was simply royalty for four years & that Income-tax should be deducted. The decision was affirmed by the House of Lords who agreed that in the circumstances of the case the lump sum payment did not constitute a capital sum but was royalty paid in respect of the user of the patent & was liable to be taxed. At p. 746 Viscount Cave states:

"The payment was made in respect of the use of the invention over a period of time. The claim put in was a claim as for royalty in respect of the successive uses of the invention. In the case of patented inventions it was the practice of the Commission, as appears from their Report which has been cited on behalf of the Appellant, to take as a basis of their award a fair royalty as between a willing licensor & a willing licensee, & I have little doubt that that basis was accepted in the present case, subject, no doubt, to certain deductions. Lastly, the patent itself, that is the corpus of the patent, was not taken away from the Appellant & his partner but still remains in them. In view of all the facts I am satisfied that the sum awarded is to be treated as profits or gains, & annual profits or gains, within the meaning of the Income-tax Act."

Viscount Dunedin was also emphatic :

"I think, on the real merits of the case, the case was scarcely arguable. This was a patent which remains this man's property. He, in the old days, got royalties for it, & those were the profits of his property. He had taken, by the Crown, the same license of user as private persons had before, & to say that the payments which the Crown make lose their character as income & suddenly become capital is, think, as all the Courts have understood the case, one of the most hopeless contentions I have ever heard urged at your Lordships' Bar."

[16] To the same effect is the decision in *Mills* v. *Jones*, (1929) 14 Tax Cas. 769, in which an award was made by the Royal Commission on Awards to Inventors in respect of the user, past, present & future, by the British Govt. (including user by way of selling for use, licensing or otherwise) of the Mills bomb. Over 75 millions of these bombs had been made during war & large stocks were still in existence. The Appellant, as patentee of certain improvements to this Bomb, received sums representing the major part of this award, & as charged to income-tax thereon. The General Commissioners, on appeal held that the sums received by the appellant were annual profits or gains chargeable to income-tax under Sch. D. The House of Lords held that the assessee was rightly charged to income-tax & that the principle of *Constantinesco's case*: (1927) 11 Tax Cas. 730, was applicable. At p. 786 Lord Buckmaster proceeded to base the decision on the finding of fact of the Commissioners that the amount of the future user included in the payment was negligible. Lord Dunedin agreed with Lord Buckmaster's opinion & significantly added. "I think the finding of fact is conclusive."

[17] My learned brother has referred to *Commissioners of Inland Revenue* v. *British Salmson Aero Engines Ltd.*, (1938) 22 Tax Cas. 29, but, in my opinion, the ratio of that case is different. In that case the assessee by a certain agreement granted to the licensees an exclusive right for a period of ten years to construct, use & sell in a certain territory Salmson Aero Engines. The consideration for the license was that the licensees were to pay a fixed sum of £25,000 payable in three instalments &, in addition to these payments, & as royalty, a sum of £2500 & a like sum each twelve months during the following nine years. The Crown contended that all these payments were income & the assessee insisted, on the contrary, that all these payments were in the nature of capital receipts. The Special Commissioners decided that the fixed sum of £25000 was capital receipt & the payments of royalty of £2500 were assessable to income-tax. The decision of the Special Commissioners was affirmed by the Court of appeal. In pronouncing judgment Lord Greene, Master of Rolls, treated the question whether a lump sum payment was a capital payment or income payment as a question of fact to be determined in the context of each particular case.

"It seems to me that in the case of patents, as in the case of any other matters, the fundamental question remains in respect to any particular payment: is it capital or is it income? & that question has to be decided, as it has to be decided in reference to other subject matters, upon the particular facts of each case, including in those facts the contractual relationships between the parties. It has been said that the question is one of fact, & it is when one gets to the bottom of it, an accountancy question. In saying that it is a question of fact, one does not mean that, in deciding it, questions of law may not have to be discussed & decided. For example, the construction of a contract may be one of the elements which must be taken into consideration in deciding that question; there may be cases where the construction of the contract (sic) is of itself the really decisive matter in answering the question."

At page 48 Lord Greene again states:

"I do not propose to add anything by way of expression of my own views on the principles on which that question ought to be determined. It is a question which has been investigated very carefully in a number of different connections & different matters of fact have been regarded in different cases as of importance & of weight. It seems to me, on all the facts of this case, including the terms of the contract itself which is the important, & indeed, the essential fact in the case, that the Commissioners were perfectly entitled to come to the conclusion to which they did come, that this class of payment was not of an income nature but of a capital nature. I can find nothing in the facts of the case, or in the construction of the documents, which would justify me in saying that the Commissioners' conclusion is wrong in law; & in my judgment their conclusion is the right one."

Scott, L. J. in his concurring judgment emphasised that in so far as the Special Commissioners came to the conclusion that a particular payment had "the accountancy quality" of capital payment, that was a view which the Court of Appeal was entitled & ought to give great weight. At page 49 Scott, L. J. states:

"In my view, that kind of weight ought to be attached to the findings of the Commissioners in the present case. It is quite true that they put before us the whole of their material, & that that material, in substance, consists of agreement made between the licensees & the patentees, & nothing more. But they have taken the view, without hesitation evidently, that these lump sum payments were in the nature of capital payments. *If there were any doubt from the purely legal point of view, which I do not think there is, that opinion of the Commissioners ought to weigh in the balance, &* in my opinion. this is an additional reason for upholding their finding."

In my opinion this is the proper legal principle of this decision & only on such a principle can the decision be reconciled with *Mills case & Constantinesco's case*

[18] Reference should be made to *Glasson* v. *Rongier*, (1944) 26 Tax Cas 86 in which the assessee who was admittedly carrying on the vocation of authoress, had entered into three agreements with a publishing company in 1925, 1932, & 1935, respectively, whereby she granted limited publishing rights in respect of three books written by her in consideration of payments based on the number of copies sold. In 1940 these agreements were cancelled & the same limited publishing rights were transferred outright to the publishing company in consideration of a lump sum payment. On appeal against an assessment to income-tax it was contended that the lump sum payment was a capital receipt. Macnaghten J. rejected the contention, holding that the payment in question formed part of the annual profits & gains of the assessee, & was rightly taxed.

[19] My learned brother has referred to the fact that in *Salmson Aero Engine's case*, the decision of Lord Greene was also based on the circumstance that:

"in the agreement there was a fundamental difference in the nature of the two classes of sums, in this sense that the former class starts off by being a lump sum payment definite & fixed, which is then payable by instalments. The other class is not of that description; no lump sum payment is referred to; it is on the face of it, nothing but an undertaking to pay yearly sums as royalty."

But this passage must be read in the context of the whole judgment & the decision of Lord Greene in a subsequent case shows that the circumstance is by no means decisive of the matter. In *Rustproof Metal Window Co. Ltd.* v. *Inland Revenue Commissioners*, (referred to supra) a patentee had entered into a contract conferring on a licensee the right to manufacture up to a stated number of articles in accordance with the patent on condition that the licensee paid a lump sum down & a royalty of so much per article. Even so Lord Greene held that the lump sum payment was an income & not a capital receipt & so was liable to excess profits tax & that the division of the price into separate elements did not by itself have the effect of turning the lump sum into a capital receipt. At page 66 Lord Greene states:

"The only considerations on the other side, once the company's arguments above discussed are rejected, are that the parties themselves call the £3000 a capital payment & the agreement separates the £3000 from the payments which are described as royalties. I cannot attach to these considerations sufficient importance to outweigh those on the other side. The fact that parties call the £3000 a capital sum cannot make it a capital sum if it is not. The word capital is a mere lable attached to the £3000 with an eye, no doubt, to tax considerations. The fact that the agreement separates the £3000 from the royalties is nothing more than a drafting necessity having regard to the fact that the latter are based on the actual number of boxes treated with the process, while the former is paid for the right to apply the process to any number of boxes up to Rs. 75,000. If a patentee negotiating with an intending licensee who wishes to obtain the right to manufacture up to a stated number of articles in accordance with the patent states his terms to be a lump sum down & a royalty of so much per article I can see no reason why the more division of the price into those separate elements should by itself necessarily produce the result that the sum down must be regarded for tax purposes as a capital receipt."

[19a] It was urged on behalf of the assessee that if the premium in this case is held to be an income receipt it ought to follow as a logical result that the price for an outright sale of the royalties should be classed as income & not as a capital receipt, that such a conclusion was opposed to common sense. But it is not the business of the Court to demarcate the boundary between two categories in a mathematical sense. The indication of the boundary need only be sufficiently distinct for the immediate problem in hand. In this connection reference should be made to *Hobbs* v. *L. & S. W. Railway*, (1875) 10 Q. B. 111, in which Lord Blackburn observed of the rule in *Hadley* v. *Baxendale*:

"It is a vague rule, & as Bramwell B. said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night or day; but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is."

[20] For the reasons given I am definitely of opinion that the amount of Rs. 2 lakhs which was

paid by the Bengal Discount Co. to the assessee in consideration of the so-called indentures of lease was a taxable income.

[21] This question must therefore be answered against assessee.

[22] As regards the second question it was argued for the assessee that there was no material upon which the Income-tax Officer could regard the amount of Rs. 84,000 as income from undisclosed source. Mr. Dutt pointed out that three reasons were given by the Appellate Tribunal in support of the inference that the sum of Rs. 84,000 was taxable. In the first place, it was stated that the assessee did not produce any Home Chest Account though it was his case that the high denomination notes were savings from his personal allowance. In the next place, it was pointed out that the assessee could not save any money since in the indenture of lease, Ex. D-3, there is a recital that the assessee was in need of money to pay the income-tax & road-cess for the properties. Lastly, it was observed by the Tribunal that the assessee was not in a position to say wherefrom the notes of the value of Rs. 10,000, each were obtained & his failure to do so led to the conclusion that he was unwilling to disclose the source. On behalf of the assessee it was argued that no Home Chest Account was maintained by the assessee & the Tribunal had no warrant for drawing an adverse inference. In my opinion the contention of the assessee is correct. There was no material before the Tribunal to suggest that a Home Chest Account was maintained & the Appellate Tribunal ought not to have drawn an adverse inference because no such account was produced. As regards the recital in Ex. D 3, learned counsel for the assessee stated that the accounts of the amounts withdrawn by the Raja for seven years were produced before the Tribunal, that the accounts showed that the Raja had a balance of Rs. 1,84,000. These account books were accepted by the Tribunal as genuine & there was hence no material upon which the Tribunal could reach the inference that the high denomination notes were not the saving of the Raja out of his personal allowance which he had drawn. It appears that the amount of Rs. 84,000 consisted of three notes to the value of Rs. 10,000 each & the rest of Rs. 1,000 each. The Income tax Officer had asked the Raja to show any lump sum payment of above Rs. 10,000. The Raja actually showed three such receipts, the first dated 15-3-1943 for Rs 25,565, the second dated 10-2-1945 for Rs. 45,000 & the third dated 24-9-1945 for Rs. 29,534. The Tribunal remarked that there was no evidence that there was a Rs. 10,000 note in any of these receipts & that the Raja & his employees had not disclosed from whom the notes of the value of Rs. 10,000 each were obtained. In my opinion, there is no onus thrown upon the Raja to indicate from whom each note to the value of Rs. 10,000 was received, & no adverse inference ought to have been drawn by the Tribunal against the assessee.

[23] In this context reference should be made to *Income-tax Commissioner, Bombay Presidency & Aden* v. *Bombay Trust Corporation Ltd.*, 63 I. A 409 in which B, a company registered & carring on business in British India, was assessed to income-tax in respect of the year of assessment 1928-29 as agent of H, a company registered & carrying on business outside India. On a reference to the High Court it was held that there was no evidence that in 1927 H received from B, any sums as interest on money lent, and that H, was not therefore in receipt of the profits or gains taxable under S. 42, sub-s. 1, & S. 43, Income-tax Act. At p. 418 the report states:

"In their Lordships' opinion the High Court at Bombay have rightly answered in the negative the question referred to them. However sceptical the attitude which the income-tax authorities may think fit to adopt towards the declarations offered & the entries made in the Bombay company's books, it is necessary, if the assessment made is to be supported, that there shall be some evidence to show that in 1927 the loan from the Hong Kong company continued, & that interest "accrued or arose" to that company thereon. If the entries in the books show no payment to the Hong Kong company and nothing due to the Hong Kong company, the income-tax authorities cannot, without evidence, insist upon a right to treat entries showing a tael loan of six & a half-crores made by a Shanghai company & interest calculated in taels paid thereon, as evidence that a somewhat similar amount was due from & was being paid by the Bombay company to the Hong Kong company."

[24] In the result I hold that there is no material to justify the assessment of Rs. 84,000 representing the value of high denomination notes which the assessee encashed on 24-1-1946. This question must accordingly be answered in favour of the assessee.

[25] As the assessee has succeeded in part I do not propose to make any order as to costs of the hearing.

[26] **Sarjoo Prasad J.** — I agree with my learned brother in the answer proposed by him to the second question under reference, namely, that there was no material to justify the assessment of Rs. 84,000 representing the value of high denomination notes which were encashed on 21-1-1946. But as I am going to indicate, I have felt considerable difficulty & hesitation in according my assent to the answer given by him to the first question under reference, namely, whether on the facts & in the circumstances of the case the Tribunal was right in holding that the sum of Rupees two lakhs received from Bengal Discount Company Limited was a taxable income.

[27] The sum of Rs. 84,000 had been assessed by the Revenue Officer as the assessee's income from undisclosed sources. The findings of the Tribunal on that point are not adequate to lead to an inference that the said sum represented some secret profits of the assessee & was, therefore, taxable as income from undisclosed sources. The

assessee had submitted his accounts from which it appeared that the assessee had, during the last seven years from 1346 to 1352 B. S., drawn from his *serishta* various sums of money representing the income from his estate & had from time to time given back to the *serishta* according to his requirement certain sums of money, & the difference between the two sums represented a balance of Rs. 1,82,000 & odd which amount would be more than sufficient to cover & explain the sum of Rs. 84,000 representing the value of the high denomination notes. These figures have not been contested by the Department, and in fact they have been accepted by the Revenue-authorities. The case of the Department, however, is that this amount must have been spent by the assessee in view of the fact that he entered into the transactions with Bengal Discount Company for the purpose of raising money to satisfy his needs. If the view of the Department is correct, then the money must have been spent before 21-4-1945, when the assessee first entered into transaction with the aforesaid Company & the income aforesaid must have been received by the assessee between this 21-4-1945 & 21-1-1946, when the high denomination notes appear to have been cashed. Now the various sources of the assessee's income are all stated in the accounts, & if the accounts are held to be genuine, as they have been held to be genuine, I do not see how it can be inferred that this money came from any different source during the period in question. The Revenue-authorities appear to have presumed that there was some homechest account kept by the assessee which the latter has failed to produce, & therefore, the presumption must be raised against him. In my opinion, there is no legal foundation for such a presumption as there is no basis for assuming that there was a homechest account maintained by the assessee. My learned brother has elaborately gone into this question, & it would not serve any useful purpose for me to repeat the reasons given by him for coming to the conclusion that there was no justification for the assessment of the said Rs. 84,000.

[28] The difficulty, however, arises when dealing with the first question whether the Revenue authorities were justified in assessing the sum of rupees two lakhs received by the assessee from the Bengal Discount Company. This amount represented the *salamis* received by the assessee on account of three different leases executed by the former in favour of the said Company. The documents are described as indentures of leases & the lump sum payment of rupees two lakhs has been specifically mentioned as *salami*, while there are small annual payments of Rs 10 or Rs. 15 mentioned in the documents by way of *rent*. The documents also indicate that they are to operate for the periods of 11, 10 & 15 years respectively. The subject-matter of the lease as mentioned in the documents is a certain area of land being about 323 acres or 544 bighas. The documents proceed to recite that by virtue of the lease in question the lessee will be entitled to realise all the royalties & commissions payable to the lessor by one Rai Sahib Chandanmal Indrakumar who had already taken settlement of the mining rights in the lands from the lessor. The lessee was also given the right to realise rent on account of certain surface rights from the said Rai Sahib, but he had no right whatsoever to the remaining surface lands. The lessee was further placed in the same position as the lessor in regard to the right to realise rents, royalties & commissions from Rai Sahib Chandanmal during the operation of the lease. The document further provided that if during the said period the lessee auction-purchased for arrears of royalties & commissions the interest of Rai Sahib Chandanmal Indrakumar in the lands, then after the expiry of the lease the purchaser lessee would have to pay the rents & royalties as payable by Rai Sahib Chandanmal himself to the lessor. These, in short, are the material terms of the document. It would prima facie appear on the face of the recitals that this lump sum payable under the various leases was payable as *salami* & was sought to be a distinct payment from the annual payments mentioned therein. There was thus a fundamental difference in the nature of the two classes of sums payable under the leases in question. The former starts off with a lump sum payment, definite & fixed; the other class is not of that description. The latter class is indisputably nothing but an undertaking to pay yearly sums as royalty. The parties were thus creating an obligation as between themselves which they chose to describe as *rent* payable each year in respect of the fixed rate but as *salami* in regard to the lump sum payment.

[29] It has been held in various cases of this Court that *salami* is really in the nature of a premium paid for granting a lease; in other words, it was the purchase price of a lease-hold interest; but so far as annual rent or royalty is concerned, it being an annual increment to the income, it was taxable as such. Normally, therefore, *salami* would be regarded as a capital receipt unless the Revenue-authorities showed that there was something in the circumstances of the case to indicate that it was not a capital receipt but a payment made in lieu of the periodical income or a payment in advance of rent or royalty; see, for instance, *Shiva Prasad* v. *Emperor*, 4 Pat. 73 and *Commissioner of Income-tax* v. *Visheshwar Singh*, 18 Pat. 805. There is thus a vital difference between a single payment made at the time of the settlement and recurring payments made during the period of the enjoyment of the property. The parties have themselves chosen to clothe the transaction in that form & the question is whether the presence of *tertius* gudens in the shape of the Revenue, on the scene would make any material difference to the real nature of the transaction.

[30] It has been urged on behalf of the Department that the Court in construing a document must look to the substance of the transaction; in other words, the Court must tear off the veil & look in the face of the transaction itself. It is pointed out that the substance of the transaction in the present case is more or less this: that a lump sum of royalty is being paid in advance to the assessee for the period of the lease, & the document does not really transfer any right in the corpus of the property itself but merely a right to realise royalty. Speaking for myself, I do not see why the document cannot be regarded as a transfer of interest in immoveable property itself. It is true that the lessor had at the time only the right to receive the royalty from Rai Sahib Chandanmal but at the same time continued to be the owner of the lands in question, and he purported to transfer a parcel of this right as owner in favour of the lessee which for the time being was demonstrated by his right to realise rents & royalties. Then again the premium or *salami* paid cannot be assumed necessarily to be a lump sum payment of the royalty in advance. In that case every premium can be treated as a consolidated amount of the rental paid in advance. It goes without saying that premium or price is always fixed after taking into consideration the amount of annual rent which the lessee is to pay to the lessor, & this ratio of the premium to the annual rent varies almost in each case in the inverse proportion. It is true that the lessee here gets the right to collect the royalty during this period, but then the position is that for the period of the lease the lessor cannot enforce this right as against Rai Sahib Chandanmal, & it is on account of parting with this right that the lessor-assessee has received the consideration of the premium in question. Besides, the royalty actually realisable by the lessee from Rai Sahib Chandanmal from year to year is a variable & an unknown quantity (though, of course, the minimum royalty may be indicated). Therefore, there is nothing to connect the premium paid with the proportion of the royalty realisable by the lessee himself after the leases began to operate. For all these reasons I was inclined to think that this *salami* was not an advance payment of the annual rent or royalty for the period of the lease; although it must be conceded that the period during which the lease is to be operative varies from 10 to 15 years only, & the annual rental payable is a very small amount.

[31] I do not find it easy to distinguish the present case from the *ratio decidendi* in *Commissioners of Inland Revenue* v. *British Salmson Aero Engines Ltd.*, (1938) 22 Tax. Cas. 29. In that case the assessee by a certain agreement granted to the licensees an exclusive right for a period of ten years to construct, use & sell in a certain territory Salmson Aero Engines. The consideration for the license was that the licensees were to pay a fixed sum of Rs. £25,000 payable in three instalments &, in addition to these payments, & as royalty, a sum of £2,500 & a like sum each twelve months during the following nine years. The Crown contended that all these payments were income & the assessee insisted, on the contrary, that all these payments were in the nature of capital receipts. The Master of the Rolls in coming to his decision referred to two important circumstances;

"The first thing to notice about it is that it is not merely an agreement under which the English Company receives the right to use a patent: Under this agreement the English Company is entitled to restrain the patentees themselves from exercising the patent in the territory, & it is entitled to call upon the patentees to take steps to prevent others exercising the invention within the territory. Now these rights are to my mind different from the mere right of user."

In the present case even if we regard the leases not as constituting any transfer of interest in immoveable property but as mere license for a certain number of years to collect the rent & royalty, the assessee has certainly parted with his right to make such collection during the period in favour of the licensee who alone could sue for the rent & royalties in question. The other circumstance to which the Master of the Rolls refers is that in the agreement there was a

"fundamental difference in the nature of the two classes of sums, in this sense, that the former class starts off by being a lump sum payment, definite & fixed, which is then payable by instalments. The other class if not of that description, no lump sum payment is referred to; it is, on the face of it, nothing but an undertaking to pay yearly sums as royalty."

It was accordingly held in the case that the lump sum payment of £25,000 was as capital receipt not liable to assessment but that the further payments of £2,500 were royalties & taxable as income of the assessee. It is true that the case was a decision on its own facts but the facts are very significant. The contract was not a lease but a mere license & the period for which it was to operate was only a period of ten years, yet the decision about the lump sum payment was to treat it as a capital payment & not income. This decision has been very strongly relied upon by Manohar Lall J. in 18 Pat. 805, referred to above.

[32] The term 'income' has nowhere been defined in the Income-tax Act any more than the case of *Shaw Wallace & Co.* 59 I. A. 206 : 59 Cal. 1843 the Judicial Committee attempted to describe the term 'income' in the following manner :

"The object of the Indian Act is to tax 'income' a term which it does not define. It is expanded, no doubt, into 'income, profits & gains' but the expansion is more a matter of words than of substance. 'Income', their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continously productive but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus, income has been likened pictorially to the fruit of a tree or the crop of a field. It is essentially the produce of something which is often loosely spoken of as "capital." But capital, though

possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production."

[33] This definition or description of income appears to have been substantially adopted by Lord Russell who further amplified it in the case of *Gopal Saran Narain Singh* v. *Commissioner of Income-tax, B. & O.* 62 I. A. 207. Again in *Kamakshya Narain Singh's case*, 22 Pat. 713 Lord Wright in adverting to the earlier judgments observed :

"It is not in their Lordships' opinion correct to regard as an essential element in any of these or like definitions a reference to the analogy to the fruit, or increase, or sowing or reaping or periodical harvests.... Sir George Lowndes speaks of income being likened pictorially to the fruit of a tree or the crop of a field. But it is clear that such picturesque similies cannot be used to limit the true character or income in general ..... Income is not necessarily the recurrent return from a definite source, though it is generally of that character. Income again may consist of a series of separate receipts as it generally does in the case of professional earnings. The multiplicity of forms which income may assume is beyond enumeration."

This broader connotation of the word 'income' makes it all the more difficult and elusive and it is not easy to specify and define its various characteristics.

[34] There has, therefore, often been considerable embarrassment in drawing a line between what is capital receipt and what is revenue receipt or 'Income.' It was this embarrassment which tempted an eminent Judge to observe that in some cases the matter is so dangerously close to the border-line that it has to be decided, as it were, by the spin of the coin. The cases relied upon on behalf of the Taxing Department are all cases where the lump sum payment specifically carried the attribute of the periodical payment as income & was definitely identifiable as such. It is true that the Income-tax Act is not cast on logical lines and in some cases the line has to be drawn with an arbitrary firmness. This case appears to me to be very much on the border-line, if not, as I tried to show, on the right side of it. My learned brother is very definitely of the opinion that

"the amount of Rupees Two lakhs which was paid by the Bengal Discount Company to the assessee in consideration of the so called indentures of lease was a taxable income."

His decision is in conformity with the decision of the revenue authorities & I do not propose to disturb the *status quo* unless the circumstances of the case were absolutely compelling & pointed definitely in a contrary direction. I have, therefore, persuaded myself eventually to adopt the answer proposed by my learned brother to the first question as well. The question whether a certain amount is *capital receipt* or income has always to be decided on the facts & circumstances of each case, & no hard & fast rule can be laid down for the purpose.

D.R.R. *Reference answered.*

A. I. R. (38) 1951 PATNA 174 (C. N. 26)

RAMASWAMI AND SARJOO PRASAD, JJ.

In the matter of M/s. Chhaturam Horilram Ltd.

Misc. Judicial Case No. 230 of 1949, D/- 14-3-1951.

(a) *Income-Tax Act (1922), S. 34 — 'Definite information' and 'discovery' meanings of.*

No universal meaning can be given to the meaning of the phrase "definite information" inasmuch as the application of S. 34 must depend upon the particular circumstances of each case. It is not, however, necessary that the "definite information should relate to a pure question of fact. Even definite information with respect to the state of the law will bring the section into operation. The section cannot be invoked merely because the income-tax Officer changed his mind about the interpretation of the law but the section will doubtless operate if the Income Tax Officer is informed that a case has been overruled or that a statute or a regulation had been passed which has not been brought to his attention before. The word "discovery" which occurs in S. 34 must be construed to mean no more than "finds out" or "has reason to believe" or "satisfies himself". (1934) I K B 524; (1938) 2 K B 220; (1938) 22 Tax Cas 305, Rel. on. A I R (21) 1934 P C 30, dist. (Para 6)

The assessee a limited company carrying on business in Chotanagpur, a partially excluded area, was assessed to income-tax for the year 1939-40 under the Indian Finance Act 1939 though it was not in force in that area. The assessment was set aside by the Appellate Tribunal and also by the High Court upon a reference to it. In the meanwhile Bihar Regulation 4 of 1942 had come into force on 7-7-1942 with retrospective effect from 30-3-1939 as a result of which the Finance Act 1939 was brought into force in Chotanagpur. The Income-tax officer then cancelled the previous notice under S. 34 and issued a fresh notice under S. 22 (2) read with S. 34 on 12-2-1944 on the strength of Reg. 4 of 1942.

'Held' that the circumstance that the Income-tax Officer came to know that Regulation IV of 1942 had been promulgated constituted "definite information", in consequence of which the income-tax officer discovered that the income which was chargeable in 1939-40 had escaped assessment. The previous proceedings for assessment were invalid and non-existent and therefore the second notice under S. 34 issued on 12-2-1944 was valid. A I R (29) 1942 All 295, Rel. on. A I R (25) 1938 P C 175, dist. (Paras 6, 8)

Anno: I. T. Act, S. 34, N. 2, 5.

(b) *Income-tax Act (1922), S. 66 — Nature of jurisdiction of High Court.*

The jurisdiction with which the High Court is invested under S. 66, Income-tax Act is of an exceptional nature and in hearing the reference the High Court has seisin only of such question of law as has been duly raised before the Appellate Tribunal and upon which there is a statement of the case. It cannot entertain a new question. A I R (37) 1950 Mad 652; A I R (20) 1933 P C 108; A I R (17) 1930 P C 151, Rel. on. (Para 9)

Anno: I. T. Act, S. 66 N. 20, 21.

Baldeo Sahay and R. J. Bahadur, for Petitioner — S. N. Dutta, for Opposite Party.

Cases referred to:

('30) 57 I A 152: (A I R (17) 1930 P C 151) (Pr 9)
('33) 60 I A 146: (A I R (20) 1933 P C 108) (Pr 9)
('34) 2 I T R 71: (A I R (21) 1934 P C 30) (Pr 6)
('38) 6 I T R 414: (A I R (25) 1938 P C 175) (Pr 8)
('42) 10 I T R 322: (A I R (29) 1942 All 295) (Pr 8)
('31) Lachhiram v. Comms. of Income-Tax, (A I R (18) 1931 Cal 545 S B) (Pr 6)
('50) 18 I T R 234: (A I R (37) 1950 Mad 652) (Pr 9)
(1934) 1 K B 524: (103 L J K B 204) (Pr 6)
(1938) 2 K B 220: (107 L J K B 472) (Pr 6)
(1938) 22 Tax Cas 305: (1938 S C 765) (Pr 6)

RAMASWAMI, J.: This reference is made by the Income-tax Appellate Tribunal under S. 66 (1), Income-tax Act.

(2) The assessee Chaturam Horilram Limited of Kodarma is a private limited company which is composed of two Hindu undivided families of which Chaturam & Darshanram are the kartas. The assessee carried on the business of exporting mica for sale to foreign countries. On 22-12-1939 the Income-tax officer made assessment for the year 1939-40 & determined the total income to be Rs. 1,09,200. In appeal the Appellate Tribunal set aside the assessment on the ground that the Indian Finance Act of 1939 was not in force in Chotanagpur which was a partially excluded area. At the instance of the Commissioner of the Income-Tax reference was made to the High Court on the following question:

"whether levy of income-tax should be made on the assessee for the year 1939-40 in the absence of a notification under S. 92 (1), Govt. of India Act, by the Governor extending the Finance Act of 1939 to the excluded area?"

On 30-9-1943, the High Court answered the question in the negative.

(3) After the decision of the Appellate Tribunal but before the date of the judgment of the High Court the Governor of Bihar enacted Bihar Regulation IV of 1942 to which the Governor-General gave assent on 30-6-1942. The notification was published in the Bihar Gazette on 7-7-1942. As a result, the Indian Finance Act of 1939 was brought into force in Chotanagpur Division & the Santal Parganas District with retrospective effect from 30-3-1939.

(4) On 8-7-1941 the Income-tax Officer had issued notice to the assessee under S .34, Income Tax Act. At the instance of the assessee the proceedings were stayed for some time but on 8-2-1944 the Income-tax officer made the following order:

"Due to recent judgment of the High Court the assessment under S. 23 (3) stands cancelled & with it the notice under S. 34 issued in this case becomes ineffective & is withdrawn. Assessee derives income from mica mining & dealing, money-lending, mining rents & non-agricultural sources of zamindary, & this has escaped assessment in its entirety. Issue notice under S. 22 (2) read with S. 34 again to file a return of income in the prescribed form & within the prescribed time, & inform the assessee that the original notice under S. 34 has been cancelled."

A fresh notice under S. 34 was issued on 12-2-1944 after which the income of the assessee was determined to be Rs. 4,86,351. On appeal the Assistant Commissioner reduced the amount by Rs. 11,187. The assessee preferred an appeal to the Income-tax Appellate Tribunal who held that the notice under S. 34 was validly issued. It was also before the Tribunal that the cash credits amounting to Rs. 4,04,618 in the books were satisfactory explained. The Tribunal held that the assessee had failed to discharge the onus which lay upon him to explain the cash credits & that the Income-tax Officer had rightly held that the cash credits were secret profits of the assessee.

(5) At the instance of the assessee the Appellate Tribunal has propounded the following question of law for being determined by the High Court:

"Whether in the circumstances of the case, the notice issued on 12-2-1944 under S. 34, Income-tax Act, was validly issued for the assessment of the year 1939-40?"

(6) On behalf of the assessee Mr. Baldeva Sahay stressed the argument that the notice issued under S. 34 was illegal since the Income tax officer had no "definite information", and since there was no "discovery" that income chargeable to income-tax had escaped assessment. Learned Counsel, therefore, maintained that the conditions precedent for the issue of the notice were not existent & the assessment made under S. 34 was illegal. In my opinion this argument is wholly untenable. From the statement of the case it is plain that on 8-2-1944 the Income-tax Officer cancelled the original notice which had been issued under S. 34 on 8-7-1941. Instead the Income-tax Officer issued a fresh notice under S. 22 (2) read with S. 34 requiring the assessee to file return of income. It is true that in the order dated 8-2-1944 the Income-tax officer did not mention in so many words that Regulation IV had not been promulgated. But as observed in the judgment of the Appellate Tribunal there can hardly be any doubt that the fresh notice dated 12-2-1944 was issued on the strength of Regulation IV of 1942. The circumstances that the Income-tax Officer came to know that Regulation IV of 1942 had been promulgated constitutes in my opinion "definite information", in consequence of which the Income-tax officer discovered that the income which was chargeable in 1939-40 had escaped assessment. No universal meaning can be given to the meaning of the phrase "definite information" for it is obvious that the application of S. 34 must depend upon the particular circumstances of each case. It is not however, necessary that the "definite information" should relate to a pure question of fact. Even definite information with respect to the state of the law will bring the section into operation. The section cannot be invoked merely because the Income-tax Officer changed his mind about the interpretation of the law but the section will doubtless operate if the Income-tax Officer is informed that a case has been overruled or that a statute or a regulation had been passed which has not been brought to his attention before. Upon the admitted facts of the present case it is manifest that the Income-tax officer had definite information with respect to the promulgation of Bihar Regulation IV of 1942 & as a result of this denfiite information the Income-tax officer made discovery that income had escaped assessment. The word "discovery" which occurs in S. 34

must in my opinion be construed to mean no more than "finds out" or "has reason to believe" or "satisfies himself". This view is supported by 'Williams v. Trustees of W. W. Grundu', (1934) 1 K B 524, in which case the discovery was that an interest supposed to be vested was in fact contingent, that is to say, it was as to a pure point of law. Finlay J. held "discovers" means only "has reason to believe" or " finds out" & he followed the same view in a later case 'British Sugar Manufacturer Ltd. v. Harris', (1938) 2 K B 220. In a Scotch case, 'Commissioners of Inland Revenue v. Mackinlay Trustees', (1938) 22 Tax Cas 305, the Judges adopted the same view as that taken by Finlay J. holding that "discovery" might include a mere discovery of the state of law, & that it was not necessary that any new fact should be discovered. On behalf of the assessee Sahay J. contended that the assessee had made a due return of his income in 1939-40 & such income cannot be said to have escaped assessment within the meaning of S. 34 of the Act. Learned Counsel referred to 'Rajendranath Mukherjee v. Commissioner of Income-tax, Bengal', (1934) 2 I T R 71 (P C), in which the question was whether the Income-tax Officer could proceed under S. 23 (1) or that he should have proceeded under S. 34, Income-tax Act. It appears that in April 1927, notice was issued to Burn & Co. calling for a return of their income for the year 1926-27 & a return was duly made in 1928. Meanwhile the income-tax authorities thought that Martin & Co. had purchased Burn & Co. & made an assessment on Martin & Co. in respect of the joint income to Burn & Co. & Martin & Co. Martin & Co. appealed & the High Court ultimately held on 16-5-1930, that the two companies should have been separately assessed. The assessment of Martin & Co. was accordingly amended by eliminating the income of Burn & Co. & the Income-tax officer assessed Burn & Co. on 8-11-1930 on their income as returned in 1928. It was held by the Judicial Committee that the assessment made under S. 23 (1) on Burn & Co. on 8-11-1930 was a legal assessment. Lord Macmillan who pronounced the opinion of the Judicial Committee observed that the income of Burn & Co. did not "escape assessment" within the meaning of S. 34, Income-tax Act, that income which has been duly returned for assessment cannot be said to have escaped assessment within S. 34 though it has not been taxed within the assessment year. At p. 77 he observed:

"The fact that S. 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income which has already been duly returned for assessment cannot be said to have 'escaped' assessment within the statutory meaning. Their Lordships find themselves in agreement with the view expressed in 'Lachhiram Basantlal v. Commissioner of Income-tax, Bengal', by the learned Chief Justice (Bankin) at p. 118: 'income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessees' income which have not yet terminated in a final assessment thereof'. It may be that if no notice calling for a return under S. 22 is issued within the tax year then section 34 provides the only means available to the Crown of remedying the omission, but that is a different matter."

(7) It is patent that the Judicial Committee proceeded on the assumption that the assessment of Burn & Co. was pending all along & there was no necessity to issue notice under S. 34. The facts of the present case are widely different. There was no valid notice served under S. 23 (2) & there was no valid proceeding under S. 34 before the Bihar Regulation IV of 1942 was enacted. As the Indian Finance Act of 1939 had not been extended to Chotanagpore, all proceedings initiated by the Income-tax officer before 30-6-1942 were illegal & the ratio of the Privy Council case will not therefore be applicable.

(8) Mr. Baldeva Sahay learned counsel for the assessee further pointed out that on 22-12-1939 the Income-tax officer assessed total income to be Rs. 1,09,200 but on 29-3-1944 after the notice under S. 34 was served the Income-tax Officer determined the total income of the assessee to be Rs. 4,86,351. The contention was raised on behalf of the assessee that it was not open to the Income-tax officer to go on making fresh computation & issuing fresh notice of demand. In support of his argument reference was made to 'Commissioner of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas', (1938) 6 I T R 414 (PC), in which on 17-1-1927, the assessees who were registered as a firm were assessed under S. 23 (4) of an income of Rs. 1,25,000 at the maximum rate. Being a registered firm no super tax was levied. A notice of demand was also made before March 1927. On 13-2-1928, the Commissioner, in exercise of his power under S. 33, cancelled the order registering the assessees as a firm & directed the Income-tax officer to take necessary action. On 4-5-1929, the Income tax officer assessed the firm to super tax. Upon these facts it was held by the Judicial Committee that the assessment made on 17-1-1927, was final and conclusive, that fresh action taken by the Income-tax Officer on 4-5-1929, was hopelessly out of time; that the order of 4-5-1929, was therefore one which the Income-tax Officer had no power to make. The Judicial Committee held that it was a debatable question whether the circumstances in the case were such as to bring it within the provisions of S. 34; but the case clearly would have fallen within the provisions of S. 35 had the Income tax officer exercised his power under section within one year from the date on which earlier demand was served upon the respondents. The facts of the present case are manifestly different for the assessment made by the Income tax officer was illegal since the Indian Finance Act of 1939 was not in force in Chotanagpore on the material date & the principle of the Privy Council case cannot therefore be applied. On behalf of the Commissioner of the Income Tax Mr. Dutta relied upon 'Bishwanath Singh v. Commissioner of Income-tax', (1942) 10 I T R 322 (All), in which the facts are almost parallel to those of the present case. The assessee, the late Maharaja of Benares, was a non-resident & he was assessed to income-tax for the assessment year 1936-37 without appointing an agent under S. 43 of the Act. The High Court, therefore, set aside the assessment on 14-2-1938. Nine days later the Income-tax officer made an order appointing an agent of the Maharaja & notice under S. 34 read with S. 22 was served upon the agent. Return was subsequently filed by the agent & he was

assessed to income-tax. The assessee contended that the income had not escaped assessment within the meaning of S. 34 of the Act & therefore the notice issued on the agent on 23-2-1938 was not valid. Upon these facts it was held that the former notice issued to the Maharaja was not a notice within the meaning of S. 22 (2) & the assessment proceedings were illegal & were void from start to finish. Consequently the income had escaped assessment within the meaning of S. 34 of the Act & the notice dated 23-2-1938 issued on the agent was legally valid. In the present case too the assessment made by the Income-tax Officer on 22-12-1939 was illegal & void since the Indian Finance Act 1939 was not operative in Chotanagpore on that date. The proceedings under S. 34 initiated by the Income-tax Officer on 8-7-1941 were wholly without jurisdiction for the same reason. In the eye of law the assessment proceedings (previous to 7-7-1942) were non-existent. In my opinion, the second notice under S. 34 of the Act dated 8-2-1944 was therefore validly issued for assessment of the year 1939-40.

(9) On behalf of the assessee Mr. Baldeva Sahay contended that there was no evidence on which the Tribunal could have held that the cash credits were secret profits of the assessee. But this question has not been formulated by the Appellate Tribunal; no statement of the case has been made thereon. It is therefore not open for the High Court to examine this question in this case. It is of importance to state that the jurisdiction with which the High Court is invested under the Income-tax Act is of an exceptional nature and in hearing the reference the High Court has seisin only of such question of law as has been duly raised before the Appellate tribunal & upon which there is statement of the case. The view that I have expressed of S. 66 finds support from 'Anglo French Textile Co.. Ltd. v. Income Tax Appellate Tribunal', (1950) 18 ITR 234 (Mad), in which an assessee applied to the Income-tax Appellate Tribunal under S. 66 (1), Indian Income-tax Act, to refer certain questions to the High Court. The Tribunal referred only some of them & refused to refer the others on the ground that they did not arise. The assessee thereupon filed an application in the Original Side of the High Court under S. 45, Specific Relief Act, for a writ of mandamus requiring the Tribunal to refer the other questions. The application was rejected by the High Court & it was held that no mandamus could be issued for the reasons that S. 66 was self-contained & did provide for the contingency when the statement of the case was incomplete as well as when no reference had been made at all. The principle finds support in the following observation of Lord Macmillan when delivering judgment of the Board in 'Commissioner of Income Tax Bihar & Orissa v. Maharajadhiraja of Darbhanga', 60 I A 146 at p. 160:

"The Commissioner unfortunately omitted to formulate any question of law arising out of this transaction. The duty of the High Court under S. 66, Sub-s. 5 is to decide the question of law raised by the case referred to them by the Commissioner & it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the questions to be decided. Their Lordships deprecate this departure from regular proceedings, but in the circumstances have not thought it proper to decline to express their view on the question thus informally presented."

Reference should also be made to 'Trustees Corporation (India) Ltd. v. Commissioner of Income-tax, Bombay', 57 I A 152, in which Lord Blanesburgh said:

"Their Lordships are fully alive to the circumstances in which the High Court was constrained to direct that these further questions should be referred to it for consideration & the result in the present case of the order then made merely serves to confirm the view of the Board that the High Court will, in future cases, be well advised to require before they seek to entertain any question under S. 66, Income-tax Act, that the preliminary requirements of the section are strictly complied with. The stringency of these requirements is clearly deliberate. It is the intention of the enactment that the High Court is not to be flooded with such applications. The object is salutary & in their Lordships' judgment the High Court will be well advised, before they entertain any question under the section, always to see that the preliminary statutory conditions have been fully observed."

(10) It is necessary to state that the provisions of the corresponding section of the English Income-tax Act (8 & 5 Geo, V Ch. 40, S. 149) are different from those contained in S. 66, Indian Income-tax Act & the interpretation of S. 66 must depend upon a consideration of the language in which that section is couched & a reference to English practice is not apposite.

(11) In the result I hold that the question referred to the High Court should be answered in the affirmative. The assesee must pay the cost of this reference. Hearing fee Rs. 250.

(12) SARJOO PROSAD, J.: I entirely agree and have nothing to add.

K.S. *Answer in the affirmative.*

A. I. R. (38) 1951 PATNA 177 (C. N. 27)

LAKSHMIKANTA JHA C. J. AND CHATTERJI J.

Champamani Bibi and another, Appellants v. Mohammad Yunus and others, Respondents.

Supreme Court Appeal No. 69 of 1948, D/- 19-3-1951.

(a) Civil P. C. (1908), S. 110 para 2 — Para whether independent of para 1 — Value of subject-matter in suit less than Rs. 10, 000 — Appeal to Supreme Court, whether lies under para 2.

What S. 110, Civil P. C. requires is that the subject-matter in the Court of first instance must be Rs. 10,000 or upwards, and in addition that the amount or value of the subject-matter on appeal must be the same or the decree must involve, directly, or indirectly some claim or question to or respecting property of like amount or value. This latter provision contained in para 2 of the section is to be read as an alternative to the second restriction in the earlier part of the section. To read it as a provision independent of para. 1 of the section would render the provision in para 1 as to the value of the subject-matter in the Court of first instance a dead letter. It is not open to the Court so to interpret the section. The Court is bound so to interpret it that effect may be given to all its provisions if it

can reasonably do so. A I R (3) 1916 Mad 985 and A I R (36) 1949 Pat 448, Relied on. Case law discussed.

Held, that the application for leave could not be allowed as the value of the subject-matter in the Court of the first instance was less than Rs. 10,000. (*Para 18*)

Anno: Civil P. C., S. 110 N. 11.

(b) *Interpretation of Statutes — Statutes must be construed as a whole — Repugnancy to be avoided — Civil P. C. (1908), S. 110.*

It is a well settled rule of interpretation that every clause of a statute should be construed with reference to the context and the other clauses of the Act, and, so far as possible, no clause, sentence or word should be considered superfluous, void or insignificant. A grammatical and literal construction is, therefore to be avoided if such construction leads to absurdity, repugnancy, or inconsistency with the rest of the construction. Thus if paragraph 2 of section 110 be read independently of paragraph 1 by adopting a grammatical rule of construction, the provision for the compliance of the first requirement of paragraph 1 would become nugatory and shall stand repealed by the second clause. An interpretation, therefore of the second paragraph ought not to depend on the spacing or punctuation. (*Para 21*)

Anno: Civil P. C., Pre. N. 7, S. 110, N. 11.

D. N. Verma, for Appellants — I. B. Saran and Mohammad Yusuf, for Respondents.

Cases referred to:

('02) 29 I A 40: (24 All 174 P C) (Pr 5)
('30) 57 I A 56: (A I R (17) 1930 P C 44) (Prs 5, 7, 9, 11)
('31) A I R (18) 1931 P C 125: (132 I C 605) (Pr 5)
('44) 71 I A 142: (A I R (31) 1944 P C 65) (Prs 11, 12)
('37) I L R (1937) All 405: (A I R (24) 1937 All 169) (Pr 9)
('46) 50 C W N 255 (Prs 10, 11)
('16) 39 Mad 843: (A I R (3) 1916 Mad 985) (Prs 7, 8, 9, 11, 13)
('19) 4 Pat L J 415: (A I R (6) 1919 Pat 305) (Pr 16)
('41) A I R (28) 1941 Pat 288: (194 I C 654) (Pr 9)
('48) A I R (35) 1948 Pat 372: (26 Pat 371) (Pr 9)
('49) 27 Pat 237: (A I R (36) 1949 Pat 448) (Pr 8)
('23) A I R (10) 1923 Rang 71: (68 I C 690) (Pr 13)
(1879) 4 Q B D 245 (Pr 21)
(1898) A C 735: (67 L J P C 126) (Pr 21)

CHATTERJI, J.: This is an application by the D. Hs. for leave to appeal to the Supreme Court from an appellate order dated 5-8-1948, of this Court which reversed the decision of the trial Court & dismissed the application for execution of a mortgage decree as barred by time.

(2) The application for leave to appeal was filed on 4-10-1948, that is, before the Constitution of 1950 came into force & will, therefore, be governed by S. 110, Civil P. C. This section provides:

"In each of the cases mentioned in Cls. (a) & (b) of S. 109, the amount or value of the subject matter of the suit in the Court of first instance must be ten thousand rupees or upwards, & the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve directly or indirectly, some claim or question to or respecting property of like amount or value,

& where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law."

The words "His Majesty in Council" must now be read as "The Supreme Court".

(3) The order sought to be appealed from being one of reversal, the only question for consideration is whether the requirements of S. 110 as to value are satisfied. The original mortgage suit which was instituted as far back as in 1916 was valued at Rs. 5,783/12/6 but the final mortgage decree which was passed in appeal by this Court on 21-9-1938, was for Rs. 67,247/4/9. The execution of this decree was held to be barred by limitation by the order of this Court now sought to be appealed from. The amount or value of the subject matter in dispute on appeal, therefore, is considerably over Rs. 10,000/-.

(4) The provisions of S. 110 as to value are contained in the the first two paragraphs. The two paragraphs are separated by the word 'or', & upon a plain grammatical construction, they appear, at first sight, to be independent of each other; in other words, the second para appears to be an alternative to the whole of the first. But on a closer examination, the true position seems to be otherwise, as I will presently show.

(5) The first para imposes two conditions (1) as to the value of the subject-matter of the suit & (2) as to value of the subject-matter in dispute on appeal. Both these conditions must be fulfilled, as held by their Lordships of the Privy Council in 'Motichand v. Ganga Prasad Singh', 29 I A 40; 'Mangamma v. Mahalakshmamma', 57 I A 56 & 'Rajendra Kumar v. Rash Behari', A I R (18) 1931 P C 125. In these cases their Lordships pointed out that the word "and" meant "and" & not "or", so that each of the two conditions had to be separately fulfilled. With regard to the last case, it may be further mentioned that though the High Court had granted a certificate that the requirements of S. 110 were fulfilled, the Board, on the preliminary objection taken by the respondent, refused to entertain the appeal on the ground that the value of the subject matter of the suit, at the date of its institution, was below Rs. 10,000/- &, therefore, the requirements of S. 110 were not fulfilled.

(6) The question then arises whether the second para. can be read independently of the first, in other words, whether it is an alternative to the whole of the first paragraph. In the second para. the words 'involve directly' are wide enough to cover the actual subject matter in dispute. If, therefore, this para. is taken to be independent of the first, the result will be that an appeal will lie to the Supreme Court, subject, of course to the provisions of the third para. of the section, in every case where the value of the subject-matter in dispute on appeal is not less than Rs. 10,000/-, no matter what the value of the subject matter of the suit was. In that case, not only the first condition in the first para. would be rendered wholly nugatory. But this para. itself

would have to be treated as a complete superfluity.

(7) In 'A. V. Subrammania Aiyar v. Sellammal', 39 Mad 843, leave to appeal was sought in a case where the value of the subject-matter of the suit in the Court of first instance was below Rs. 10,000/-, but the value of the appeal to His Majesty in Council exceeded that amount by reason of the addition of mesne profits for the period from the institution of the suit to the date of the petition for leave to appeal. It was contended that the case fell within the second para. of S. 110 &, therefore, leave should be granted. This contention was over-ruled in these words:

"If this contention be accepted, a certificate must be granted in any case in which the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is not less than Rs. 10,000/- whether or not the amount or value of the subject-matter of the suit in the Court of the first instance fell below Rs. 10,000/- & this provision becomes wholly nugatory."

This reasoning was approved by their Lordships of the Privy Council in the case of 'Mangamma v. Mahalakshmamma', 57 I A 56, already cited.

(8) The same view was taken by this Court in 'Satibaladasi v. Chotanagpur Banking Association Ltd.', 27 Pat 237, in which the value of the subject-matter of the suit in the Court of first instance was below Rs. 10,000/-, but the value of the subject matter in dispute on appeal was more than Rs. 10,000/- as there was a mortgage decree including post-litem interest. It was contended that the decretal amount should be taken to be the value for the purpose of the second para. of S. 110. This contention was negatived in these words:

"If this were the proper construction of the section, the first requirement of paragraph 1 would be rendered nugatory."

The learned Judge followed the aforesaid decisions in 'A. V. Subramania Aiyar v. Sellammal', 39 Mad 843.

(9) A contrary view, however, appears to have been taken by this Court in 'Ishwari Prasad Singh v. Kameshwar Singh', A I R (28) 1941 Pat 288, decided by Harries, C. J. & Fazl Ali, J. (as he then was). There a suit was brought by the auction-purchasers of the disputed property in execution of a mortgage decree for a declaration that the property could not be attached & sold in execution of the certificate in a certain certificate case. The suit was decreed by the trial Court, but was dismissed on appeal by the High Court. The pltfs. then applied for leave to appeal to His Majesty in Council. The value of the suit as well as of the appeal was Rs. 7699 odd, being the amount for which the certificate was issued. But the value of the property was considerably over Rs. 10,000/-. It was contended on behalf of the petitioner that they were entitled to leave as a matter of right, because the case fell under the second para. of S. 110. Their Lordships acceded to this contention & granted leave. It appears from the report that the said Madras decision in '39 Mad 843', & the Privy Council decision in '57 I A 56', were not brought to their Lordships' notice. The only case referred to in their judgment is 'Nadir Hussain v. Municipal Board, Agra', I L R (1937) All 405. We examined the original records of that case & found that the appeal was eventually dismissed on 25-2-1943, by the Privy Council on the merits. Apparently, no objection to the validity of the certificate given by this Court under S. 110 was raised before the Privy Council.

(10) Again, in the recent case of 'Bashir Mohammad Khan v. Md. Kabir Ahmad Khan', A I R (35) 1948 Pat 372, this Court granted leave to appeal apparently, on the basis of the second para. of S. 110. There the suit was brought by one of the heirs of a deceased Mohammadan lady for recovery of his share of the dower due to her which, he alleged, was Rs. 40,000/-. It is not clear from the report as to what the value of the suit was, but on examination of the records of that case, it appears that the suit was valued at Rs. 6,668/8/8, being the pltfs' share. The trial Court dismissed the suit. On appeal to this Court, it was decreed for Rs. 6666/8/8, being the pltf's admitted share, on the finding that the dower was Rs. 40,000/-. The principal deft. then applied for leave to appeal to His Majesty in Council. It was contended on his behalf that the decree directly or indirectly involved a claim or question to or respecting property of above Rs. 10,000/- in value. This contention was accepted. Manohar Lall J., who delivered the judgment to which Mukherji, J. agreed, referred to a large number of cases & at the end followed the view taken by the Calcutta High Court in 'Nurul Absar v. Haripada Biswas', 50 C W N 255, which will be presently dealt with. It appears that the leave granted by this Court was challenged, at the hearing of the appeal before the Supreme Court, on the ground that the requirements of S. 110, Civil P. C. were not satisfied as the value of the appellant's claim was below Rs. 10,000/-. This objection was overruled in these words:

"This matter was fully dealt with by the High Court & we agree with their view that the suit as well as the appeal involves at least indirectly a question relating to an amount exceeding Rs. 10,000."

Overruling the preliminary objection, their Lordships allowed the appeal on the merits. From the above quoted observation it is apparent that their Lordships did not treat the case as falling exclusively under the second para. of S. 110.

(11) In the aforesaid Calcutta case '50 C W N 255, there was an estate of which there was a common manager appointed under S. 95, Bengal Tenancy Act. The purchaser of a four-anna share in the estate brought a suit against the common manager, impleading all the co-sharers as parties, for recovery of possession of the purchased share on a declaration that the appointment of the common manager was illegal. The suit was valued at Rs. 2,900/-, being the value of the right of the common manager to the four anna share, though it was stated in the plaint that the value of the pltf's share was Rs. 10,020/-. The trial Court decreed the suit, but on appeal, it was dismissed by the District Court. On second appeal, the High Court restored the decree of the trial Court, holding that the appointment of the common manager was illegal. The deft. then applied for leave to appeal to His Majesty in Council. It was admitted that the value of the right of management of the four anna share claimed by the pltf. could be taken to be about Rs. 2,900/-. The learned Judges, therefore, said:

"The subject of the suit in the Court of first instance & of the appeal to His Majesty in Council is, therefore, below Rs. 10,000/-. So

the case does not fulfil the requirements of the first para of S. 110, Civil P. C."

Next they proceeded to consider whether the case came within the second para. of S. 110. They were of opinion that the effect of the decree in question was that the deft. could no longer manage as common manager not only the pltf's share, but also the shares of the remaining owners which were outside the subject-matter of the suit, &, therefore, the decree directly involved the question of the management of their shares also which were admittedly over Rs. 10,000/- in value. Consequently it was held that the case came within the second para. of S. 110. The value of the subject-matter of the suit being Rs. 2900/- only, it is difficult to reconcile this decision with the Privy Council case in '57 I A 56', cited above. This Privy Council decision was actually referred to by the learned Judges, but they were apparently of the opinion that their Lordships' decision had no reference to the first para. of S. 110. But from the judgment of their Lordships it will appear that they approved the reasons given by the Madras High Court in '39 Mad 843'. Both Wallis C. J. & Srinivasa Aiyangar, J., who decided that Madras case, definitely held that if the second para. were to be considered independently of the first, the condition as to the value of the subject-matter of the suit prescribed in the first para. would be wholly nugatory. They further held that "property" in the second para. contemplated property additional to the subject matter in dispute. On this latter point, however, their Lordships of the Privy Council reserved their opinion in the recent case of 'Shevantibai v. Janardhan Raghunath', 71 I A 142.

(12) The last mentioned Privy Council case '71 I A 142', arose out of a suit brought by an assignee of the share of a member of a joint family for partition of the joint family property. The total value of the joint family property exceeded Rs. 10,000/-, but the value of the pltf's share was about 3,000 only. Both the trial Court & the appellate Court dismissed the claim for partition on the ground of limitation. The pltf. applied for leave to appeal to His Majesty in Council which was refused by the High Court. The pltf., then applied for special leave which was granted, reserving liberty to the respondent to contest it at the hearing of the appeal. When the appeal came up for hearing, the respondent took the preliminary objection that leave to appeal should not have been granted. The appellant, on the other hand, contended that the High Court should have granted leave on the second clause in S. 110, as the decree involved directly or indirectly a question respecting the whole of the joint family property, admittedly of a value exceeding Rs. 10,000/-. Their Lordships rejected this contention in these words:

"It is enough for the purposes of the present case to say that their Lordships feel no doubt that a question as to the title of the pltf. to the share which she claims in the joint property does not become a question respecting the whole of the joint family estate merely because if her title is established it will result in the joint family estate being partitioned."

Their Lordships also stated

"Their Lordships do not find it necessary to decide whether the words of the second clause in S. 110 can be on their true construction ever refer to any property but that outside the suit."

Their Lordships, however, made no reference to the requirements of the first para. of S. 110. But from this, it by no means follows that their Lordships intended to hold that the second para. was quite independent of the first, which would be contrary to the view taken in the case in 57 Indian Appeals 56. It is obvious that their Lordships gave reason which, in their opinion, was just necessary to meet the appellant's contention. If their Lordships had accepted the contention, the position, of course, might have been quite different.

(13) In 'Maung Thwe v. A.L.A.R. Chetty Firm', A I R (10) 1923 Rang 71, the value of the subject matter of the suit in the Court of first instance was less than Rs. 10,000/-, but the value of the subject matter in appeal exceeded that amount, as it included the interest which accrued till the date of the decree. The requirements of the first para. of S. 110 were, therefore, not satisfied. It was, however, contended that the case came under the second para. Their Lordships disposed of this contention as follows:

"It is urged that the decree involves, directly or indirectly, some claim or question to or respecting property of like amount or value. In the first place it is claimed that this provision is to be read alone & not subject in any way to the requirements of the first para. of the section. We are quite unable to accept this view. It is based apparently on the spacing & quasi-separation into a separate para. We do not consider that it was intended to make it a separate provision. What the section requires is that the subject-matter in the Court of first instance must be Rs. 10,000/- or upwards, & in addition that the amount or value of the subject-matter on appeal must be the same or the decree must involve, directly or indirectly, some claim or question to or respecting property of like amount or value. This latter provision is to be read as an alternative to the second restriction in the earlier part of the section. To read it otherwise would render the provision as to the value of the subject matter in the Court of first instance a dead letter. It is not open to us so to interpret the section. We are bound so to interpret it that effect may be given to all its provisions if we can reasonably do so."

Then their Lordships referred to the aforesaid Madras decision in '39 Mad 843'. I entirely agree with the view so taken.

(14) It, therefore, follows that the second para. of S. 110 cannot be read independently of the first para.

(15) Mr. D. N. Verma on behalf of the petitioners contends that the first para. is applicable where the appeal arises out of a suit & cannot apply to an appeal which arises out of an execution proceeding. It is said that so far as the matters in controversy in the suit were concerned, they were settled at rest by the decree passed in the suit, & the questions arising in the execution proceeding relate to the execution of the decree & have no relation to the subject-matter of the suit. Consequently, it is contended, an appeal arising out of an execution proceeding will be governed, not by the first, but by the second para. If this contention is to be accepted, it will have to be assumed that though for the purpose of an appeal arising out of a suit, the second para. cannot be read independently of the first, as shown above, still in the case of an appeal aris-

ing out of an execution proceeding, it may be taken by itself. Such inconsistent position is not permissible. Further, it will be noticed that there are the words "decree or final order" in the second para. Obviously, therefore, this para. will apply equally to an appeal arising out of a suit as also to an appeal arising out of an execution proceeding. But in either case, it will have to be read subject to the provisions of the first para. It is true that the questions arising in an execution proceeding may have no relation to the matters that were in controversy in the original suit. But for the purpose of S. 110 this is immaterial. The whole object of this section is to fix a pecuniary limit below which there could be no appeal to His Majesty in Council. The section, as it stands, has to be interpreted & effect must be given to all its provisions.

(16) In this connection the case of 'Gossain Bhaunath Gir v. Bihari Lal', 4 Pat L J 415, is in point. It arose out of an execution proceeding in which the mortgaged property was sold in execution of a mortgage decree. One of the judgment-debtors who was interested in a share only of the mortgaged property applied for setting aside the sale of the property in which he was interested. His application was dismissed by the trial Court & its decision was affirmed on appeal by this Court. The J. D. then applied for leave to appeal to His Majesty in Council. The judgment was one of affirmance, but before considering the question whether it involved any substantial question of law, as required by the third para. of S. 110, Dawson-Miller, C. J. who delivered the judgment (Coutts J. agreeing) said:

"But before it becomes necessary to consider that question the petitioner must make out that the subject matter of the suit in the court of first instance & the subject matter of the dispute on appeal to His Majesty in Council is of the sum of Rs. 10,000/- or upwards."

His Lordship then proceeded to consider the question of valuation, & was of opinion that though the mortgaged property sold was over Rs. 10,000 in value, the J. D., himself valued his interest at Rs. 4000/-. His Lordship, therefore, concluded:

"In the present case I think that the appellant has failed to show that the subject matter of the suit or dispute in appeal is of Rs. 10,000/- or upwards, & this application must be dismissed with costs."

It thus appears that in his Lordship's view the requirements of the first para of S. 110 were to be satisfied, even though that was a case arising out of an execution proceeding. It is true that the question whether the case could come under the second para of S. 110 was not raised or decided. Nevertheless, their Lordships did consider that the requirements of the first para of S. 110 had to be satisfied. This decision is a complete answer to Mr. Verma's contention that the first para. does not apply to an appeal arising out of an execution proceeding.

(17) It has been faintly suggested that a suit, as defined in Wharton's Law Lexicon, includes a petition to court &, therefore, an execution application may be treated as a suit for the purpose of the first para. of S. 110. But having regard to the various provisions of the Civil P. C., it is not permissible to use the word 'suit' in such wide sense. S. 26 of the Code provides:

"Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed."

O. 4, R. 1 of the Code then provides:-

"(1) Every suit shall be instituted by presenting a plaint to the court or such officer as it appoints in this behalf."

(2) Every plaint shall comply with the rules contained in Orders VI & VII so far as they are applicable."

The provisions for application for execution which can be found in O. 21 of the Code are quite distinct. Consequently, an execution application can on no account be regarded as a suit.

(18) As already stated, the value of the original suit in the present case was Rs. 5783/12/6. Consequently, the first requirement of the first para. of S. 110 is not satisfied. The application, therefore, must be dismissed, but in the circumstances, without costs.

(19) This order will govern Supreme Court Appeal No. 70 of 1948 which is also by the D. Hs. & arises out of the same judgment of this court, in so far as it set aside the order of the trial court allowing the decree-holders' application for review of its previous order dismissing their application for execution as not maintainable.

(20) LAKSHMIKANTA JHA, C. J. : I fully concur in the order proposed.

(21) It is a well-settled rule of interpretation that every clause of a statute should be construed with reference to the context & the other clauses of the Act, & so far as possible, no clause, setence or word should be considered superfluous, void or insignificant: 'Canada Sugar Refining Co. Ltd. v. The Queen', ((1898) AC 735 at 741). 'The Queen v. The Bishop of Oxford' ((1879) 4 Q B 245 at 261). A grammatical & literal construction is, therefore, to be avoided if such construction leads to absurdity, repugnancy, or inconsistency with the rest of the construction. If para. 2 of S. 110 be read independently of para. 1 by adopting a grammatical rule of construction, the provision for the compliance of the first requirement of para. 1 would become nugatory & shall stand repealed by the second clause. An interpretation, therefore, of the second para. ought not to depend on the spacing or punctuation. It is logically proper, & indeed imperative, to construe the second para in the light of the provision of the first para. to avoid repugnancy, & if so construed there is no escape from the conclusion that the second para. is only an alternative to the second part of the first para. With these observations, I entirely agree with the reasons given by my learned brother.

D. R. R. *Application dismissed.*

A. I. R. (38) 1951 PATNA 181 (C. N. 28)

LAKSHMI KANTA JHA C. J. AND CHATTERJI J.

Sundar Krishta Sarkar, Deft. Applt. v. Sm. Malti Manjari and others, Pltfs.-Resps.

L. P. A. No. 4 of 1950 D/- 13-4-1951.

Tenancy Laws — Bihar Tenancy Act (8 of 1885), Ss. 40(6), 188 — Jurisdiction of Collector whether affected in hearing appeal preferred by some landlords without impleading others.

The non-joinder of ten-annas co-sharer landlords to an appeal preferred before the Collector by the

six-annas co-sharer landlords u/s. 40(6) from an order fixing the rent made by the Rent commutation officer does not attract the provisions of S. 188 as the filing of an appeal is not a thing "which the landlord is under this Act required or authorized to do." Even assuming that S. 188 is applicable and the Collector acted in violation of the provision of the statute while hearing the appeal, such a violation would not affect the jurisdiction which is conferred upon him by S. 40(6). For a mere violation of an imperative provision of the Statute cannot affect the jurisdiction of the Ct. Even if a party is not before the Ct., on general principle the Ct. can pass an order in its favour but not against it. 35 Cal 331 PC; AIR (13) 1926 P C 142; AIR (35) 1948 Pat 460, Rel. on, A I R (35) 1948 Pat 153 held impliedly overruled by A I R (36) 1949 Pat 139. (F. B.) (*Paras 6, 7*)

P. K. Bose, for Applt., — Rajkishore Prasad and Anugrah Narain, for Resps.

Cases referred to:

('26) 53 I A 271: (A I R (13) 1926 P C 142) (Pr 7)
('08) 35 I A 73: (35 Cal 331 P C) (Pr 6)
('47) 26 Pat 592: (A I R (35) 1948 Pat 153) (Pr 8)
('48) 27 Pat 242: (A I R (35) 1948 Pat 460) (Pr 7)
('47) 26 Pat 748: (A I R (36) 1949 Pat 139 F B) (Prs 4, 7, 8)

LAKSHMIKANTA JHA, C. J.: This is an appeal under the Letters Patent by deft. 1 from the judgment of Shearer, J. It arises out of a suit for recovery of cash rent for the years 1350 to 1353 Fasli. The rent was claimed at the rate of Rs. 229/1/- per year. The courts below decreed the suit & on second appeal to this Court the decrees of the courts below have been affirmed.

(2) The facts relevant to the point for decision are as follows: Originally the defts. were bhaoli tenants & the rent was payable wholly in kind. They applied for commutation of rent under S. 40, Bihar Tenancy Act, & Rent Commutation officer fixed the rent at Rs. 179/5/-. In the rent commutation proceedings all the landlords were impleaded & the order was passed in the presence of the 16 annas landlords. Only the plffs, who are 6 annas co-sharer landlords, appealed against the order of the Rent Commutation officer to the Collector under S. 40, Clause (6), Bihar Tenancy Act, without impleading the remaining 10 annas co-sharer landlords in the appeal. The Collector set aside the order of the Rent Commutation Officer & fixed the rent at Rs. 229/1/- by his order dated 7-2-1945. While the appeal was pending before the Collector, the tenants who are the defts. in the present suit, applied for reduction of the rent fixed by the Rent Commutation officer under S. 112A(1)(c), Bihar Tenancy Act, & the rent was reduced from Rs. 179/5 to Rs. 168/1/9. In the present suit the plff. claimed rent at the rate of Rs. 229/1- as fixed by the Collector. The defts. resisted the suit on the ground that the rent having been reduced in a proceeding under S. 112A (1) (c), Bihar Tenancy Act, the plffs. were not entitled to claim rent at the rate fixed by the Collector. The plffs. on the other hand, alleged that the order passed by the Rent Reduction Officer in the proceeding under S. 112A (1) (c) was ineffective because the foundation of his order was the order of the Rent Commutation officer which had been reversed by the Collector on appeal. They asserted that they were entitled to claim the rent at the rate fixed by the Collector. The courts below, as well as Shearer, J., accepted the plffs. contention & the suit was accordingly decreed at the rate of rent fixed by the Collector.

(3) The point for our consideration is whether the order passed by the Collector fixing rent at Rs. 229/1/ is with or without jurisdiction, the defts. appeal must fail.

(4) The argument of Mr. Bose, on behalf of the appellant, is that the order of the Collector is without jurisdiction because there was violation of the statutory provision of S. 188, Bihar Tenancy Act, inasmuch as the 10 annas landlords were admittedly not impleaded as parties before the Collector. In my opinion, this argument is not sustainable. The Collector had jurisdiction to entertain the appeal under S. 40, Cl. (6), Bihar Tenancy Act, even in the absence of the 10 annas co-sharer landlords, & his order cannot be characterized as one passed by him without jurisdiction.

"Jurisdiction may be defined as the power & authority conferred on a Court to pronounce the sentence of the law or to award the remedies provided by law upon a state of facts, proved or admitted, referred to the Court for decision & authorised by law to be the subject of investigation or action by that Court, & in favour of, or against, persons who present themselves, or who are brought before the Court in some manner sanctioned by law as proper & sufficient." (See Black on 'Jurisdiction', section 215).

In 'Ramranbijaya Prasad Singh V. Ramkawal', 26 Patna 748 at p. 754) it was held

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision".

(5) S. 40, Cl. (1), Bihar Tenancy Act, provides:

"Where an occupancy-raiyat pays for his holding rent in kind....either the raiyat or his landlord may apply to have the rent commuted to money rent."

Section 188, which is of general application, lays down:

"Where two or more persons are joint landlords, anything which the landlord is under this Act required or authorized to do must be done either by both or all these persons acting together, or by an agent authorized to act on behalf of both or all of them."

S. 40 (1), read with S. 188, requires that all the landlords must be party to the rent commutation proceeding. In the present case the proceeding commenced at the instance of the raiyat & admittedly all the landlords were parties to the proceeding. Therefore, there was no defect of party, in so far as the proceeding before the Rent Commutation officer was concerned. His order, therefore, was with jurisdiction. Cl. (5) of S. 40 requires:

"The order shall be in writing & shall state the grounds on which it is made & the time from which it is to take effect."

Cl. 6 (a) of S. 40 provides:

"An appeal shall lie from an order referred to in Sub-S. (5)

(i) If such order is passed by any officer other than the Collector of a district, to the Colleetor of the district or to any officer specially empowered by the Provincial Govt. by notification to hear such appeals."

Therefore, the Collector had jurisdiction to entertain the appeal.

(6) It is contended by Mr. Bose that there was non-compliance with the provisions of S. 188, Bihar Tenancy Act, because all the landlords were not impleaded. An examination of S. 40, Cl. (6), Bihar Tenancy Act, does not show that the "landlord is under this Act required or authorised" to file an appeal. All that the section provides is

that "An appeal shall lie"; in other words, the order is made appealable. It does not provide, nor is it necessary to provide, by whom the appeal may be filed. The appeal is to be preferred only by the aggrieved party; for this no specific statutory provision is necessary. Therefore, the filing of an appeal is not a thing "which the landlord is under this Act required or authorized to do." The filing of an appeal is, no more than the institution of a suit for rent, a thing required or authorized by the Act. In 'Pramada Nath v. Ramini Kanta Roy', 35 I.A. 73 at p. 78 the Privy Council held: "The filing of a suit" for rent "is not a thing which the landlord is, under the Act, required or authorized to do." The 6 annas landlords, who are the present plaintiffs, if they felt aggrieved by the order of the Rent Commutation officer, were certainly entitled to prefer an appeal, & if they did not implead the remaining 10 annas co-sharer landlords as respondents, all that might be said was that there was defect of parties. But no objection on this score was taken before the Collector at the hearing or at any other stage by the defts. who contested the appeal before him.

(7) Even assuming that S. 188, Bihar Tenancy Act, is applicable & the Collector acted in violation of the provision of the statute, such a violation would not affect the jurisdiction which is conferred upon him by S. 40 (6). The Privy Council in Umed Mal v. Chand Mal, (53 I. A. 271) held that the failure to join a necessary party is only a material irregularity in the exercise of jurisdiction & falls within Cl. (c) of S. 115, C P. C. Their Lordships observed:

"The very question is whether Fatima ever conveyed the bighas to the alleged mortgagees, & it was a material irregularity to decide it in the absence of Fatima herself. Under the circumstances, the Chief Commissioner had the power to make such order in the case as he thought fit"

It has been held by the Full Bench in 'Maharaja Bahadur 'Ramranbijaya Prasad Singh v. Ramkawal Upadhya', 26 Patna 748 that a mere violation of an imperative provision of the statute cannot affect the jurisdiction of the Court. But even if a party is not before the Court, on general principle the Court can pass an order in its favour but not against it. In 'Radha Mohan v. Shreekishun Gir, 27 Pat 242, Meredith J, on a review of the divergent views on the point has held that

"the word 'parties' in O. 41, R. 33, is wide enough to include persons who were parties to the suit in the trial Court, but were not parties to the appeal". He has further held that "there is nothing whatever in the terms of rule 4 to suggest that the persons, who did not appeal, must be impleaded as respts. & were it necessary, one would expect words to that effect in the rule.... Neither rule offends the principle that an order cannot be passed to the prejudice of a person in his absence, because the terms of each rule carefully & expressly limit its application to orders in favour of the absent person so that no question of any objection by him being shut out can arise." Therefore, in my opinion, even though the 10 annas co-sharer landlords were not impleaded before the Collector, & even if section 188, Bihar Tenancy Act, be held applicable to a proceeding in appeal, non-compliance with its provision cannot affect the jurisdiction of the Collector.

(8) Learned counsel for the appellant has strongly relied upon the case of 'Basdeonarain v. Karu Mahton, 26 Pat. 592 in support of his contention. But the decision seems to have been impliedly overruled by the Full Bench in 'Ramranbijaya Prasad Singh v. Ramkawal', 26 Pat 748. The Collector, in my opinion, was competent to pass the order even in the absence of a necessary party & his order cannot be collaterally challenged. The appeal is accordingly dismissed with costs.

(9) CHATTERJI, J.—I agree.

V.S.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 183 *[C. N. 29.]*

REUBEN J.

Ramakant Missir and another — *Appellants* v. *Kamla Prasad Sukul and others* — *Respondents.*

A. F. A. D. No. 467 of 1950, D/- 2-5-1951.

Court-fees Act (1870), Ss. 7 (ix), 12 (ii), Sch. I Art. 1—Applicability.

The plaintiffs mortgaged a certain share in a tauzi usufructuarily to defendants 1 and 2 to secure a loan of Rs. 1,600. 12 bighas of land were included in the hypothecated property as *bakasht* land. The suit was brought by the plaintiffs to redeem the mortgage. They also sought khas possession of these 12 bighas as against defendants 3 and 4 alleging that these defendants were the *benamidar* for defendants 1 and 2. The plaintiffs succeeded as regards the prayer for redemption in both the Courts below and this portion of the decree was not challenged. Defendants 3 and 4, who claimed occupancy rights in the 12 bighas, which they claimed to have been settled with them by the predecessor-in-interest of the plaintiffs with the consent of the mortgagees. This defence was accepted by the Munsiff, but, in appeal by the plaintiff, the lower appellate Court held that there was no such settlement and granted the plaintiff the relief prayed for. Defendants 3 and 4 filed the second appeal. The suit was valued in the Court of first instance at Rs. 1,600 under cl. (ix) of S. 7. The same value was placed by the plaintiff on his appeal in the lower appellate Court. On an objection by the Stamp-reporter that the relief as regards the 12 bighas was not covered by cl. (ix) of S. 7 the District Judge accepted the valuation but on a different basis, namely, Rs. 683-7-3 on account of a set-off claimed by the plaintiffs and refused by the Munsiff and the balance of Rs. 916-8-9 as the value of the 12 bighas of land on the basis of rental of Rs. 36. The appellants in the High Court valued their appeal at Rs. 1,147-8-7 consisting of Rs. 916 and odd as the value of the land and Rs. 220 and odd on account of excess cost etc. assessed against them:

Held that the question that was raised in the present appeal was not a question which arose between the mortgagor and the mortgagee. It arose between the mortgagor and persons who were strangers to the mortgage. Clause (ix) of S. 7, therefore, did not apply. The matter in dispute in the second appeal was the right to hold the land as an occupancy *raiyat* at a particular annual rent. The decision of the District Judge as regards the valuation of the property had no finality, and was not binding for the purpose of valuing the appeal in the High Court and the Taxing Officer was empowered to assess the value. The court-fee was payable on the appeal under Art. 1 of Sch. I. In addition to *ad valorem* court fees payable on account of excess cost etc. the appellants were liable to pay *ad valorem* court fee on the value of the interest claimed by them in the 12 bighas of land. There was no logical connection between the rent and the value of the holding. The property consisted of 12 bighas of cultivable land, and *prima facie* Rs. 916 was a low valuation: A.I R. (12) 1925 Pat. 392 (F. B), *Rel. on;* S. A. No. 1500 of 1949 and S. A. No. 704 of 1949, *Disting.*

[Paras. 6, 7, 8, 9]

Anno. Court-fees Act, S. 7 (ix) N. 1, S. 12 N. 17, Sch. I Art. 1 N 2, 6.

P. P. Varma—for Appellants; L. N. Sinha for Govt. Advocate—for the State.

Case referred to:
('25) 4 Pat. 336 : (A. I. R. (12) 1925 Pat. 392 F. B.).

[Pr. 8]

Order.—This is a reference under S. 5, Court-fees Act.

[2] One Ramyad Gosain, proprietor of three annas and odd share in touzi No. 1484, mortgaged this share usufructuarily in the year 1911 to defendants 1 and 2 to secure a loan of Rs. 1,600. 12 bighas of land which forms the subject-matter of the present appeal was included in the hypothecated property as *bakasht* land. The present suit has been brought by the plaintiffs as successors-in-interest of Ramyad Gosain to redeem the mortgage. They also seek khas possession of these 12 bighas as against defendants 3 and 4 alleging that these defendants are the *benamidar* for defendants 1 and 2. The plaintiffs have succeeded as regards the prayer for redemption in both the Courts below and this portion of the decree is not challenged. The present appeal is by defendants 3 and 4, who claim occupancy rights in the 12 bighas, which they claim to have been settled with them by Ramyad Gosain in 1919 with the consent of the mortgagees. This defence was accepted by the Munsiff, but, in appeal by the plaintiff, the lower appellate Court has held that there was no such settlement and has granted the plaintiff the relief prayed for. Hence, the present appeal.

[3] The suit was valued in the Court of first instance at Rs. 1,600 under cl. (ix) of S. 7, Court-fees Act. The same value was placed by the plaintiff on his appeal in the District Court. On an objection by the Stamp-reporter that the relief as regards the 12 bighas is not covered by cl. (ix) of S. 7, the District Judge accepted the valuation but on a different basis, namely Rs. 683 7-3 on account of a set-off claimed by the plaintiffs and refused by the Munsiff and the balance of Rs. 916-8-9 as the value of the 12 bighas of land. Regarding this latter sum, the District Judge remarked :

"This may be taken as adequate, in view of the fact that defendants 3 and 4 have, according to the judgment of the lower Court, to pay rental of Rs. 36 to the plaintiff."

The appellants, to this Court have valued their appeal at Rs. 1,147-8-7 consisting of Rs. 916 and odd as the value of the land and Rs. 230 and odd on account of excess cost etc. assessed against them.

[4] This reference has been made to me for a decision on two points : firstly, as to whether cl. (ix) of S. 7 has any application and, secondly, if *ad valorem* court fee is payable, how it is to be assessed.

[5] Really, there is no distinction between the the two points. Clause (ix) of S. 7 is not a charging section. It merely prescribes the manner in which the valuation is to be computed in certain cases in which an *ad valorem* court-fee is payable. The charging section in the case of appeals in the High Court against judgments of Subordinate Courts is S. 4, which provides that no document of any of the kinds specified in the first or second schedule to the Act as chargeable with fees, shall be filed or received in a High Court in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document. We have, therefore to see whether there is any provision in the schedules which applies to the appeal. In the present case, there is no specific article that applies and we have to fall back on the residuary provision, Art. 1 of Sch. 1, under which an *ad valorem* court-fee is chargeable on "the amount or value of the subject-matter in dispute". The test is what is the subject matter in dispute and what is its amount or value ?

[6] The question of the applicability of cl. (ix) of S. 7 has been referred to me on account of my decisions on references under S. 5, Court-fees Act made in Second Appeal Nos. 1500 of 1949 and 704 of 1949, in both of which I held that the value should be computed as provided in cl. (ix). Those appeals arose out of suits for the redemption of usufructuary mortgages in which the plaintiff had added a prayer for mesne profits. I pointed out in my decisions that the claim for mesne profits was superfluous, as the Court was bound under the provisions of S. 76, T. P. Act read with O. 34, R. 7, Civil P. C., to take accounts between the parties. The suits were, therefore, plain and simple suits for redemption. Hence, for the purposes of the payment of court-fee they were governed in the Court of first instance by cl. (ix) of S. 7. The appellants in the High Court raised the very same points that had been raised in the Courts below. In one case, the plaintiff was the appellant, in the other case the defendant. So far as the appeal by the plaintiff was concerned, it was clear that the matter in dispute in second appeal should be valued on the same basis as his claim was valued in the Court of first instance. From this it would follow that the same basis of valuation should be accepted for the appeal by the defendant, for there is no reason why an appeal, which raises the same points as were raised in the Court of first instance, should be valued differently according to whether the appellant is the plaintiff or the defendant. My decisions in those cases have no application to the present case, where redemption has been granted and the correctness of the decree to that extent has not been challenged. The question that is raised in the present appeal is not a question which arises between the mortgagor and the mortgagee. It arises between the mortgagor and persons who are strangers to the mortgage. Clause (ix) of S. 7

therefore, is entirely foreign to the present appeal. For this reason, I would answer the first point in the negative.

[7] As regards the second point, the test for valuation is plain, namely, what is the subject-matter in dispute and what is its amount or value? The matter in dispute in this appeal is the right to hold the land as an occupancy *raiyat* at a particular annual rent. It has been urged on behalf of the appellants that this value should be computed in accordance with cl. (xi), sub cl. (cc) of S. 7. That section relates to a suit for the recovery of immovable property from a tenant including a tenant holding over after the termination of a tenancy. It has no application to a suit in which the relationship of landlord and tenant is denied by the plaintiff. Next, it is suggested that following the principle in cl. (iv), sub-cl. (c) of S. 7, the valuation placed on the relief sought in the memorandum of appeal should be accepted. It is well established, however, that the Court is not bound to accept a valuation which on the face of it is arbitrary. The valuation stated in the memorandum of appeal is based on that adopted by the District Judge. That valuation was a fortuitous one arising out of particular facts of the appeal before the District Judge. The appellants-plaintiffs had there placed a total value of Rs. 1,600 on their appeal in accordance with cl. (ix) of S. 7. The District Judge having held that cl. (ix) has no application and having allotted a portion of the stated valuation to one of the specific reliefs claimed, accepted the remaining amount as sufficient to cover the other relief. The reason given by him for accepting that amount as sufficient has no logical connection with the value of that relief. It is based on the amount of the rent claimed as payable by the tenant. No attempt was made by the District Judge to ascertain what proportion that rent bore to the net produce of the land. It might have been a high rent which would considerably diminish the value of the holding On the other hand, it might have been a very low rent, which would have exactly the contrary effect. So there is no logical connection between the rent and the value of the holding. The property consists of 12 bighas of cultivable land, and, *prima facie* Rs. 916 seems a low valuation.

[8] It has also been suggested, though somewhat faintly, that the decision of the District Judge as regards the valuation of the property is final. The decision has no finality even as regards the correctness of court fee charged in the Court below, vide cl. (ii) of S. 12 of the Act. It is certainly not binding for the purpose of valuing the appeal in this Court and the Taxing Officer is empowered to assess the value: *Krishna Mohan* v *Raghunandan*, 4 Pat. 336.

[9] For the reasons I have given above, I hold that the court-fee is payable on the appeal under Art. 1 of Sch. I to the Court-fees Act. In addition to the *ad valorem* court-fee payable on account of excess cost etc., the appellants are liable to pay *ad valorem* court-fees on the value of the interest claimed by them in the 12 bighas of land. The reference is answered accordingly.

D.H. *Answers accordingly.*

A. I. R. (38) 1951 Patna 185 *[C. N. 30.]*

S. K. DAS AND NARAYAN JJ.

Gopal Krishna Pal—Petitioner v. *The State.*

Criminal Misc. No. 621 of 1950, D/- 6-12-1950.

Explosive Substances Act (1903), S. 7 - Offence under S. 5—Consent of State Govt. not obtained—Effect - Criminal P. C. (1898), S. 195.

Section 7 merely restrains the Court from proceeding to the trial of any person for an offence under the Act except with the necessary consent. But lack of such consent does not invalidate the committal proceedings. [Para 2]

Where the petitioner was committed to Sessions to take his trial for an alleged offence under S. 5 & in the course of arguments it was discovered that no consent of the State Govt. as required by S. 7 had been obtained, an order by the Ses. J. quashing the proceeding & adjourning the case for a fresh trial, to enable the prosecution to obtain necesaary consent of the Govt. is a good order: A. I. R. (14) 1927 Bom. 21, *Rel. on.* [Paras 2, 5]

Anno. Cri. P. C. S. 195 N. 30.

Govt. Advocate—for the State.

Case referred to:

('27) A. I. R. (14) 1927 Bom. 21 : (28 Cr. L. J. 5) [Pr. 2]

Judgment. — This is an application by an under-trial prisoner who has challenged his detention. The facts are these. The petitioner was committed to take his trial in the Court of Session for an alleged offence under S. 5, Explosive Substances Act (VI [6] of 1908). Section 7 of that Act lays down that no Court shall proceed to the trial of any person for an offence against this Act except with the consent of the State Govt. After the case had proceeded to trial & in the course of arguments, it was discovered that no consent, as required by S. 7 of the Act, had been obtained. The learned Assistant Ses. J. who was conducting the trial, then recorded an order the concluding portion of which runs as follows:

"I hereby quash the proceeding & order that the accused Gopal Krishna Pal be remanded to custody. The case is adjourned to 27-11-50 for a fresh trial. Meanwhile the prosecution should obtain necessary consent of the Govt. The assessors are discharged. Fresh assessors will be summoned. The witnesses should also be summoned in the order in which they had been summoned. For the purpose of choosing the assessors by lot the sessions clerk will put up the list of assessors at once."

[2] The question is whether the aforesaid order is correct, & whether the learned Ses. J. was right in giving an adjournment when the proceeding was quashed. It appears that a similar case arose in Bombay, *Emperor* v. *Kallappa Dundappa*, A. I. R. (14) 1927 Bom. 21. It was there pointed out that the words used in S. 7, Explosive Substances Act, were not as wide as some

similar enactments in the Criminal P. C. It was further pointed out that S. 7, Explosive Substances Act, merely restrained the Court from proceeding to the trial of any person for an offence under the Act except with the necessary consent. But lack of such consent did not invalidate the committal proceedings. It was stated therein that the committal proceedings were only an 'inquiry' as defined in cl. (k) of S. 4, Criminal P. C. In that case also it was pointed out that though the learned Ses. J. could not proceed with the trial the accused person on that commitment without the requisite consent, the proper procedure was to arrange to postpone the trial till the requisite consent was obtained. The learned Assistant Ses. J. seems to have followed the same procedure in the present case.

[3] Our attention was drawn to a decision of the Federal Court in *Basdeo Agarwalla* v. *King Emperor* (1945 Federal Courts Reports 93). Their Lordships had to consider in that case the words of cl. 16 of the Drugs Control Order, 1943, which provides that no prosecution for any contravention of the provisions of the Drugs Control Order shall be instituted without the previous sanction of the Provincial Govt. Their Lordships held that the sanction required was not intended to be, & should not be, an automatic formality & should not be so regarded either by police or officials. They pointed out that the whole proceeding was bad for lack of such sanction.

[4] There is a vital point of distinction between the words used in Cl. 16 of the Drugs Control Order, 1943, & the words used in S. 7, Explosive Substances Act, & that distinction was the basis of the decision in the Bombay case.

[5] It is clear to us that the order of the learned Assistant Ses. J. is a good order; & there are no reasons for interference by us. If the committal proceedings were valid the detention of the petitioner for an alleged offence under S. 5, Explosive Substances Act, is not illegal.

[6] We would accordingly dismiss the petition.

V.B.B. *Petition dismissed.*

A. I. R. (38) 1951 Patna 186 *[C. N. 31.]*

RAMASWAMI AND SARJOO PROSAD JJ.

Bihar Mica Concern Ltd. — Applicant v. *Commr. of Income-tax, Bihar & Orissa — Respondent.*

Misc. Judicial Case No. 229 of 1949, D/- 14-3-1951.

Income-tax Act (1922), Ss. 3, 4, 22, 34 — Foundation of liability — Bihar Regulation, IV [4] of 1942 — Retrospective effect of—Escaped income-tax—Notice under S. 34—Validity of.

The issue or receipt of notice is not the foundation of the jurisdiction of the Income-tax Officer to make the assessment or of the liability of the assessee to pay the tax. The liability to pay the tax is founded on Ss. 3 and 4, Income-tax Act which are the charging sections. Section 22, and others are the machinery sections to determine the amount of tax: A. I. R. (34) 1947 F. C. 32, *Foll.* [Para 4]

The assessee, a private limited company, carried on its business at a place situated in Chota Nagpur, a partially excluded area. The assessee was assessed to income-tax for the year 1939-40. The income was determined to be Rs. 346. The Indian Finance Act, 1939 was brought into force in Chota Nagpur with effect from 30-3-1939 by Bihar Regulation IV [4] of 1942. On 10-7-1941 the Income-tax Officer issued notice to the assessee under S. 34 on the ground that the income had partly escaped assessment. A revised estimate was made and the total income was computed to be Rs. 8,146. The assessee contended that there could be no question of income escaping income-tax when the Indian Finance Act was not in force in Chota Nagpur at the material time:

Held (1) that under S. 92 (2), Government of India Act, 1935, the Governor had full plenary powers of legislation in respect of the partially excluded area and that he had power to make the Finance Act applicable to the Chota Nagpur by Bihar Regulation IV [4] of 1942 with retrospective effect; [Para 4]

(2) that the revised assessment was validly made and that the notice under S. 34 was validly issued for the assessment of year 1939-40. [Paras 3, 5]

Anno. Income-tax Act, S. 3, N. 1; S. 4, N. 1; S. 34, N. 3.

Baldeva Sahay and R. J. Bahadur —for Petitioner; S. N. Dutt —for Opposite Party.

Case referred to.—

('47) 1947-15 I. T. R. 302 : (A.I.R. (34) 1947 F. C. 32). [Pr 4]

FACTS—Bihar Mica Concern Ltd., the assessee company, is a private limited company, the share-holders being Chatturam and Darsanram, holding equal shares. The assessee company carriers on business at Kodarma which is situated in Chota Nagpur. Chota Nagpur is a partially excluded area. The assessee company was assessed for the year 1939/40 by the Income-tax Officer on 25-8-1939. Its income was determined at Rs. 346. On 10-7-1941 the Income-tax Officer recorded the following order on the order sheet:

"As income from business appears to have partly escaped assessment, issue notice under S. 34 read with S. 22 (2) for income return for the year assessable in 1939-40 within one month from the date of the receipt of this notice."

Notice was issued on 10-7-1941. The assessee company filed a return in pursuance of the notice under S. 34 for the assessment year 1939-40.

The case dragged on before the Income-tax Officer and on 31-3-1944 a revised assessment order was passed computing the income at Rs. 8,146. An appeal was preferred before the Appellate Assistant Commissioner. He dismissed the appeal, whereupon an appeal before the Tribunal was filed. That appeal was argued, along with the appeal by Chatturam Horilram Ltd., on the basis that the facts in both the cases were similar.

The Indian Finance Act, 1939, was brought into force in Chota Nagpur with effect from 30-3-1939 by Bihar Regulation IV [4] of 1942. That Regulation was assented to by the Governor General on 30-6-1942 and published in the Bihar Gazette on 7-7-1942. If the Regulation had not been made by the Governor, the original assessment made on 25-8-1939 and the revised assessment made on 31-3-1944, would have been set aside. Two points

were raised before the Appellate Tribunal (1) Whether the notice issued on 10-7-1941 under S. 34, Income-tax Act was validly issued; and (2) whether the cash credits amounting to Rs. 7,800 in the assessee company's books were satisfactorily explained by the assessee company.

The question as to what definite information did the Income-tax Officer have on 10-7-1941 when he directed the issue of a notice under S. 34, was not raised before the Tribunal. The argument before the Tribunal was that there could be no question of income escaping income-tax when the Indian Finance Act was not in force in Chota Nagpur at the material time.

The position that emerges out of the facts stated above is that an original assessment was made on 25-8-1939 and a revised assessment on 31-3-1944. If the Regulation referred to above had not been made these assessments would be invalid. The questions of law that arise out of the facts stated above, therefore, are :

"1. Whether the revised assessment made on 31-3-1944 is validly made having regard to the fact that the Bihar Regulation IV [4] of 1942 had been made with retrospective effect ?

2. Whether the notice under S. 34 issued on 10-7-1941 was validly issued for the assessment for year 1939-40 ?"

Ramaswami J.— This reference is made by the Income-tax Appellate Tribunal under S. 66 (1), Income-tax Act.

[2] The assessee Bihar Mica Concern Ltd. is a private company limited, the share-holders being Chatturam and Darsanram, holding equal shares. The assessee carried on business at Kodarma which is situated in Chotanagpore, a partially excluded area. The Income-tax Officer made assessment for the year 1939-40 on 25-8 1939. The income was determined to be Rs. 346. No appeal was preferred by the assessee to the Appellate Assistant Commissioner or to the Tribunal. On 10-7-1941 the Income tax Officer issued notice under S. 34 on the ground that the income had partly escaped assessment. The proceedings continued till 31-3 1944. A revised estimate was made and the total income was computed to be Rs. 8146. An appeal was preferred by the assessee to the Appellate Assistant Commissioner who dismissed the appeal. A second appeal was preferred before the Appellate Tribunal who heard it along with the appeal instituted by Chhatturam Horilram Limited. The Appellate Tribunal delivered a single judgment dismissing both the appeals.

[3] At the instance of the assessee the Appellate Tribunal has referred the following questions of law for being determined by the High Court :

(1) "Whether the revised assessment made on 31-3-1944 is validly made having regard to the fact that the Bihar Regulation IV [4] of 1942 had been made with retrospective effect ? and (2) Whether the notice under S. 34 issued on 10-7-1941 was validly issued for the assessment of the year 1939-40?"

[4] In my opinion both these questions must be answered against the assessee in view of the principle enunciated by the Federal Court in *Chatturam* v. *Commissioner of Income tax, Bihar*, (1947) 15 I. T. R. 302. In that case the assessee was served on 20-4-1940 with a notice under S. 22 (2), Income-tax Act, for furnishing a return in the prescribed form for the accounting year 1939-40. On 22-4-1940 a notice under S. 22 (1) was published in the newspapers requiring persons generally to submit the returns in prescribed form. On 26-5-1940 the Governor of Bihar by Notification under S. 92 (1), Government of India Act, directed that the Indian Income-tax Act and the Indian Finance Act 1940 should be deemed to have been applied to the Chotanagpur Division with retrospective effect. To remove doubts as to the retrospective applicability of the Acts the Governor of Bihar acting under S. 92 (2), Government of India Act made Regulation I [1] of 1941. The Regulation received assent of the Governor-General on 13-6-1941. There were appeals against the assessments and the appeals were pending when Regulation I was made. Upon these facts it was held by the Federal Court that under S. 92 (1) the Governor was acting in exercise of his legislative powers; that in any event under S. 92 (2), Constitution Act, the Governor had full plenary powers of legislation in respect of the partially excluded area and that he had power to make Regulation I [1] of 1941 applicable to the Chotanagpore Division with retrospective effect. It was further held that the issue or receipt of a notice was not the foundation of the jurisdiction of the Income-tax Officer to make the assessment or of the liability of the assessee to pay the tax. The liability to pay the tax is founded on Ss. 3 and 4, Income-tax Act, which are the charging sections. Section 22 and others are the machinery sections to determine the amount of tax and it was futile to contend that the Income-tax Officer was not entitled to assess the party or that the party is not liable to pay any tax because notice had not been issued to him.

[5] Applying the ratio of this decision to the present case it is manifest that both the questions referred to the High Court must be answered in the affirmative. The assessee must pay the cost of this reference. Hearing fee Rs. 250.

[6] **Sarjoo Prosad J.**— I agree.

V.S.B. *Answer against assessee.*

A. I. R. (38) 1951 Patna 187 *[C. N. 32.]*

SHEARER AND SARJOO PROSAD JJ.

Visheswar Singh — Petitioner v. *Commissioner of Income tax, Bihar and Orissa— Opposite Party.*

Misc. Judicial Case No. 228 of 1949, D/- 13-10-1950.

Income-tax Act (1922), S. 41 (1) — Trust — Construction—Applicability of first proviso.

A babuana grant provided as follows :—"The late Maharajadhiraj Sir Rameshwar Singh constructed a palace known as 'Rajnagar Palace', as also several temples of marble and masonary, all of rare architectural beauty and value and installed therein various deities . . . It is the

pious duty of the parties to these presents to make suitable provision for the performance of the daily worship, Raj Bhog, periodical festivals and ceremonies of the said deities as well as for the upkeep, preservation, repair and maintenance of these monumental works of art with their appurtenances of gardens, tanks, etc. Therefore, out of the villages mentioned in Sch. A at foot hereof, the villages detailed and specified in Schs. B and C hereunder written are granted to the said Maharajadhiraj Kumar Visheswar Singh subject to the trust that the income of the villages specified in Sch. B would be wholly devoted to the performance of the Pooja, Path, Raj Bhog, Utsab and Samaiya of the deities aforesaid and that of the villages in Sch. C would be entirely devoted to the maintenance, upkeep, repair and preservation of the said palaces, temples, gardens, tanks, and other appurtenances :

Held, that the document did not create two different kinds of trusts. It was in substance a dedication of all the properties to the deities and in making the dedication, it separately provided on the one hand for the performance of the pujas and observance of the festivals, etc., and on the other for the repair and upkeep of the temples and other appurtenances. The mere fact that the palaces, gardens and tanks had also been mentioned did not in any manner affect the position because these things went along with the temples and the idols which were installed therein. Both Schs. B and C properties had the same characteristics, and the income from both the properties was to be spent over determinate objects, namely, the deities which were undoubtedly juridical persons. Though the shares of these deities had not been defined all the various deities had been mentioned in the document, and, as such in the eye of law they had equal shares in the income of the properties, and, in the circumstances, the income of the properties in Sch. C also should be assessed in the same manner as the income of the properties in Sch. B. Thus the income of the trust property in the hands of the trustee was not liable to be assessed at the maximum rate under the first proviso to S. 41 (1), but should be assessed at the rate applicable to the individual income of each of the deities : A I. R. (34) 1947 Pat. 178, *Ref.* [Paras 3, 5]

Anno. Income-tax Act, S. 41, N 1.

B. C. De, Prem Lal and S. P. Srivastava — for Petitioner; S. N. Dutt—for Opposite Party.

Case referred to :—

('47) A. I. R. (34) 1947 Pat 178 : (1946-14 I. L. R. 703.) [Paras 3, 6]

Sarjoo Prosad J. — This is a reference made under S. 66 (1), Income-tax Act, by the Income-tax Appellate Tribunal, Bombay Bench. The point of reference is

" whether the income from the properties mentioned in Sch C is taxable at the maximum rate under the first proviso to S. 41."

The answer to the question depends upon the interpretation of a certain deed of trust executed by the Maharajadhiraj of Darbhanga on 23-7-1929, in favour of the applicant, Raja Bahadur Visheswar Singh, his brother.

[2] The facts are that in the Darbhanga Raj, which is claimed to be an impartible estate, maintenance grants are made in favour of the junior members of the family. They are commonly known as *babuana* grants. In pursuance of this practice it appears that the present Maharajadhiraj of Darbhanga executed the deed aforesaid under which a *babuana* grant was given to the applicant in respect of a number of villages in separate enjoyment. I shall briefly refer to the relevant terms of the document in question. After the preliminary recitals, it proceeds to state as follows :

"Now these presents witness that in accordance with the family custom or usage, otherwise called Dastcor Khandan or Kulachar of Darbhanga Raj, of assigning a maintenance of Babuana grant to the younger son or sons of the family and also in pursuance of the aforesaid amicable settlement and arrangement the said Maharajadhiraj Kameshwar Singh Bahadur doth hereby grant and convey to the said Maharajadhiraj Kumar Visheswar Singh such interest in all the villages or parts of villages & other classes of lands, appertaining to and in fact constituting the Rajnagar Circle of Darbhanga Raj as per detailed list given in Sch. A below with all arrears of rent due in respect thereof with all buildings, structures, erections, standing thereon, except such as are hereinafter specified as trust properties and all rights appertaining thereto as are usually conveyed under a Babuana grant to the junior members of the family to have & to hold the same as a maintenance or Babuana grant according to the custom of the family subject amongst others to the conditions hereinunder specifically set forth."

This recital shows that the applicant received a grant of all the villages given in Sch. A of the document except such as were hereinafter specified as trust properties. Now, the specification of the trust properties is contained in para. 5 of the recitals in the document. I propose to reproduce a part of this para. which has been the subject-matter of interpretation by the parties before this Court. Para 5 says :

"That the late Maharajadhiraj Sir Rameshwar Singh constructed a palace known as 'Rajnagar Palace' as also several temples of marble and masonary all of rare architectural beauty and value and installed therein various deities., viz. Sri Durga, Sri Kali, Sri Ardh Narishwar, Sri Rajeshwari, Sri Ramshwarnath Mahadeva, Sri Radhakrishna, Sri Ramjanki. Sri Soorj, Sri Criba Debi (Goswan), Sri Vishun and Sri Mahadeva, the said palace and temples are situated in village Rajnagar except two temples which are situated in villages Barrooar and Korabia, Perganna Bachhaur and all the three villages aforesaid form part of this grant. The late Maharajadhiraj, Sir Rameshwar Singh used to celebrate the Puja, Path, Raj, Bhog Utsab and Samaiya of the various deities aforesaid on a grand scale befitting his position as Maharajadhiraj of Darbhanga. Hence, it is the pious duty of the parties to these presents to make suitable provision for the performance of the daily worship, Raj Bhog, periodical festivals & ceremonies of the said deities as well as for the upkeep, preservation, repair and maintenance of these monumental works of art with their appurtenances of gardens, tanks, etc. etc. Therefore out of the villages mentioned in Sch. A at foot hereof, the villages detailed and specified in Schs. B and C hereunder written are granted to the said Maharajadhiraj Kumar Visheswar Singh subject to the trust that the income of the villages specified in Sch. B would be wholly devoted to the performance of the Pooja Path Raj Bhog Utsab and Samaiya of the deities aforesaid and that of the villages in Sch. C would be entirely devoted to the maintenance, upkeep, repair and preservation of the said palaces, temples, gardens tanks, and other appurtenances. The said Maharajadhiraj Kumar shall stand possessed of the said palace, temples with their appurtenances and the villages mentioned in Schs. B and C below upon trust for the purposes above mentioned and shall be the first trustee in respect thereof . . "

I may also refer to another relevant recital in the document as contained in para 6. The relevant portion is

"The aforesaid palace and temples as also the villages mentioned in Schs. B and C shall not be liable to be partitioned, sold, exchanged or otherwise disposed of or dealt with by the trustee nor shall the income of the aforesaid villages or any of them be used or spent otherwise than for the purposes set forth above."

These recitals indicate that the properties specified in Schs. B and C of the document were given to the Raja Bahadur to be held as a trustee for disbursing the income thereof over the performance of the daily worship, Raj Bhog periodical festivals and ceremonies of the deities as well as for the upkeep, preservation, repair and maintenance of the monumental works of art with their appurtenances of gardens, tanks, etc. The recitals also show that the income from Sch. B properties was to be wholly devoted to the performance of Puja Path, Raj Bhog, Utasab and Samaiya of the deities, and that the income from Sch. C properties was to be devoted to the upkeep, repair preservation of the palaces, temples, gardens tanks and other appurtenances. The contention of the assessee is that the properties both in Schs. B and C were part and parcel of the same endowment in favour of the deities who were the cesti qui trust, and that the properties being vested in the deities or held in trust for them by the applicant, who was the first trustee, under the terms of the proviso to S. 41 of the Act, it should be deemed that each of the deities installed in the various temples enumerated in the document has an equal share out of the income of both the properties mentioned in Schs. B and C of the document, and therefore, the assessment should be on this basis. The contention of the Department, however, is that the document really speaks of two separate trusts, one in respect of the deities and the other for the purposes of maintaining the palaces, temples, gardens, tanks, and other appurtenances; and although, in so far as Sch. B properties are concerned, it may be held that the dedication was in favour of the deities but in respect of Sch. C properties, the properties being vested in the trustee himself and not in the palaces, temples, gardens etc. which were not juridical persons, the assessment in respect of the income from Sch. C properties should be at the maximum rate under the first proviso to S. 41.

[3] The Income-tax officer held that the income of the properties mentioned in the trust deed was not receivable on behalf of any particular person; the shares of the beneficiaries being indeterminate, be, therefore, assessed at the maximum rate. The appellate Assistant Commissioner of Income-tax upheld the assessment. He observed that on the terms of the deed the individual shares of the persons on whose behalf the incomes of the trust properties were receivable were indeterminate or unknown and that the mere fact that the trustee disbursed or appropriated the income in a certain manner did not affect the legal position. When the matter came to the Income-tax Tribunal, the Tribunal was of the view that in respect of Sch. B properties mentioned in the document the income of which was wholly devoted to the worship of the deities is of the different temples, the assessment should not be at the maximum rate but at the rate applicable to each beneficiary and deity. In doing so, they relied upon a decision of this Court *Sri Sri Jyotishwari Kalimata* v. *Commissioner of Income tax, B & O.*, (A. I. R (34) 1947 Pat. 178: 1946-14 I. L. R. 703. In regard to Sch. C properties, however, they took the view that the income from these properties stood on a different footing. They held that the income of these properties was to be utilised for the upkeep of the palaces, gardens, tanks, temples, etc. As these objects were not juridical persons, it could not be said that the properties were vested in them; nor could it be said that the income was to be disbursed over these objects according to some determinate shares. They, therefore, held that the assessment in respect of the income from these properties in Sch C should be at the maximum rate; in other words, they allowed the objection of the assessee in respect of Sch. B properties but rejected his claim in respect of Sch. C properties. And this they did on the basis that in their view the document created two different trusts, one for the Puja Path etc. of the deities, & the other for the maintenance of the palaces, gardens, tanks, temples, etc. They also observed that in regard to the second trust, if it had been restricted to the upkeep of temples only, it might well have been assumed that it was intended for the benefit of the deities. But the objects mentioned therein include other objects also, & therefore the principle that a trust in favour of the temple means a trust in favour of the deities installed therein, & therefore, a trust in favour of a juridical person does not apply to such a case. In my opinion, the members of the Tribunal were in error in thinking that the document created two different kinds of trusts. It is true that the provision in the document that the income from Sch. C properties was to be utilised entirely for the maintenance, upkeep, repair & preservation of the said palaces temples, gardens & other appurtenance may apparently lead to this impression; but this recital has to be read in the light of the recital in the earlier part of the para. which quite clearly shows that the intention was to provide for the performance of the daily worship of the various deities installed in the several temples of marble & masonary, all of rare architectural beauty, & also to provide for the upkeep of these monumental works of art with their appurtenances of gardens, tanks, etc. It was, therefore, in substance a dedication of all the properties to the deities of which the applicant was appointed the first trustee under the terms of the document & in making the dedication, it separately provides on the one hand for the performance of the pujas & observance of the festivals etc. & on the other for the repair & upkeep of the temples & other appurtenances.

The mere fact that the palaces, gardens & tanks have also been mentioned does not in any manner affect the position because these things go along with the temples & the idols which are installed therein. The intention of the document was not to treat these objects as separate entities, & it is difficult to hold that the trust created in respect of Sch. C properties in view of their small income was something quite apart from the trust in favour of the idols in the temples. Reading the whole para together, the impression is that they are all part & parcel of the same trust though it is enjoined upon the trustee to spend the income from the properties in the two schedules in different ways, one exclusively for the purposes of worship & the other for the upkeep of the temples, gardens & other appurtenances thereof. If the above construction of the documents is adopted, then it is quite clear that both Schs. B & C properties have the same characteristics, & in that case the income from both the properties is to be spent over determinate objects, namely, the deities which are undoubtedly juridical persons. It is true that the shares of these deities have not been defined but all the various deities have been mentioned in the document, & as such, it will have to be assumed that in the eye of law they had equal shares in the income of the properties, & in the circumstances, the income of the properties in Sch. C also should be assessed in the same manner as the income of the properties in Sch. B. The Tribunal have relied upon a decision of this Court in *Sri Joytishwari Kalimata* v. *Commissioner of Income-tax, B. & O.*, A. I. R. (34) 1947 Pat. 178, which clearly lays down the principle that the income of the trust property in the hands of the trustee is not liable to be assessed at the maximum rate under the first proviso to S. 41 (1), Income tax Act, but should be assessed at the rate applicable to the individual income of each of the deities.

[4] It is contended by Mr. S. N. Dutt for the Department that it is not really a trust at all. According to him, the properties in Schs. B & C are also vested in the applicant though he holds subject to certain conditions, namely, that the income of Schs. B & C properties is to be spent for the purposes specified & earmarked in the document. In his submission, Sch. C properties have nothing to do with the deities at all. He says that the purpose for which the disbursement of these properties is to be made is entirely a different purpose, & although the temples might be included, yet there are the palaces, gardens, etc. also mentioned therein, & as it is not known that part of the income is to be spent over these palaces, gardens, etc., the amount to be spent over the temples is indeterminate. Therefore, he says that there is no option but to assess the income of the Sch. C properties at the maximum rate as it has been done by the revenue authorities. The learned counsel relies upon the finding of the Tribunal which is to the effect that there was no evidence or material to show that the palaces, gardens, tanks, etc., were parts of the temples. He points out that a trust in favour of palaces, gardens, tanks etc. would not be a trust at all. & therefore, it must be held that the properties in Sch. C were vested in the trustee himself, namely, the applicant assessee. It is true that if the disposition in respect of Sch. C properties is treated on a separate footing, then the properties would be vested in the trustee himself, but, as I have already discussed above, this interpretation will not be a correct interpretation of the document. S. 41 of the Act does not make any distinction whether the properties are vested in the trustee or vested in the benefeciaries thereof. It is only concerned with the disbursement of the income over determinate objects of the trust in defined shares or otherwise. Therefore, in my opinion, this contention is without any merit & is not sustainable in view of the true interpretation of the document.

[5] For the above reasons, the reference should be answered in the negative, & the income from the Sch. C properties should be taxed not at the maximum rate under the first proviso to S. 41, but on the same basis as the income from Sch. B properties as directed by the Tribunal already. The assessee, in the circumstances of this case, will not be entitled to any costs of the hearing of this application.

[6] **Shearer J.**—I agree to the order proposed to be passed by my learned brother, but desire to say that I am inclined to doubt the correctness of the decision in *Joytishwari Kalimata* v. *Commissioner of Income-tax B. & O.*, A. I. R. (34) 1947 Pat. 178, & think that when a suitable occasion arises, it may have to be reconsidered.

D.H. *Answer in the negative.*

A. I. R. (38) 1951 Patna 190 *[C. N. 33.]*

S. K. DAS AND SARJOO PROSAD JJ.

Jai Narain—*Appellant* v. *Syed Ali Murtaza*—*Respondent.*

A. F. A. D. No. 2138 of 1949, D/- 16-5-1951.

(a) Civil P. C. (1908), O. 2, R. 2—Previous suit for rent in Small Cause Court—Relief of ejectment on ground of forfeiture of lease not claimed — Subsequent suit for ejectment — Maintainability — T. P. Act (1882), S. 111 (g).

The defendant who was a sub-lessee from the plaintiff repudiated the plaintiff's title and refused to pay the rent. The plaintiff thereupon gave a notice to quit and on non-compliance of the notice brought a small cause suit for recovery of arrears of rent only till the date of suit. This suit was ultimately decreed but during this suit there was a fresh disclaimer of plaintiff's title and the plaintiff without serving any fresh notice to quit brought a suit for possession and injunction in respect of the demised premises:

Held, that the second suit was barred by O. 2, R. 2 as the plaintiff had failed to claim the relief for ejectment of the defendant on the ground of forfeiture in his previous suit for rent. It was open to the plaintiff to choose

a proper forum where he could have claimed all the reliefs arising out of the same cause of action. But having failed to do so he must be deemed to have omitted to sue for these reliefs. He could not by his own choice defeat the provisions of O. 2, R. 2, Civil P. C. : A. I. R. (20) 1933 Pat. 715 and A.I.R. (18) 1931 P.C. 229, *Ref.* [Paras 6, 7]

Held further that the suit was not maintainable on the basis of disclaimer of plaintiff's title in the previous suit as the plaintiff had failed to give fresh notice as required by S. 111 (g), T P. Act. The previous notice to quit could not avail him as it had been waived by suing only for arrears of rent only. [Para 8]

Anno. Civil P. C., O. 2, R. 2, N. 6, 14, 15; T. P. Act, S. 111 (g), N. 16.

(b) Civil P. C. (1908), S. 100 — Mixed question of law and fact — Question whether status of defendant is of sub-lessee or licensee.

The question whether the status of the defendant is that of sub-lessee or licensee is a mixed question of law and fact depending upon the deed of agreement and the surrounding facts and circumstances. As such even if the point has been conceded in the lower appellate Court it can be attacked in second appeal. [Para 9]

Anno. Civil P. C., Ss. 100 & 101, N. 28, 42 & 53.

(c) T. P. Act (1882), S. 105 — Lease and license—Distinction — Easements Act (1882), S. 52 — (Deed-Construction—Lease or license).

A license as defined in S. 52, Easements Act, must be distinguished from a lease. A license does not create any interest or property in the estate of the grantor, and, therefore, a licensee is not entitled to a notice to quit before eviction. On the other hand, a lease as defined in S. 105, T. P. Act, creates an interest in immoveable property, and a notice of the intention to determine the lease is necessary before eviction. [Para 9]

A had taken a lease of certain land from the Municipality for a period of five years with option of renewal for the construction of a petrol pump and a shop. By a subsequent document described as an indenture of agreement, *A* agreed to tranefer to *B* the exclusive right of management of the shop and the petrol pump standing on the demised land in consideration of a premium of Rs. 20 per month till the time the pump continued to exist on the site. *A* undertook to render assistance to *B* in obtaining a lease of the petrol pump in his own name from the oil company. A removed the materials of the shop and in its place *B* constructed a new shop. *B* was to bear all the taxes, charges and the expenses of management and he was to continue the business in his own name. Thus *A* had no other interest left in the business except to receive the monthly premium :

Held, on a construction of the document and the surrounding circumstances that the document created a sub-lease and not a licence in favour of *B*. [Para 9]

Anno. T. P. Act, S. 105, N. 13, 14.

Devendra Prasad — for Appellant; *S. A. Saghir and S. Imteaz Hussain—for Respondent.*

Cases referred to :—

('31) A.I.R. (18) 1931 P. C. 229 : (134 I. C. 654). [Pr. 7]
('33) A. I. R. (20) 1933 All. 911 : (149 I. C. 486). [Pr. 9]
('40) A. I. R. (27) 1940 All. 524: (I. L. R. (1940) All. 781). [Pr. 6]
('30) A. I. R. (17) 1930 Bom. 165 : (31 Cri. L. Jour 1100). [Pr. 9]
('30) A. I. R. (17) 1930 Cal. 739 : (57 Cal. 655). [Pr. 9]
('33) 14 P.L.T. 663:(A.I.R. (20) 1933 Pat. 715). [Pr. 7]
(1904) A. C. 405 : (73 L. J. P. C. 62). [Pr. 9]

Sarjoo Prosad J.—The defendant is the appellant in this appeal which relates to a suit for injunction and accounts. The plaintiff in the action took in lease a piece of land in Mohalla Sabzibagh of the Patna town from the City Municipality for the purpose of installing a petrol pump and erecting a shop for motor accessories. The lease was under a registered document dated 29th March 1941, for a term of five years with option for renewal for a further period of five years. After obtaining the lease, the plaintiff put up a temporary shed on the site and got a petrol pump installed, and he ran the business under the name and style of Ali & Sons. Finding some difficulties in carrying on the business, the plaintiff on 28th August 1945, entered into an agreement with the defendant. The terms of the agreement have assumed some importance in the case and may have to be referred to in some detail at a later stage in the judgment. For the present it may be sufficient to observe that the purport of the agreement was to transfer the entire management of the shop to the defendant, and the plaintiff in consideration thereof was entitled to the payment of a monthly premium of Rs. 20 only with effect from September 1945. The defendant in his turn undertook to run the business in its old name with the option to get the petrol pump transferred to his own name. By virtue of the agreement the defendant was duly let into occupation and possession of the land, and in course of the year it appears that the Standard Vacuum Oil Company transferred the lease of the petrol pump to the defendant. The lease granted by the Municipality to the plaintiff expired in March 1946, and thereafter the defendant applied to the Municipality for grant of the lease to him and changed the original name of the business. The plaintiff states that in view of this conduct of the defendant he served a notice on 9th September 1947, terminating the agreement and asking the defendant to quit the land and the business by 30th September 1947. The defendant, however, did not vacate the premises. The plaintiff then instituted a suit in the Court of Small Causes at Patna being S. C. C. Suit No. 109/99 of 1947 for recovery of arrears of premium from May 1946 to September 1947. In that suit, it is alleged, the defendant pleaded, inter alia, that the plaintiff had no title to the lease given by the Municipality after the expiry of the term of five years mentioned therein. The S. C. C. suit was decreed on 16-9-1948, and in revision the decision of the learned Judge was affirmed by this Court on 24-3-1949. The plaintiff in the meantime had filed the present suit on 27-2-1948, urging that the lease in favour of the plaintiff granted by the Municipality continued to operate and the defendant having repudiated the plaintiff's title had forfeited his right under the agreement dated 28-8-1945, to remain on the land. The plaintiff accordingly prayed for permanent injunction restraining the defendant from going near the site or working the petrol pump or having any concern with the premises. There was a further prayer for accounting and for a decree in favour of the plaintiff in respect of any sum found payable to him from the defendant.

[2] The defence to the action substantially was that the defendant had been inducted on the site by the plaintiff as a sub-leasee subject to the payment of Rs. 20 only to the latter, and that the agreement in question was not merely to transfer the right of management with respect to the concern. It was further urged that the plaintiff's lease having expired and no fresh lease having been granted to him, the suit at the instance of the plaintiff was not maintainable he having no title to the property and that no case of forfeiture had at all been made out. The defendant further averred that the present suit was barred under O. 2, R. 2, Civil P. C.

[3] The learned Munsif who tried the suit found that the plaintiff continued to be a lessee in respect of the premises but that he had failed to make out a case of forfeiture. He further held that the claim for accounts was not maintainable and that the suit was barred by O. 2, R. 2 Civil P. C. In regard to the defendant's case that the agreement constituted a sub-lease in his favour, the learned Munsif accepted the defendant's plea on a consideration of the terms of the agreement as also the surrounding circumstances and evidence in the case. On these findings he dismissed the suit.

[4] The lower appellate Court also held that the learned Munsif was justified in coming to the conclusion that the plaintiff's lease had not come to an end and the plaintiff was entitled to sue. On the question whether under the terms of the agreement dated 28-8-1945, only the right to manage the business had been transferred, the learned Subordinate Judge observed that the appellant had accepted the position that the document created a sub-lease, and that, therefore, it was unnecessary to enter into a further discussion of the matter. He, however, appears to have also found in concurrence with the learned Munsif that

"It is clear from the evidence and the surrounding circumstances that the intention of the parties was to create a sub-lease in respect of the premises. Plaintiff no doubt purported to transfer the management of the petrol pump and the shop but what was in fact transferred was the lease-hold itself."

He accordingly held that the defendant's status was that of a sub-lessee. He, however, came to the conclusion that the lease in favour of the defendant had come to an end by forfeiture though there was no liability to render accounts. He accordingly allowed the appeal and decreed the suit of the plaintiff.

[5] It is contended on behalf of the appellant that the decision of the learned Subordinate Judge on the question of forfeiture was not maintainable at all. In my opinion there is much force in this contention. The claim of the plaintiff is based on two grounds. It is based, firstly, on the ground that when the plaintiff's lease expired on 29-3-1946, in April following the defendant repudiated the plaintiff's title and stopped paying rent. This was followed by a notice to quit given by the plaintiff asking the defendant to vacate the premises by the end of September 1946. When the defendant failed to comply with the demand in the notice, the plaintiff instituted the Small Cause Court suit to which I have already referred claiming recovery of premium due from May 1946, up to the date of the institution of the suit. The next ground on which the claim of forfeiture rests is that there was a fresh disclaimer of the plaintiff's title in the written statement which the defendant filed in the Small Cause Court suit, and the manner in which the suit was contested by the defendant. It may be stated at the outset that this written statement was found inadmissible in evidence by the learned Munsif. The learned Subordinate Judge appears to rely upon the allegation made in para. 9 of the plaint of this suit in regard to the recital in the written statement. But the learned Subordinate Judge himself characterises the allegation therein as quite vague and not worthy of any weight being attached to it. It is doubtful whether the mere recital in the plaint in the absence of the written statement in the Small Cause Court suit itself would be enough to prove the disclaimer in question. There can be, however, no dobut that one of the principal questions raised in the Small Cause Court suit was the attack on the title of the plaintiff. The Small Cause Court suit of course ended in favour of the plaintiff, but having regard to the manner in which the case was contested, there was certainly a disclaimer of the plaintiff's title. I will examine both these grounds in their order.

[6] In so far as the first ground is concerned, both the Courts below have come to the conclusion that the relief as to forfeiture claimed in the present suit should have been included in the plaint of the previous suit, and this not having been done, the relief as to forfeiture is barred under O. 2, R. 2, Civil P. C. The lower appellate Court in dealing with the point (though I must say that he has mixed up the consideration of the two aspects of forfeiture) says thus :

"Plaintiff's suit for rent for the period following the first disclaimer in April 1946 amounted to waiver of forfeiture. Plaintiff had a cause of action for ejectment or injunction on the date the S. C. C. suit was filed. He chose not to include a relief by way of ejectment or injunction in that suit. His relief as regards the arrears due and the relief by way of ejectment or injunction arose out of defendant's refusal to pay the premium on the ground of plaintiff's want of title. In other words he was entitled to two reliefs out of one and the same cause of action. Having relinquished one of the two reliefs it was not open to the plaintiff to ask for that relief in another suit. If the present suit were based on the cause of action, plaintiff's claim would manifestly have been barred under O. 2, R. 2 of the Civil Procedure Code and to that extent I entirely agree with the contention put forward on behalf of the respondent."

The decision of the two Courts below on the point appears to me to be correct. The cause of action consists of the whole bundle of facts which entitles the plaintiff to certain reliefs. It may be that a particular set of facts may be co-related

to a certain kind of relief but that will not mean that those sets of facts constitute different causes of action. They all form the occasion or foundation of a suit, and with a view to avoid multiplicity of litigations the Code provides under O. 2, R. 2 that

"a person entitled to more than one relief in respect of the same cause of action may sue for all or any such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

It is not, therefore, open to the plaintiff to cut up the different sets of facts all relating to the same cause of action but connected with a particular kind of relief in order to make the different sets the foundation for different suits. He must sue for all these reliefs together and his omission to do so disentitles him to seek the relief in a subsequent suit. The plaintiff in this case, as observed above, was entitled to sue for ejectment of the defendant on the ground of forfeiture by the time he instituted the Small Cause Court suit. He did not, however, choose to do so. Therefore his claim now on this ground evidently comes under O. 2, R. 2 (3), Civil P. C. It was held in *Saqir Hassan* v. *Tayab Hassan*, A. I. R. (27) 1940 ALL. 524 that if a person is wrongfully kept out of possession of immoveable property he is entitled to sue for possession and for mesne profits and under the provisions of O. 2, R. 2 (3) he is bound to include both claims in one suit. If he sues only for mesne profits he cannot in a subsequent suit sue separately for possession. In the present case, the plaintiff sued only for the premium due when he instituted the Small Cause Court suit but not for possession. Therefore, he cannot now on that account claim recovery of possession.

[7] It is next argued on behalf of the plaintiff that in the Small Cause Court suit there could have been no claim for recovery of possession. Now it was open to the plaintiff to chose a proper forum and he cannot by his own choice defeat the provisions of the Code. There was nothing to prevent the plaintiff from instituting the suit before another Court of competent jurisdiction where he could have claimed all the reliefs to which he was entitled under the same cause of action. As observed in *Kamakhya Narain Singh* v. *Ramraj Singh*, 14 P. L. T. 663, there is no reference in O. 2, R. 2 of the Code to the jurisdiction of the Court trying the claims, and if the plaintiff chose the Court of the Additional Subordinate Judge in the exercise of his powers as Munsif, he merely relinquished a part of his claim within the meaning of the second part of R. 2 to O. 2 of the Code. Here, as he chose a Court where the relief as to ejectment or injunction could not be granted to him, he would be deemed to have omitted to sue for these reliefs. The case relied upon on behalf of the plaintiff viz. *Naba Kumar* v. *Radhashyam Mahish*, A. I. R. (18) 1931 P. C. 229 does not help his contention at all. On the contrary, it lends support to the conclusion at which I have arrived. Their Lordships observed in that case that the relief for rent and profits which could have been prayed for in a previous suit for conveyance of properties and arising out of the same cause of action cannot be prayed for in a subsequent suit.

[8] The question then is whether the right for forfeiture could be claimed on the fresh disclaimer in the Small Cause Court suit itself. The learned Subordinate Judge thinks that the present suit is founded on the forfeiture caused by the subsequent disclaimer made in the written statement filed by the defendant in the Small Cause Court suit (vide para. 14 of the plaint). He also observes that

"the fact that the S. C. C. suit was preceded by a notice is immaterial in this case. The notice must be deemed to have been waived since plaintiff claimed arrears only in the previous suit."

Therefore, on this finding the service of the previous notice to quit could not now be availed of by the plaintiff. The learned Subordinate Judge, however, thinks that any fresh notice was not necessary "inasmuch as it is a case of forfeiture caused by disclaimer". This part of the decision of the learned Subordinate Judge has been very seriously questioned before us; and I think quite rightly, having regard to the provisions of S. 111 (g) of the Transfer of Property Act. Section 111 (g) says that a lease of immoveable property determines by forfeiture in case the lessee renounces his character as such by setting up a title in third person or by claiming title in himself: but in all such cases it provides that the lessor or his transferee must give notice in writing to the lessee of his intention to determine the lease. Therefore, when there was a fresh disclaimer of title by the defendant it was the duty of the plaintiff to have given him a fresh notice in writing of his intention to determine the lease. There is no evidence in this case of any such notice having been given, and the learned Subordinate Judge was wrong in thinking that no such notice was necessary, he having himself found that the plaintiff could not take advantage of the previous notice to quit because that part of his claim was now closed by reason of the provisions of the Code stated above.

[9] Learned counsel for the respondent has, therefore, raised the most serious question that the defendant was not a lessee but a mere licensee, and therefore no notice for determining the lease was necessary. He contends that the question turns upon the interpretation of the indenture of agreement between the parties which is the document of title and is, therefore, a pure question of law. I have already stated that before the lower appellate Court it was conceded that the finding of the learned Munsif on the point that the deed of agreement created a sub-lease was correct. I have also shown that the finding of the Courts below on the point does not merely

rest upon the deed of agreement but also upon the surrounding facts and circumstances of the case. But the question being a mixed question of law and fact and the inference whether the status of the defendant was that of a sub-lessee or that of a licensee: being an inference of law arising on those findings, I am not prepared to hold, as at present advised, that the concession made on behalf of the plaintiff is conclusive. I have, therefore, to examine the question on merits. Primarily, we have to decide the question on the terms of the document itself and it is only where the terms are of an ambiguous character that we can look to other evidence and circumstances bearing on the question. It has been often said : Tell me what the parties have done under the document and I will tell you what the document means." The conduct of the parties, therefore, as to how they themselves treated the agreement in question would be very material. The distinction between a lease and a license is well known. 'License' has been defined in S. 52, Indian Easements Act (5 of 1882) as

"a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property."

In other words, a license does not create any interest or property in the estate of the grantcr, and, therefore, a licensee is not entitled to a notice to quit before eviction. On the other hand, a lease as defined in S. 105, Transfer of Property Act, creates an interest in immoveable property, and as I stated above, a notice of the intention to determine the lease is necessary before eviction. The distinction, therefore, in the two cases is one of substance and not of mere words. The only difficulty is to find out this distinction in a given case and sometimes the line of demarcation is very thin. The Judicial Committee of the Privy Council in *Glenwood Lumber Co. Ltd.* v. *Phillips*, (1904) A. C. 405 made the following pertinent observation :

"If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purpose for which it may be used, it is in law a demise of land itself."

That was a case where under the document a right had been given to cut timber on the land, and the argument was that there was no demise of the land itself but a mere license to cut timber; but this argument did not find favour with their Lordships. Similarly, the Bombay High Court following the above observations of the Judicial Committee, in *Sharif Dadumiyaji* v. *Emperor*, A. I. R. (17) 1930 Bom. 165 said as follows :

"The main test for deciding whether a person is a licensee of a property or a lessee is that of exclusive possession. If the effect of the agreement is to give exclusive possession to the holder though subject to certain reservations then it is a lease if the agreement is merely for the use of the property in a certain way and on certain terms while it remains in the possession and control of the owner, it is a license."

These decisions have been followed in various other cases, for instance, *Behari Lal* v. *Chhote*, A.I.R. (20) 1933 ALL. 911 and *Secretary of State* v. *Bhupal Chandra Ray*, 57 Cal. 655 : A.I.R. (17) 1930 Cal. 739. In the Allahabad cases the document recited that so long as the donee or his sons or heirs continue to carry on the business of the said shop and the sale of goods and merchandise therein, till then the donor or his heirs would allow it to be carried on therein, but whenever the donee or his heirs close the said business and the shop becomes vacant, then the donor or his heirs would re-enter into the possession of the said shop. It also appeared in the facts of that case that the donee had exclusive possession and control of the shop so long as he carried on business thereof. He had also been made responsible for the repairs and it was quite obvious that he had the right to exclude from possession every one else including even the lawful owner, and under these circumstances their Lordships held that it was a demise of the shop itself and not merely a license to carry on the business of the said shop. In the Calcutta case a plot of land which was used as a hat or market was let out for a fixed period and for a fixed sum. The person to whom it was let out had the right to collect tolls in the market and had covenanted to keep the hat clean and not to interfere with the rent of any permanent shop and not to make alterations without the leave of the person who let it out and the former was bound to deliver possession at the end of the term. In spite of the restrictions aforesaid, it was held that the person to whom the land had been let out had sufficient control of the land and the settlement was in the circumstances construed as a lease and not as a license. The cases must of course be of an illustrative character, but keeping the above principles in view, we have to see what the document amounts to in the present case. A copy of the deed of agreement in question has been placed before us. It is termed as as an indenture of agreement and the document recites at various places that the first party (plaintiff) had agreed to transfer the management of the oil pump and the shop existing on the land to the second party (defendant). It is, therefore, argued that prima facie it was a mere transfer of management and was not a transfer of interest in immoveable property. But the document shows that the agreement was to enure indefinitely till the petrol pump existed on the present site. The petrol pump belonged to the Standard Vacuum Oil Co. and not to the plaintiff and the stipulation was that even if the Company transferred the lease of the pump to the second party, even then the second party was liable to pay the first party the monthly premium payable under the agreement till the time the pump continued to exist

on the present site. The first party even undertook to render assistance to the second party in obtaining a transfer of the lease of the pump. So far as the shop is concerned it has been found that the plaintiff had removed the materials of the previous shop constructed by him before he let out the land to the defendant. The previous shed was made of tin only and the defendant after he had entered into occupation under the agreement constructed the shed at present standing on the land which is made of bricks and wood. Therefore the premium was in respect of the shop and the land both. Then again under the deed of agreement between the plaintiff and the defendant it is mentioned that all the municipal taxes, petrol taxes, electric charges, income-tax, all the expenses of the management and repairs of the road etc. shall be exclusively paid by the second party with effect from September 1945. The first party appears to have no other interest left except for the payment of the monthly premium of Rs. 20 and otherwise the second party was entitled to the exclusive use and enjoyment of the land. In fact, it has been found that he even changed the name of the business shortly after this agreement and the plaintiff did not object to the same but rather acquiesced in this act of the defendant and continued to get the rent of Rs. 20 per month only. It has been also found that with the express consent of the plaintiff, the defendant got his name registered with the Standard Vacuum Oil Company as a dealer and within a week of the agreement in his favour he began to carry on his business in the name of Mohan and Sons. These findings have been arrived at in detail by the trial Court and the appellate Court has also affirmed these findings which were not seriously questioned and in fact accepted before him. The appellate Court says :

"The subject-matter of the agreement is described at the foot of the agreement as a piece of land and then follows full particulars of that land. It is undisputed that the plaintiff ceased to have all concern with the business with effect from the date of agreement. It is conceded that plaintiff did not invest any capital in the business which was run by the defendant. The entire capital was invested by the defendant himself. Further plaintiff was not to have any concern with the profit or loss is what he described in his evidence in Court as defendant's business. Defendant was certainly not the agent of the plaintiff or an employee under him. The agreement between the parties provided that if defendant so liked he could get the petrol pump itself transferred to his name. This in fact was done soon after the close of the agreement. Even the name of the business was changed by the defendant a week after the agreement. Plaintiff has admitted that he never got the license for selling petrol renewed in his name after the close of the agreement. The original lease in favour of the plaintiff was also made over to the defendant. Plaintiff's allegation in the plaint that defendant was merely a manager cannot therefore be accepted. It is manifest that he has no manner of concern with the business and that the monthly premium payable to him was nothing but rent payable for the premises."

The conduct of the parties itself indicates that the intention was to treat the agreement not as a mere license but as a document creating a lease in favour of the defendant a demise in property because the defendant was entitled to the enjoyment of the property even to the exclusion of the plaintiff so long as the petrol pump stood on the land and the only right which the plaintiff had was to get the monthly premium. In my opinion, the document, therefore, created a demise in property, and the finding of the two Courts below that there was a sub-lease in favour of the defendant is entirely correct. Whatever doubts there may have been on the construction of the document are more than dispelled by the surrounding circumstances of the case and the conduct of the parties. I have, therefore, no hesitation in holding that the decision of the Courts below on the point is justified. That being so, the conclusion is that the defendant was entitled to a notice determining the lease as provided by S. 111 (g), Transfer of Property Act, and that not having been done, the plaintiff's suit in ejectment cannot succeed.

[10] I would accordingly allow the appeal, set aside the decree of the learned Subordinate Judge and restore that of the learned Munsif with costs throughout.

[11] **Das J.**—I must admit that I have been of a divided mind as to the true construction of the indenture of agreement dated 28-8-1945.

[12] The document is described as an indenture of agreement, it does not expressly say anything about transference of any interest in the leasehold, though it talks of management of the shop, transfer of the petrol pump etc., at the foot, it describes the land, as though the description were not that of a property demised but rather of a property over which the right of holding the shop would be exercised. These are circumstances in favour of the view that it is a mere license.

[13] On the other hand, there are the circumstances pointed out by my learned brother; exclusive right of possession, building of a new shop, starting of the business under a new name etc. These are circumstances in favour of the view taken by the Courts below and accepted by my learned brother.

[14] I would myself prefer the test 'whether any interest in the property has been given or not', rather than the test of 'possession'; because a licensee may also possess the property for exercising the right given to him by the grantor. But an exclusive right to possess, as distinguished from mere permissive possession would, I think, turn the scale in favour of a lease, that is, a transfer of interest in the property itself. The power to exclude others including the grantor is hardly consistent with permissive possession, and would indicate a transfer of interest rather than a mere permission to exercise a right. Therefore, I would now yield to the view that on a proper construction the indenture of agreement is a lease rather than a license.

[15] I agree with my learned brother in his conclusions on the bar of O. 2, R. 2, Civil P. C. and the necessity of a notice under S. 111 (g), Transfer of Property Act.

[16] The appeal must, therefore, be allowed with costs, as directed by him.

K.S. *Appeal allowed.*

A. I. R. (38) 1951 Patna 196 *[C. N. 34.]*

SARJOO PROSAD AND C. P. SINHA JJ.

Mahendra Lal Kushiary — Petitioner v. *Gurdeyal Singh and another—Opposite Party.*

Civil Revn. No. 694 of 1950, D/- 7-12 1950.

Partnership Act (1932), S. 69 (3) (a) — Application under S. 8 of the Arbitration Act (1940).

Even a suit for dissolution of partnership and accounting is not barred under S. 69. Where in a title suit by a partner, after a notice to the other partner dissolving the partnership, the defendant files an application in the Court for referring the matter in dispute to arbitration under S. 8 of the Arbitration Act the case stands on a better footing. The application is not barred under S. 69 and is covered by S. 69 (3) (a). **A. I. R. (26) 1939 All. 735**, *Rel. on.* **A. I. R. (27) 1940 Nag. 78**, *Dissent.* [Paras 6, 7]

Anno. Partnership Act, S. 69 N. 8, 9.

A. N. Banerji and A. N. Chakravarty—for Petitioner; Janak Kishore—for Opposite Party.

Cases referred to: —

('40) I. L. R. (1940) All. 26: (A. I. R. (26) 1939 All. 735 S. B.) [Pr. 5]

('40) A. I. R. (27) 1940 Nag. 78: (I. L. R. (1940) Nag. 130.) [Prs. 6, 7]

('43) A. I. R. (30) 1943 Nag. 12: (I. L. R. (1943) Nag. 24.) [Pr. 7]

C. P. Sinha J.—This is an application in revision on the following facts. There was a partnership business between one Mahendra Lal Kushiary, the present petitioner, and one Gobinda Chandra Chakravarty for the purpose of running a motor business in the name and style of Sarju Motor Company. Later on Gurdeyal Singh, opposite party, agreed to join the partnership business in place of Gobinda Chandra Chakravarty, and a deed of agreement dated 17-3-1948, was executed by the present opposite party. One of the conditions of the agreement was that in case of any dispute or difference between the parties the matter would be referred to arbitration. Subsequently, difference arose between the parties and the petitioner Mahendra Lal Kushiary sent a notice to the applicant on 17-1-1950 dissolving the partnership, and later on he also filed a title suit No. 44 of 1950 in the Court of the Munsif, Hazaribagh Gurdeyal Singh, the opposite party filed an application before the learned Subordinate Judge for referring the matter in dispute to arbitration under the provision of S. 8, Arbitration Act, and the learned Subordinate Judge allowed the application on hearing the parties, and decided to refer the matter to arbitration, and the parties were called upon to suggest names of arbitrators within a time fixed by the Court, and the suit pending before the learned Munsif was stayed.

[2] The present petitioner having felt aggrieved by the order of the learned Subordinate Judge referring the matter in dispute to arbitration filed an application in revision in this Court (Civil Revision No 496 of 1950). This application however, was dismissed on 3-8-1950. Having failed in this Court, the petitioner filed an application under S. 151, Civil P. C. in the Court of the Subordinate Judge, Hazaribagh, for reviewing the order of 12 7-1950, sending the matter to arbitration. The ground of review made out in the application was that as the partnership consisting of the petitioner and the opposite party was not a registered partnership under the provisions of the Indian Partnership Act (IX of 1932), S. 69 of that Act was a bar to the application for sending the matter in dispute to arbitration, and that, therefore, the order of 12-7-1950, passed by the Court below was without jurisdiction. This application in review has been dismissed by the Court below and hence this application in revision to this Court.

[3] It has been argued, as was argued in the Court below, that S. 69 of the Partnership Act was a bar to the application of the opposite party for sending the matter in dispute to arbitration and the order sending the same to arbitration was without jurisdiction. The learned counsel appearing for the opposite party has argued, firstly, that in view of the order in Civil Revision No. 496 of 1950 of this Court. no such application for review of the order of the Court below, dated 12 7-1950, lay in the Court below, and, secondly, that S. 69 of the Indian Partnership Act has no application to the facts of the present case.

[4] It is true that the order, sending the matter in dispute between the parties having been affirmed by the order of this Court in the aforesaid Civil Revision No. 496 of 1950, the decision of the learned Court below dated 12-7-1950, was binding between the parties thereto as it became final when the application in revision against that order was dismissed by this Court, and in that view of the matter it was not open to the petitioner to re-open the matter again. But the matter in regard to the bar of S. 69 of the Partnership Act has been argued by both the parties, and I consider that to decide the case finally, it is necessary to give our opinion in regard to the application or non-application of S. 69, to the facts of the present case.

[5] Section 69 (3) of the Partnership Act lays down:

"The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect —.

(a) the enforcement of any right to sue for the dissolution of a firm, or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm. . ."

The provisions contained in sub-ss. (1) and (2) bar suits in certain circumstances as mentioned in those two sub-sections, but clauses (a) and (b) of sub-s (3) of S. 69, engraft an exception upon the

provisions contained in sub-ss. (1) and (2) of S. 69. The language of clause (a) of S. 69 (3) on the very face of it shows that there is no bar to enforce a right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of such a firm, and this view has been upheld in *Shibba Mal* v. *Gulab Rai*, I. L. R. (1940) ALL. 26. That was a suit for dissolution of partnership and rendition of accounts. In that case the defendants to the suit, had taken the objection that the provisions of S 69 are a bar to the maintainability of that suit, but their Lordships held that the right of a partner of an unregistered firm to obtain a decree for dissolution of the partnership and for accounts remained unaffected by the provisions of sub-ss. (1) and (2) of S. 69, in view of the proviso contained in sub-s. 3 (a) of S. 69 of the Partnership Act, and they rejected the plea of the defendants in bar of the suit. While disposing of this point, their Lordships made the following observations:

"In our judgment the intention of the legislature is plain. It intended that the rights of the partners of an unregistered firm in regard to dissolution of the partnership and accounting were to remain unaffected by the provisions of Sub-sections (1) and (2) of Section 69 of the Partnership Act."

It is thus clear on the authority of this Full Bench judgment that even a suit for dissolution of partnership and accounting is not barred under the provisions of S. 69, Partnership Act. The present case, however, stands on a better footing inasmuch as no suit had been filed in this case but an application was made to the Court below under the provisions of S. 8, Indian Arbitration Act. In my opinion, therefore, S. 69 of the Act was no bar to the application for sending the matter in dispute to arbitration.

[6] The learned counsel appearing on behalf of the petitioner has cited before us a decision in *Chhotelal Nanakram* v. *Gopaldas Gulabdas*, A. I. R. (27) 1940 Nag. 78. This judgment is a judgment by a single Judge of the Nagpur High Court and it is in regard to the application of S. 69 (1), Partnership Act, and his Lordship decided in that case that S. 69 (1) bars a suit by a partner of a firm although the firm may have been dissolved before the suit was filed. That case, however, has not been followed in a later decision and now it can be taken as established that persons who were the partners of a dissolved firm can bring a suit for dissolution of partnership and accounts, and that S. 69 (1) and (2) is no bar to such a suit.

[7] Our attention has been drawn by the learned counsel appearing for the opposite party to a decision in *Damodhar Gulabrao* v. *Kushal Laxman*, A. I. R. (30) 1943 Nag. 12 in which the case in *Chhotelal Nanakram* v. *Gopaldas Gulabdas*, A. I. R. (27) 1940 Nag. 78, was distinguished, and his Lordship Vivian Bose J. said with reference to A. I. R. (27) 1940 Nag. 78 that he need not consider whether the decision referred to in A. I. R. (27) 1940 Nag. 78, required reconsideration. With very great respect to the learned Judge who decided the case in A. I R. (27) 1940 Nag. 78, I do not feel bound by the decision arrived at in that case. In my opinion, therefore, the provisions of S. 69, are no bar to the maintainability of the application made by the opposite party under S. 8 of the Arbitration Act, and that the same is covered by the provisions contained in the exception-section 69 (3) (a) of that Act.

[8] In the result, the application is without merit and must be dismissed with costs, hearing fee two gold mohurs.

[9] **Sarjoo Prosad J.**—I agree.

D.H. *Revision dismissed.*

A. I. R. (38) 1951 Patna 197 *[C. N. 35.]*

RAMASWAMI AND SARJOO PROSAD JJ.

Mohammad Amin Brothers, Ltd.—*Petitioner* v. *Province of Bihar*—*Opposite Party.*

Misc. Judicial Case No. 155 of 1948, D/- 7-3-1951.

(a) Sales Tax—Bihar Sales Tax Act (VI[6]of 1944), S. 2 (c)—Dealer—Meaning of.

Where in spite of the deed of partnership entered into by the assessee with other parties which was more in the nature of an administrative arrangement for supervision of the Factory on the basis of a local directorate subject to certain terms about remuneration to the partners concerned the assessee, who signed the contract with the Government, remained responsible to the Government for the supply of dehydrated meat :

Held that the assessee was a dealer though actual work of production of the dehydrated meat was entrusted to a separate concern. [Para 3]

(b) Sales Tax—Bihar Sales Tax Act (VI [6] of 1944), S. 2 (g)—"Sale"—Meaning.

Where according to the terms of the contract the plant and machineries were provided by the Government, dressed goat-meat was supplied to the assessee by another contractor at a fixed price on certain terms agreed to between the Government of India and that contractor but the assessee himself paid for the dressed meat at a price fixed by the Government and the assessee was entitled to receive payment from the Government of India according to a fixed scale for the dehydrated meat including the cost of containers and packing :

Held that there was a transfer of property for valuable consideration and therefore a "sale". [Para 4]

(c) Sales Tax—Bihar Sales Tax Act (VI [6] of 1944), S. 10 (5)—Wilful default.

Where the assessee bona fide believed that the sale of the dehydrated meat being made to the department of the Government of India was not liable to be charged with sales tax, but after he was informed of the decision of the Government of Bihar to the contrary he promptly applied for registration to the appropriate authorities :

Held that there was no wilful default committed by the assessee within the meaning of S. 10 (5) and the penalty imposed by the Sales Tax authorities ought not to have been levied. [Para 6]

(d) Sales Tax — Bihar Sales Tax Act (VI [6] of 1944), S. 4 (1)—Applicability.

For S. 4 (1) to operate, it is not necessary that the business which the assessee carried on in 1943-44 should be the same business which he started in 1944-45. [Para 5]

S. N. Dutt and S. C. Sinha—for Petitioner ; Government Advocate—for Opposite Party.

Ramaswami J. — In pursuance of an order of the High Court, this reference is made by the

petitioner under S. 25 (3), Bihar Sales Tax Act, 1947.

[2] The questions formulated for the determination of the High Court are :

(1) "Whether in the circumstances of the case the assessee was a dealer within the meaning of S. 2 (c), Bihar Sales Tax Act, 1944. (2) whether the assessee was liable to pay sales tax in respect of the quarters ending 31 12-1944 and 31-3-1945, and (3) whether the assessee was liable to pay the penalty."

[3] As regards the first question, it was contended by Mr. S. N. Dutt on behalf of the assessee that according to the agreement dated 23-3 1944, the actual work of production of dehydrated meat in the Digha Factory was entrusted to a separate concern. In support of his argument learned counsel referred us to paras. 7 and 9 of the deed of partnership which is printed at p. 23 of the paper-book. But the argument of the learned counsel is not tenable since on a perusal of all the terms of the deed of partnership it would appear that the agreement was more in the nature of an administrative arrangement for supervision of the Digha Factory on the basis of a local directorate subject to certain terms about remuneration including commission to the partners concerned. The contract which the assessee executed with the Government of India for supply of dehydrated meat has not been printed on behalf of the assessee. According to the statement of the case it appears that the contract was signed by Messrs Amin Brothers who continued to be responsible to the Government of India for supply of dehydrated meat in spite of the circumstance that the assessee had entered into a deed of partnership with other parties. Upon these facts it is clear that the assessee was a dealer within the meaning of S. 2 (c), Bihar Sales Tax Act.

[4] On the second question, Mr. S. N. Dutt stressed the argument that the assessee was a mere labour contractor and he had not entered into any contract with the Government of India for sale of goods within the meaning of S. 2 (g), Bihar Sales Tax Act. As I have mentioned, the contract between the assessee and the Government of India has not been printed but the findings of the Board of Revenue are that according to the terms of the contract the plant and machineries were provided by the Government, dressed goat meat was supplied to the assessee by another contractor at a fixed price on certain terms agreed to between the Government of India and that contractor. It is important to notice that the assessee himself paid for the dressed meat at a price fixed by the Government and that the assessee was entitled to receive payment from the Government of India according to a fixed scale for the dehydrated meat including the cost of containers and packing. The Board of Revenue has found that according to the stipulation of the contract an inclusive price was fixed for process meant to be packed in sealed containers at a prescribed rate. To my mind there is no doubt that there was a transfer of property for valuable consideration and therefore a "sale" within the meaning of S. 2 (g) of the Bihar Sales Tax Act. The contention of the assessee on this point fails.

[5] It was argued on behalf of the assessee that he was not liable to pay sales tax for the quarters ending 31-12-1944 and 31 3-1945 since S. 4 (2) of the Act enacts that the dealer shall be liable to pay tax

"with effect from three months after the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5000."

In this case it was pointed out that the assessee started the business of manufacturing dehydrated meat at Digha Ghat on 17-4-1944. The Bihar Sales Tax Act received assent of the Governor-General on 29-5-1944 and was published in the Bihar Gazette of 16-6-1944, from which date it came into force. It was argued that under S. 4 (2) of the Act, the assessee was not liable to pay tax in 1944-45 but that he was liable to pay tax only from April 1945, since the gross turnover exceeded Rs. 5000 in 1944 45 and indeed the business commenced in that year. In my opinion the argument of the learned counsel is untenable for the liability upon the assessee is imposed in this case not under S. 4 (2) but under S. 4 (1) of the Act which states :

"Subject to the provisions of Ss. 5 and 6 and with effect from such date as the Provincial Government may, by notification in the official Gazette, appoint, being not earlier than thirty days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded Rs. 5000 shall be liable to pay tax under this Act on sales effected after the date so notified."

It was, however, contended by the learned counsel that the dealer admittedly commenced the business of dehydrated meat on 17-4 1944 and it cannot be said that his gross turnover in 1943-44 exceeded the sum of Rs. 5000 as required by S. 4 (1). In this context definition of the word "dealer" in S. 2 (c) is important. In S. 2 (c) "dealer" is defined to mean

"any person who carries on the business of selling or supplying goods in Bihar, whether for commission, remuneration or otherwise . . . ."

It is the admitted case that the assessee was carrying on business in Bihar from before and that he had been registered for the year 1943-44 under the Bihar Sales Tax for the business he had been carrying on in Ranchi. Learned counsel argued that the business which the assessee had carried on in 1943-44 should be the identical business of dehydrated meat in order that the provisions of S. 4 (1) may operate. But there is no warrant for construing the word "dealer" in any such manner. For the definition of the word "dealer" in S. 2 (c) is wide and unqualified—"any person who carries on the business of selling and supplying goods in Bihar . . . .". For S. 4 (1) to operate it is not necessary that the business which the assessee carried on in 1943-44 should be

the same business of dehydrated meat which he started in Digha Ghat in 1944-45. In my opinion the assessee was liable under S. 4 (1) read with S. 2 (c) to pay sales tax in respect of the two quarters in question.

[6] On the question of penalty, one case of the assessee stands on a better footing. It was pointed out by the learned counsel that there was a long correspondence between the Government of India and the Bihar Government as regards the liability to sales tax of dehydrated meat. From letter no. 13, printed at page 27 of the paper book, it appears that the Government of India requested the Bihar Government that the entire output of the factory should be exempted from the sales tax on the ground that the factory was a Central Government property and was producing dehydrated meat exclusively for the defence service. The correspondence was continued for some time but on 24-10-1945 the Government of India intimated to the assessee that Bihar Government had expressed their inability to exempt sales to the Food Department from Bihar Sales Tax Act. After this intimation was received the assessee applied to get himself registered to the Sales Tax authorities. It was urged by the learned counsel that the assessee *bona fide* believed that the sale of the dehydrated meat being made to the department of the Government was not liable to be charged with sales tax. After he was informed of the decision of the Government of Bihar he promptly applied for registration to the appropriate authorities. Learned counsel also referred to a letter dated 22-12-1944, addressed by the Sales Tax Officer to the assessee, to the effect that meat was exempt from sales tax and the business need not be registered under the Bihar Sales Tax Act (vide Annexure A, printed at p. 5 of the paper book). Upon these facts it is clear that there was no wilful default committed by the assessee within the meaning of S. 10 (5) of the Act and the penalty imposed by the Sales Tax authorities ought not to have been levied. I would therefore answer this question in favour of the assessee.

[7] Since the assessee has failed as regards the other two questions I hold that he should pay costs of this reference. Hearing fee Rs. 250.

[8] **Sarjoo Prosad J.**— I agree. The reference should be answered in the manner indicated and for the reasons stated by my learned brother.

D.H. *Answers accordingly.*

A. I. R. (38) 1951 Patna 199 *[C. N. 36.]*

RAMASWAMI AND SARJOO PROSAD JJ.

Firm Jitanram Nirmalram — Petitioner v. *Commissioner of Income-Tax, Bihar & Orissa, Patna—Opposite-Party.*

Misc. Judicial Case No. 37 of 1949, D/- 1-3-1951.

Income-tax Act (1922), S. 33 — Decision of appeal by appellate Tribunal without setting aside order of remand.

The assessee firm was assessed to income-tax for the year 1945-46 on a total income which included three sums of cash-credits which appeared in the accounts of the partners. The Income-tax Officer treated these cash amounts as secreted profits of the firm and assessed them as such. On appeal the Appellate Assistant Commissioner of Income-tax held that the question of the cash credit should be re-examined after a scrutiny of the goods, accounts and the books in general. The appellate Tribunal set aside the findings of the Appellate Assistant Commissioner in regard to the said amount claimed as cash credit by the assessee. But the Tribunal at one place in their judgment when disposing of the appeal observed thus: "As the examination of the accounts is the subject matter of remand order passed by the Appellate Assistant Commissioner, we do not wish to express any opinion on that point:"

Held that although there was some anomaly created by the observation made by the tribunal in regard to the remand order passed by the Appellate Assistant Commissioner yet in view of their definite and categorical finding that the amount was not cash credit as claimed by the assessee but secreted profits, the anomaly was not such as to vitiate the decision of the Tribunal. [Para 1]

Anno. Income-tax Act, S. 33, N. 1.

Baldeva Sahay, B. N. Jain and Tarkeshwar Prasad —for Petitioner; *S. N. Dutta — for Opposite Party.*

Sarjoo Prosad J.—This is a reference made under S. 66 (2) of the Income-tax Act by the Income-Tax Appellate Tribunal, Allahabad Bench, under the directions of this Court. The assessee is a firm called Jitanram Nirmalram. The firm was assessed to income-tax for the year 1945-46 on a total income of Rs. 3,12,331. This amount included three sums of cash-credits which appeared in the accounts of the partners. They are as follows: a sum of Rs. 1,46,126 given by the partner Ramchandram, a sum of Rs. 55,871 by the partner Lachminarain and a sum of Rs. 73,121, by the partner Vishnu Prasad. The Income-tax Officer treated these cash amounts as secreted profits of the firm and assessed them as such. On appeal the Appellate Assistant Commissioner of Income-tax held that the sum of Rs. 2,75,178 may have been the sale proceeds of family ornaments as claimed by the assessee. The concluding part of his order is in the following terms:

"As the I. T. O. has not mentioned the defects in the goods accounts and has not properly scrutinised them and even though the additions made by the I. T. O. cannot be maintained, the case should go back to the I. T. O. for re-examination of the goods accounts and the books in general. Hence this portion of the order of the I.T.O. will be set aside. The cash credit addition must go and the I. T. O. will re-examine the position by reference to the account books in the light of the facts and figures mentioned in paras. 27 to 29 above."

It may be stated here that paras. 27 to 29 of his order relate to the consideration of the point as to whether the profits shown by the assessee were prima facie ridiculously low and this point again the Appellate Assistant Commissioner was considering in connection with the argument of the Income-tax Officer rejecting the contention of the assessee in regard to the cash credit amount. Against the order of the Appellate Assistant Commissioner there was an appeal to the Tribunal under S. 33 (2) of the Income-tax Act

mainly on the ground that the Appellate Assistant Commissioner was wrong in holding that the cash credits of Rs. 2,75,178 did not represent secreted income as held by the Income-tax Officer. The Appellate Tribunal set aside the findings of the Appellate Assistant Commissioner in regard to the said amount claimed as cash credit by the assessee and allowed the appeal of the department. The Tribunal held as follows:

"Taking into account all the facts and circumstances of the case and disbelieving the story of the receipt of the ornaments through the partition by the members of the family, we hold that the cash credits in question remain un-explained and the assessee's explanation about them is false. We further hold that they are secreted profits of the business and are liable to be added to the income of the firm. We, therefore, reverse the findings of the Appellate Assistant Commissioner on this point and affirm the findings of the Income-tax Officer in this respect."

It is on these facts that a reference was called for on two points formulated by this Court. They are :

"(1) Whether the Appellate Tribunal was justified in law and in the circumstances of this case in deciding the appeal without setting aside the order of remand passed by the Assistant Commissioner of Income-tax by which he directed the Income-tax Officer to examine the goods accounts.

(2) Whether the Appellate Tribunal was justified in giving a finding as to whether Rs. 2,75,178 represented secreted profits from business assessable in 1945-46 before the completion of examination of the accounts as directed by the remand order of the Assistant Commissioner of Income-tax."

The second point is really involved in the first point. In order to understand the implication of the points formulated, it should be mentioned that the Tribunal at one place in their judgment when disposing of the appeal observed thus:

"As the examination of the accounts is the subject matter of remand order passed by the Appellate Assistant Commissioner, we do not wish to express any opinion on that point; but there appears to be certainly much force in the remarks of the Income-Tax Officer that even by an addition of the cash credits in question amounting to Rs. 2,75,178, the percentage of the net profits of the appellant does not go upto more than 5.3% and the gross profits to more than 6.3.%

It is contended on behalf of the assessee that the Tribunal having expressly observed that they wanted to give no opinion on the point of the examination of the accounts which was the subject-matter of the remand order passed by the Appellate Assistant Commissioner they have erred in law in disposing of the appeal. The direction of the Assistant Commissioner was that the question of the cash credit should be re-examined after a scrutiny of the goods accounts and the books in general and so long as it had not been done, which was the real purport of the remand order with which the Tribunal did not propose to interfere, it is urged that the decision of the Tribunal on the question was not in accordance with law. In other words, the real point at issue between the parties is whether the judgment of the Tribunal in deciding about this question of the cash credit was in accordance with law in view of its observation that it did not propose to express any opinion on the subject-matter of the remand order passed by the Appellate Assistant Commissioner. There is no doubt that prima facie there is force in this contention of the assessee. But a closer examination of the question makes it clear that the Tribunal did expressly hold that the explanation of the assessee in regard to these cash credit figures was false and that they were secreted profits of the business and therefore liable to be assessed as the income of the firm. This finding they have arrived at after a full consideration of all the materials bearing on the point. The examination of the books of account as directed by the Appellate Assistant Commissioner would not, in my opinion, advance the matter very far because even taking the best view in favour of the assessee all that it might come to is that the accounts are genuine. Even then it was open to the Tribunal to come to a finding that these are secreted profits which could not be sufficiently explained by the examination of the accounts, specially when the explanation of the assessee otherwise has been found to be false. In my opinion no useful purpose would be served directing that the decision of the Appellate Tribunal should be set aside and that the matter should be reheard by the Tribunal on this question because the Tribunal having considered the material bearing on this point would not be expected to come to a different finding. In my opinion, therefore, although there is some anomaly created by the observation made by the tribunal in regard to the remand order passed by the Appellate Assistant Commissioner yet in view of their definite and categorical finding that this amount of Rs. 2,75,178 was not cash credit as claimed by the assessee but secreted profits, the anomaly is not such as to vitiate the decision of the Tribunal. The reasons which have been given by the Tribunal for coming to that finding appear to me otherwise sound. An appeal to the Tribunal did lie as against any order passed by the Appellate Assistant Commissioner and it was within the competence of the Tribunal to pass such orders as they thought fit on the appeal which came up for consideration before them. Therefore it was entirely within the jurisdiction of the Tribunal to decide this question as to whether the sum of Rs. 2,75,178 was secreted profits of the business assessable during the period or it was cash credit as claimed by the assessee. For these reasons I hold that the finding of the Tribunal on the point is not erroneous and the Tribunal was justified in coming to such a finding. The points, therefore, formulated for our decision have to be answered in the affirmative. The department is entitled to its costs of this reference. Hearing fee Rs. 250.

[2] **Ramaswami J.**—I agree.

D.H. *Answers in the affirmative.*

A. I. R. (38) 1951 PATNA 201 (C. N. 37)

LAKSHMIKANTA JHA, C. J. AND CHATTERJI, J.

The Union of India, Appellant v. Premchand Satram Das and another, Respondents.

A. F. O. O. Nos. 252 and 253 of 1950, D/- 11-5-1951.

(a) *Arbitration Act (1940), S. 30 — Award — Extent of finality — Power of Court to set aside.*

The law as to how far finality attaches to the decision of an arbitrator may be summarised thus; The award if baldly stated without giving any reason for it, cannot be assailed even if it be against fact or repugnant to law. In other words, the award is not open to judicial review. But if a reference to arbitration be made generally and not specifically, and the arbitrator enunciates a proposition of law and states his own view of the law as a ground of his award, such an award is open to attack in a court of law and is liable to be set aside if there be an error of law apparent on the face of it. So also, if the arbitrator construes a document and gives his own construction or interpretation of the document as a reason for the award, it is open to the Court to examine the reason and set aside the award if the error in the construction is apparent on the face of the award. If, however, a reference is made specifically and a dispute relating either to fact or to law is submitted to the arbitrator for his decision, his award cannot be challenged even if there be an error of fact or law, or both, apparent on the face of the award. (1857) 140 E. R. 712, (1912) A. C. 673; 1923 A. C. 395; AIR (10) 1923 P. C. 66; A I R (14) 1927 P C 164 and 1933 A. C. 592 Ref. (Para 10)

Anno: Arbitration Act, S. 30 N. 1, 6.

(b) *Arbitration Act (1940), S. 30 — 'Otherwise invalid' — Illegality apparent on face of award.*

Where an arbitration clause in a contract for supply of bricks provided that the arbitrator was to settle disputes and claims arising out of the contract but the arbitrator in awarding compensation to the contractor took into consideration the moral obligation of the other party, the award is vitiated by illegality which is apparent on the face of the award and can be set aside. (Para 14)

Anno: Arbitration Act, S. 30 N. 6.

(c) *Arbitration Act (1940), S. 30 — Otherwise invalid — Subject matter of reference not including claim for interest for delay in settling dues of contractor — Claim preferred for first time during progress of arbitration — Other party not submitting to jurisdiction of arbitrator to decide such question — Arbitrator in awarding interest acts without jurisdiction.* (Para 17)

Anno: Arbitration Act, S. 30 N. 6.

(d) *Arbitration Act (1940), S. 30 — 'Otherwise invalid' — Contract for supply of bricks specifically providing that other party will not entertain any claim for damage to unburnt bricks due to any cause whatever — Claim by contractor for damage due to non-removal of bricks from kiln area according to contract — Arbitrator upon erroneous construction of contract awarding compensation to contractor — Error in construction of contract is apparent on face of award and therefore it must be set aside.* (Para 22)

Anno: Arbitration Act, S. 30 N. 6.

Government Pleader, for Appellant — Mahabir Prasad, Bhagirathi Rai, Ramchandra Singh, Umesh Chandra Prasad Sinha and Thakur Gurusewak Singh, for Respondents.

Cases referred to:

('23) 50 Ind App 324: 1923 A C 480: (A I R (10) 1923 P C 66) (Prs 9, 10)
('27) 54 Ind App 427: (A I R (14) 1927 P C 164) (Prs 7, 9, 10)
(1857) 3 C B (N S) 189: 140 E R 712 (Pr 3)
(1912) A C 673: (81 L J K B 1132) (Pr 10)
(1923) A C 395: (92 L J Ch 307) (Pr 10)
(1933) A C 592: (102 L J K B 648) (Prs 9, 10)

LAKSHMIKANTA JHA, C. J.: This is an appeal by the defendant (the Union of India) in a suit instituted by the plaintiff-respondent for the enforcement of an award given by an arbitrator appointed under an arbitration clause in an agreement between the parties which provided for settlement of all disputes arising between them.

(2) The Central Public Works Department invited tenders for the manufacture and supply of four crores of bricks on the 23rd September, 1945, for what is known as the Sindri Fertiliser project. Seth Prem Chand Satram Das, the plaintiff in the present suit, was one of the persons who offered to manufacture and supply bricks at certain rates. His tender was accepted by the Superintending Engineer, Bihar Central Circle, by his letter dated the 1st November, 1945, and he was given a contract for the supply of 1 1/2 crores of bricks at his tender rates. A deed of agreement was executed and signed by the plaintiff and the Additional Chief Engineer, New Delhi, on behalf of the appellant, and a delivery schedule was appended showing the number of bricks to be supplied by the plaintiff month by month from January to May, 1946.

(3) The case of the plaintiff is that he performed his part of contract and kept bricks in readiness for supply according to the schedule appended to the contract. But for certain reasons the bricks were not removed from the kiln sites, though they were manufactured and made ready for delivery, as required by the delivery schedule, and this caused, according to the plaintiff, serious dislocation in the manufacture of bricks. His case is that he had to acquire 10 bighas of land at the rate of Rs. 200/- per bigha which included the cost of preparing and levelling the land for the stacking of the bricks of which delivery could not be taken. It is not disputed that the plaintiff was paid, at the contract rate, the full price of the bricks which he was ordered to manufacture, but his case is that he suffered loss on various counts by reason of the defendant's failure to remove the bricks according to the agreement. He therefore submitted his claims under various heads and submitted a bill to the Chief Engineer for the reimbursement of the losses suffered by him. The Chief Engineer refused to make any payment on account of any loss. Thereupon the plaintiff applied for arbitration according to the arbitration clause of the agreement. It appears from the Additional Chief Engineer's letter that he appointed Mr. Dixon, the Superintending Engineer of the Circle, as the arbitrator and the plaintiff was asked to submit his case to the arbitrator on the date to be fixed by him. The plaintiff accordingly submitted his claims in writing to Mr. Dixon, for his decision, and preferred his claims under eighteen heads. A sum of Rs. 1,65,893/- was claimed by the plaintiff before the arbitrator under different heads and a further sum was also claimed by way of interest at 6 per cent., per annum for two years; in all Rs. 2,01,371/- was claimed by the plaintiff before the arbitrator, including interest. No objection was filed in writing on behalf of the appellant, but the Executive Engineer appearing before the arbitrator on behalf of the Central Public Works Department objected to the claims orally. Mr. Dixon, after hearing the parties, awarded a sum of Rs. 1,20,560/9/- as against the plaintiff's claim of Rs. 2,01,371/-, by his order dated the 1st May, 1949, and directed the amount to be paid on or before the 1st June, 1949, failing which interest at 6 per cent per annum from the 1st June, 1949, was to be paid by the appellant.

(4) The plaintiff filed the present suit for enforcement of the award and prayed that the

award be accepted and a decree passed in terms of the award. The suit was contested and the objection of the Union was only in respect of claims Nos. 3, 4, 6, 8, 13 and 17. The award regarding claim No. 6 relating to sale tax was set aside, but the rest of the award was affirmed. With this modification the learned Subordinate Judge directed a decree to be made in terms of the award.

(5) The dispute before us is now confirmed only to claims Nos. 3, 4, 8, 13 and 17, which are as follows:

"'Claim No. 3: Payment for the purchase of an additional ten bighas of land for stacking bricks. Rs. 1285 (i.e. Rs. 2000/- less Rs. 715/- already paid).

'Claim No. 4': Payment on account of additional wages paid to labourers because of non-availability of ration and cloth Rs. 37,215/-10-0.

'Claim No. 8': Payment for the loss of 47 lacks of kuchcha bricks which were destroyed by rain: Rs. 40,537/-

'Claim No. 13': Payment for loss sustained as the result of brick fields not being freed for lease to intending lessees and suspension for brick manufacturing business — Rs. 25,000/-.

'Claim No. 17': Payment of interest @ 6 per cent per annum for 2 years on account of delay in settling dues."

(6) The contention of Mr. Lal Narain Sinha, for the Union, is that the award in respect of all these five items is illegal and ought to be set aside because the error in law is apparent upon the face of the award. He, however, concedes that the plaintiff is entitled to a decree according to the award for the claims in respect of which there is no illegality in the award apparent on the face of it. He does not want us to remit the award to the arbitrator for reconsideration in case we are satisfied that there is an error apparent on the face of the award in respect of any of the claims. Nor is it necessary to do so because the award in respect of each claim is self-contained and separable. Even if the award in respect of any claim be held to be bad, the rest of it can be maintained without any prejudice to either party. The point for our consideration, therefore, is whether the award is bad in law in respect of any of the five claims mentioned above.

(7) Domestic tribunal was not unknown to India. Statutory recognition was given to it during the British rule and now the whole law on the subject has been incorporated in the Indian Arbitration Act, 1940. With the growth of trade in India it has become almost a regular practice with the businessmen to insert an arbitration clause in almost every agreement providing for settlement of all disputes by an arbitrator. Whenever a dispute is submitted to an arbitrator, his decision becomes final. The arbitrator is constituted the sole and final judge of all questions both of law and of fact. The decision of an arbitrator, though sacrosanct, can be challenged for his "judicial misconduct", which does not necessarily imply moral turpitude, but may consist "in making a mistake in law, and letting it be visible on the face of his award": 'Saleh Mahomed v. Nathoomal', 54 Ind. App. 427 at p. 430). The test for the determination of judicial misconduct of the arbitrator has been laid down in number of cases.

(8) In 'Hodgkinson v. Fernie', (1857) 3 C. B. (N. S.) 189: 140 E. R. 712, which is a leading case on the point, Williams, J. stated the grounds on which an award can be successfully assailed. In that case the allegation of the plaintiff was that his ship had been run down owing to the negligent navigation of the defendant's ship. At the trial a verdict was entered for the plaintiff for damages. The amount of damages was referred to be assessed by an arbitrator. The arbitrator awarded a lump sum. The defendant sought to show by affidavit that the arbitrator had included an item which ought to have been rejected. It was held that the award could not be interfered with because there was no error on the face of the award. Williams, J. stated the law thus:

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and fact ..... The only exceptions to that rule are, cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established".

(9) 'In Champsey Bhara & Co. v. Jivaraj Balloo Spinning & Weaving Co., Ltd.', 50 Ind App 324, which was a case under the Indian Arbitration Act, 1899, Lord Dunedin, on a review of the decisions of the English courts, stated the law thus:

"An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous".

At another place he stated:

"The question of whether an arbitrator acts within his jurisdiction is, of course, for the court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference. It is, therefore, for the Court to decide in his case whether the dispute which has arisen is a dispute covered by R. 13 of the Association. It clearly is so, because it is undoubtedly a dispute arising out of or in relation to a contract made subject to the rules and regulations of the Cotton Trade Association. Now that clause refers to the arbitrator the whole question whether it depends on law or on fact, with the exception only of dispute as to quality".

The principle enunciated in this case was followed and reaffirmed by the Privy Council in 'Saleh Mahomed v. Nathoomal', 54 Ind App 427. It is not profitable to examine other cases relevant to the point because the case law bearing on the question was examined by the Houses of Lords in 'F. R. Absalom, Ltd. v. Great Western (London) Garden Village Society, Ltd.', 1933 A. C. 592. The learned law Lords on a review of the case law bearing on the point stated the law in clear and unambiguous terms. Lord Russell of Killowen observed at page 607:

"It is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the court can interfere if any when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one".

In the same case Lord Wright enunciated the law thus:

"The rule in truth applies to the ordinary case where, in the words of Lord Dunedin in 'Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co. Ltd.', (1923) A C 480, at p. 489), the submis-

sion refers 'to the arbitrator the whole question whether it depends on law or on fact'. To be contrasted with such cases there is the special type of case where a different rule is in force, so that the court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question, whether involving both fact or law, but only some specific question of law in express terms as the separate question submitted; that is to say, where a joint of law is submitted as such, that is, as a point of law, which as all that the arbitrator is required to decide, not fact being, quoad that submission, in dispute".

(10) The law as to how far finality attaches to the decision of an arbitrator may be summarised thus: The award if baldly stated without giving reason for it, cannot be assailed even if it be against fact or repugnant to law. In other words the award is not open to judicial review. But if a reference to arbitration be made generally and not specifically, and the arbitrator enunciates a proposition of law and states his own view of the law as a ground of his award, such an award is open to attack in a court of law and is liable to be set aside if there be an error of law apparent on the face of it. So also, if the arbitrator construes a document and gives his own construction or interpretation of the document as a reason for the award, it is open to the Court to examine the reason and set aside the award if the error in the construction is apparent on the face of the award. If, however, a reference is made specifically and a dispute relating either to fact or to law is submitted to the arbitrator for his decision, his award cannot be challenged even if there be an error of fact or law, or both, apparent on the face of the award: see 'Hodgkinson v. Fernie', (1857) 3 C. B. (N. S.) 189: 140 E. R. 712, 'British Westinghouse Electric and Manufacturing Co., Ltd. v. Under ground Electric Rly. Co., of London Ltd.', (1912) A C 673, 'Government of Kelantan v. Duff Development Co., Ltd', (1923) A C 395, 'Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Company, Limited', 50 Ind App 324, 'Saleh Mahomed Umer Dossal v. Nathoomal Kessamal', 54 Ind App 427 and 'F. R. Absalom, Ltd. v. Great Western (London) Garden Village Society, Limited', (1933) A C 592.

(11) Bearing in mind the principles already enunciated, we have to examine the legality of the award with reference to the arbitration clause and other relevant clauses of the agreement and see for ourselves whether there is any error in law apparent on the face of the award. In order to appreciate the argument at the bar on the question raised before us it is necessary to quote here in extenso the arbitration clause of the agreement which runs as follows:

"14. Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specification and instructions herein before mentioned and as to quality of materials or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, specification, instructions, orders, or these conditions, or otherwise concerning the supplies whether arising during the progress of delivery or after the completion or abandonment thereof shall be referred to the arbitration of the Superintending Engineer of the Circle for the time being in the manner provided by law relating to arbitration for the time being in force who after such investigation as he may think proper shall deliver his award which shall be final, conclusive and binding on all parties to this contract".

'Claim No. 3.'

The dispute in respect of claim No. 3 involves a question arising out of or relating to the contract. It was, therefore, within the competence of the arbitrator to take cognizance of the point in question. He considered the argument on either side and recorded his finding in these terms:

"I hold that Rs. 200/- per bigna was a reasonable price, the claim of the contractor for Rs. 2000/- less Rs. 715/- (already paid) is therefore awarded".

(12) It does not appear that there is any error apparent on the face of the award. The arbitrator has held without assigning any reason in support of his award that the contractor is entitled to Rs. 2000/- less Rs. 715/-. Therefore, the award cannot be interfered with.

(13) The arbitrator, while dealing with the argument on behalf of the contractor on this point, referred to the argument advanced on behalf of the parties with respect to claim No. 1 in which reference has been made to the agreement. It does not appear that he has referred to any term of the agreement as a matter of construction to fix the liability of the appellant. He seems to have referred to the agreement to understand the nature and origin of the dispute, and in so doing he has not committed any error of law. But even assuming that the arbitrator construed the agreement and has based his award on the construction of it, it does not appear that he committed any error. The appellant was in ordinary course of business expected to remove the bricks according to the schedule. The contractor was compelled to acquire the land for the stacking of the bricks on account of the non-removal of the bricks by the appellant. Therefore, the award on this point is unassailable. The order of the learned Subordinate Judge is, therefore, confirmed and the award upheld.

'Claim No. 4'.

(14) On account of certain restrictions local labour was not available to the contractor. He had to import coolies from the Central Provinces and the United Provinces for the manufacture of bricks and had to incur extra cost for procuring supply of food for the coolies. It appears that there was certain correspondence between the contractor and the Central Public Works Department in this connection, and the arbitrator seems to be of the view that the responsibility for making available controlled rations for the coolies was accepted by the Central Public Works Department. On account of this and other reasons the arbitrator decided that the appellant is liable to pay to the contractor Rs. 30,000/- to make good the loss which the contractor suffered. There is nothing in the agreement to show that the appellant was under any contractual obligation to supply rations for the coolies at controlled rates. In fact the arbitrator himself found that the appellant was not bound to compensate the contractor on this account. His finding is:

"From the point of view of contractual obligations therefore the department was not bound to compensate the contractor for any losses on this account".

In view of this finding the arbitrator misdirected himself in law in holding further that:

"there was a moral and implied obligation on the part of the C. P. W. D. to see that the contractor was given the necessary facilities to purchase rations at the controlled rates, and that this should have been arranged prior to arrival of the contractor's men."

and awarding compensation. The arbitrator's jurisdiction was to fix contractual and not moral liability. The illegality, therefore, is apparent on the face of the award and it is open to us to set

aside the award under this head. It is accordingly set aside.

'Claim No. 8'.

(15) The contractor preferred a claim for the price of 47 lacs of kuchcha bricks which had been destroyed by rain. His case was that the destruction of these kuchcha bricks resulted from the jamming of the kilns as a result of a breakdown in the brick removal arrangements which was the responsibility of the department. The Executive Engineer, on behalf of the appellant, maintained that the removal of bricks from kiln area was not a contractual obligation and that, in any case, only 45 lacs of bricks had been destroyed. The arbitrator on a consideration of the arguments on either side recorded his finding thus:

"I hold that the contractor is entitled to compensation and award payment for 36 lacks of bricks at 8/8 per cent i.e. Rs. 30,600/-".

There is no illegality on the face of the award. Therefore, it cannot be assailed. The award in respect of this claim is, therefore, good and is accordingly maintained.

'Claim No. 13'.

(16) The contractor claimed damage for the loss in his business arising on account of the non-removal of the bricks by the appellant from the kiln area within a reasonable time. The arbitrator was satisfied on the merits of the case that the contractor was unable to manufacture any bricks and supply the same to his customers because the approaches to land surrounding his kilns were jammed with stacks of Government bricks, and his finding is "I hold that the contractor is entitled to compensation on this matter and award payment to him of Rs. 15,000/-." From the finding of the arbitrator it is clear that he has fixed the liability without giving any reason in support of his view. Therefore, there is no error of law apparent on the face of the award and it cannot be assailed.

'Claim No. 17'.

(17) The arbitrator has allowed interest from the 31st March, 1947 to the 20th April, 1949, i.e. for a period of 24 months and 20 days, at the rate of 6 per cent per annum. The contractor did not include any claim for interest for this period in his bill originally submitted to the Chief Engineer, Central Public Works Department. The claim was preferred before the arbitrator for the first time during the progress of the arbitration proceeding, and the Executive Engineer, appearing on behalf of the Union, does not seem to have submitted to the jurisdiction of the arbitrator to decide this question. In the circumstances it cannot be said that the claim for interest was one of the matters referred to arbitration. The arbitrator, therefore, in my opinion, had no jurisdiction to entertain this claim and the award in this respect must accordingly be set aside.

'Miscellaneous Appeal No. 253 of 1950.'

(18) This appeal arises out of suit No. 34 of 1949. It was heard by us along with Miscellaneous Appeal No. 252 of 1950, which arises out of suit No. 27 of 1949. Both the suits were heard together by the trial court and are governed by the same judgment. We have also heard these two appeals together, but for the sake of convenience this appeal is dealt with separately.

(19) The plaintiff, Seth Thawardas Pherumal, entered into an agreement with the Additional Chief Engineer, New Delhi, under which the plaintiff agreed to supply 2 1/2 crores of bricks to the Central Public Works Department for the Sindri Fertiliser project. The terms of this agreement are substantially the same as in the other suit. Owing to differences between the parties, the dispute was referred to Mr. Dixon, Superintending Engineer for his decision under the terms of the arbitration clause of the agreement which are identically the same as those of the other already quoted. The contractor claimed Rs. 4,76,138/12/- plus interest at 6 per cent for 16 months, that is, a total sum of Rs. 5,38, 003/- under different heads. But the arbitrator allowed Rs. 2,35,346,/6/- only under his award dated the 8th May, 1949. The contractor thereupon filed the present suit for the enforcement of the award. The appellant objected to the award on various grounds. The learned Subordinate Judge overruled the objections of the appellant and accepted the award in its entirety and passed a decree in terms thereof. The award has been contested before us with respect to claims Nos. 2, 5, 8 and 17 only, which are as follows:

'Claim No. 2': Payment for loss sustained due to closing of Kiln No. 3..... Rs. 8,443/12/-.

'Claim No. 5': Payment for 88 lacs of kuchcha bricks destroyed by rain..... Rs. 75,900/-.

'Claim No. 8': Payment on account of additional wages paid to labourers because of non-availability of rations and coth..... Rs. 51,495/-.

'Claim No. 17': Payment of interest on money blocked..... Rs. 27,665/-.

'Claim No. 2'.

(20) The contractor claimed Rs. 8443/12/- for the loss sustained due to closing of kiln No. 3. His case was that the Executive Engineer wrote to him a letter to the effect that he would not pass any bricks coming out of this kiln. The Executive Engineer on the other hand, contended on behalf of the appellant that the letter could not be interpreted to mean an order to close the kiln. The arbitrator on the construction of the Executive Engineer's letter held as follows:

"I hold that the Executive Engineer's letter was tantamount to an order to close the kiln which in my opinion was not justified as it was not the kiln that was at fault. I, therefore, award that the contractor be paid the cost of making the additional kiln, i.e. Rs. 6400/-."

(21) The Executive Engineer's letter has not been placed before us. Mr. Lal Narain Sinha was unable to show that the interpretation of the arbitrator was wrong. We cannot, therefore, interfere with the award with respect to this claim. It is accordingly upheld.

'Claim No. 5.'

(22) Claim No. 5 in this appeal is similar to claim No. 8 of Miscellaneous appeal No. 252 of 1950 which we have upheld on the ground that there was no illegality upon the face of the award. But in the present case the award with respect to this claim cannot be supported because it is based upon an erroneous interpretation of clause 6 (additional) of the agreement and the error in the construction is apparent on the face of it. Clause 6 of the agreement is to the effect that:

"the department will not entertain any claim for idle labour, or for damage to unburnt bricks due to any cause whatsoever."

The arbitrator on the interpretation of this clause has held:

"This clause is not, in my opinion, meant to absolve the department from carrying out their part of the contract. It is impossible not to admit this without offending the rudiments of commonsense reasoning".

The language of this clause is general and subject to no limitations and is not open to the construction put by the arbitrator. Therefore, even if there was any contractual obligation on the part of the appellant to remove the bricks from the kiln area and the damage was due to non-removal thereof, the contractor is precluded by the said clause from claiming any damage on that account. The award is, therefore, bad on the face of it. It is accordingly set aside.

'Claim No. 8.'

(23) This claim corresponds to claim No. 4 in Miscellaneous Appeal No. 252 of 1950 which I have disallowed. For the reasons given therein, the award in respect of this claim is set aside.

'Claim No. 17.'

(24) Claim No. 17 of this appeal corresponds to claim No. 17 of Miscellaneous Appeal No. 252 of 1950, which has been disallowed for the reasons given therein. For the same reasons the award in respect of this claim is disallowed.

(25) In the result, the appeals are allowed in part. In appeal No. 252 the decree of the lower court will be modified by excluding claims Nos. 4 and 17, and in appeal No. 253 the decree of the lower court will be modified by excluding claims Nos. 5, 8 and 17. In the circumstances, the parties will bear their own costs in each case.

(26) CHATTERJI, J.: I agree.

K.S. *Appeals partly allowed.*

A. I. R. (38) 1951 PATNA 205 (C. N. 38.)

REUBEN AND RAMASWAMI, JJ.

Nathu Singh and another, Appellants, v. Rohin Singh and others, Respondents.

Letters Patent Appeals Nos. 29 & 32 of 1948, D/- 15-11-1950.

Tenancy Laws—Bihar Tenancy Act (8 of 1885), S. 112-A — Holding of raiyat at fixed rate under Kabuliat — Reduction of rent under S. 112-A — Validity of — Possession as occupancy raiyat before execution Kabuliat if continues after execution.

Where the tenancies are the holding of raiyats of fixed rates under Kabuliats executed by them S. 112-A does not apply and the order of reduction of rent passed under that section is without jurisdiction. The efect of the execution of the Kabuliats is to bring a new tenancy into being, viz., the tenancy of a raiyat at fixed rates. The contention that before the execution of these kabuliats the raiyats were already in possession as occupancy raiyats and that by the execution of these kabuliats and the acceptance thereby of fixed rents there was no merger of the original occupancy raiyati interest with the new interest created is not correct. For there is no question of the previous tenancy merging with the tenancy so created. It is open to an occupancy raiyat to transfer his interest. It is equally open to him to surrender it. There is no reason why by entering into a new contract he cannot extinguish the interest altogether. A I R (14) 1927 Cal 846; A I R (9) 1922 Cal 287 (2); AIR (5) 1918 Cal 426, Disting. (Paras 1, 4)

Further, the fact that the predecessor-in-interest of the landlord being under a mistaken impression that he was bound by the order under S. 112-A realised the rent at reduced rate does not amount to a new contract between the parties and cannot prevent the landlord from realising in subsequent years the rent to which he is legally entitled. (Para 6)

Shambunath and S. C. Misra, for Appellants; K. K. Sinha, for Respondents.

Cases referred to:

('18) 27 C L J 284: (A I R (5) 1918 Cal 426) (Pr 4)

('22) 49 Cal 280: (A I R (9) 1922 Cal 287 (2) (Pr 4)

('27) 54 Cal 681: (A I R (14) 1927 Cal 846) (Pr 4)

REUBEN, J: These appeals, both by the defts. are directed against a decision of Shearer, J., reversing the concurrent decisions of the Courts below in the relevant suits. They arise out of suits for rent filed by the respondents, who are common to both the appeals, against the defts. The landlord sought to recover arrears of rent for the years 1350 to 1353 fasli at the rent specified in the Kabuliats (Exs. 2 & 2/a) executed by the defts. in his favour in the years 1927 & 1928. The tenancies are agricultural tenancies. The defence taken was that the rent of these tenancies had been reduced under the provisions of S. 112-A, Bihar Tenancy Act. This defence was accepted by the lower Courts but the decision was reversed by Shearer, J., on the finding that the tenancies were the holdings of raiyats at fixed rates & therefore the orders passed under S. 112-A were without jurisdiction.

(2) Five points were urged before us: one, that the point that the tenancies were 'sharahmoayyan raiyati' tenancies was raised for the first time in the Court of the single Judge; secondly, that the right of occupancy raiyati had already been acquired by the defts. before the kabuliats in question were executed & they, therefore, continued to be occupancy raiyats after the exectuion of the kabuliats; thirdly, that a previous decision in a rent suit brought by the predecessor-in-interest of the respondents operates as 'res judicata' in these cases; fourthly, that the predecessor-in-interest of respondents granted receipts to the defts. on realisation of rent at the reduced rate & thus created a new contract between the parties; & fifthly, that the learned single Judge erred by reversing a finding of fact.

(3) Point No. 1: There is no substance in this objection. The tenancies are described in the plaints 'Istimrari Mokarrari' without any specific interest of a tenure-holder. It appears to have been argued on behalf of the plffs. before the Munsif that the tenancies were tenures. This is usually the case with a tenancy which is described as 'Istimrari Mokarrari.' The contention raised before the Munsif appears to have been in the nature of the interpretation of the two kabuliats & no objection on this ground seems to have been raised, when, in the first appellate Court, it was argued on behalf of the plffs. that the tenancies were really 'sharahmoayyan raiyati tenancies. It has been contended before us that the matter is not entirely one of interpretation, that in order to determine whether a tenancy is that of a raiyat or of a tenure-holder questions of fact have to be gone into. So far, however, as the facts relating to these tenancies are concerned there is no dispute whatever, either as regards the area or the rent or the purpose for which the tenancies were created.

(4) Point No. 2: This is the point on which main reliance has been placed. Contention is that before the execution of these kabuliats the defts. were already in possession as occupancy raiyats & that by the execution of these kabuliats & the acceptance thereby of fixed rents there was no merger of the original occupancy raiyati interest with the new interest created. In support of this contention reference was made to Midnapore Zemindary Co. Ltd. v. Sadhumoni Dasi', 54 Cal 681, 'Sarbeshwar Patra v. Bijay Chand Mahtab', 49 Cal 280 and 'Lakhi Charan Saha v. Hamid Ali', 27 C L J 284. In 49 Cal 280, it was held that a 'Sharahmoayyan raiyat', can acquire occupancy rights & thus claim protection under the provisions of Section 160, B. T. Act. In the other two cases the question was as to the existence of "protected interest", in the first case under S. 160, B. T. Act & in 27 Cal L Jour 284, under the provisions of the Revenue Sales Tax Act of 1859. The provisions of these sections relate to tenants who have occupancy rights, & in the decisions relied on it was not held that the right of an occupancy raiyat persisted. On the contrary, in 27 Cal L Jour, 284, their Lordships appear to draw a distinction between a raiyat holding at fixed rates & an occupancy raiyat & expressly considered the question

whether the latter can retain the privileges of an occupancy raiyat after he becomes a raiyat holding at fixed rates. The point in question was protection under S. 160, Bengal Tenancy Act. This privilege is accorded to occupancy rights & this is the point that was found in the decision cited. There is nothing in these decisions to support the contention that there was no "merger." The use of the term "merger" seems to be incorrect. The effect of the execution of the kabuliats was to bring a new tenancy into being, viz., the tenancy of a raiyat at fixed rates; there was no question of the previous tenancy merging with the tenancy so created. It is open to an occupancy raiyat to transfer his interest. It is equally open to him to surrender it. There seems to be no reason why by entering into a new contract he cannot extinguish the interest altogether. As regards the right of occupancy, that would be governed by the provisions of Ss. 19 & 20. Bihar Tenancy Act. This point must, therefore, be decided against the appellants.

(5) Point No. 3: This point was rightly given up before the learned single Judge. The previous decisions relied on relates only to one tenancy. The only document relating to which consists of the copy of the decree. The pleadings & judgment are not incorrect.

(6) Point No. 4: This point has been sufficiently dealt with in the judgment of the learned single Judge. Stress has been laid on the receipts because it is said that they contain express references to the order under S. 112-A. The references, in my opinion, make no difference. All that these references amount to is that the predecessor-in-interest of the plaintiffs being under a mistaken impression that he was bound by the order under S. 112-A realised the rent at reduced rate. This cannot amount to a new contract between the parties & cannot prevent the landlord from realising in subsequent years the rent to which he is legally entitled.

(7) Point No. 5: As I have said already no question of fact was really in dispute. The question is one entirely of interpretation. This point therefore fails.

(8) On these grounds I would dismiss this appeal with costs.

(9) RAMASWAMI, J: I agree.

V.S.B. *Appeal dismissed.*

A. I. R. (38) 1951 PATNA 206 (C. N. 39-40)

REUBEN AND RAMASWAMI, JJ.

Mrs. J. L. Quadros, Appellant v. Adeline Teresa Quardros and others, Respondents.

Letters Patent Appeal No. 15 of 1948, D/- 17-11-50.

(a) Succession Act (1925), Ss. 82, 87, 302 — Construction of will — Intention of testator — Contradictory clauses in will to be reconciled — Direction of Court for sale of properties sought — 'Held' on construction that direction could be given.

At the commencement of his Will the testator stated: "I give my mother 'J.' a life interest in all my immovable properties including leasehold properties and investments." Later on there was a direction that six items of immovable properties be sold and 'on each of my eight children attaining majority, one-eighth of the sum realised by sale of these six mouzas shall be paid to her or him. The interest accruing from the said sale proceeds during my mother's life time shall be enjoyed by her exclusively." One of the married daughters of the testator by an application claimed that she was entitled to a direction from the Court that the properties be sold by the executrix and she be given her share out of the sale proceeds. The executrix contested the application on the ground that the Court could not direct a sale of the properties or distribution of the sale proceeds so long as she was alive as she had a life interest in the said properties and she was given absolute discretion over the sale of the properties, and further the application was not maintainable on the ground that the administration of the estate was concluded and the executrix was in the position of a trustee.

'Held' (1) that as there had not been a complete administration of the estate of the testator the application for direction was maintainable under S. 302, Succession Act. (Para 7)

(2) that on the proper construction of the Will and after reconciling any possible contradiction between the various clauses, the real intention of the testator was that the executrix should sell the mauzas and the sale proceeds should be invested, that the interest drawn from the investment should be enjoyed by the mother but that each of the children, on his or her attaining majority, should be paid the capital sum to which he or she is entitled, irrespective of the question whether the executrix was alive or not at that time. (Paras 4, 6)

(3) that the daughter was accordingly entitled to the direction prayed in her application. (Para 6)

Anno: Suc. Act, S. 82, N. 1; S. 87, N.1; S. 302, N. 1.

(b) Succession Act (1925), S. 87 — Construction of Will— Intention of testator.

It is a primary rule of construction of a Will that the intention of the testator must be gathered 'ex-visceribus testamenti.' All the parts and provisions of a Will are to be construed in relation to each other, and so as to form one consistent whole and operate together, and contradictory clauses should if possible reconciled accordingly. The Court should thus consider the whole instrument together. A I R (12) 1925 P C 105, Rel. on. (Para 3)

Anno: Suc. Act, S. 87, N. 1.

(c) Will — Construction of — Will making provision for children subject to prior life interest — Presumption.

In construing a will or settlement which makes a provision for children subject to a prior life interest, the Court must presume in favour of that construction by which the children will take a vested interest at twenty-one or on marriage (1885) 10 App. C. 422, Rel. on. (Para 5)

(d) Succession Act (1925), S. 302 — Administration not complete so long as direction in will is not complied — Executor when becomes trustee.

So long as the direction in the will has not been complied with, it is not possible to hold that there is a complete administration of the estate of the testator. The question when the executor becomes a trustee depends upon the circumstances of each particular case. If the administration is complete, if the executor is 'functus officio' with regard to any of the assets and retains them in his possession he becomes clothed with the character of a trustee of those assets. For instance, as soon as the executor has assented to a legacy he becomes a trustee of the subject-matter of the legacy for the legatee. AIR (14) 1927 Mad 994; 31 Cal 89; AIR (5) 1918 Cal 41, Rel. on. (Para 7)

Anno: Suc. Act, S. 302, N. 1.

R. S. Chatterji and Syed Hasan, for Appellant. S. S. Asghar Hussain, for Respondent. S. C. Chakravarty—for D. R. Guardian.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('25) 52 I A 214: (A I R (12) 1925 P C 105) (Pr 3)

('49) A I R (36) 1949 All 93: (I L R (1949) All 66) (Pr 7)

('04) 31 Cal 89 (Pr 7)

('18) 28 C L J 271: (A I R (5) 1918 Cal 41) (Pr 7)

('27) 50 Mad 956: (A I R (14) 1927 Mad 994) (Pr 7)

('28) 7 Pat 396: (A I R (15) 1928 Pat 348) (Pr 5)
(1748-9) 1 Ves. Sen 208: (27 E R 986) (Pr 5)
(1858) 6 H L C 823: (108 R R 327) (Pr 3)
(1885) 10 A C 422 (Pr 5)

RAMASWAMI, J: The question to be decided in this appeal is whether upon the proper construction of a will executed by one Mr. J. A. Quadros on 20-2-1937, the respondent is entitled to a direction from the Court that certain properties should be sold by the executrix & the respondent given her share out of the sale proceeds.

(2) It is the admitted case that, on 20-2-1937, Mr. J. A. Quadros executed the will in question. Mrs. Adeline Reid is the third child of the testator & when the will was executed ,she was aged fourteen years. She has since married & has now two children, the elder of whom is seven years of age. On her behalf, it is alleged that Mrs. J. L. Quadros, who was the executrix appointed under the will, has not carried out the direction of the testator that certain properties should be converted into cash & one-eighth of the sum realised by the sale should be paid to each of his children on his or her attaining the age of twenty-one years. The executrix contested the application on the ground that the Court cannot direct a sale of the properties or distribution of the sale proceeds so long as she was alive. It was maintained that by the will the executrix was given a life interest in all the immovable properties left by the testator & she was given absolute discretion over the sale of the properties. Shearer, J., held upon the construction of the will that the respondent was entitled to a direction that the mauzas should be sold by the executrix & that she was entitled to a share of the sale proceeds. The learned Judge accordingly allowed the application.

(3) The question at issue in this appeal depends upon the construction of the material terms of the will executed by Mr. J. A. Quadros. At the commencement of the will, the testator states:

"I give my mother Mrs. Julia L. Quadros a life interest in all my immovable properties including leasehold properties & investments."

There is a direction later on to the following effect:

"I also direct that (a) Tauzi No. 59, Mauza Rampur Taliqua, (b) Tauzi No. 59/29 Mauza Bhagwangama, Rampur Taliqua, (c) Tauzi No. 616, Mauza Bhikanpur, (d) Tauzi No. 4736, Mauza Moinuddinchuk of which I am the sole proprietor, & also (e) Tauzi No. 4586, Mauza Nagar, Pargannah Colgon & (f) Tauzi No. 796 C, Mauza Lakhraj, Mauza Chicksi, Pargana Phulbari, Thana Paliganj, district Patna of which last two I am an 8 annas & five annas share-holder respectively be sold & the net sale proceeds be invested & form part of my estate along with the other monies & investments mentioned above except the sale proceeds of my share in Touzi No. 796-C Mauza Lakhraj; Mauza Chicksi; Parganah Phulbari; Thana Paliganj, District Patna; which I leave to my mother absolutely. That the remaining 8 annas share in Touzi No. 796-C Mauza Lakhraj, Mauza Chicksi, Pargana Phulbari; Thana Paliganj; District Patna is exclusively the property of my mother Mrs. Julia L. Quadros & the sale proceeds thereof shall be hers absolutely. That Tauzi No. 306-1 Mouzh Dadpur Pakuria Baurgaon be sold, and the sale proceeds thereof, I leave to my mother absolutely. On each of my eight children attaining majority, one-eighth of the sum realised by sale of these six mauzas shall be paid to her or him. The interest accruing from the said sale proceeds during my mother's life time shall be enjoyed by her exclusively."

On behalf of the appellant, Mr. R. S. Chatterji presented the argument that the will clearly provided that Mrs. J. L. Quadros was to be granted a life interest in all the immovable properties & it was manifest that the intention of the testator was to make Mrs. J. L. Quadros the 'karta of the family" & give her complete control over the provision for maintenance of the wife & children of Mr. Quadros. It was also contended that the disposition in favour of the children was merely contingent & cannot prevail over the definite direction in the will that the mother should be given a life interest in all the immovable properties. In my opinion, the argument on behalf of the appellant is not tenable. For it is a primary rule of construction that the intention of the testator must be gathered 'ex-visceribus testamenti' that all the parts & provisions of a will are to be construed in relation to each other, & so as to form one consistent whole & operate together, & contradictory clauses should if possible be reconciled accordingly as the Court should consider the whole instrument together. In 'Venkatadri Appa Rao v. Parthasarathi Appa Rao', 52 I A 214, the Judicial Committee referred with approval to the statement of law made by Lord Wensleydale in 'Roddy v. Fitzegerald', (1858) 6 H L C 823 to the following effect:

"These rules are perfectly plain & clear. The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, & may lead to speculation as to what the testator may be supposed to have intended to write, whereas the only & proper inquiry is, what is the meaning of that which he has actually written? That which he has written is to be construed by every part being taken into consideration according to its grammatical construction & the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the Court in the position of the testator."

In the present case, there is no material repugnancy between the relevant clauses in the will, namely, (1) that the mother Mrs. Julia L. Quadros is given a life interest in all the immovable properties, & (2) "On each of my eight children attaining majority, one eighth of the sum realised by sale of these six mauzas shall be paid to her or him."

(4) Learned Counsel has referred to the subsequent clause that "The interest accruing from the said sale proceeds during my mother's lifetime shall be enjoyed by her exclusively." But, in my opinion, any possible contradiction between the various clauses may be reconciled: & the real intention of the testator is apparent that the executrix should sell the mauzas & the sale proceeds should be invested, that the interest drawn from the investment should be enjoyed by the mother but that each of the children, on his or her attaining majority, should be paid the capital sum to which he or she is entitled.

(5) Even if it be assumed for a moment that the clauses in the will are ambiguous or conflicting the respondent would be entitled to the direction asked for, on the operation of another principle. For it is settled by high authority that in construing a will or settlement which makes a provision for children subject to a prior life interest, the Court must presume in favour of that construction by which the children will take a vested interest at twenty-one or on marriage. The rule is stated thus in Williams on 'Executors', Edn. 12 p. 805, Vol. II:

"In construing a settlement or Will, which makes a provision for children subject to a prior life interest, the Court leans strongly in favour of that construction by which the children will take a vested interest at twenty-one or marriage, whether they survive the tenant for life or not: & if the instrument is incorrectly or 'ambiguously' expres-

sed, or if it contains 'conflicting' & contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the rational presumption is that the child acquires a vested & transmissible interest at the period when it is most needed, viz., at twenty-one, if a son, or on marriage or at that age, if a daughter."

In 'Edward Thomas Wakefield v. William Hamilton Maffat', (1885) 10 A. C. 422: lands were conveyed by a marriage settlement upon trust for husband & wife successively for life, & after the death of the survivor

"to levy out of the said lands & premises the sum of £3,000 to be divided to & among all the children of the said intended marriage, save & except such child & children as under the limitations aforesaid shall succeed to the enjoyment of the lands & premises hereby conveyed in equal shares & proportions as tenants in common & not as joint tenants, the share of such child or children as shall be a son or sons to be paid to him or them upon his or their respectively arriving at the full age of twenty-one years, & the share or shares of such of them as shall be daughters to be paid upon their respectively arriving at their full age of twenty-one years, or day or days of marriage, whichever shall first happen: Provided always that such marriage during minority shall be had by & with the consent & approbation of the parents or the survivor of them: with interest for the same by way of maintenance at the rate of £6 by the hundred to be computed from the day of the death of the survivor of the parents: with benefit of survivorship to the survivors or survivor of such children if any of such children shall die before his, her or their share or shares shall become payable unmarried & without leaving issue as aforesaid, it being the true intent & meaning of these presents that none of the children of the said intended marriage, who under the limitations herein contained shall become entitled to an estate in possession in any part of the lands & premises hereby conveyed shall be entitled to any part of the said sum."

A son attained twenty-one & died in the lifetime of his father. Upon these facts, it was held by the House of Lords, affirming the decision of the Court of Appeal in Ireland, that there being no words indicating a clear intention to make the vesting of children's shares contingent on their surviving both parents, the rule laid down in 'Emperor v. Rolfe', (1748-9) 1 Ves. Sen. 208 applied, & the son took a vested interest in his share on attaining twenty-one.

(6) In the present case, upon proper construction of the will, it must be held that, upon each of the children attaining majority, one-eighth of the sum realised by the sale of the mauzas should be paid to her or him irrespective of the question whether the executrix was alive or not at the time. The respondent was accordingly entitled to the direction given by the learned Judge of this Court.

(7) The argument was also presented on behalf of the appellant that the application was not maintainable under S. 301, Succession Act, on the ground that the administration of the estate concluded & the respondent was really in the position of the trustee. In support of this argument, learned Counsel referred to 'Nandkishore Lal v. Pasupati Nath', 7 Pat 396 & 'In the goods of Sarnath Sanyal', AIR (36) 1949 All 93. In my opinion, these authorities are not of much assistance to the appellant for they proceed on the assumption that there has been a complete administration of the estate of the deceased in each case & the executor had become 'functus officio.' But it cannot be held upon circumstances admitted or proved in the present case, that there has been a complete administration of the estate of Mr. J. A. Quadros. It is important to notice that there is a specific direction in the will that the executrix should sell the mauzas specified & out of the sale proceeds, shall pay one-eighth share to each of the eight children on their attaining the age of twenty-one years. So long as the direction in the will has not been complied with, it is not possible to hold that there was a complete administration of the estate of the testator. The question when the executor becomes a trustee must be answered with reference to the circumstances of each particular case. If the administration is complete, if the executor is 'functus officio', with regard to any of the assets & retains them in his possession he becomes clothed with the character of a trustee of those assets. For instance, as soon as the executor has assented to a legacy, he becomes a trustee of the subject-matter of the legacy for the legatee. As observed by Lewin

"An executor is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged, even by the Court from his 'executorship.' When the funeral & testamentary expenses, debts, & legacies have been satisfied, & the surplpus has been invested upon the trusts of the will, the executor then drops that character & 'becomes a trustee in the proper sense, & may then be discharged from the office like any other trustee."

This passage has been quoted with approval in 'Dhanabakkiyammal v. Thangavelu Mudaliar', 50 Mad 956. In 'Taran Singh v. Ramratan Tewari', 31 Cal 89, also the Court observed:

"The position & duties of an executor in this country are not very well understood, & considerable confusion exists as to duties of the executor in the administering the estate. The duties of the executor are to administer the estate of the deceased only so far & so long as to enable him to carry out the terms of the will of which he is executor. After the property has ceased to be the estate of the deceased & has become the property of the residuary legatee under the will, the executor as such has no authority to manage the estate on his behalf."

This case was followed in a subsequent decision in 'Sankar Nath v. Biddutlata Devi', 28 C L J 271.

(8) For these reasons, I hold that the respondent is entitled to a direction from the Court under S. 302 of the Act. There appears however, to be a slight mistake in the will, for, upon a careful perusal thereof, it is apparent that each of the children would be entitled to one-eighth of the sum realised by the sale 'not of the six' but of the five mauzas, namely (1) Tauzi No. 59, Mauza Rampur Taliqua, (2) Tauzi No. 59/29 Mauza Bhagwangama, Rampur Taliqua, (3) Tauzi No. 616, Mauza Bhikanpur, (4) Tauzi No. 4736, Mauza Maoinuddinchuk & (5) Tauzi No. 4586, Mauza Nagar, Parganah Colgon. In view of the admitted fact that out of the eight children one, namely, Julia Gertrude Quadros, died during the lifetime of the testator, the respondent will be entitled not to one-seventh share as claimed but to one-eighth share of the sale proceeds of the five mauzas which have been specified. It is necessary that the executrix should sell the five properties specified within a period of six months from this date or within such further time as may be granted on a proper application being made in this behalf to the Court of the D. J., of Bhagalpur.

(9) This appeal under the Letters Patent is accordingly dismissed with costs. Hearing fee three gold mohurs.

(10) REUBEN, J: I agree.

V.S.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 209 *[C. N. 41.]*

DAS AND SARJOO PRASAD JJ.

Jamuna Prasad and others—*Petitioners* v. *Jogendra Prasad and others*—*Opposite Party.*

Civil Revns. Nos. 679 and 773 of 1949, D/- 14-3-1950.

(a) Bihar District Board Electrol Rules (1937), R. 3 (b)—'Contract' in the rule includes lease: Per *Sarjoo Prasad J.* [Para 6]

(b) Civil P. C. (1908), S. 115 - Court subordinate to High Court—Election Commissioner.

The High Court can interfere in revision with the order of an Election Commissioner appointed under the Bihar District Board Electoral Rules (1937). [Para 7]

Anno. C. P. C., S. 115, N. 6.

(c) Civil P. C. (1908), S. 115—Error of law.

Even if the decision of the Election Commissioner under the Bihar District Board Electoral Rules (1937), to the effect that R. 3 (b) covered a case of lease is held to be wrong, it is only an error of law not affecting his jurisdiction to decide the matter and no revision lies. [Paras 6, 7]

Anno. C. P. C., S. 115, N. 12, 13.

(d) Bihar District Board Election Petitions Rules (1939), R. 16 (1) (b) — Corrupt practice not materially affecting result of election.

All that is required under R. 16 (1) (b) is that the corrupt practice in question must have been committed in the interest of the returned candidate, in which case his election must be held to be void, and the fact that the corrupt practice did not materially affect the result of the election as the candidate was returned by an overwhelming majority is not material. [Para 15]

(e) Elections — Principal and agent — Contract Act (1872), S. 182.

The law of agency in election cases goes much further than the ordinary law of pricipal and agent There may be no direct proof of an actual appointment of an agent. A man may be proved to be an agent of a candidate on the various facts and circumstances leading to such an inference in a particular case. [Para 20]

(f) Bihar District Board Election Petitions Rules (1939), R. 16—R. 16 (2)—Construction and applicability.

The various clauses in sub-r. (2) of R. 16 have to be read conjunctively, and all the conditions enumerated in those clauses must be found to exist before a returned candidate can take advantage of sub-r. (2). Sub-Rule (2) can have no application at all where the returned candidate is himself found guilty of the corrupt practices of the Part I variety referred to in R. 16 (1) (b) and R. 16 (2) of the Rules. It can only come into play where the candidate himself is innocent but his agent is guilty or has knowledge or connived at the corrupt practices in question. [Para 21]

Lal Narain Sinha, Prem Lall, Tribeni Prasad Sinha and B. K. Sharma; P. R. Das, S. C. Mukherji and N L. Untwalia—for Petitioners (in Nos 679 and 773. respectively); P. R. Das, S. C. Mukherji, N. L. Untwalia and Umesh Chandra Sinha; Mahabir Prasad and Umesh Chandra Sinha—for Opposite Party (in Nos. 679 and 773 respectively).

Sarjoo Prasad J. — These two applications in revision are directed against an order dated 8-8-1949, of Mr. P. K. Nag, as an Additional Election Commissioner of Muzaffarpur.

[2] The order in question arises out of an election petition presented by three unsuccessful candidates against three returned candidates, namely, the applicant in Civ. Revn. No. 679 of 1949, Jamuna Prasad Tripathi, Ramdhari Prasad (since dead) and Jagat Prasad Singh, the respondent opposite party in Civ. Revn. No. 773 of 1949, in connection with the last District Board election held in May and June, 1947, in respect of police station Muzaffarpur— Kamtaul-Kanti constituency. The respondent Ramdhari Prasad having died subsequent to the presentation of the election petition, a fresh bye-election was held in respect of the vacancy so caused, and his name was expunged from the election petition. The election petition, therefore, is now concerned only with the election of the returned candidates Jamuna Prasad Tripathi and Jagat Prasad Singh, the surviving respondents named in that petition.

[3] The election petition raised various grounds of objection to the return of the candidates concerned. It would be unnecessary to refer to all the other grounds except those on which the election petition succeeded before the Election Commissioner.

[4] The first objection against the respondent Jamuna Prasad Tripathi who is the petitioner in Civ. Revn. No. 679 of 1949 was that the respondent was a member of a joint family which used to be contractors under the District Board during election, and, as such, the said respondent Jamuna Prasad Tripathi was not eligible for election to the District Board. Jamuna Prasad Tripathi contested on the ground, firstly, that he was separate from the other members of his family, namely, his father and brothers, and secondly, that in any case the members of his family were not contractors under the District Board, and, consequently no objection could be raised as to his eligibility to the election as a member of the said Board. The Election Commissioner after a consideration of the evidence came to a definite finding that the respondent

Jamuna Prasad Tripathi was a member of the joint family consisting of himself, his father and his brothers, and that his plea of separation was false. He also found that there was evidence to show that leases had been obtained of the District Board road-side lands by the father and the brothers of the respondent, and although these leases expired, the lessees thereunder had been holding over, and the District Board had not taken possession of the lands in question after dispossessing the said lessees. He accordingly held that

"contractual relationship existed between the father and brothers of respondent 1 and the District Board at the time when the nomination paper was filed by respondent 1"

and respondent 1 being a member of the joint family with his father and brothers, he was directly interested in such contracts, and, as such, he was not eligible for election under R. 3 (b), District Board Electoral Rules, 1937.

[5] The learned counsel appearing for the applicant before us contends that this finding of the Election Commissioner that the father of the respondent or his brothers were lessees in respect of the road-side lands belonging to the District Board did not in any manner bring him within the mischief of the said rule. In order to appreciate the point, it would be useful to quote the rule in question.

[6] It provides:

"No person shall be eligible for election if he is in the employment or pay of the district board or of any local board or union committee or union board subordinate to that district board or who has directly or indirectly any share or interest in any contract with or under the district or local board or union committee or union board."

The relevant provision with which we are concerned in this case is whether the respondent had "directly or indirectly any share or interest in any contract with or under the District Board," Mr. Lal Narain Sinha appearing for the respondent petitioner before this Court urges that the word "contract" used in the rule cannot refer to leases which are really transfers of property. He says that the Election Commissioner found that it could not be proved by the petitioners who filed the election petition that any member of the family of respondent 1 was a contractor in the District Board so far as constructions of roads etc., were concerned, and that the meaning of the word "contract" given in the rule must be confined to such class of contracts relating to construction or roads etc., referred to above. It is true the Election Commissioner has held that the petitioners in the election petition were unable to prove such contracts ; but it appears to me that the view taken by the Election Commissioner as to the interpretation of the rule is on the whole correct. The language of the rule is sufficiently wide to cover a case of contractual relationship arising out of leases as well, or for the matter of that out of any other kind of contract. The comprehensive intention of the rule seems to be particularly emphasised by the expression:

"No person shall be eligible for election if he has directly or indirectly any share or interest in any contract."

After all, transfer of property also is in the nature of a contract between the parties, and there seems to be no justification for holding that the application of the rule should be restricted by the narrow interpretation which is sought to be put upon it by learned counsel appearing for the applicant. Even assuming that the interpretation of the rule given by the Election Commissioner was erroneous, it could be only an error of law not affecting his jurisdiction to decide the matter.

[7] Of course, it is now well settled that it is open to this Court to interfere in revision with the order of an Election Commissioner appointed under the District Board Rules. I may refer in this connection to a Full Bench decision of this Court in *Mt. Dirji* v. *Sm. Goalin*, 20 Pat. 373: (A. I. R. (28) 1941 Pat. 65 F. B.). In that case a question arose whether a Commissioner appointed under the Workmen's Compensation Act of 1923 was a Court, and whether his order could be revised under S. 115, Civil P. C. It was held that the Commissioner under the Act is constituted an independent tribunal, and his function is to judge and decide and not merely to enquire and advise, and in judging and deciding the matters before him, he has to proceed judicially and not arbitrarily, and that he satisfied all the main tests which one has to apply for determining whether the tribunal is a Court or not. That being so, it was held that any final order passed by him was open to revision by this Court under S. 115, Civil P. C. The question, however, relating to an Election Commissioner directly arose for consideration in another subsequent case reported in *Abdul Razak* v. *Kuldip Narain*, 22 Pat. 577: (A. I. R. (31) 1944 Pat. 147). In this case there was a difference of opinion between Meredith J. as he then was, and Chatterji J. and the case was then referred for decision to another learned Judge, Manohar Lall J. It appears that all the learned Judges who dealt with the case at different stages were unanimously of the view that the Election

Commissioner referred to in the Bihar District Board Electoral Rules, 1937, is a Court and a Court subordinate to the High Court within the meaning of S. 115, Civil P. C. That being so, there can be no question that it was open to us to revise this order of the Election Commissioner if there were any scope for interference under S. 115 of the Code. It is contended by Mr. Lal Narain Sinha, the learned Government Pleader, that this error of law resulting in an erroneous construction of R. 3, District Board Electoral Rules, affected the jurisdiction of the Election Commissioner. In my opinion, this is, as I have said, not a tenable contention. It was open to the Election Commissioner to construe the rule in question and it was a matter entirely within his jurisdiction to decide about it. Therefore, even if he had decided the matter wrongly it could not be said that he had no jurisdiction to decide it in that manner. I have already pointed out that as at present advised, I see no reason to differ from him in the view which he has taken as to the construction of R. 3, and I hold that his decision is correct and is not open to interference.

[8] The next ground of attack in the election petition was that there were various irregularities committed by the officer in charge of the election and it also enumerated various corrupt practices resorted to by the returned candidates in securing their election. In dealing with these objections in issue 4, the learned Commissioner has sought to classify them under two groups.

[9] Within the first group he deals with the irregularities committed by the officers in charge of the election which were alleged to have materially affected the result of the election. He examined the evidence regarding the allegations made in respect of such irregularities, and he came to the conclusion that there were some irregularities due to carelessness and lack of discretion on the part of the officers in charge of the election; but such irregularities or carelessness did not affect the result of the election as contemplated in R. 69, Bihar District Board Electoral Rules, 1937, and the election, therefore, could not be held to be invalid on any of the grounds mentioned in group one aforesaid.

[10] In the second group he deals with corrupt practices resorted to by the returned candidates and their agents which would come under Part I of the Schedule to the Bihar District Board Election Petitions Rules, 1939. This appears to be the most serious part of the objection taken against the election of the candidates returned. In that group the main grounds of attack, *inter alia*, were that (1) a large number of women were hired to personate the absentee women voters and to vote for the latter in favour of the respondents, and (2) a number of persons were engaged by the respondents to personate as absentee voters and dead voters and to vote for such persons in favour of the respondents. These were serious charges constituting corrupt practices on the part of the returned candidates or their agents.

[11] The learned Government Pleader appearing for the respondent, Jamuna Prasad Tripathi, contended that the election petition did not set forth full particulars of the corrupt practices alleged by the petitioners in their election petition as against each of the respondents or their agents. I have examined the election petition and I find on the whole that they do contain the particulars required. But even if there was any vagueness in those particulars, it was open to the respondents to ask for further particulars, if any. It does not appear that they took any serious objection on that ground and there has been obviously no prejudice to the applicant. I, therefore, see no force in this contention advanced on his behalf in this Court.

[12] The Election Commissioner after examining very carefully the evidence adduced in proof of the alleged corrupt practices came to the conclusion that several hired women other than the real voters had been allowed to vote for the actual voters in favour of the Congress candidates meaning the two respondents in the election petition. He also found that there was definite proof that several votes cast in the name of dead persons were cast in favour of the respondent, Jamuna Prasad Tripathi, and only two in favour of the other respondent, Jagat Prasad Singh. In course of his discussion of the evidence on the point he observed that the packages containing the votes polled in two of the booths could not be traced, and there was no guarantee that the corrupt practices, referred to above, were the only corrupt practices committed in the interest of the candidates returned. In summing up his findings under issue 4, the Election Commissioner found these facts against both the returned candidates. He, therefore, held that these corrupt practices committed in the interest of the returned candidates came within R 16 (1) (b) District Board Election Petitions Rules, 1939, and accordingly the election of the returned candidates had to be declared void. He also found that the corrupt practices in question were not of a trivial nature and could not be brushed aside.

[13] In regard to the respondent applicant, Jamuna Prasad Tripathi, he held that he was

personally responsible for the corrupt practices in question which were to his knowledge and at his connivance but, in so far as Jagat Prasad Singh is concerned, he held that the corrupt practices were resorted to without his knowledge and connivance, and his case came within R. 16 (2) of the Rules. He accordingly found that the election of this respondent was not void. I shall have to refer to the case of the respondent, Jagat Prasad Singh, when I come to deal with Civ. Revn. No. 773 of 1949 which is directed against this part of the order of the Election Commissioner.

[14] It is contended by the learned Government pleader appearing for the respondent, Jamuna Prasad Tripathi, that there was nothing definite to connect this respondent with the corrupt practices in question. He argued that the mere fact that some votes cast in the name of deceased voters were found in his ballot box or that some women happened to personate for certain other women voters did not necessarily imply that the petitioner was directly concerned in the matter, and that there was no definite material on which the Election Commissioner could hold that the petitioner, Jamuna Prasad, could be directly connected with the corrupt practices in question. I am afraid in view of the findings of the Election Commissioner, I cannot accept this contention. To quote his own words, the Election Commissioner found as follows:

"As regards Babu Jamuna Tripathi I am unable to accept such a view. He did not rest satisfied with what might have been done by the Congress party whose nominee he was to secure his election. He was acting and supervising the election and was visiting each polling booth on every day. The corrupt practices have been resorted to in Kamtaul and Siraia polling booths in which locality this particular candidate resides. When he was in close touch with the election it cannot be assumed that the hiring of men to vote for dead persons and women to vote for absentee women voters could have been done without his knowledge. There could be hardly any direct evidence of the fact that he had knowledge of these corrupt practices and the same must be inferred from the facts and surrounding circumstances..... From the evidence and circumstances of the case and active interest that was taken by this returned candidate I find that all these corrupt practices found to have been resorted to were certainly within the knowledge of B. Jamuna Tripathi and were done with his connivance if he himself was not the originator of the plan."

In view of this finding which certainly cannot be challenged before us in revision, it seems difficult to uphold the contention of the learned Government Pleader that the election of the respondent, Jamuna Prasad Tripathi, did not come directly within the mischief of R. 16 (1).

[15] Mr. Lal Narain Sinha also suggested, though faintly, that the corrupt practices involved did not materially affect the result of the election because the respondent, Jamuna Prasad, was returned by an overwhelming majority of votes. This argument does not arise in construing R. 16 (1) (b) of the Election Petitions Rules. All that is required under that rule is that the corrupt practice in question must have been committed in the interest of the returned candidate in which case his election must be held to be void.

[16] I am, therefore, of opinion that there is no substance in the application filed on behalf of the applicant, Jamuna Prasad Tripathi, in Civ. Revn. No. 679 of 1949 which accordingly fails and must be dismissed with costs; hearing fee three gold mohurs.

[17] *Civ. Revn. No. 773 of 1949.* — I shall now turn to Civ. Revn. No. 773 of 1949 which as I have said, is directed against that part of the order of the Election Commissioner in which he found that the election of Jagat Prasad Singh was not void in view of sub-r. (2) of R. 16. It is unnecessary to recapitulate the facts. The petitioner in this case is one of the persons who filed the election petition challenging the election of Jagat Prasad Singh. Mr. P. R. Das who appears for the petitioner contends that the order of the Election Commissioner is clearly wrong and without jurisdiction. He relies upon the findings of the Election Commissioner where he held that the corrupt practices under Part I of the Schedule to the District Board Election Petitions Rules, 1939, had been committed in the interest of both the returned candidates. He also relies upon the finding that the corrupt practices complained of could not be brushed aside as of a trivial nature, and then he contends that having regard to these findings the Election Commissioner had no jurisdiction to act under sub-r. (2) of R. 16.

[18] The contention of Mr. Das rests upon a construction of R. 16, and, therefore, it would be useful to quote the rule in full:

"(1) Subject to the provisions of this rule, if, in the opinion of the Election Commissioner —

(a) the election of a returned candidate has been procured or induced, or the result of the election has been naterially affected, by any corrupt practice, or

(b) any corrupt practice specified in Part I of the Schedule to these rules has been committed in the interests of a returned candidate; or

(c) the result of the election has been materially affected by the improper acceptance or rejection of any nomination or by reason of the fact that any person nominated was not qualified or was disqualified for election, or by the improper reception or refusal of a vote or by the reception of any vote which is invalid, or by any non-compliance with the provisions of th

Act or of the rules framed under the Act in respect of the election; or by any mistake in the use of any prescribed form; or

(d) the election has not been a free election by reason of the large number of cases in which bribery or undue influence has been committed;

the election of the returned candidate shall be void.

(2) If the Election Commissioner finds that the returned candidate has been guilty by an agent of any corrupt practice specified in Part I of the Schedule to these rules but further finds that the candidate has satisfied him:

(a) no corrupt practice was committed at the election by the candidate and the corrupt practices found by the Election Officer to have been committed were committed contrary to the orders, and without the sanction or connivance, of the candidate;

(b) that the candidate took all reasonable means for preventing the commission of corrupt practices at the election;

(c) the corrupt practices found by the Election Commissioner to have been committed were of a trivial and limited character or took the form of customary hospitality which did not affect the result of the election; and

(d) in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

then the Election Commissioner may find that the election of the returned candidate is not void."

It is quite clear from the above that whereas in sub-r. (1) of R. 16 the word "or" has been used in respect of each of the various clauses, it is to be noted the word "or" is significantly absent in the various clauses of sub-r. (2) of R. 16. Mr. Das accordingly submits that the various clauses in sub-r. (2) must be taken in conjunction with each other. The learned Commissioner having definitely found that the corrupt practices complained of were not "of a trivial and limited character or took the form of customary hospitality which did not affect the result of the election" as required by R. 16 (2) (c), he contends that all the elements necessary to give the candidate the benefit of sub-r. (2) and in order to take him out of the mischief of sub-r. (1) did not exist. Therefore, the first finding of the Election Commissioner that the election was void must stand. Mr. Das further submits that this is not a mere error of law but an error of law which affects the ambit of his jurisdiction, and, therefore open to revision by this Court. He relies upon a decision reported in *Harihar Prasad* v. *Gopal Saran*, 14 Pat. 488: (A. I. R. (22) 1935 Pat. 385) where it has been held that if the High Court should find that the lower Court has made a mistake as to the extent of its jurisdiction, it may then interfere, and this is particularly so when the lower Court in determining the ambit of its own jurisdiction considers legislative enactments. Having once found that the election of the respondent Jagat Prasad Singh, also came under R 16 (1) (b) of the rules, the learned Election Commissioner had to declare that the election was void of this candidate as well, unless the candidate could invoke to his aid sub r. (2) of that rule which as discussed above he could not. If all the various clauses of sub-r. (2) are taken conjunctively it is quite clear that one of the conditions contemplated by cl. (c) of that rule has been definitely found to be against the candidate returned, and that being so sub-r. (2) could not come into operation. Consequently, the Election Commissioner could not be deemed to act within his jurisdiction in coming to a finding that the election of Jagat Prasad Singh was not void and this was a matter which really affected the ambit of his jurisdiction. There is apparently much substance in this contention of Mr. Das.

[19] The question, therefore, arises whether these various clauses of sub-r (2) of R 16 of the Election Petitions Rules have to be read conjunctively as contended for by Mr. Das Mr. Mahabir Prasad appearing for the respondent opposite party after some discussion conceded that the construction put upon the rule that the various clauses of sub-r. (2) had to be read conjunctively was a correct construction. He also conceded that the misconstruction of the rule made by the Election Commissioner in spite of his own findings did affect his jurisdiction in pronouncing upon the validity of the election. He, however, contended that there was no definite finding that the corrupt practices complained of were with the knowledge of or at the connivance of the candidate or his agent.

[20] On a perusal of sub-r. (1) of R. 16, it appears that where the election of a returned candidate has been procured or induced by any corrupt practice, the election is void. Such a corrupt practice may be of either variety mentioned in Part I or Part II of the Schedule to the rules. On the findings we are concerned with cl. (b) of sub-r. (1) of R. 16 which provides that where any corrupt practice specified in Part I of the Schedule to these rules has been committed in the interest of a returned candidate, the election of the returned candidate shall be void. Therefore, cl. (b) of sub-r. (1) refers to corrupt practices of Part I variety. Now, in Part I of the Schedule we find various kinds of corrupt practices specified but in each one of these instances it is to be noticed that it must be either by the candidate or his agent or by any other person "with the connivance of the

candidate or his agent." So far as Jagat Prasad Singh is concerned, there is a definite finding by the Commissioner in his favour to the effect that the Election Commissioner was satisfied that these corrupt practices were resorted to without his knowledge and connivance. The question then arises whether he can even then take advantage of an election in which corrupt practices have been committed in his interest provided they were committed with the knowledge or connivance of his agent which, as I have said, is an essential factor in all the various instances specified in Part I of the Schedule to the rules. On that point, there does not appear to be any definite finding arrived at by the Election Commissioner. Our attention has been drawn to a part of the judgment wherein the Election Commissioner held as follows :

"Exhibit 6 shows that the Secretary of the District Congress Committee who was acting as polling agent for the respondents filed a petition before one of the Presiding Officers of Sirisia polling station and the agent Kailash Behari of the petitioners was given last warning that he would be turned out if he would challenge the women voters any further."

In this Ex. 6 it appears that the Secretary of the District Congress Committee described himself as a polling agent only of one of the respondents, namely, Jamuna Prasad Tripathi, and not of the respondent Jagat Prasad Singh as well. Therefore, the value of this finding is greatly shaken by this error of record which has crept in the judgment of the Election Commissioner. We were also referred to another portion of the judgment wherein it is pointed out that Jagat Prasad Singh took no active part but that he was all along in Bochaha Booth, and that the Congress party was doing the work for him. So he did not even come to Muzaffarpur, Sirsia and Kamtaul polling booths where these corrupt practices were resorted to. It is argued that the Congress party was really conducting the election on behalf of both the respondents who had been set up by the party, and therefore, it must be held that the Secretary of the Congress party was the agent of both the candidates. It is no doubt true that the law of agency in election cases goes much further than the ordinary law of principal and agent. There may be no direct proof of an actual appointment of an agent. A man may be proved to be an agent of a candidate on the various facts and circumstances leading to such an inference in a particular case; but the trouble in this case is that there is no definite finding that the corrupt practices in question were resorted to with the knowledge or connivance of any agent of Jagat Prasad Singh. At one stage I was inclined to think that the case should be remitted to the Election Commissioner for disposal after a finding on the point whether the corrupt practices of Part I variety referred to in cl. (b) of R. 16 (1) were with the knowledge of Jagat Prasad's agent, if any. But it seems to me that no useful purpose will be served now by sending the case back on remand at such a late stage, the election in question having taken place in May and June, 1947.

[21] As at present advised I am inclined to agree with the contention of Mr. Das that the various clauses in sub-r. (2) of R. 16 have to be read conjunctively, and that all the conditions enumerated in those clauses must be found to exist before a returned candidate can take advantage of sub-r. (2). This distinction is clearly brought out by the fact that in sub-r. (1) the various clauses are made disjunctive by the use of the word "or" which is absent in sub r. (2) where all the clauses are connected one after the other by a semi-colon and finally with the conjunction "and" linking up the last cl. (d) of that sub-rule Sub rule (2) is obviously an exception to sub-r. (1) and this exception must be rigorously found before a returned candidate can take any advantage of it. This exception in sub-r. (2) can have no application at all where the returned candidate is himself found guilty of the corrupt practices of the Part I variety referred to in R. 16 (1) (b) and R. 16 (2) of the rules. It can only come into play where the candidate himself is innocent but his agent is guilty or has knowledge of or connived at the corrupt practices in question. It is in that case alone, if all the conditions mentioned in the various clauses of the sub rule are found to exist, that the successful candidate can be exonerated and his election upheld otherwise he cannot take advantage of the election vitiated by those practices. Such an interpretation is in consonance with public policy and the real intention of the rules to keep inviolate the purity of these elections. I agree with the view of the Election Commissioner in so far as he held that :

"The rules, however, as framed do not seem to tolerate any moral turpitude on the part of the returned candidate in obtaining his election. The rules do not seem to like that the local bodies be filled with persons of questionable and doubtful honesty and integrity. That is why R. 16 appears to be so strict in the matter of corrupt practices resorted to in the interest of a returned candidate to his knowledge and with his connivance by his workers."

But I do not agree with him in his application of sub-r. (2) of R. 16 to the case of Jagat Prasad Singh. I, however, think, as I have said, that the case does not at this stage call for any interference in revision on our part specially when there is no clear finding against Jagat Prasad, the respondent opposite party, that the corrupt practices in question were brought about

with the knowledge or connivance of his agent. The Secretary of the Congress Committee may or may not have been his agent but at any rate Ex. 6 does not show that he was the polling agent of Jagat Prasad Singh as wrongly appears to have been assumed by the learned Election Commissioner. That being so, I would dismiss this application also but in the circumstances without costs.

[22] In the result both the applications fail, and the order passed by the Election Commissioner stands.

[23] **Das J.**— I agree to the orders proposed to be passed by my learned brother, and would state, very briefly my opinion on the questions raised and the reasons therefor.

[24] *Civ. Revn No 679 of 1949* : *Jamuna Prasad Tripathi.*—I do not think that it is necessary to decide in this case the question of the meaning of the word "contract" occurring in R. 3 (b), District Board Electoral Rules, 1937, and I wish to guard myself against expressing any final or concluded view that the word "contract" in the rule means something more than an agreement enforceable by law and includes a transfer of property or any interest in property, e. g. a lease or a sale. It may be doubted if a person is disqualified for election merely because he has taken a lease of or purchased some property from the District Board. If the decision of the Election Commissioner had rested only on the interpretation put upon R. 3 (b) aforesaid, and it was found that the interpretation was wrong, it might, I think, be said with some force that the error of law related to the extent of the jurisdiction of the Election Commissioner to declare the election void.

[25] But there is the clear finding of the Election Commissioner that Jamuna prasad Tripathi knew and had connived at corrupt practices of the kind specified in item 3 of Part I of the Schedule to the District Board Election Petition Rules, 1939 His election was thus void under R. 16 (1) (b). As long as that finding stands — and nothing has been stated before us which would entitle us to go behind that finding — there can be no interference with the order of the Election Commissioner.

[26] *Civ. Revn.No. 773 of 1949* : *Jagat Prasad Singh.*— I agree with my learned brother that the four cls. (a) to (d) in R. 16 (2), District Board Election Petitions Rules, should be read conjunctively, and the learned Election Commissioner made an error of law in thinking otherwise. I also agree that such an error would attract the operation of S. 115, Civil P. C., as it related to the extent of jurisdiction of the Election Commissioner.

[27] I am not satisfied, however, that the finding of the learned Election Commissioner, so far as Jagat Prasad Singh is concerned, is a finding that corrupt practices of the kind specified in Part I of the Schedule were committed, so as to make his election void under R 16 (1) (b). Though the learned Election Commissioner considered and put the case of both the returned candidates together, while giving his finding about the corrupt practices resorted to at the election he clearly found that Jagat Prasad neither knew nor connived at those corrupt practices. Therefore, to make the election of Jagat Prasad viod within the meaning of R. 16 (1) (b), it would be necessary to find that the corrupt practices were resorted to, at least, by or with the connivance of the agent ; for by the definition of item 3 of Part I of the Schedule (with which item we are concerned) such connivance is essential to distinguish corrupt practices of Part I variety from those of Part II variety. Such a finding is absent, or at least not clearly expressed ; and in view of the error of record regarding Ex. 6, to which my learned brother has referred, it is not possible to spell out such a finding against Jagat Prasad from what the learned Election Commissioner has said on the point of corrupt practices.

[28] Thus, the Election Commissioner has substantially come to a correct conclusion about the election of Jagat Prasad, though he was in error about R. 16 (2).

D.H. *Applications dismissed.*

A. I. R. (38) 1951 Patna 215 *[C. N. 42.]*

IMAM AND SARJOO PRASAD JJ.

Achhaibar Missir and others — *Appellants* v. *Sohan Teli and others*—*Respondents.*

A. F. A. D. No. 2460 of 1947, D/- 16-8-1950.

(a) Tenancy Laws—Bihar Tenancy Act (VIII [8] of 1885), S. 182 — Applicability – Homestead in different but contiguous village—Section applies.

Section 182 applies in the case of a *raiyat* who holds his homestead land in one village and has agricultural land in another, provided the lands in the two villages are either adjacent or in close proximity. The tenant, therefore, cannot be ejected as a mere tenant-at-will and he has the protection given to his homestead land in the same manner as the protection which he enjoys with reference to the lands he holds in the right of occupancy, although the two lands are in different villages: *Case law discussed.* [Paras 12, 14]

(b) Tenancy Laws – Bihar Tenancy Act (VIII [8] of 1885), S. 182 – Scope of.

Section 182, Bihar Tenancy Act, does not create a homestead land into an occupancy holding. This provision merely extends to it in the absence of local custom or usage the provisions of the Act appliable to the land held by a *raiyat*. If a *raiyat* has occupancy holding with occupancy rights, the incidents of the

tenancy of his homestead would be regulated accordingly. This, however, does not mean that his homestead is an occupancy holding. [Para 13]

(c) Tenancy Laws - Bihar Tenancy Act (VIII [8] of 1885), S. 182 - Homestead land — Meaning of.

The homestead land is prima facie the land where the home of the agriculturist is situated and in which he resides. It may be that the agriculturist has lands at some distance from the homestead land, but he cultivates his agricultural land by going to it for that purpose from his homestead land. There is, therefore, necessarily some connection between his agricultural land and homestead land. [Para 8]

A. N. Lal—for Appellants; *Brahmdeo Narain and P. Jha - for Respondents.*

Imam J.—The plaintiffs are the appellants and they have appealed against a decision of the Subordinate Judge of Gaya, who reversed the decision of the fourth additional Munsif of Aurangabad. The appellants had filed a suit for the ejectment of the defendants from plot No 121 in tauzi No. 4932 with an area of .04 acres. It was the case of the plaintiffs that this land was *gairmazrua malik* and that on a private partition amongst the landlords plot No. 121 had fallen to the plaintiffs' takhta. Their further case, as argued before the trial Court, though not in their plaint, was that the defendants were inducted on to the land to render service and that when they ceased to render service, they were liable to be ejected from the plot in question. The plaintiffs and the pro forma defendants were co sharer landlords to the extent of two annas eight pies in tauzi No. 4932. The pro forma defendants supported the case of the plaintiffs. By the expression the defendants' in this judgment, I do not include the pro forma defendants.

[2] The facts found by the lower appellate Court are that the defendants are settled *raiyats* of village Nirmal Bigha, which is contiguous to village Tendua, in which plot No. 121 is situated, that the defendants were not inducted on to the land to render service to the plaintiffs, that defendant 1 has been cultivating the land on *batai* in village Tendua for the last fifteen years or so, and that the defendants have been living in the house on plot No. 121 for the last three generations.

[3] On the questions of law, the lower appellate Court was of the opinion that as defendant 1 had taken settlement of land in village Tendua at a later date than plot No. 121, it was debatable as to whether the defendants could acquire occupancy right in plot No. 121. Relying upon the decision of the Calcutta High Court in *Bhikariram Bhagat* v. *Maharaj Bahadur Singh*, A. I. R. (3) 1916 Cal. 60 : (43 Cal. 195), it was of the opinion that although the defendants were settled *raiyats* of village Nirmal Bigha and had acquired occupancy rights there, the provisions of S. 182, Bihar Tenancy Act, came to their aid with regard to plot No. 121 in village Tendua which was their homestead land, and the incidents of its tenancy were regulated by the provisions of the Bihar Tenancy Act applicable to lands held by a *raiyat*. In the opinion of the lower appellate Court, it made no difference that the homestead land was in village Tendua while the lands held in occupancy were in Nirmal Bigha a contiguous village. It rejected the contention of the plaintiffs that S. 182 of the Act could only be applied if the *raiyat* holds the homestead land in the same village as the land held by him as a *raiyat*. The lower appellate Court referred to several decisions of this Court, to which reference will be made, but was of the opinion that none of them actually dissented from the decision of the Calcutta High Court in *Bhikariram Bhagat* v *Maharaj Bahadur Singh*, A I. R (3) 1916 Cal 60 : (43 Cal. 195). It accordingly held that the defendants could not be ejected and that the plaintiffs' suit must be dismissed.

[4] In this Court, this appeal came up for hearing before Das J. who was of the opinion that the appeal should be heard by a Division Bench.

[5] On the findings, it must be assumed that the defendants were settled *raiyats* of village Nirmal Bigha and has acquired occupancy right therein. It must also be assumed that village Nirmal Bigha is contiguous to village Tendua where plot No. 121 is situated. It is necessary then to examine in the first instance the provisions of the Bihar Tenancy Act contained in Ss. 182 and 21. Section 182 reads as follows:

"When a *raiyat* holds his homestead otherwise than as part of his holding as a *raiyat*, the incidents of his tenancy to the homestead shall be regulated by local custom or usage and subject to local custom or usage by the provisions of this Act applicable to the land held by a *raiyat*."

It is clear on the findings that the defendants were *raiyats* and that they held the land, plot No. 121, as their homstead otherwise than as part of their holding. The question is as to how the incidents of their tenancy to the homestead shall be regulated. There is no question of custom or usage in this case as none has been pleaded or proved. Therefore, the incidents of their tenancy to the homestead will be regulated by the provisions of the Bihar Tenancy Act applicable to the land held by them as *raiyat*. On a plain reading of the section, the position comes to this that the defendants were *raiyats* and held lands as *raiyats* while they possessed the homestead land, plot No. 121. Section 182 speaks nothing of the homestead land being held by the *raiyat* in the same village as the *raiyati* land held by him. It has been held again and again that

S. 182, should be given a liberal interpretation, the main purpose of its provisions being to afford some protection to the *raiyat* with reference to the homestead. The argument on the other hand that the *raiyati* land held by the *raiyat* must be in the same village as his homestead land is, I think, largely based on the wording of the provisions of S. 21, Bihar Tenancy Act. Sub-cl. (1) of that section says that a settled *raiyat* of a village shall have the right of occupancy in all lands for the time being held by him as a *raiyat* in that village. Sub-clause (2) need not be specifically referred to, but it is noticeable that in that clause also the words "in that village" appear. It was suggested that because a person may be a settled *raiyat* of a village within the meaning of S. 20 of the Act and that he could thereby acquire a right of occupancy in all lands held by him in the same village as a *raiyat*, therefore S. 182 of the Act must necessarily refer to such a person having homestead in the same village as the land held by him. In my opinion, S. 182 of the Act does not create a holding, nor does it confer any particular status to the person who holds homestead land. It merely sets out a protective measure to the holder of homestead land if he is *raiyat*, and the protection given is in the absence of custom or usage, what would be applicable under the Act to the land held by such a person as a *raiyat*. Mr. Aditya Narain Lal has relied upon certain observations of Sinha J. in *Mahadeo-ashram Prosad* v. *Parikha Choudhury*, A. I. R. (32) 1945 Pat. 428 : (24 Pat. 366). The real point decided in that case was as to whether S. 26A, Bihar Tenancy Act, was applicable to the transfer of a homestead land. In considering this main question, his Lordship referred to an observation of Rampini J. in *Golam Mowla* v. *Abdool Sowar*, 13 C. L. J. 255 : (9 I. C. 922) to the following effect :

"Even though the defendant is not a *raiyat* in respect of this piece of *bastu* land in dispute between the parties, still under S. 182, the provisions of this Act applicable to land held by a *raiyat* are applicable to this particular piece of land, in other words, he has, under S. 21, a right of occupancy in this piece of *bastu* land as well in the agricultural land in village of which he is a settled *raiyat*."

Sinha J. as to this observed :

"I am not sure whether the learned Judge has not stated the result of the application of S. 182 a little too broadly. Section 182 does not say in so many words that a *raiyat*, holding his homestead otherwise than as a part of his holding as a *raiyat*, shall acquire in the homestead all the rights, and be subject to all the liabilities, that he has as a *raiyat* in his holding. If it had said that, certainly the homestead would have constituted a separate *raiyati* holding with all the incidents of such a holding. What S. 182 lays down, in my opinion, *inter alia*, is that a *raiyat* shall not be ejected from his homestead, so long as he continues to be a raiyat of some land in the village; for example S. 182 does not have the effect of making the raiyat liable for payment of rent for the homestead portion on the same terms as he holds his *raiyati* land, though in this case, as in other cases, the land is *belagan*."

Emphasis is laid on the words "so long as he continues to be a *raiyat* of some land in the village." The facts of the case, however, make it clear that the question of land in different villages did not arise and his Lordship was not considering as to what is the proper construction to be given to the provisions of S 182 in circumstances such as appear in the present case. It may be noticed at this stage that although their Lordships in *Mahadeoashram Prosad* v. *Parikha Choudhury*, A. I. R. (32) 1945 Pat 428 : (24 Pat. 366) held, though Sinha J did so hesitatingly, that S 26A, Bihar Tenancy Act, was applicable to a transfer of homestead land, the Full Bench of this Court in *Harinaram Singh* v. *Babui Mohari*, A. I. R. (36) 1949 Pat. 413 : (30 P L T 403 F. B.) took definitely a contrary view.

[6] Mr. Lal then referred to the case of *Bishnath Singh* v. *Mt. Bibi Ayesha*, 11 P. L. T. 107 : (A. I. R (17) 1930 Pat 224). In this case, however, the lands were in the same village and the question, which is for our present consideration, did not come up for consideration.

[7] Mr. Lal then referred to the case of *Ganga Singh* v. *Chairman District Board, Patna*, A. I. R. (6) 1919 Pat. 108 : (50 I C. 8) where their Lordships said of the decision of the Calcutta High Court in *Kripanath* v. *Sekh Anu*, 4 C. L. J. 332 : (10 C. W. N. 944), that that decision was very far-reaching and may under suitable conditions require further judicial consideration in this Province. Their Lordships of the Calcutta High Court in the said decision said that it was not required by S. 182, Bihar Tenancy Act, that a tenant in occupation of homestead land should be a *raiyat* in the village in which the homestead land is situated. In the case before their Lordships the defendants held culturable lands in the immediate vicinity of their homestead but situated in a different village, but that would not in their opinion prevent the application of the provision of S. 182 of the Act. The learned Judges were Rampini and Moohkerjee JJ. (late Sir Ashutosh Mookherjee). The view of these eminent Judges cannot be easily brushed aside.

[8] Mr. Brahmdeo Narain, on the other hand, has asked us to construe S. 182 in such a way as not to make the reading of it leading to absurdities. He urged that the word 'homestead' in S. 182 must necessarily mean land from which the tenant cultivates his land, that is to say that the tenant uses the homestead land for the purpose of his residence and that land is either

adjacent to the land which he cultivates or in close proximity to it. The word 'homestead' could not possibly be read to mean land on which the tenant has a house in which he resides and from which he does not do his cultivation. If what he suggested is to be the true meaning of the word homestead, then obviously in the largest number of cases, such land would be either adjacent or in close proximity to the land which the tenant actually cultivated. He first referred to the case of *Pogode* v. *Rajoo Dhopee*, 22 W. R 511. Although this decision was before the Bengal Tenancy Act was enacted, it seems to me that the observations made by Markby J. in the case are relevant. The land was described as *bastoo* land, which his Lordship explained as lands upon 'which houses stand, inhabited by persons engaged in agriculture and are adjacent to the lands which the *raiyats* who inhabit those houses cultivate and that it would appear that they are held of the same landlord as the lands which are cultivated. His Lordship further observed that distinction has frequently been drawn between the houses in a town and what are called homestead lands of *raiyats* engaged in agriculture, and the general rule laid down is that although Act X [10] of 1859 did not apply to the former, yet it applied to the latter. The homestead land, it seems to me, is *prima facie* the land where the home of the agriculturist is situated and in which he resides. It may be that the agriculturist has lands at some distance from the homestead land but he cultivates his agricultural land by going to it for that purpose from his homestead land. There is, therefore, necessarily some connection between his agricultural land and homestead land.

[9] The next case referred to by Mr. Brahmdeo Narain is *Dina Nath* v. *Sashi Mohan*, 31 I. C. 16 : (A. I. R. (3) 1916 Cal. 730), a decision of the Calcutta High Court of a Bench consisting of Sir Ashutosh Mukherji and Newbould J. Their Lordships relied upon several cases including the decision of Rampini J. in *Kripa Nath* v. *Saikh Anu*, 4 C. L. J. 332: (10 C. W. N. 944) for the proposition that in order to make S. 182 applicable it was not essential that the homestead should be in the same village or be held under the same landlord as the holding of the *raiyat*.

[10] In the case of *Pratap Chandra* v. *Biseswar Paramanick*, 9 C. W. N. 416 the, position was that the *raiyat* was holding agricultural land under one landlord and the homestead land under another.

[11] In *Harihar* v. *Dinu Bera*, 16 C. W. N. 536 : (10 I C 139), the position was that the *raiyat* was holding his agricultural land in one village and his homestead land in another village and under different landlords. Sir Ashutosh Mookerjee and Teunon JJ. were definitely of the opinion that the provisions of S. 182, Bengal Tenancy Act applied.

[12] It seems to me, therefore, that the tendency of the Calcutta High Court has been to apply the provisions of S. 182, Bengal Tenancy Act, in the case of a *raiyat* who holds his homestead land in one village and has agricultural land in another, provided the lands in the two villages are either adjacent or in close proximity. In Bengal, there has been an amendment in 1928 of S. 182, Bengal Tenancy Act, where it has been made perfectly clear that its provisions would apply whether the holding of a *raiyat* was within the same village as his homestead or in another village contiguous to that. I take it that the amendment was in conformity with the case law as to be found in Bengal. Mr. A. N. Lal frankly conceded that he had not found a single case from Calcutta taking a contrary view to that which has been expressed in the cases of that Court, which I have already referred to, nor a single decision of this Court taking specifically a different view.

[13] Mr. A. N. Lal, however, relied on the Full Bench decision of this Court in *Harinarain Singh* v. *Babur Mohari*, A.I R. (36) 1949 Pat. 413 (30 P. L. T. 403 F. B), to show that it was held by their Lordships that the provisions of S. 26A, Bihar Tenancy Act, has no application to transfer of homestead lands. It seems to me, however, that the provisions of S. 182, Bihar Tenancy Act, do not create a homestead land into an occupancy holding. These provisions merely extend to it in the absence of local custom or usage the provisions of the Act applicable to the land held by a *raiyat*. If a *raiyat* has occupancy holding with occupancy rights, the incidents of the tenancy of his homestead would be regulated accordingly. This, however, does not mean that his homestead is an occupancy holding. Section 26A refers to the case of a transfer of an occupancy holding or a portion of it together with right of occupancy therein. It seems to me that the decision of their Lordships in the Full Bench case does not affect the question which we have to consider in the present case.

[14] Having regard to the view taken by the Calcutta High Court and giving to S. 182 its true interpretation, although its words are wide, it seems to me that the decision of the Court below, in law, was correct when it took the view that the defendant could not be ejected as he was not a mere tenant-at-will. He had the protection given to his homestead land in the same manner as the protection which he enjoyed with reference to the lands he held, in Nirmal Bigha,

namely, right of occupancy, although the two lands were in different villages.

[15] Having regard to the view which I take in the case, it is unnecessary to say anything on the other question of law referred to by the lower appellate Court, namely as to whether the lands held by the defendant in village Tendua acquired after PLOT NO. 121 could give him the protection afforded by S. 182, Bihar Tenancy Act.

[16] I would accordingly dismiss this appeal with costs.

[17] **Sarjoo Prasad J.** — I entirely agree. As the question is of some importance, I would like to add a few remarks. The application of S. 182, Bihar Tenancy Act, to cases where the homestead of the *raiyat* lies in one village and his *raiyati* lands in another village has always raised perplexing problems. The *cursus curiae* of the Calcutta High Court seems to be in favour of the view that whether the homestead of the tenant lies in one village and his *raiyati* lands in another, or whether these two kinds of holdings are held under different landlords, S. 182, Bengal Tenancy Act will apply to protect the interest of the tenant. In other words, the incidents of his *raiyati* land will regulate the incidents of his homestead. So far as this Court is concerned, there has been no direct decision upon the point, and in one or two cases where the point did not directly arise, this Court was reluctant to accept the whole effect of the Calcutta view. One of the leading cases of the Calcutta High Court on the point is the decision in *Kripanath* v. *Seikh Anu*, 4 C. L. J. 332 : (10 C.W.N. 944), the judgment having been delivered by Rampini J. himself, a reputed authority on land tenures, with which Mookherjee J. another eminent Judge, also agree. The decision of these eminent Judges, as my learned brother has observed cannot be lightly brushed aside. In *Ganga Singh* v. *Chairman District Board, Patna*, A.I.R. (6) 1919 Pat. 108 : (50 I. C. 8), the homestead as well as the *raiyati* holdings were in the same village, but when the attention of their Lordships was drawn to the decision of the Calcutta High Court in *Kirpa Nath* v. *Seikh Anu*, 4 C L.J. 332 : (10 C.W.N. 944), they observed that that decision was very far reaching and may under suitable conditions require further judicial consideration in this Province. To a similar effect is the observation made by Sinha J. in *Mahadeoshram Prasad* v. *Parikha Chouhury*, 24 Pat. 366 : A. I. R. (32) 1945 Pat. 428. As I said the two cases of this Court, where the observations were made, were cases in which the *raiyati* holding as also the homestead were situated in the same village. If the observations made by Rampini J. in *Kirpa Nath* v. *Seikh Anu*, 4 C.L.J. 332 : (10 C.W.N. 944), are intended to mean that although the homestead holding and the *raiyati* lands of the *raiyat* are widely apart, situated in distant villages and one having no connection with the other, and yet the *raiyat* could be entitled to the benefit of S. 182, then probably the decision might require some modification. But, in my opinion, the solution of the problem lies in the meaning of the expression 'homestead' as has been rightly suggested by Mr. Brahmdeo Narain for the respondents. The word 'homestead' must mean the homestead land of the tenant in the neighbourhood of the *raiyati* land, or in other words in the vicinity of the *raiyati* land from where the *raiyat* carries on his agricultural operations in respect of the *raiyati* land. If that finding is there, as the finding in this case is, that the cultivation of the *raiyati* lands by the tenant in village Nirmal Bigha is carried on from village Tendua, where the homestead lands are situated, then in that case S. 182, Bihar Tenancy Act, must apply to protect the interest of the tenant. That is why the position appears to have been made clear by the amendment of the Bengal Tenancy Act in 1928, as pointed out by the Calcutta High Court in *Indra Chand* v. *Tinkari Ghose*. A I. R. (37) 1950 Cal. 170. The amendment there, as my learned brother has shown, is to the effect that if the homestead land is in any village "contiguous" to the village where the *raiyati* lands lie, the incident of his homestead will be governed by the incident of his tenancy. In my opinion, the term "homestead" although not actually defined in the Bihar Tenancy Act, carries the same implication.

D.R.R. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 219 *[C. N. 43.]*

JHA C. J. AND REUBEN J.

The Union of India—Appellant v. *Baijnath Madan Lall and others—Respondents.*

A. F. O. D. Nos. 423 of 1946 and 312 of 1947, D/-21-8 1950.

(a) Contract Act (1872), S. 73 — Contract for sale of goods—Late delivery—Goods sold by purchaser —Damages for late delivery—Measure of.

Where in a contract for sale of goods, the goods are delivered late, the measure of damages is the difference between the market price on the due date of delivery and on the day of actual delivery, as given by S 73, Illus (e). But this test is subject to the main section that the purchaser must prove loss or damage caused to him. Where, however, the purchaser sells the goods after the late delivery, the mere difference in price on the relevant dates is not sufficient to establish the loss. The measure of loss in such a case is the difference between the market price on the due date and the price actually obtained by sale of the goods. Where the fact of sale is established but the sale price is not proved, the purchaser is not entitled to any damages: 1911 A. C.

301, *Foll.*; A. I. R. (2) 1915 P. C. 48 and A. I. R. (17) 1930 All. 132, *Not foll.* [Para 5]

Anno. Cont. Act, S. 73, N. 4, 5.

(b) Railways Act (1890), S. 77 — Notice under—Notice relating to non-delivery combined with non-delivery due to loss or destruction—Held, sufficent compliance with S. 77.

If it is the law that it is not open to a person to give notice until he is certain on the point whether it is a pure case of non-delivery or of non-delivery due to loss or destruction, it might become too late for him to give such notice at all, for the knowledge might come to him much more than six months after the goods were delivered for transport. Where, therefore, a person combines both these notices in one notice given at a stage when it is not possible for him to decide whether it is a pure case of non-delivery or the other, the notice is sufficient under S. 77 to entitle him to sue for non-delivery due to loss or non-delivery: A. I. R. (36) 1949 Pat. 410, *Ref.* [Para 11]

Anno. Railways Act, S. 77, N. 1.

N. C. Ghose and P. K. Bose—for Appellant; Rajkishore Prasad, Shambhu Saran, Shivanugrah Narayan and Rajkishore Prasad — for Respondents.

Reuben J.— These two appeals are directed against a decision of the Subordinate Judge, Patna, in Money Suits Nos. 1 and 11 of 1944, which were tried analogously by him. The appellant was the defendant in both the suits.

[2] The suits were for the recovery of damages for short delivery and for loss due to delay in the delivery of two consignments of Indian cotton piece goods made over to the B. B. and C. I. Railway at Ahmedabad on 10-4-1943 for transport to and delivery at Bigha Ghat on the O. T. Railway. In the ordinary course, these consignments should have arrived at Digha Ghat in the first week of May. Actually they arrived on 8-11-1943. The consignee finding them to be in a damaged condition, took open delivery on 23-11-1943. Shortages were found in both the consignments, Rs. 696 in Money Suit No. 11 of 1944 and Rs. 227 in Money Suit No. 1. The plaintiffs claim these amounts on account of the short delivery, and, on account of loss due to late delivery. They base their claim on the difference between the market prices of cotton piece goods on the date when the consignments should have been delivered and on the date when they were, in fact, delivered. The Subordinate Judge has held that, during this period, there was a depreciation in the price of 25 per cent. of the value on the date when the goods should have been delivered. He has decreed the suits accordingly.

[3] The appellant does not challenge the decrees so far as they relate to short delivery. As regards delay in delivery, two points are urged on his behalf:

(1) that the appellant was sued as the owner of the O. T. Railway and, under the provisions of S. 80, Railways Act, the plaintiffs are not entitled to a decree against him without proof that the O. T. Railway Administration was responsible for the delay, and

(2) that the plaintiffs have not proved that they have suffered loss by reason of the delay in delivery and, in any case, the evidence given by them is insufficient to prove the amount of damages they should get.

On behalf of the plaintiffs a third point is pressed, that the decrees appealed from are decrees against the Governor General in Council as owner of the B. B. and C. I., the E. I. and the O. T. Railways, that the appeals have been filed by him only in the capacity of the owner of the O. T. Railway, and that, therefore, the decrees are final so far as the other two Railways are concerned.

[4] It will be convenient to take up the second point first. The other two points can be dealt with together afterwards.

[5] The provision for compensation when there is a breach of contract is made by S. 73, Contract Act. I reproduce the relevant portion:

"When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, *compensation for any loss or damage caused to him thereby*, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

* * * * * *

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

There follow a number of illustrations. Illustration (e) exactly covers the present case. According to it, the test adopted by the Subordinate Judge namely, the difference between the market prices on the due day of delivery and on the day of actual delivery, is correct; this is subject however, to the main provision of the section which I have reproduced above. From the portion of the citation which I have placed in italic, it is clear that the plaintiff must prove loss or damage. Ordinarily the mere difference in price on the two relevant dates is sufficient to establish this fact. In the present case, it is urged that it is not sufficient because it is admitted by the Munim of the plaintiffs (P. W. 1) that the goods were sold. The witness admits, further, that particulars of the sales are to be found in the account books of the plaintiffs, but those account books have not been produced and no particulars of the sales have been given. It is possible it is urged, that, on the prices obtained, no loss was suffered by the plaintiffs; or, at least, it is possible that the sales were at prices exceeding

the market prices in November and that the loss incurred was considerably less than that shown by a comparison of the market prices on the respective dates. On behalf of the appellant, reference has been made to *Jamal* v. *Moolla Dawood, Sons & Co.*, 43 I. A. 6: (A. I. R. (2) 1915 P. C. 48) as an authority that the price actually obtained by the plaintiffs by selling these goods is irrelevant for the purpose of ascertaining the damages to be given to them in a suit for breach of contract. That was a case of a contract for the sale of negotiable securities and their Lordships of the Judicial Committee, in stating the point for consideration were careful at p. 10 of the report to specify this fact. They found that the retention of the shares after the breach had occurred was a speculation of the plaintiff. As such, it was his speculation and, since the other party could not be penalised for any loss he might suffer thereby, it could not claim any profit he might get by means of that speculation. The decision was followed as an authority in a case similar to the present one in *G. I. P. Rly.* v *Jugul Kishore*, 52 ALL. 238: (A. I. R. (17) 1930 ALL. 132). With respect I would suggest that the correct principle was laid down by the Judicial Committee in *Wertheim* v. *Chicoutimi Pulp Co.*, (1911) A. C. 301 : (80 L. J. P. C. 91). In that case the plaintiff sought to recover damages for late delivery at 27 sh. 6 d. a ton, the difference in the market price on the due date and on the date of actual delivery. It appeared, however, that he had sold the goods at 65 sh. a ton involving a loss to him, as compared with the price on the due date of only 5 sh. a ton. It was contended on his behalf that the rule on which he based his claim was

> "the well established and indisputable measure of damages for delay in breach of contract in delivery of goods."

Their Lordships pointed out that, if his reasoning was accepted, the result would be that, whereas if the goods had been delivered in time his profit would have been 32 sh. per ton, he should now get damages according to the above formula in addition to the profit made by the sale at 65 sh. per ton, making a total profit to him of 54 sh. 6 d. per ton, the result being that the plaintiff would get a profit at 22 sh. 6d. more per ton than if the contract had never been broken at all. Their Lordships, therefore, accepted the contention for the defence and allowed damages only at 5 sh. a ton. In the present case, there is nothing to suggest that there was any holding back of the goods by way of speculation. Hence, the rule laid down in *Wertheim* v. *Chicoutimi Pulp Co.*, (1911 A. C. 301 : 80 L. J. P. C. 91) would apply, and the price at which the goods were sold not having been proved, the plaintiffs are not entitled to any damages.

[6] Further, even accepting the rule which has been followed by the Subordinate Judge, it seems to me that there is insufficient evidence to establish the rate at which damages should be allowed. The evidence on the point falls into three classes. There is the evidence of two witnesses who come from Ahmedabad from which place the goods were despatched and where the mills which supplied the goods were situated. These witnesses know nothing about the prices at Patna. They only tell us about the rate of prices in Ahmedabad, and the general result of their depositions is that, between May and November of that year, the prices fell about 25 to 35 per cent. Secondly, there is the evidence of three witnesses belonging to Patna, one of them an employee of the plaintiffs and the other two employees of other firms in Patna. Their evidence is very general and they depose that the price of the cotton piece goods fell about 50 per cent. during this period. They do not depose particularly about the price of cotton piece goods of the sort with which we are concerned. In view of this fact and also because of the failure of the plaintiffs to produce their account books showing the entries relating to the sale of the cotton piecegoods in question, the Subordinate Judge found himself unable to accept the evidence of these witnesses. Thirdly, there are some account books of the plaintiffs and of two other firms at Patna. Only a very few entries in these books, eight in all, have been marked as exhibits—I say advisedly "marked as exhibits" and not "proved". The Subordinate Judge rejected the entries in the books of the plaintiffs, because the books were produced very late. As regards the books of the other two firms, he pointed out that the entries did not relate to the same sorts of cloth and, further, he was not prepared to believe that, during this period, the prices fell as much as 50 per cent. It has been pointed out to us that two of the entries in those books, namely Exs. 3 (d) and 3 (e) relate to *dhotis* No. 2470 which is one of the different varieties of cloth forming a part of the consignments with which we are concerned. Exhibit 3 (d) relates to sale of two pairs of *dhotis* in May 1943 at Rs. 8-10-0 per pair and Ex. 3 (e) to sale in November 1943 of one pair of *dhotis* at Rs 3-8-0 a pair. To my mind, two individual transactions like this are insufficient to establish what were the ruling market prices. Even if I accepted these entries as reliable, therefore, I would not accept them as evidence for this purpose Looking at the deposition of Sheo Narain Lal (P. W. 2), however, I find that

the transactions have not been properly proved. The witness depo-es:

"These entries in the credit books of the firm are in my pen and in the pen of Beni Madho marked *Exs. 3 (b) and 3 (c).*"

[The portion in italics appears from the record to be a mistake for "Exhibits 3 (b) to 3 (e)".]

The mere existence of these entries in the account books in the handwriting of a particular person is not sufficient to prove that there were really such transactions. What the witness says is insufficient to establish that he has any personal knowledge of these particular transactions and can vouch that such transactions took place. The same is the case with the entries in the account book of the firm of Babulal Narain Prasad, which Mahabirji Kalawatia (P. W. 3) proves to be in the handwriting of Lakhan Lal Gumasta. We find this also in the case of the entries in the books of the plaintiffs, which Shyam Sunder Agrawala (P. W. 1) proves to be in the handwriting of Ramjiwan Ram and of Sarju Prasad. It is for this reason that, when mentioning these entries above, I said that they had been "marked as exhibits".

[7] In the absence of satisfactory evidence regarding market prices in Patna, the learned Subordinate Judge has inferred the probable drop in prices at Patna from the drop in prices during the corresponding period at Ahmedabad. That drop, as I have mentioned above, was between 25 to 35 per cent. It is hardly necessary to state that this reasoning is purely conjectural. There is no logical connection between the price at Ahmedabad and those at Patna. There are many factors which determine what the price of a particular commodity at a particular place will be, and it may well happen that, owing to local factors, the prices at Patna may have gone up, although those at Ahmedabad went down. The conclusion arrived at by the learned Subordinate Judge, therefore, cannot be supported.

[8] On the authority of *Erroll Mackay* v. *Kameshwar Singh*, 59 I. A. 398: (A I. R (19) 1932 P. C. 196), it has been contended on behalf of the respondents that the prices at Ahmedabad, and not those at Patna formed the proper criterion for assessing the damages payable in this case. That decision related to an entirely different set of circumstances. The claim for damages arose out of a failure by a vendor to supply at Purnea 200 mds. of indigo seed. Under S. 73, Ill. (e), Contract Act, damages were recoverable at the difference between the contract price and the price for which the purchaser might have obtained a like quantity of indigo seed at Purnea on the due date for delivery. Evidence showed that there was no market for indigo seed at or near Purnea, and that Cawnpore, 300 or 400 miles from Purnia, was the central market for indigo seed to which growers at Purnea and purchasers resorted. It was in these circumstances that it was held that the damages should be based upon the market price at Cawnpore. Here, Ahmedabad is merely the wholesale market from which the plaintiffs obtained the goods in question. The goods were purchased by them for resale at Patna or in its neighbourhood. The wholesale or even the retail prices at Ahmedabad are, therefore, irrelevant.

[9] This brings me to points 1 and 3. To understand them, it is necessary to refer to the provisions of Ss 77 and 80, Railways Act, which are reproduced below:

77. A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway.

80. Notwithstanding anything in any agreement purporting to limit the liability of a railway administration with respect to traffic while on the railway of another administration, a suit for compensation for loss of the life of, or personal injury to a passenger, or for loss, destruction or deterioration of animals or goods where the passenger was or the animals or goods were booked through over the railways of two or more railway administrations, may be brought either against the railway administration from which the passenger obtained his pass or purchased his ticket, or to which the animals or goods were delivered by the consignor thereof, as the case may be, or against the railway administration on whose railway the loss, injury, destruction or deterioration occurred."

[10] Two sets of notices purporting to be under S. 77 were issued in this case. One set was issued on 28-7-1943 and directed to the three Railways concerned, namely, the B. B. & C. I., the E. I. and O. T. Railway Administrations. The second set was issued on 28-12-1943 and was directed to the O. T. Railway Administration alone. It has been held that under S. 77, notice is not necessary in cases relating to pure non-delivery but is required where non delivery is due to loss or destruction: vide *Jaisram Ramrekha* v. *G. I. P. Rly Co*, 8 Pat. 545: (A. I. R. (6) 1929 Pat. 109) and *Dominion of India* v. *Hazari Lal*, A. I. R. (36) 1949 Pat. 410: (30 P. L. T. 280 F. B.). On behalf of the appellant, it has been argued that the first set of notices was for pure non-delivery, and that the notices were unnecessary. It is pointed out that the claim in these suits is for short delivery which has been attributed in the plaint to tampering, that is, theft thus requiring a notice under S. 77 and for loss due to fall of prices which has been held to be a claim for deterioration within the

meaning of S. 77. It is these claims, it is said, that are covered by the second set of notices and, therefore, the suits lay against the O. T. Railway alone.

[11] At first sight, the contention on behalf of the appellant seemed plausible, but, on examining the matter more closely it is found to have no substance. It should be pointed out, first of all, that a notice under S. 77 must be given within six months from the date of the delivery of the goods for carriage by railway. Therefore, the notice that was given in December 1943 was not a notice under S. 77. Coming to the notice given in July 1943, it runs substantially as follows:

"The said consignment has not been delivered to my clients in spite of demands and various correspondence, and great loss has been caused to my clients.

There has been unreasonable delay in delivery of the consignment and the market value of the goods has gone down by 50 per cent. and is still going down.

My clients have been advised to submit that the delay cau ed is unreasonable and they are entitled to all loss due to the depreciation in value of the goods and in case of non-delivery to the purchase price."

This is clearly a notice relating to depreciation due to fall in prices. It is also a notice that sufficiently covers non-delivery due to loss or destruction. At that stage, it was not possible for the plaintiffs to say whether it was a pure case of pure non-delivery or was non-delivery due to loss or destruction. If it is the law that it is not open to the plaintiff to give notice until he is certain on the point, it might become too late for him to give such notice at all, for the knowledge might come to him much more than six months after the goods were delivered for transport. In fact, in *Dominion of India* v. *Hazari Lal*, A.I.R. (36) 1949 Pat. 410 : (30 P. L. T. 280 F. B.), it is suggested by Manohar Lall J. that for safety a notice under S. 77 should be given even when the claim relates to pure non-delivery. The notices given in July 1943, therefore, were sufficient to entitle the plaintiffs to a decree against all the three Railways concerned.

[12] It is this fact, which was pointed out by me during course of the argument, that suggested the point that has been urged on behalf of the plaintiffs-respoodents. It is stressed on their behalf that the plaints in these suits are directed against "the Governor-General of India in Council, New Delhi, representing the State Railways," and that it is in this form that the defendant is described in the decrees in both the suits. It is argued from this that the decrees must be taken to be decrees against all the three Railways and that since the appeal has been filed by the Governor-General as owner of the O. T. Railway alone, it must be taken that the decrees are final as against the other two Railways. We must not allow ourselves to be misled by the description of the defendant in the plaints and in the decrees. The cases must be looked to as a whole. It is evident from the giving of the second set of notices that the plaintiffs thought a further notice was necessary. This second notice was addressed to the O. T. Railway alone and, the plaints did not mention the particular Railways against which the plaintiffs were proceeding. The Governor-General, apparently under the same impression, appeared in the suits as the owner of the O. T. Railway alone and filed a written statement in this capacity. The suits proceeded on the basis that they related to the O. T. Railway alone. This is shown by the judgment of the Subordinate Judge, which states in express terms that the suits are against the Governor-General in Council as owner of the O. T. Railway. When he decreed these suits, therefore, he decreed them only against the O. T. Railway. The description of the Governor-General in the decrees as representing the States Railways has by itself no meaning. In order to understand the term, it is necessary to go back to the judgment which makes it clear that the decrees are decrees in respect of the O. T. Railway alone.

[13] If I had held that the decrees under appeal are decrees in respect of the B. B. & C. I., and the E. I. Railway also, I would have felt justified in varying the decrees in favour of those two railways in exercise of this Court's powers under O. 41, R. 4, Civil P. C. In this connection, a reference has been made on behalf of the respondents to *Chokalingam Chetty* v. *Seethai Ache*, 55 I. A. 7: (A.I.R. (14) 1927 P. C. 252) and *Nathuni Ram* v. *Secy. of State*, A I. R. (21) 1934 Pat. 589 : (154 I. C. 171). These are both decisions under O. 41, R. 20, and decide that, where one of the holders of a decree has not been joined as respondent to the appeal and the time limited for appealing has elapsed, he is no longer "interested in the result of the appeal" and cannot be added as a party to the appeal under O. 41, R. 20. The question arose in those decisions when the appellant was seeking to press his appeal against persons who had not been impleaded. The problem does not arise when all that the Court proposes is to exercise its power under O. 41, R. 4, and to pass an order in favour of, and not against a person who is not a party to the appeal.

[14] This brings me back to the first point, namely, the contention of the appellant, as owner of the O. T. Railway, that he is not responsible for the loss due to fall in prices unless it is shown that the O. T. Railway Administration was responsible for the delay. The point is of academic interest in view of my finding that the plaintiffs have failed to establish that they

are entitled to any damages on this account. I may merely note briefly that this contention is not open to the appellant in view of an admission made by his Advocate in the Court of the Subordinate Judge that "the defendant is liable for the late delivery" (I am citing from the judgment of the learned Subordinate Judge.) The liability of the O. T. Railway Administration depended on certain facts, namely, that the delay occurred while the goods were in the custody of the O. T. Railway Administration. When the appellant's lawyer made this admission, he must be taken to have made an admission of this necessary fact, and the appellant must be treated at this stage as bound by that admission. In the order-sheet of the learned Subordinate Judge dated 10-6-1946, with reference to a petition filed by the plaintiffs for the delivery of certain documents, the Subordinate Judge disallowed the petition, observing :

"In my opinion these documents could have been necessary, provided the defendant company would have asserted that there was no negligence or misconduct on the part of the Railway in dealing with the consignment. In the present suit, I find as is also admitted by the learned Advocate for the defendant that there was late and short delivery of the goods consigned to the plaintiff."

This shows that, even at an earlier stage, this position was taken up by the Advocate for the appellant. Had he contended that under S. 80, the appellant was not liable it might have been open to the plaintiffs to take steps to bring the appellant on the record as representative of the other two Railways also. In these circumstances, it would not be fair at the appellate stage to permit the appellant to disclaim liability on this ground.

[15] In the result, I would allow these appeals to the extent indicated, namely, that the decrees will be set aside so far as they relate to damages for late delivery. The principal amount of the decrees will, therefore, be Rs. 696 in Money Suit No. 11 and Rs. 227 in Money Suit No. 1. The appellant will get his costs in this Court proportional to his success. In accordance with S. 82, Civil P. C., it will further be directed that the decrees in these suits be satisfied within three months from today.

[16] **Jha C. J.** — I agree.

D.R.R. *Order accordingly.*

A. I. R. (38) 1951 Patna 224 *[C. N. 44.]*

RAMASWAMI AND NARAYAN JJ.

Sm. Lila Devi and others—*Appellants* v. *Bhatu Mahton and others*—*Respondents.*

A. F. O. O. No. 2 of 1950, D/- 24-3-1950.

(a) Civil P. C. (1908), O. 39, R. 2—Dispute regarding bakasht land—Order under S. 145 (4). Criminal P. C.—Reference of dispute to Board under S. 3, Bihar Act (XIII [13] of 1947)—Injunction to stay proceedings before Board— Bihar Bakasht Dispute Settlement Act (XIII [13] of 1947), S. 3.

Where apprehending the breach of the peace on account of dispute regarding bakasht land, the Magistrate passed an interim order of attachment under S. 145 (4), Criminal P. C., and one of the parties referred the dispute to the Arbitration Board under S. 3, Bihar Act (XIII [13] of 1947) and the opposite party prayed for an injunction restraining the party from preceeding before the Board relying on O. 39, R. 2:

Held that the lawful exercise of a right vested in a person cannot be legally restrained by the Court under O. 39, R. 2. It could not be said that by prosecuting the reference before the Board constituted under the Act the party was committing a breach of contract or 'other injury of any kind" as enacted in O. 39, R. 2, Civil P. C. [Para 4]

Anno: C. P. C. O., 39, R. 2, N. 3, 4.

(b) Civil P. C. (1908), S. 151—Inherent power to restrain party from proceeding before another tribunal.

Apart from the provisions of the Code it is true that the High Court has inherent jurisdiction to restrain a person from prosecuting a case before another tribunal in exceptional cases. But the jurisdiction should be exercised with great caution and only on ample evidence that the action is vexatious and oppressive. [Para 5]

Anno. C. P. C., S. 151, N. 2.

Lal Narain Sinha and K. B. N. Singh — for Appellants ; Ramchander Singh, L. K. Sinha and N. Chatterji — for Respondents.

Ramaswami J.—This appeal is presented against an order of the Subordinate Judge of Gaya refusing to grant an injunction restraining the respondents from proceeding with a reference under the Bihar Bakasht Dispute Settlement Act (XIII [13] of 1947).

[2] Plaintiffs 1 and 2 alleged that they had taken raiyati settlement of bakasht land from defendant 2nd party at a fixed rate of rent; that subsequently they sold the land to plaintiffs 3 to 18 by registered sale deeds. But defendants 1st party made a false claim to the land alleging that they had taken a previous oral settlement from the malik. Apprehending that there would be a breach of the peace, the Sub-divisional Magistrate started proceedings under S. 145 and made an interim order of attachment under S. 145 (4), Criminal P. C. Defendant 1st party then applied to the District Magistrate for making a reference under Bihar Act XIII [13] of 1947. On 5-9-1949, the District Magistrate after hearing the parties referred the dispute to a Board constituted under S. 3 of the Act. The plaintiffs alleged that since there was no dispute between the landlord and tenant the reference made by the District Magistrate was *ultra vires* and illegal. The plaintiffs, therefore, asked for a declaration to this effect and prayed for a permanent injunction restraining the defendants from proceeding before the Arbitration Board. The principal defendant objected to the issue of

temporary injunction on the ground that the plaintiffs had made a fraudulent claim to the land in collusion with the landlord, that the dispute was in substance a dispute between the landlord and tenant with respect to bakasht land, that the reference made by the District Magistrate was legal and valid. The principal defendant maintained that the Board was legally constituted under the Act and the civil Court had no jurisdiction to restrain the Board from proceeding with the case.

[3] In support of this appeal Mr. Lal Narain referred to O. 39, R. 2, Civil P. C., which is to the following effect :

"In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right."

[4] Learned counsel argued that the reference made by the District Magistrate under S. 3 of the Act was without jurisdiction and illegal. Learned counsel said that the plaintiff would suffer great injury if the Board should hold that the defendant 1st party were in possession and in consequence the Magistrate should deliver to them possession of the attached land. But the respondents object that the plaintiffs are in collusion with the landlord and that the dispute before the Board really involved a question between the landlord and tenant with respect to possession of bakasht land. I am not satisfied at this stage that the plaintiffs have shown a *prima facie* case on this disputed question of fact. On the contrary, the lawful exercise of a right vested in a person cannot be legally restrained by the Court under O. 39, R. 2. It cannot be said that by prosecuting the reference before the Board constituted under the Act the respondents are Committing a breach of contract or "other injury of any kind" as enacted in O. 39, R. 2, Civil P. C.

[5] Apart from the provisions of the Code, it is true that the High Court has inherent jurisdiction to restrain a person from prosecuting a case before another tribunal in exceptional cases. But there is authority for the opinion that the jurisdiction should be exercised with great caution and only on ample evidence that the action is vexatious and oppressive. On behalf of the appellant Mr. Lalnarain Sinha contended that the High Court may not order the Board to stay the proceeding but only restrain the respondent from prosecuting it. But as the same result is obtained and the effect is to interfere with proceedings in another jurisdiction this power should be exercised with great caution to avoid even the appearance of undue interference with another Court. The question then arises in what circumstances and upon what principle should the Court act in exercising its jurisdiction to stay another action between the parties and for substantially the same relief. The answer is that the Court will exercise jurisdiction where the circumstances are such as to satisfy it that continued prosecution of both the proceedings should be oppressive or vexatious. In *Cohen* v. *Rothfield*, 1919-1 K. B. 410 at p. 416 : (88 L. J. K. B. 468), two parties having cross claims arising out of the same transaction for substantially the same relief one commenced an action in England and the other an action in Scotland. The Court of Appeal held that in such a case the Court will not restrain the plaintiff in either action from proceeding with his action unless it is satisfied that the continued prosecution thereof would be oppressive or vexatious; and that it was incumbent on the party seeking to restrain the other to show that the proceeding he complains of is oppressive or vexatious and that the party instituting it can gain no advantage therefrom. At p. 416, Eve J. states :

"To restrain a man from proceeding with an action which *prima facie* he has a right to bring and prosecute is, as was pointed out by Fletcher Moulton L. J. in *In re Connolly Brothers*, (1911) 1 Ch. 731 at p. 746 : (80 L. J. Ch. 403) a very serious thing, but it is not disputed that there is jurisdiction to make the order, the basis of the jurisdiction being that it is a jurisdiction *in personam* and has nothing to do with any conflict between the tribunals: *Bushby* v. *Munday*, (1821) 5 Mad. 297 at p. 307: (21 R. R. 294)."

[6] In *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 141: (75 L. J. K. B. 218) Sir Gorell Barnes States the same principle:

"In my opinion, however, the jurisdiction of the Court to stay proceedings on the ground of vexation should be exercised with great care; indeed, I find that Cotton L. J. in *McHenry* v. *Lewis*, (1882) 22 Ch. D. 397 at p. 406 : (52 L. J. Ch. 325) of the report, said : 'In the first place, it is a jurisdiction which one ought to exercise with extreme caution. Stopping in the middle of a suit a plaintiff from going on, when he has a right of action as against the defendant, is a jurisdiction which has to be exercised with very considerable caution.' "

[7] It cannot be disputed that the Arbitration Board is vested with judicial powers under the Act and the proceedings before it are of judicial nature. On principle, a tribunal exercises judicial power if it decides a question of legal right in a *lis inter partes* involving either a finding of fact or the application of fixed rule or principle of law or involved with both. Reference should be made to *R.* v. *Local Government Board for Ireland*, (1910) 2 Ir. R. 349 at p. 373 where Palles, C. B states:

"To erect a tribunal into a 'Court' or jurisdiction so as to make its determinations judicial, the essential element

is that it should have power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depends upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorizing it is judicial."

[8] In my opinion, the proceedings before the Board constituted under Act XIII [13] of 1947 are of judicial nature and no injunction can be issued to restrain such proceedings since it is not *prima facie* shown that the continued prosecution of those proceedings would be vexatious or involve injustice to the appellant.

[9] For these reasons I should dismiss this appeal with costs.

[10] **Narayan J.**—I agree.

G.M.J. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 226 *[C. N. 45.]*

DAS AND SINHA JJ.

Kalyanpur Lime Works Ltd.—Appellants v. *The State of Bihar and another — Respondents.*

Misc. Appeal No. 210 of 1950, D/- 30-8-1950.

(a) Civil P. C. (1908), O. 39. R. 2 — Injunction to disturb status quo, if should be granted.

Where in a suit for specific performance of a contract of lease of certain property the plaintiff prayed for an *interim* injunction restraining the first defendant from executing any lease in favour of the second defendant, who was in possession of the property during the pendency of the suit:

Held that though the Court had power to pass an order for injunction in terms wider than those prayed for resulting in the disturbance of the first defendant's possession, an order for injunction should not be passed in order to disturb the *status quo* when the plaintiff had no right to immediate possession. [Para 7]

Anno. C. P. C., O. 39, R. 2, N. 2.

(b) Civil P. C. (1908), O. 39, R. 2 — *Prima facie* case made out — Temporary injunction, if must follow.

The fact that a *prima facie* case has been made out by showing that there is a fair question for trial, does not necessarily mean that a temporary injunction must follow restraining the contracting defendant from dealing with the property. Whether an order of injunction should or should not issue will depend on the facts of the case, and the Court must also consider the questions of irreparable or serious injury and balance of convenience. [Para 9]

Anno. C. P. C., O. 39, R. 2, N. 2, Pts. 3 to 6.

(c) Civil P. C. (1908), O. 39, R. 2 — Suit for specific performance—Defendant, if can be restrained pending litigation, from using property.

It cannot be the law that in a suit for specific performance the plaintiff is entitled to ask, during the pendency of the litigation, that the defendant in whom the legal title still vests should be restrained from using the property. [Para 10]

Anno. C. P. C., O. 39, R. 2, N. 4, Pt. 8.

Mahabir Prasad, Awadh Behari Saran and Awadh Kishore Pd. — for Appellants; P. R. Das, K. K. Verma, P. N. Gour and Govt. Advocate — for Respondents.

Das J.— This is an appeal from an order of the learned Subordinate Judge of Sasaram, dated 1-6 1950, rejecting a prayer for an *ad interim* injunction, under the provisions of O. 39, Civil P. C., against the defendants in the action, namely, (1) the State of Bihar and (2) Messrs Dalmia Jain & Company Ltd. The form of the order of injunction which the appellant, plaintiff in the action, asked for was in these terms (I am quoting the prayer portion of the petition for *interim* injunction):

"It is, therefore, prayed that your honour may be pleased to restrain defendant 1 from executing any lease in favour of defendant 2 during the pendency of the suit."

[2] The facts leading up to the suit and the prayer for *interim* injunction are these: There is a hill known as Murli Hill (the upper portion being known as upper Murli hill and the lower portion as lower Murli hill) within the sub division of Sasaram in the district of Shahabad. The hill contains lime stone etc. On 1-4-1928, the Secretary of State for India (the then competent authority) granted two leases to the Kutchwar Lime and Stone Company Ltd. (hereinafter to be referred to as Kutchwar) in respect of the two portions of the hill in question for a period of twenty years, for the purpose of quarrying lime stone, and converting the same into lime etc. In 1933, Kutchwar went into voluntary liquidation. On 30-9-1933, Kutchwar through their managing agents and liquidators, purported to transfer the leases to one Mr. Bose, subject to the sanction of the Board of Revenue, but in the meantime appointed Bose as their local agent. The Board of Revenue refused to sanction the proposed transfer of the leases. On 25-1-1934, the Kalyanpur Lime Works Ltd. (hereinafter to be referred to as the appellant) wrote to the Collector of Shahabad and applied for leases in respect of both upper Murli hill and lower Murli hill. On 27-3-1934, the Government of Bihar in the Revenue Department appeared to have sanctioned the proposal to forfeit the two leases held by Kutchwar, and on 31-3-1934, the Board of Revenue approved the proposal to grant leases for quarrying lime stone to the appellant. The relevant letter is printed at p. 17

of the paper book, and shows that the proposal to grant leases in favour of the appellant was approved :

"On the existing terms and conditions as set forth in Chap. V, Bihar and Orissa Waste Lands and Minerals Concession Manual, on the understanding that after the lease is executed the question of royalty will be re-examined by the Board provided it is well understood that any reduction, if made, would be a matter of grace."

It is stated that on 15-4-1934, the appellant got possession, and the appellant started operations on 15-5-1934. On 18-7-1934, the Board of Revenue, by a formal resolution, forfeited the leases in favour of Kutchwar. On 24-9-1934, Kutchwar filed a suit against Government. The suit was dismissed by the Subordinate Judge. There was an appeal to this Court, and on 25-4-1935, this Court issued an injunction restraining Government from granting leases to the appellant. On 7-2-1936, this Court decreed Kutchwar's suit. There was an appeal to the Privy Council which was dismissed on 9-11-1937 (*see Secy of State* v. *Kuchwar Lime and Stone Co. Ltd*, 65 I.A. 45 : (A.I.R. (25) 1938 P.C. 20).) In the meantime certain contempt proceedings were instituted by Kutchwar against Government and the appellant, though the appellant was not a party to the suit which Kutchwar had brought in 1934. In the contempt proceedings, this Court held on 9-10-1936, that both Government and the appellant had been guilty of contempt of Court, *see Kuchwar Lime & Stone Co. Ltd.* v. *Secy. of State*, 16 Pat. 159 : (A. I. R. (24) 1937 Pat. 65 S. B). The appellant alleged that as a result of this decision in the contempt proceedings, it had to give up possession which it had got in 1934. Against the decision in the contempt proceedings, there was an appeal to the Privy Council. On 31-10-1938, the Privy Council held that there was no contempt, *see S. N. Bannerjee* v, *Kuchwar Lime & Stone Co. Ltd.*, 17 Pat. 770 : (A.I.R. (25) 1938 P.C. 295). After this decision, the appellant applied for restitution, that is, to be restored to possession. This application for restitution was dismissed by this Court on 11-5-1939. The matter again went to the Privy Council, and the Privy Council affirmed the decision of this Court on 30-7-1941 *see S. N. Bannerjee* v. *Kuchwar Lime & Stone Co. Ltd*, 21 Pat 243 : (A.I.R. (28) 1941 P.C. 128). On 31-3-1948, Kutchwar's leases expired. On 10-8-1949, two leases were granted to Messrs. Dalmia Jain & Company Ltd. (hereinafter to be referred to as Dalmias) for a period of one year only. On 21-11-1949 the present suit was instituted by the appellant against the State of Bihar and Dalmias.

[3] It was alleged in the plaint that the period of the leases in favour of Kutchwar having expired on 31-3-1948, the State of Bihar entered into possession. The appellant then asked the State of Bihar to execute leases in its favour and thus perform the agreement which had been entered into between the appellant and Government in 1934. The State of Bihar did not pay any heed to these requests. A notice was then served under S. 80, Civil P. C., and Dalmias were also served with a notice informing them of the existence of the agreement between the appellant and the State of Bihar. The draft leases which had been agreed to and settled between the parties in 1934, were annexed to the plaint. On these allegations, the appellant sued for specific performance of the contract entered into in 1934. Of the various dates mentioned with reference to the cause of action, the important date was 2-6-1949, when the appellant was informed that the State of Bihar was going to execute leases in favour of Dalmias.

[4] The plaint asked for the following reliefs:

"1. A decree for specific performance of contract in terms of the agreement and as claimed hereinbefore with a direction that defendant 1 through his authorised agent do execute the necessary documents for completing the title of the plaintiff for twenty years' lease.

2. Possession of the properties aforesaid be delivered to the plaintiff by evicting the defendants or such of them as may be in possession.

3. Defendant 1 may be restrained by an order of injunction from executing any lease in favour of defendant 2.

4. A decree for compensation to be ascertained in further proceedings.

5. Any other or further relief to which the plaintiff may be entitled."

On 28-4-1950, the appellant applied for a temporary injunction, the terms whereof I have already stated, and on 1-6-1950, the learned Subordinate Judge rejected the application.

[5] The learned Subordinate Judge found in favour of the appellant on the question of a *prima facie* case, and expressed himself as follows :

"On a perusal of the papers and the judgment of the previous litigations, there can be no manner of doubt that the plaintiff has got a fair question to raise, and if he has got a fair question to raise, then this Court would like to express the view that the plaintiff has got a *prima facie* case."

On the other two questions of balance of convenience and irreparable injury, the learned Subordinate Judge held against the appellant.

[6] We have been addressed at great length by learned counsel for the parties on the question of a *prima facie* case, as also on the other questions involved. It is, I think, unnecessary to state again the principles which have to be kept in mind in granting or refusing to grant temporary injunctions under the provisions of O. 39, Civil P. C. These principles have been stated and re-stated in several decisions of this Court *vide*, *Brajendra Nath* v. *Kashibai*, 24

Pat. 656 : (A. I. R. (33) 1946 Pat. 177) and *Subodhgopal Bose* v. *Province of Bihar*, A. I. R. (37) 1950 Pat. 222 : (31 P. L. T. 100). On the question of title, we are in agreement with the learned Subordinate Judge, and hold that the appellant has raised a fair question for trial. The two principal points which were urged before us on behalf of the respondents in this connection were : (1) that there was no concluded agreement on behalf of the State of Bihar, and (2) that the suit was barred by time. We have been taken through the pleadings of the parties and the correspondence of 1934 between the appellant and Government. The learned Advocate-General, who appeared for the appellant in this case, drew our attention to Para. 12 of the written statement of the State of Bihar which, according to the learned Advocate-General, amounted to an admission of the case of the appellant. On the question of limitation, Mr. P. R. Das appearing for respondent 2, referred to Art. 113, Limitation Act and relied on the decision in *Mani Singh Mandhata* v. *Nawab of Murshidabad*, 46 I. A. 60 : (A. I. R. (5) 1918 P. C. 180). He further contended that the claim for compensation, in any view, was barred under Art. 115, Limitation Act. The learned Advocate-General has, on the contrary, contended that the suit for specific performance which his client has brought, is of the nature contemplated by S. 18, Specific Relief Act, and the period of limitation will run from the date when performance of the contract was refused after the lessor had re-entered possession on the expiry of the leases in favour of Kutchwar. There has been some discussion before us as to what the expression "imperfect title" means in S. 18, Specific Relief Act. Mr. Das has contended that the expression merely means inchoate title, where something remains to be done to complete title, such as confirmation of a court sale, etc. His contention is that a distinction must be drawn between "imperfect title" and "absence of title." He has contended that in 1934 Government had no right or title to grant a lease, because the leases in favour of Kutchwar were still running. Therefore, Mr. P. R. Das has argued that S. 18, Specific Relief Act, has no application; moreover, he contends that the suit as framed was not a suit of the nature contemplated by S. 18, Specific Relief Act. In my view, it is unnecessary to decide these questions at this stage. These are questions which will fall for decision at the trial. It is sufficient to state that in view of the pleadings of the parties and the correspondence which had passed between the appellant and the State of Bihar, there is a *prima facie* case in the sense that the appellant has raised a fair question for trial. I desist, therefore, from expressing any opinion on the questions mooted before us in this connection.

[7] The more important points, for the decision of this appeal, are what I am going to state presently. It is not disputed that Dalmias were in possession by virtue of the leases which they obtained on 10-8-1949, and that they are still in possession after the expiry of the leases this month. It is also not disputed that if the State of Bihar grants any lease now to Dalmias, during the pendency of the litigation, it would be hit by the doctrine of *lis pendens*. Dalmias who are a party to the suit, would be bound by any decision given. The appellant has, therefore, the security of *lis pendens*. It is also reasonably clear that by granting a temporary injunction in the terms in which it has been asked for, the possession of Dalmias, or of the State of Bihar through any of its agents, or of anybody else cannot be disturbed. In the course of arguments we put to the learned Advocate-General the question as to the benefit his client would get or what irreparable injury he would be saved from, if we granted the injunction in the terms asked for. The learned Advocate-General said that no question of disturbing the possession of anybody arose; but the granting of a lease would complicate matters and embarrass his client. He placed very strong reliance on the decision in *Promotha Nath* v. *Jagannath Kishore*, 17 C. L. J. 427 : (16 I. C. 359), and contended that, though the appellant might have the security of *lis pendens*, yet the Court would always grant an injunction to prevent an apprehended breach of contract. He drew our attention to the provisions of R. 2, O. 39, Civil P. C., which states, *inter alia*, that in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, the plaintiff may, at any time after the commencement of the suit, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract. The argument of the learned Advocate-General is: Here is a case where there was an enforceable contract between the appellant and the State of Bihar; the State of Bihar is going to break that contract by granting leases to Dalmias; therefore, the Court must step in and stop the apprehended breach of contract. The learned Advocate-General has placed very strong reliance on the dictum of Turner L. J. in *Hadley* v. *London Bank of Scotland*, (1865) 3 De. G. J. & Sm. 63 : (12 L. T. 747), quoted at p. 430 in *Promotha Nath* v. *Jagannath Kishore*, 17 C. L. J 427 : (16 I. C. 359). Turner L. J., stated as follows :

"I have always understood the rule of the Court to be that if there is a clear valid contract for sale, the

Court will not permit the vendor afterwards to transfer the legal estate to a third person although such third person would be affected by *lis pendens*."

It was observed by Mookerjee J., that the rule enunciated above was not in consistent with the settled doctrine of the balance of convenience of the parties. To understand this observation of Mookerjee J., it is necessary to state the facts of that case. In that case, a contract was alleged to have been made with the plaintiff by the father of the infant defendant, and subsequent to the death of the father, the contract was affirmed by the mother and guardian of the infant. A suit was instituted to enforce the contract, and seven days later an application was made under R. 2, O. 39, Civil P. C., for an injunction to restrain the defendant from dealing with the property during the pendency of the litigation. An obvious distinction between that case and the case before us at once presents itself. No third party was in possession at the time when the litigation was pending, and the purpose or object of the temporary injunction was to prevent the introduction of such a third party in that case. In the case before us, a third party was already in possession by virtue of a valid lease. That third party continues in possession, rightly or wrongly. There has been some argument before us if Dalmias are merely holding over after the expiry of their leases, or are merely trespassers. I do not think that that question can be decided on the materials before us. But I think that it is sufficient to state that Dalmias are in possession and if we grant the injunction in the terms asked for, the possession of Dalmias or, for the matter of that, of the State of Bihar or of its agents cannot be disturbed. The learned Advocate-General has said that we are not bound by the terms in which the prayer for injunction has been made, and if we are satisfied that an order of injunction should be passed in wider terms, there is nothing to prevent us from passing such an order. We may have the right to pass an order of injunction in terms wider than those asked for; but the question is whether this is a case in which an order of injunction should be passed in order to prevent an irreparable injury. In cases of the kind referred in *Promotha Nath* v. *Jagannath Kishore*, 17 C. L. J. 427 : (16 I. C. 359), the main purpose of the order of injunction was to maintain the *status quo*, in order to avoid embarrassment or complication by the introduction of a third party. But what is the real purpose of the prayer for injunction in the case before us? It is obvious that the real purpose of the prayer for injunction is not to maintain the *status quo*. but to change the *status quo*. In the course of his argument, the learned Advocate-General stated that if Dalmias continued in possession after an order of injunction restraining the State of Bihar from granting a lease to Dalmias, Dalmias would be trespassers in the eye of law and might even be guilty of contempt. I do not think that an order of injunction should be granted in order to disturb the *status quo*. There cannot be any doubt that the appellant has no right to immediate possession, and the appellant's title would accrue after the contract has been specifically performed. In referring to English decisions on the subject, one must bear in mind that the English doctrine of an equitable estate, on a contract for sale, does not apply in India, and the law of India does not recognise such equitable estates.

[8] For the reasons given above, I do not think that the principle laid down in *Promotha Nath* v. *Jagannath Kishore*, 17 C. L. J. 427 : (16 I. C. 359) applies in the present case. The other decision on which the learned Advocate-General relied is *Subba Naidu* v. *Haji Badsha Sahib*, 26 Mad. 168 : (13 M. L. J. 13). There also the facts were entirely different, and the question considered was the distinction between a permanent injunction granted under the Specific Relief Act and a temporary injunction granted under the provisions of the Code of Civil Procedure.

[9] Then, there is another aspect of the matter. The stopping of quarrying of lime stone will not only cause loss to respondent 2, but may cause harm to the State. I do not think that the appellant has any right to come to Court and say that the quarrying operations be put an end to during the pendency of the litigation. The circumstance that the appellant has a *prima facie* case, does not necessarily mean that an order of injunction must follow. This point has been dealt with at great length in *Brajendra Nath* v. *Kashibar*, 24 Pat. 656 : (A. I. R. (33) 1946 Pat. 177), a decision to which I was a party. I think that the learned Advocate-General is putting his case too high when he contends that where a *prima facie* case has been made out by showing that there is a fair question for trial, a temporary injunction must follow restraining the contracting defendant from dealing with the property. Whether an order of injunction should or should not issue will, in my opinion, depend on the facts of the case, and the Court must also consider the questions of irreparable or serious injury and balance of convenience. I do not think that there is any such irreparable or serious injury from which the appellant is required to be saved by an order of injunction in the present case.

[10] We have also been addressed on the question whether the appellant can be sufficiently compensated by money in respect of any loss suffered before specific performance of the contract. The learned Advocate General has drawn

our attention to S. 12, Expln. and ss. 54 and 56, Specific Relief Act. He has also drawn our attention to s. 19, Specific Relief Act, which says that any person suing for the performance of a contract may also ask for compensation for its breach, either in addition to or in substitution for such performance. Personally, I do not see any reason why the appellant cannot be compensated by money for any loss he may suffer, provided the appellant is entitled to compensation in addition to specific performance, under the law, as to which I express no opinion at this stage. If, as I have already stated, there is no question of stopping the quarrying operations during the pendency of the suit for specific performance, the question of compensation will remain whether an order of injunction is or is not passed. It cannot surely be urged that in a suit for specific performance the plaintiff is entitled to ask, during the pendency of litigation, that the defendant in whom the legal title still vests should be restrained from using the property If the plaintiff were so entitled, then in a suit for specific performance the defendant would be required to vacate the property which he had contracted to sell or lease. That surely cannot be the law.

[11] In the course of the argument some suggestions were made for expediting the hearing of the suit. It was stated before us that the issues had been settled and as the points at issue depended mainly on documentary evidence, the parties desired to give very little oral evidence. We consider that this is a fit case in which the rights of the parties should be determined as soon as possible. We would, accordingly, direct that the learned Subordinate Judge should intimate to the parties at once that the suit would be taken up for hearing within one week, or as soon thereafter as may be possible, of the re-opening of the civil Courts after the Puja holidays. The learned Subordinate Judge should fix a peremptory date and proceed with the trial as expeditiously as possible. In order to obviate any apprehended difficulties in ascertaining the amount of lime stone extracted from time to time by the party in possession, we direct that the defendant in possession must produce in Court monthly returns of limestone extracted, so that it may be easy to ascertain the profits made in case the appellant succeeds in establishing his legal right to compensation.

[12] Subject to the directions given above, I would dismiss this appeal, and would further direct that each party must bear its own costs of this appeal.

[13] **Sinha J.**—I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 230 *[C. N. 46.]*

RAMASWAMI J.

Parmeshwar Ram Bhadani — Petitioner **v.** *The State of Bihar and another — Opposite Party.*

Cri. Revn. No. 629 of 1950, D/- 28-8-1950.

(a) **Criminal P. C. (1898), Ss. 344, 561A and 439— Stay of criminal proceedings pending civil suit— Prosecution instituted by Government — Considerations.**

The discretion to be exercised by the High Court in ordering stay of criminal proceedings pending a civil suit between the same parties and involving the same questions cannot be crystallized into a hard and fast rule, and must, to a large extent, depend on circumstances of each case. One point of importance is whether the criminal complaint has been filed before or after the civil suit. If it is filed afterwards, the intention to prejudice the civil litigation which is only a matter of inference, can be suspected. But it is very difficult to draw any such inference in the case of public prosecution. In the case of prosecution instituted at the instance of the Government it is impossible to accept the argument that there is any intention on the part of the Government to prejudice the trial of the civil suit. **[Para 4]**

Anno. Criminal P. C., S. 344, N. 11; S. 439, N. 27; S. 561A, N. 1.

(b) **Criminal P. C. (1898), S. 439 — Revision against refusal to stay criminal proceeding pending civil suit instituted subsequently —High Court will not interfere — Lower Court cannot be said to have acted unjudicially.** **[Para 4]**

Anno. Criminal P. C., S. 439, N. 17, 27.

Tarkeshwar Nath — for Petitioner; Shambhu Prasad Singh—for Opposite Party.

Order.— This rule is directed against the order of the Sub-Divisional Magistrate of Gaya refusing to stay proceedings in a criminal case.

[2] In consequence of an industrial dispute between the management of the Gaya Cotton and Jute Mills Limited and the workers represented by the Gaya Cotton and Jute Mills Labour Union, an industrial tribunal was constituted by the Government for adjudication of the said dispute. The tribunal constituted made an award on 4-9-1948, which was duly published in the Bihar Gazette. By a subsequent Government notification the award was made binding for the period up to 18 6-1949. It was alleged that in spite of the publication in the Gazette the management failed to implement the award. The Assistant Commissioner of Labour, therefore, made a criminal complaint before the District Magistrate of Gaya for prosecuting the applicant, who is the Managing Director of the Company, under S. 29, Industrial Disputes Act. The Government of Bihar had previously authorised the Assistant Commissioner of Labour to file the complaint.

[3] The criminal complaint is dated 27.4-1949, but the District Magistrate of Gaya took cogni-

zance of it on 18-5-1949. On 17th of May the applicant instituted a suit in the Court of the Subordinate Judge, Gaya, alleging that the constitution of the tribunal and the making of the award were illegal and *ultra vires* and that the tribunal had no jurisdiction to make the award. It was also averred in the complaint that the Governor of Bihar had no jurisdiction to appoint the tribunal.

[4] In support of this rule, Mr. Tarkeshwar Nath argued that the principal issue in both the proceedings was whether the award of the industrial tribunal was valid and *intra vires*. Learned counsel pointed out that notice under S. 80 was sent on 8-3-1949, which date is prior to the institution of the criminal complaint by the Assistant Commissioner of Labour at the instance of the Government of the State. Learned counsel referred to *Mt. Phuleshra Kuer* v. *Emperor*, 1 P.L.T. 697: (A I.R. (7) 1920 Pat. 816 : 22 Cr.L.J. 489) and *Banambar Chhotra* v. *Nata Behera*, 6 P. L. T. 348 : (A. I. R. (12) 1925 Pat. 193 : 26 Cr. L. J. 286) in support of his argument that the criminal proceedings should be stayed pending the decision of the civil suit. On behalf of the State Government, Mr. Shambhu Prasad Singh referred to *Hirday Narain Singh* v. *Emperor*, A.I.R. (16) 1929 Pat. 500 : (30 Cr. L. J. 1101), *Bhagirath Bhagat* v. *Ram Narain*, A. I. R. (17) 1930 Pat. 194 : (30 Cr. L. J. 1144) and *Bhagwat Prasad* v. *Ram Kishun Ram Sonar*, A. I. R. (17) 1930 Pat. 351 : (31 Cr. L. J. 766) for the proposition that it is undesirable for the High Court to interfere with the pending criminal proceedings unless in an exceptional circumstance. In my opinion, the discretion to be exercised by the High Court in ordering stay of criminal proceedings cannot be crystallized into a hard and fast rule, and must, to a large extent, depend on circumstances of each case. One point of importance is whether the criminal complaint has been filed before or after the civil suit. If it is filed afterwards, the intention to prejudice the civil litigation which is only a matter of inference, can be suspected. But it is very difficult to draw any such inference in the case of public prosecution. In *Jehangir Pestonji* v. *Framji Rustomji Wadia*, 30 Bom. L. R. 962 : (29 Cr. L. J. 1053), Mirza J. points out the distinction between public and private prosecution. At p. 965 the learned Judge states that the "test seems to be whether the prosecution is public or private. Where it is public, the Court, as a rule, in the exercise of its inherent jurisdiction, would not stay criminal proceedings. Where it is private, as in the present case, there would not be the same reluctance on the part of the Court to interfere with criminal proceedings."

In the present case, it is apparent that the prosecution was instituted at the instance of the Government, and it is impossible to accept the argument that there is any intention on the part of the Government to prejudice the trial of the civil suit. There is another circumstance also to be considered. In the present case the trial Court has refused to exercise discretion in favour of the applicant who has moved for stay of the criminal proceedings. In criminal revision the High Court cannot interfere with the order, since, on the material, it is not possible to hold that the learned Sessions Judge has, in exercise of his jurisdiction, acted in a manner which is unjudicial. As Jackson J. observed in *C. Ramiah* v. *N. Ramiah*, 50 Mad. 830 : (A. I. R. (14) 1927 Mad. 778 : 28 Cr. L. J. 812), there is no invariable rule as against staying of criminal proceedings pending issue of the civil suit:

"Each case must be considered on its own merits and the only general rule that can be adumbrated is that every Court should be left as far as possible to dispose of the cases on its file with the utmost expedition. This rule is in the interest of not only of public administration but also of private persons involved in criminal proceedings; for no one wishes to have a criminal charge kept hanging indefinitely over his head. If authority were required for the above proposition, there is the Patna ruling: 'It is the policy of the law to go on immediately with the enquiry.' *Ram Saran Singh* v. *Nikhind Narain Singh*, A. I. R. (12) 1925 Pat. 619 : (26 Cr. L. J. 1179), which is founded on *Sheikh Bahatar* v. *Nobadali*, A. I. R. (11) 1924 Cal. 634 : (26 Cr. L. J. 65). Another Patna ruling on which the petitioner relies *Mt. Phuleshra Kuer* v. *Emperor*, 62 I. C. 185 : (A. I. R. (7) 1920 Pat. 816 : 22 Cr. L. J. 489) proceeds on the assumption that there may be manifest and irreparable injuries done in the criminal Court, but, with all respect, I do not think that such an assumption can properly be made when the integrity of the Court is not impugned. It must be assumed that in either Court justice will be done and which Court precedes the other is merely a question of convenience."

[5] Upon the facts of the present case, I am unable to hold that exceptional ground has been made for the stay of the criminal proceeding. For these reasons this rule must be discharged. The application is accordingly dismissed.

R.G.D. *Rule discharged.*

A. I. R. (38) 1951 Patna 231 *[C. N. 47.]*

REUBEN AND DAS JJ.

Bukhtiarpur-Bihar Light Rly. Co., Ltd. — *Petitioner* v. *State of Bihar and others* — *Opposite Party.*

Misc. Judicial Case No. 139 of 1950, D/- 8-9-1950.

(a) Contempt of Courts Act (1926), S. 1—Contempt of Court, what amounts to.

Where a consent order, passed in an application by one party for the issue of a writ of mandamus restraining the other from taking possession from the former except in due course of law, provided that the latter will take possession only after the purchase to which the latter claimed to be entitled had been legally completed, and vacated the interim order of injunction:

Held that taking of possession by the latter before the purchase was legally completed did not amount to

contempt of Court as in the consent order there was an undertaking given by the latter to the former but there was no undertaking given to the Court. [Para 12]

Anno. Contempt of Courts Act, S. 1, N. 3.

(b) Constitution of India, Art. 226—Writ of mandamus when can be issued.

A party who has entered into an agreement with another party and is illegally dispossessed by the other in breach of the agreement cannot ask the High Court for a writ of *mandamus* as the aggrieved party can get an effectual and adequate remedy by an ordinary action in the civil Court. [Para 26]

(c) Constitution of India, Art. 226—Writ of mandamus—Nature of.

The grant of a writ of *mandamus* is, as a general rule, a matter for the discretion of the Court and is not a writ of right. [Para 26]

Sir Sultan Ahmad, P. R. Das, A. S. Ismailee, S. M. Siddique and Balbhadra Prasad Singh — for Petitioner; K. K. Varma, Hari Kishore Thakur, K. Deyal, T. Nath and Advocate-General — for Opposite Party.

Reuben J. — On the petition of the Light Railway Company filed on 28-6-1950, a rule has been issued on the opposite party to show cause why a writ of *mandamus* should not issue against them restraining them from interfering with the possession of the Company over the properties and management of the Bihar Bukhtiarpur Light Railway. There is also a rule against the District Board of Patna (opposite party 3), Mr. Khaderan Singh, Chairman of the District Board (opposite party 4), and Mr. H. Subberwal, ex-Head Accounts Officer of the Light Railway Company (opposite party 5) to show cause why they should not be committed for contempt of Court. At the same time, an *ad interim* injunction was issued restraining the opposite party from interfering with the possession of the Light Railway Company. It being asserted on behalf of the District Board that dispossession had already taken place before the issue of the injunction, a further rule has been issued on the District Board of Patna and Mr. Khaderan Singh, on a petition filed by the Light Railway Company on 19-7-1950, to show cause why a mandatory injunction shall not issue against them directing them to restore possession of the Light Railway to the petitioning Company.

[2] The Light Railway was established about the year 1901 under the provisions of the Bengal Tramways Act, 1883 (Bengal Act III [3] of 1883). By Notifn. No. 100R dated 25-6-1901 under S. 5 of that Act, the Local Government of Bengal sanctioned its construction between Bukhtiarpur and Bihar Sharif, subject to an agreement between Messrs. Martin & Co., the promoters of the Bukhtiarpur-Bihar Light Railway Co. Ltd., on the one side and the District Board of Patna on the other which was entered on 21-8-1899. Subsequently, there was an extension of the Light Railway to Rajgir. The agreement of August 1899 is set out in a schedule to the Government Order and I reproduce below the relevant provisions of it:

"(1) The Board will grant to the Company in perpetuity subject to cl. 5 of the free use of so much of the side portion of the said road as is necessary but not exceeding a width of 8' on one side for the purpose of laying thereon and using a steam Tarmway of 2' 6" gauge to be worked by the Company. The Board will also grant to the Company in perpetuity subject as aforesaid full right and liberty to lay the said Tramway across the said road wherever necessary and to use the same wherever laid across the said road.

(2) The Board will promote the acquisition by the Company under the provisions of Act I [1] of 1894 of such additional land outside the boundary of the said road as may be necessary for the purpose of the said Tramway.

(5) In the event of the Board exercising the right of purchase conferred upon them by S. 41 of Act III [3] (B. C.) of 1883 the value to be placed upon the Tramway as a going concern shall be calculated at twenty years purchase of the average net annual profits to the Company during the four years preceding the transaction together with a bonus of twenty per cent., on the amount so arrived at over and above that amount. In case of dispute the matter will be determined by arbitration under the clause in that behalf hereinafter contained.

(12) If any doubt or difference shall arise between the Board and the Promoters or the Board and the Company concerning anything herein contained or any matter in any way connected therewith or with these presents or the construction thereof or the rights, duties and liabilities of any person or persons in connection with these presents or as to the incidence of expense as between the Board and the Company under any of the clauses of this agreement then and in every such case the matter in doubt or difference shall be referred to two arbitrators one to be appointed by each party or to the umpire of such arbitrators in case they differ in opinion but if either of the parties shall refuse or neglect to appoint for one month after notice in writing from the other of an arbitrator being or having been appointed then the arbitrator so appointed may make a final decision alone which shall have the same force and effect as the award of two arbitrators or the umpire duly appointed."

This agreement was confirmed by the Light Railway Company after it was incorporated.

[3] Under S. 41, Bengal Tramways Act, the District Board is entitled on six months' notice in writing to purchase the undertaking upon the expiration of twenty one years from the date of the order under S. 5 of the Act, and, thereafter, the Board has a renewed right of purchase on similar notice at the expiry of every period of seven years after the expiry of the initial period of twenty one years. The last seven-year period expired in June 1950. On 16-12-1949, in pursuance of a resolution of the District Board of the same date, Mr. Syed Hassan, Advocate on behalf of the District Board, gave notice to the Light Railway Company of the decision of the District Board to exercise its right of purchase with effect from 25-6-1950 on

the expiry of the current period of seven years, and called on the Light Railway Company to settle the transfer value by mutual agreement. The legal validity of this notice is not admitted by the Light Railway Company, but it is agreed that, for the purposes of this case, the notice may be treated as legally valid. There followed a correspondence between the Company and Mr. Syed Hassan, the details of which it is unnecessary to set out at length. A difference arose between the Company and the District Board as to the interpretation of cl. 5 of the agreement of August 1899. According to the Company, in addition to the amount calculated under cl. (5), the purchase price must include the present market value of the assets, such as plant, buildings, rolling stock, land, etc., whereas, according to the District Board, that amount is an inclusive price for the Railway as a going concern. The Company also questioned the validity of the notice under S. 5. Finally, on 29-3-1950, the District Board gave a notice to the Company, appointing Mr. Baldeva Sahay, Advocate, as its arbitrator, and calling upon the Company to appoint its arbitrator within one month, failing which in accordance with the agreement of August 1899, Mr. Baldeva Sahay would proceed as the sole arbitrator and give "a final and conclusive award". Thereupon, the Railway Company appointed Mr. Abdul Manan, a pleader of Purnea, as its arbitrator, but limited his authority to the point as to whether the notice under S. 5 was legally valid. Upon protest by the District Board on this limitation, Mr. Manan retired from the arbitration and subsequently Mr. Nizamuddin Khan, Advocate, was appointed by the Company "under protest" with authority to consider the question of valuation. The arbitrators, however, were unable to come to a definite decision for want of the audited accounts of the preceding four years.

[4] In the meantime, an agitation had started against the management of the Light Railway Company, and a body styling itself the Bihar-Bukhtiarpur Light Railway Passengers' Association began to voice publicly the alleged grievances of persons travelling on the said Railway and to urge on the District Board the desirability of taking under itself the management of the Light Railway. On account of an assertion said to have been made by Mr. Khaderan Singh at a meeting of the Association at Bihar Sharif on 13-5-1950 that he was preparing to take over the management of the Light Railway on the 25th June whether the Company was willing or not to hand over control, the Company instituted Misc. Jud. Case No. 120 of 1950 in this Court asking among other reliefs for a writ of mandamus restraining the District Board from taking possession of the Light Railway "except in due course of law" Mr. Khaderan Singh and Mr. Subberwal were also impleaded. A rule was issued and an *ad interim* injunction was granted on 17-5 1950. The case came before Das J., and me and was disposed of on 23-6 1950 by a consent order which I reproduce below :

"This application is disposed of on the following consent order agreed to by the parties.

Subject and without prejudice to whatever right the parties may have in respect of the matters in dispute;

(1) It is agreed to by the parties that the petitioner will submit for inspection such accounts as the arbitrators appointed by the parties may call for; if the accounts so called for be not in the present possession of the petitioner but be in the possession of the auditors, the petitioner will write to the auditors to give every facility to the arbitrators to examine the accounts. It is admitted by the learned Advocate General on behalf of the opposite parties that the audited accounts of the three years beginning from April 1946 have already been submitted to the arbitrators.

(2) The District Board will take possession of the undertaking, viz., the Bihar Bukhtiarpur Light Railway (including the Rajgir extension) only after the purchase to which the District Board claims to be entitled, has been legally completed.

(3) On the submission of the accounts by the petitioner to the arbitrators appointed by the parties, no question arises of inspection of the accounts by any other person or authority; and

(4) There will be no order for costs of the hearing of this petition.

The interim order of injunction is vacated."

It is alleged that, in violation of this order, Mr. Khaderan Singh, representing the District Board of Patna, helped by the other members of the opposite party, has proceeded to take possession of the Light Railway, although the purchase has not been legally completed. At the hearing, it was admitted that the District Board is now in possession of the Light Railway with the exception of the Head Offices at Calcutta and Patna. According to the Light Railway Company, the taking of possession commenced from the midnight of 24/25th June, and has been completed, since the passing of this Court's order on 28th June. According to the opposite party, the taking of possession was peacefully effected at midnight of 24/25th June.

[5] It may be mentioned that, before the District Board proceeded to take possession of the property, it made a deposit on 24th June of Rs. 10,00,623 to the credit of the Bukhtiarpur-Bihar Light Railway Co., Ltd. in the Imperial Bank of India, Patna, as the tentative price of the undertaking on the basis of a valuation made by Messrs. B. K. Sinha & Co., Chartered Accountants and Auditors, Patna. The valuation was obtained by the District Board in accordance with a resolution recorded by the Board of Directors of the Light Railway Company on 11.6.1950 :

"That the only correct approach to the subject would be for the District Board to assess and determine, if necessary by help of experts, the price payable to the Company, and as soon as the figure of amount of price is arrived at, let the District Board deposit the money in the Imperial Bank of India, and call upon the Company to accept the same, and then the Board of Directors shall immediately ascertain the views of the share-holders and shall expedite the transaction."

This action was taken by the District Board "subject to such adjustment as may be necessary according to the award of the arbitrators."

The deposit of this amount is of no importance in the present proceeding, as the District Board does not rely upon it as contributing towards transfer of title.

[6] The rule which was issued on 28th June was obtained on the basis that the petitioner Company was still in possession and that there was merely a disturbance of its possession As it is now admitted that dispossession is complete, the rule relating to the issue of a writ to restrain the opposite party from disturbing possession is frustrated and must be discharged. The only points which arise for consideration, therefore, are ; (1) whether opposite parties 3 to 5 have committed a contempt of Court, (2) if so, what action is called for, and (3) whether, in the circumstances of the case, a mandamus should issue against opposite parties 3 and 4 directing them to restore possession to the petitioner Company. As regards the first point, the argument on behalf of the Light Railway Company is as follows. The consent order of 23rd June contemplated that the District Board will not take possession until the purchase is legally complete. One essential to the completion of the purchase is the ascertainment and payment of the purchase price, and the price, since there has been a difference between the parties, can be determined only by the arbitrators as provided in the agreement of August 1899; the arbitrators appointed have not yet fixed the price, and, consequent upon a difference between the arbitrators, steps are now being taken to appoint an umpire. Secondly, the purchase involves a transfer of tangible immovable property valued at more than Rs. 100 and, therefore, a registered deed of transfer is required for the completion of the purchase. These two requisites being absent, the purchase is still incomplete and the consent order has been contravened. On the other side, there is a four-fold contention, 1stly, that there was no order of this Court or undertaking given to it which could form the subject-matter of proceedings for contempt, 2ndly, that in law the title legally passed to the District Board on the expiry of the 24th June and the District Board had the right peacefully to take possession in accordance with the consent order of 23rd June, 3rdly that the District Board and the Light Railway Company, under the agreement of 1899, were in the position of "partners", using this term in a non-technical sense, and, after the expiry of the relevant date, the District Board became the sole owner, entitled to possession and control, and the Light Railway Company was merely entitled to the price of its share of the undertaking, and, 4thly, that Mr. Khaderan Singh acted *bona fide* on legal advice in the belief that title had passed to the District Board.

[6] It is unnecessary for me in the present proceeding to set out and examine the elaborate grounds on which the second and third contentions of the opposite party are based, because I think that the opposite party are entitled to succeed on their first contention.

[7] Contempt of Court may be committed by disobedience of an order of a Court or by breach of an undertaking given to a Court. The disobedience or breach may be unintentional resulting in a contempt in theory only, which is not punishable by committal but may render the respondent liable to pay the costs of the application, or the disobedience or breach may involve misconduct resulting in a contempt which partakes to some extent of a criminal nature (Halsbury's Laws of England, Edn. 2, vol. 7, p. 24). The first contention on behalf of the opposite party is based on the form in which the consent order of this Court was passed. It is pointed out that all that the consent order does is to recite the agreement arrived at between the parties and to vacate the *ad interim* injunction which had been issued by the Court, that, in other words, the rule issued by the Court was discharged. This means, it is argued, that the Court refrained from passing any order, and that the agreement recorded by the Court is at most a contract between the parties enforceable by appropriate action in the civil Court. The first portion of this contention has not been seriously contested. As the consent order stands, there is no direction given by this Court except that the interim order of injunction is vacated and the application is disposed of on consent. It has been very strenuously argued, however, that the agreement of the District Board contained in Cl. (2) of the consent order that it will take possession only after the purchase has been legally completed is an undertaking given to the Court. *Wolverhampton and Walsal Rly. Co.* v. *L. & N. W. Rly. Co.*, (1874) 16 Eq. 433 : (43 L. J. Ch. 131) and *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.*, (1926) A. C. 108 : (95 L. J. P. C. 71) have been cited as authorities for implying the negative stipulation from the positive terms used, but this was hardly necessary;

it was well understood at the time the consent order was passed that this was the meaning of the term agreed to by the District Board and the correctness of this interpretation was not challenged during the hearing of this petition—all that was challenged was the assertion that this term constituted an undertaking given to the Court.

[8] In *Kusadhaj Bhakta* v. *Brojo Mohan*, 19 C. W. N. 1228 : (A. I. R. (3) 1916 Cal. 816), Jenkins C. J. (Holmwood J. agreeing) observed with reference to a consent decree :

"It is well settled that a contract of the parties is none the less a contract because, there is superadded to it the command of a Judge. It is still a contract of the parties, and as the contract is capable of being rectified for an appropriate mistake so, as the necessary consequence, is the decree which is merely a more formal expression given to that contract."

Their Lordships were dealing with the question of the maintainability of a suit to set aside a consent decree in a previous suit on the ground of mistake. It should be noted that their Lordships do not describe the agreement as a contract pure and simple, but as a contract with the command of a Judge superadded. The point is elaborated somewhat more in *Sabitri Thakurain* v. *Mrs. F. A. Savi*, 14 P. L. T. Sup. 1 at pp. 211 to 212 : (A. I. R. (20) 1933 Pat. 306) where their Lordships observed that, as soon as a petition of compromise is adopted as a part of a decree, it passes from the domain of mere contracts into that of decrees, and a promise by a party to pay is converted into an order of the Court to that party to pay; this is so even though, according to the accepted practice, a formal decree is not drawn up specifying the orders of the Court but the decree drawn up merely says that the suit is decreed or dismissed, as the case may be, in the terms of the compromise, and the petition of compromise is attached to the decree as an annexure. Their Lordships pointed out that the consent decree has this effect because of O. 23, R, 3, Civil P. C., which provides that, after recording the compromise, the Court shall pass a decree in accordance therewith so far as it relates to the suit. The effect is that the agreement between the parties, so far as it relates to the suit, becomes the order of the Court and, to that exent, may be enforced by execution. So far as the present order is concerned, however, there is no provision corresponding to O. 23, R. 3, and there is no reason why the consent order under consideration should be held not to be governed by the following observation at p. 124 of Seton on Judgments and Orders, Edn. 7, Vol. I :

"A compromise ought not to be introduced into the body of the order, but either identified or scheduled. It is, however, common practice to insert undertakings in the body of the order, and in the event of a breach, the undertaking may be enforced by writ of attachment, whereas if it formed part of the agreement set forth in the schedule, proceedings in the nature of specific performance might be necessary."

The learned author distinguishes between orders in which the compromise is introduced into the body of the order and those in which it is kept separate from the order of the Court. The order before us appears at first sight to fall in the first class, but really it belongs to the second class of consent orders. I say this because, though it embodies the agreement between the parties, that agreement is kept distinct from the directions of the Court, as it would be if it were set out in a schedule.

[9] A case on a par with the case before us is reported in *Dashwood* v. *Dashwood*, 1927 W. N. 276. By a consent order made in a partnership action brought by the plaintiff against the defendants further proceedings were stayed "except so far as may be necessary for the purpose of carrying this order and the terms agreed between the parties and set out in the schedule hereto into effect."

The defendants subsequently moved for committal of (contempt) or the issue of a writ of attachment against the plaintiff on the ground that he had carried on the business of an undertaker within a radius of three miles from the Guildhall, Portsmouth, contrary to a covenant contained in the scheduled terms. Tomlin J. held that the terms in the schedule were not an order of the Court enforceable by proceedings for contempt and that the proper course was to apply for specific performance or an injunction, and then to base proceedings for contempt on a subsequent breach, if any.

[10] This decision was distinguished by Panckridge J. in *Hari Charan Dey* v. *Ranjit Kumar*, 42 C. W. N 203, a case relied on for the Light Railway Company. His Lordship was concerned with a consent decree in a money suit. The terms of the compromise between the parties were given in a schedule annexed to the decree. Clause (4) of those terms is relevant and runs thus:

"The defendants undertake not to dispose of their properties until the decree is fully satisfied."

This term was obviously not enforceable by execution. Panckridge J., held the term to be an undertaking given to the Court and found the defendant to be guilty of contempt by transferring property in contravention of it. The grounds on which his Lordship distinguished *Dashwood* v. *Dashwood*, (1927 W. N. 276), support what I have said above. He observes:

"In *Dashwood* v. *Dashwood*, (1927 W. N. 276) the action was merely stayed and the schedule and terms of settlement were annexed to the stay order. In the present case the suit has been concluded by the decree of the Court which declares that the terms of settlement ought to be carried out and the same are ordered

and decreed accordingly. Thus, there is an order of the Court embodied in the decree directing the parties to carry out the terms, one of which is an undertaking by the defendants not to dispose of their properties until the decree is fully satisfied. But even if the order of the Court were not so clear, the case would still in my opinion not fall on the same side of the line as *Dashwood* v. *Dashwood*, (1927 W. N. 276), which Tomlin J. expressly distinguishes from a case where there is in the body of the order either an express direction or an undertaking. Here there are in my view both an express direction and undertaking, so whichever test one applies, the distinction between the present case and *Dashwood* v. *Dashwood*, (1927 W. N. 276), is obvious."

The distinction drawn is that, in the decree with which his Lordship was concerned, there was an express direction for carrying out the terms of the agreement, and the terms of the agreement were thus embodied in the decree. This condition is not present in the case before us. The correctness of the decision of Panckridge J., was doubted by a Division Bench of the same Court in *Nisha Kanto* v. *Saroj Bashini*, A. I. R. (35) 1948 Cal. 294: (49 Cr. L. J. 567). That case was concerned with an undertaking given by the defendant in a compromise in a suit for ejectment, which compromise was made a rule of the Court. The defendant thereby undertook to remove a Kali image, as also all permanent brick-built and other structures in and around the place where the image stood, before he gave up possession of the said property, or at any time prior thereto on demand by the plaintiff or the owner for the time being of the said property. Subsequently, he was called on by the plaintiff to remove the image of Kali, but declined to do so. Gentle J., held that he had committed contempt by a breach of an undertaking given to the Court, and directed that he be detained in prison for a period of one month. This order was set aside in a Letters Patent appeal. The Letters Patent Bench held that the undertaking was one between the parties and not an undertaking given to the Court. The Letters Patent Bench observed that a compromise is nothing more than an agreement between the parties with the command of the Court superadded, it has really no greater sanctity than the agreement itself and certainly cannot mean anything more than the agreement itself. Referring to the decision in *Hari Charan* v. *Ranjit Kumar*, 42 C. W. N. 203, their Lordships pointed out that Panckridge J., had given no reason for holding that there was an undertaking given to the Court except that the word "undertake" was used. Harries C. J., who delivered the leading judgment, observed:

"But as I have stated the mere user of the word 'undertake' does not mean a promise to a Court. It merely means a solemn promise to some one and where the word appears in an agreement between *A* and *B*, it appears to me that if *A* undertakes, he obviously undertakes to *B*, and not to a Court."

He went on and added that each case must be decided on its particular facts. His Lordship the Chief Justice concluded by saying that, if it was a practice as was urged on behalf of the respondent that practitioners on the original side of the Court did not make it clear that an undertaking in a compromise was an undertaking to the Court, this practice must cease, and, in future, the fact should be made clear. It has been urged before us that the decision of the Letters Patent Bench was incorrect, and reference has been made to several forms in Seton on Judgments and Orders, Edn. 7 (Vol. 1, p. 47 form 2, p. 450 form 3, p. 796, form 5, (Vol. II, p. 1179 form 12 and Vol. III, p. 2322 form 4) showing the embodying in orders of the Court of undertakings given to the Court without expressly stating that those undertakings were given to the Court. A perusal of all the forms cited, however, shows that from the context it is clear that the undertakings incorporated in these forms are undertakings to the Court. Selecting one at random, I reproduce the form at p. 1179 of Vol. II:

"12. Undertaking to appoint Co-Trustee by Beneficiaries when appointed Trustees.

And the applicants, by their counsel, undertaking to take steps immediately for the appointment of a co-trustee in the case of the decease of either of them, appoint A.B. and C.D. new trustees of etc. *Re Lightbody*. Kay, J., 19-12-1884, B. 1634; S. C., 52 L.T. 40."

This form is clearly intended to be an order of the Court. It is not an agreement between the parties. The undertaking referred to, therefore cannot be merely an undertaking between the parties, but must be one given to the Court. This is exactly what Harries C. J. says in the passage which I have cited above. Turning to the order with which we are concerned, we find first of all, that there is no such word as undertaking, a word which, according to Harries C. J., implies a solemn undertaking. It is not necessary to consider whether this makes any difference, for, applying the further test suggested by his Lordship, the term in question occurs in what is set out as the agreement between the parties. It must, therefore, be taken as a term between the parties and not as an undertaking given to the Court. I am confirmed in this view by the principle that, so long as an order of the Court exists, it must be obeyed and obeyed to the letter, and anyone who does not obey it to the letter is guilty of committing a wilful breach of it: *Spokes* v. *Banbury Board of Health*, (1866) 1 E. Q. 42: (14 W. R. 128). If the person bound by an order is to comply with that order to the letter, the Court itself must be very strict in interpreting that order and not put upon that order an interpretation which is open to any doubt or difference of opinion.

[11] It has been urged that this interpretation would make the entire proceedings of the 23rd June meaningless, that it was contemplated both by the Court and the parties that the District Board should not take possession till the compulsory purchase was legally complete and that, if it is open to the District Board to take possession contrary to this agreement without incurring a liability for contempt of Court, the Court is set at naught, and the directions of the Court are treated as unworthy of notice. It is urged, further, that the circumstances clearly show that, at the time when he entered into this agreement, Mr. Khaderansing intended to enter into possession on the expiry of the 24th June, and his entering into the agreement was merely a dodge by which he induced this Court to refrain from exercising its powers and issuing an injunction against the District Board. This, it is said, is a clear overreaching of the Court. The flouting of the Court in this manner, it is contended, constitutes a contempt. In support a reference has been made to *Seaware* v. *Paterson*, (1897) 1 Ch. 545: (66 L. J. Ch. 267). The respondents in that case were found guilty of contempt in respect of an injunction issued by the Court, Paterson who was a party to the previous proceedings by disobedience of the Court's order, and Murray who was not a party to the previous proceedings by aiding and abetting Paterson in committing a breach of that order. The important point is that in that case there was an order of the Court on which the proceedings in contempt could be based. In the case before us, there is no such order or undertaking.

[12] The present case is somewhat similar to that reported in *Narayan Sahu* v. *Thakurji Ramji*, 106 I. C. 194: (A. I. R. (15) 1928 Pat. 49), which arose out of a first appeal in this Court against a decree for the redemption of a usufructuary mortgage. The appellant applied for stay of delivery of possession. When the matter came up for hearing before the Registrar on 6.6.1927, the respondent decree-holder represented that the application was premature as no steps had yet been taken for delivery of possession. The argument prevailed and the Registrar rejected the application for stay. The decree-holder thereupon went to the execution Court on the 10th June, put in an application for delivery of possession, and succeeded in obtaining delivery of possession on the 13th June, before the appellant realised what was happening. Their Lordships held that there had been an overreaching of the Court and the delivery of possession could not be allowed to stand. This decision was followed in *Lahore Electric Supply Co., Ltd., Lahore* v. *Province of Punjab*, I. L. R (1949) 24 Lah. 617: (A. I. R. (30) 1943 Lah. 41 F. B.). That decision relates to a suit instituted by the Lahore Eletric Supply Co., Ltd., against the Punjab Government for a declaration that it was entitled to carry on the Lahore electric supply undertaking as licensee for another twenty years, attacking among other things the validity of a notice given by the Punjab Government to the plaintiff Company of its intention to exercise the option to purchase the licensee's undertaking given to the Punjab Government under the Electricity Act 1910 (Act IX [9] of 1910). The plaintiff Company applied for a temporary injunction to maintain the *status quo*. The Punjab Government during the pendency of this matter succeeded in taking over the undertaking. This was done before the service of an order of injunction. The Full Bench held it to be a case of over-reaching the Court and, following the decision in *Narayan Sahu* v. *Thakurji Ramji*, 106 I. C. 194 : (A. I. R. (15) 1928 Pat. 49) issued a mandatory injunction on the Punjab Government to restore possession to the plaintiff Company. Similar cases are reported in *Daniel* v. *Ferguson*, (1891) 2 Ch. 27 : (39 W. R. 599) and *Von Joel* v. *Hornsey*, (1895) 2 Ch. 774 : (65 L. J. Ch. 102). In these last three cases, their Lordships, while granting a mandatory injunction, refrained from expressing any opinion as to the merits of the subject-matter of the controversy. It is to be noticed that in none of these cases was there any suggestion that a contempt of Court had been committed. The mere fact, therefore, that there had been an overreaching of the Court will not render the guilty party liable to proceedings for contempt. The effect will not be to make proceedings before the Court meaningless for, as it appears from the decisions to which I have just referred, it will be open to the Court in an appropriate proceeding to give the aggrieved party relief against the misdeed of the opposite party. Having come to the conclusion that there was no undertaking given to the Court, it follows that no contempt of Court has been committed by the action which is complained of. It is, therefore, not necessary to consider the second point formulated at p. 6 above

[13] Coming to the third point, namely, whether a *mandamus* should issue against opposite parties 3 and 4 directing them to restore possession to the petitioner company, I must premise to begin with that the dispute between the District Board and the Light Railway Company is essentially a private dispute of a civil nature, whether the District Board has complied with S. 41, Bengal Tramways Act, 1883, and is entitled to "purchase" the undertaking and, if so, what should be the price to be paid by the District Board. This is a matter to be settled between the parties themselves by negotiation or

by arbitration as provided in the agreement of 1899, or, in the last resort in the ordinary civil Courts. The Light Railway Company seeks the help of this Court in the exercise of its extraordinary powers under Art. 226, Constitution of India, on the ground that the District Board in "gross contempt" of the order of this Court

"forcibly started turning out officers of your petitioner and disturbing your petitioner's possession on the midnight of the 24th June last,"

and was guilty of a "gross fraud" on this Court by agreeing to the consent order while intending, nevertheless, to take possession of the undertaking on the expiry of the 24th June. In the petition asking for this relief, the petitioner Company included by reference to allegation contained in its petition in Misc. Jud. Case No. 120 of 1950. There were two things complained of in that petition, firstly, that the State Government had illegally, or, alternatively, arbitrarily and unreasonably, appointed Mr. H. Subberwal, a dismissed employee of the Light Railway Company, to inspect its accounts, and, secondly that with the help of the State of Bihar and its officers, the District Board was threatening forcibly to dispossess the Light Railway Company and take over the management of the Railway itself A mention was made of a raid "by the police along with the abovementioned Subberwal", in which the offices and godown of the Light Railway Company in Fraser Road, Patna, were entered into and again, on the next day it was said with the help of the police, some papers of the Railway were seized and some accounts examined. It was expressly stated that there was

"a conspiracy between the State of Bihar, the District Board of Patna and the said Mr. H. Subberwal to take forcible possession"

of the property of the petitioner. Stress was throughout laid on the threatened use of force and the fact that, in its threatened action, the District Board had the backing and support of the State Government and the District Officials. We are not concerned here with the first ground; as a result of the consent order, the question of Mr. Subberwal inspecting the accounts did not arise, apart from an incident which has been separately dealt with by us in a proceeding for contempt of Court against Mr. Subberwal (Original Cri. Misc. No. 5 of 1950). The other aspect of the matter was stressed before us and it was urged that the dispossession of the Light Railway Company was effected by force and with the help of the State and its Executive Officers in the District. This is a serious charge and calls for some expression of our opinion on the facts so far as this is possible on the evidence before us. After discussing evidence, his Lordship concluded on the evidence before us. I am not prepared to say that possession was taken by force and that in effecting such possession the District Board was helped by the officers of the State.

[14] The conclusion is irresistible that in the present case the Light Railway Company has asked for the interference by this Court in the exercise of its powers under Art. 226 on a statement of facts which is incorrect in two important particulars, firstly that the possession of the Light Railway Company was merely disturbed, and, secondly, that force was being used and that the State Officials were helping the District Board in taking possession. It was this misrepresentation of facts that, on the 28th of June, led me to issue an *ad interim* injunction which is utterly inappropriate to the true facts. It is also doubtful whether, if the true facts were before me, I would have issued a rule at all. On the 22nd and 23rd of June, when we were hearing the arguments in Misc. Jud. Case No. 120 of 1950, I made it clear that I was very reluctant to make the rule absolute in favour of the Light Railway Company. I pointed out then that the Light Railway Company was in the position of the person in possession and was entitled to use force to maintain that possession. Had it been a matter between the Light Railway Company on the one side and the District Board alone on the other side, there would have been no doubt that the matter was one to be dealt with by the Ordinary Civil Courts. The stress, however, was, as I have indicated, on the threat of force backed by the State and its officers. This aspect has also been stressed in the present proceeding but the allegations have not been established. In these circumstances, I do not think that a case has been made out for the issue of a writ of *mandamus* as asked for.

[15] In my opinion, therefore, the petition has no merits and must be dismissed. It remains to consider the question of costs.

[16] I do not think that the District Board and Mr. Khaderan Singh should be granted any costs, since I am not satisfied as to the propriety of their action in agreeing to the consent order on the 23rd June and, nevertheless, taking physical possession on the expiry of the 24th June. It has been contended that Mr. Khaderan Singh acted on advice and in *bona fide* belief that the purchase was legally complete and the District Board was entitled to enter into possession at midnight of the 24th and 25th June. [After discussion of evidence His Lordship concluded.] It is improbable that Mr. Khaderan Singh took any legal advice to satisfy himself that the District Board was entitled to enter into possession in accordance with the agreement between the parties embodied in the consent order of the 23rd June.

[17] The other members of the opposite party are entitled to costs but opposite parties 6 to 26 will get hearing fees only for one day, as it was intimated on the first day of the hearing that the rule against them had become infructuous and would not be pressed.

[18] In the result, I would discharge the rule and dismiss the petition with costs to the opposite parties other than opposite parties 3 and 4. The hearing fee will be assessed in three sets as follows : Opposite parties 1 and 2 — 5 gold mohars; Opposite party 5 — 5 gold mohars ; Opposite parties 6 to 26 — 2 gold mohars.

[19] **Das J.**— I have had the advantage of reading the judgment proposed to be delivered by my learned brother.

[20] I think the main questions in issue may be thus formulated : (1) What is the nature of the agreement dated 23.6-1950, on which we disposed of the petitioner's application in Misc. Jud. Case No. 120 of 1950 — was it an undertaking to the Court ? (2) Was there any breach of the aforesaid agreement or undertaking ? (3) If there was a breach, does it constitute contempt of this Court ? (4) Alternatively, are the District Board of Patna or any of their officers guilty of over-reaching the Court in disturbing the possession of, or dispossessing, the petitioner on the midnight of 24-6-1950, in violation of the agreement of 23-6-1950 ? If so, should this Court restore the petitioner to possession ?

[21] My learned brother has quoted in full the agreement of 23-6-1950. I agree with his conclusion that that agreement was a contract between the parties, and not an undertaking to the Court. The distinction between an agreement with the sanction of the Court superadded to it, and an undertaking to the Court on the faith of which the Court sanctions a particular course of action or inaction is not easy to define or determine ; much will depend on the circumstances in which the agreement is made, and the words in which it is expressed to embody the intention of the parties : (see the observations in *Nisa Kanto* v. *Saroj Bashini*, A. I. R. (35) 1948 Cal. 294 : (49 Cr. L. J. 567). The agreement in this case did not result in any order of the Court, except disposal of the application without consideration of merits and a termination of the interim order of injunction. It saved "whatever right the parties may have in respect of the matters in dispute" (see the opening clause of the agreement). I accept Mr. P. R. Das's contention that this opening clause *does not* mean that the points regarding which the parties definitely agreed in the four clauses of the agreement, are to be included in the saving clause, so as to unsettle what has been agreed to. I also accept his argument as to the meaning of cl. 2 of the agreement ; namely, that though affirmatively put, it implies the negative and means that the District Board shall not take possession of the undertaking till the purchase is legally completed. Even accepting the aforesaid contentions, I do not think that the agreement goes beyond a contract between the parties on which the Court disposed of the application without granting any order of injunction. Of course, the formal order of disposal is there, but that does not convert the agreement into an undertaking to this Court. It is worthy of note that the order of 23-6-1950, as recorded, states clearly — "It is *agreed to by the parties* etc." There is nothing to suggest that there is an undertaking given to the Court on the faith of which the Court is sanctioning a particular course of action or inaction. Mr. Das has contended that on the basis of the agreement the Court refrained from deciding the case on merits, and this would bring the agreement within the category of an undertaking on the faith of which the Court sanctioned a particular course of inaction, that is, refrained from deciding the case on merits. I agree that the Court refrained from deciding the case on merits ; but that does not necessarily mean that the Court did so on the faith of undertaking given to the Court. If Mr. Das's contention is correct, then every action which is dismissed on compromise, without decision on merits, will give rise to a proceeding in contempt on a breach of a term of the compromise. I do not think that that is correct in law.

[22] My learned brother has examined the case law on the subject, and as I am in agreement with him I need not say again what he has already said with greater clarity and in greater detail. It is not disputed that an undertaking entered into with the Court is equivalent to, and will have the effect of an injunction so far that an infringement thereof may be made the subject of an application to the Court for a proceeding in contempt (see Kerr on Injunctions, Edn. 6, pp. 668.669 ; see also Halsbury's Laws of England, vol. 7, p. 35, para. 51). But if the agreement does not constitute an undertaking to the Court, what then is the position ?

[23] This brings me to the second question. The learned Advocate-General and Mr. Varma, appearing for the opposite party, have very strenuously contended before us that there was no breach of the agreement of 23-6-1950. Speaking for myself. I find it difficult to accept that argument. We have been taken through the relevant provisions of the Bengal Tramways Act, 1883 ; notification No. 100 R dated 25-6-1901, and the agreement of August 1899 between Messrs Martin & Co. and the District Board of

Patna — the relevant provisions whereof have been quoted *in extenso* by my learned brother. On the basis of those provisions, the learned Advocate-General contended — (1) that the agreement of 1899 was a mere license for "the free use" of a portion of the road, which license came to an end on 24-6-1950 ; or (2) that it was in the nature of a contingent lease (the words used in the document are "grant to the Company in perpetuity subject to cl. 5" which automatically came to an end when the contingency happened ; that is, the District Board exercised the right of purchase conferred upon them by S. 41, Bengal Tramways Act, 1883 ; or (3) that the jural relation between the District Board of Patna and Railway Company was analogous to that of partners, which relation came to an end as soon as the District Board intimated that it would exercise its right of purchase with effect from 25-6-1950. On these contentions, which were elaborately and very strenuously canvassed, the learned Advocate General founded his main argument that the purchase, to which the District Board claims to be entitled, was legally complete on 25-6-1950, within the meaning of cl. (2) of the agreement of 23-6-1950. I do not think, speaking for myself, that the aforesaid contentions are well-founded. The agreement clearly enough, was a grant in perpetuity, as the document expressly states, subject, however, to the right of purchase conferred by S. 41, Bengal Tramways Act. There is, I think, a well-understood distinction in law between a "right of purchase" arising out of a contract for sale, and a "sale" as defined in S. 54, T. P. Act. That section itself makes it clear that a contract for sale does not, of itself, create any interest in or charge on the property. In my opinion, the agreement of 1899 was a perpetual lease, with a contract for sale of the undertaking on certain conditions. It is not in dispute that the requirements of S. 54 have not been fulfilled in this case. The contention of the learned Advocate General is that S. 54 has no application. I am unable to agree. By merely informing the Company that the District Board are going to exercise their right of purchase with effect from a particular date and expressing their willingness to pay the price calculated in the manner laid down in cl. (5), the purchase cannot be said to have been legally completed.

[24] My view, therefore, is that there has been in law a breach of the agreement of 23-6-1950 ; but it is not a breach of an undertaking to this Court; nor does it constitute contempt of this Court. It is, I think, well settled that any and every breach of an agreement embodied in an order or decree of the Court does not constitute contempt. There must be an element of defiance; a wilful disobedience to an order or process or in the breach of an undertaking given to Court. In dealing with what is called contempt in procedure, the position is thus summarised in Halsbury's Laws of England, Vol. 1, p. 24, para. 37 :

"Misconduct of this kind consists in disobedience to such orders for the payment of money as are excepted from the general provisions of the Debtors Act, 1869, abolishing imprisonment for debt, or in wilful disobedience to any order or process or in the breach of an undertaking given to the Court."

As has been observed in *State of Texas* v. *George W. White*, 89 U. S. 819; 22 Lawyer's Edn. 157, punishments for contempt of Court have two aspects, namely, (1) to vindicate the dignity of the Court from disrespect shown to it or its orders; (2) to compel performance of some order or decree of the Court, which it is in the powers of the party to perform and which he refuses to obey In the present case, there is no order of the Court to which disrespect has been shown, or the performance of which should be compelled.

[25] It is, however, the last question which has caused me the greatest anxiety in this case, and I confess to a feeling of hesitation as to the appropriate action to be taken. In Misc. Jud. Case No. 120 of 1950, the petitioner Company had, *inter alia* asked for an order restraining the District Board from taking possession of the undertaking except in due course of law. The allegation made in para. 40 of the petition of that case was that the chairman of the District Board had declared that he would assume control of the Railway on 24-6-1950 irrespective of whether the present management of the Company was willing or unwilling to transfer such control. On the 23rd June, the application was disposed of on an agreement between the parties, and no decision was given on merits. On the 25th June, the District Board assumed control. *Prima facie*, it looks as though the District Board, at any rate the Chairman, has taken possession under cover of the agreement and in breach thereof; and Mr. P. R. Das has indignantly characterised the conduct of the Chairman as "sharp practice." I must say that the impression left on my mind on a perusal of the petitions and affidavits is that the conduct of the District Board or rather of the Chairman, has not been straightforward or ingenuous. The agreement of 23-6-1950 did not have much meaning, if it were entered into with certain mental reservations. In para. 17 of the reply of the opposite party it is stated that the Chairman took steps, as advised, in accordance with a resolution of the Board of Directors of the Railway Company dated 16-6-1950. My learned brother has referred to that resolution. The action of the Chairman

was not quite in accord with that resolution; nor is it stated on whose advice the Chairman acted. If, therefore, the District Board derived an advantage, probably an undue advantage, by reasons of a breach of the agreement of 23-6-1950, what should be the appropriate action? This is the question which has given me the greatest trouble.

[26] Mr. P. R. Das has contended that there must be an order or direction for restoration of possession by means of a writ of *mandamus* under Art. 226, Constitution of India, irrespective of the question of contempt. He has relied on several Indian and English decisions (*Narayan Sahu* v. *Thakurji Ramji*, 106 I. C. 194: (A.I.R. (15) 1928 Pat. 49); *Daniel* v. *Forguson*, (1891) 2 Ch. 27 : (39 W. R. 599) ; *Krehl* v. *Burrell*, (1877) 7 Ch. D. 551 : (47 L. J. Ch. 353) ; *Von Joel* v. *Hornsey*, (1895) 2 Ch. 774: (65 L. J. Ch. 102) and *Krehl* v *Burrell*, (1879) 11 Ch. D. 146 : (48 L. J. Ch. 252). Most of those decisions related to cases where in a pending action for an injunction, the defendant on being served with notice tried to steal a march by completing a construction in respect of which the complaint was made, or evaded service of notice in order to present the Court with a *fait accompli*. In those circumstances the Court having seisin of the action issued orders to undo what was done to defeat the purpose of the action. In *Narayan Sahu's case*, 106 I. C. 194 : (A. I. R. (15) 1928 Pat. 49), a delivery of possession obtained by a party to the appeal under what was described as a "questionable move" was set aside by the appellate Court. None of those decisions are any authority for the proposition that a party who has entered into an agreement with another party can ask a superior Court for a writ of *mandamus* under Art. 226 when illegally dispossessed by the latter party in breach of the agreement, instead of going to the ordinary Civil Court of competent jurisdiction for the necessary reliefs. I have great doubt if Art. 226 of the Constitution can be invoked in a case of this nature. The aggrieved party in this case can get an effectual and adequate remedy by an ordinary action in the Civil Court—for enforcement of the agreement, for recovery of possession and damages, if any. The power to issue writs under Art. 226 of the Constitution is an extra-ordinary power, and in several recent decisions of this Court it has been held that where there is an alternative adequate remedy, this Court will be reluctant to exercise its powers under Art. 226 (*See* Misc. Jud. Case No. 142 of 1950 decided on 24-7-1950; Misc. Jud. Case Nos. 53 and 155 of 1950 decided on 5-4-1950). Speaking of the nature of the high prerogative writ of *mandamus*, the position is thus stated in Halsbury's Laws of England, vol. 9, para. 1269, p. 744 :

"Its purpose is to supply defects of justice ; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right ; and it may issue in cases where, although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual."

I can see no reason for thinking that the alternative legal remedy available to the aggrieved party in this case is less convenient, beneficial and effectual, except perhaps for the fact that the aggrieved party will have to pay fairly heavy court-fees for bringing an action in the ordinary Civil Court. Article 32 (1) of the Constitution of India gives a guaranteed right to move the Supreme Court for the enforcement of fundamental rights. Article 226 gives the High Court power to issue directions, orders or writs for the enforcement of fundamental rights and for any other purpose. In a sense, the power under Art. 226 is wider, because the power can be exercised for *any other purpose* : but that itself makes the exercise of the power discretionary for any other purpose. In England, the grant of a writ of *mandamus* is, as a general rule, a matter for the discretion of the Court, and is not a writ of right (Halsbury's Laws of England, vol. 9, para. 1270, p. 744). I do not think that the position is different under Art. 226, Constitution of India.

[27] Then, there is another aspect of the matter. It is very doubtful if on the petition filed originally in Misc. Jud. Case No. 120 of 1950, the petitioner Company would have got any order in their favour under Art. 226. They were then in possession; and I greatly doubt if a mere apprehension of an illegal disturbance or dispossession which they would be justified in resisting, would have been a good ground for the issue of a writ in their favour—this in spite of the argument that a month's notice was required before an action against the District Board could be instituted. The decisions on which Mr. P. R. Das relied in *Tan Bug Taim* v. *Collector of Bombay*, A I.R (33) 1946 Bom. 216: (47 Cr. L. J. 594) ; *Dintai Petit* v. *M. S. Noronha*, A. I. R. (33) 1946 Bom. 407: (225 I. C. 577) and *Municipal Corporation for the City of Bombay* v. *Govind Laxman*, A I. R. (36) 1949 Bom. 229 : (51 Bom. L. R. 190), related to different facts where the alternative remedy could not be as effectual as the one asked for.

[28] A very important consideration in this connection is the way the District Board got possession or assumed control on 25-6-1950. My learned brother has examined the affidavits on this part of the case, and has come to the conclusion—a conclusion with which I agree—that

possession was taken, or rather control was assumed by the District Board, not by use of any force, but by reason of the fact that the working of the Railway was at a standstill by reason of the strike of the railway employees and these employees voluntarily went over and agreed to work under the District Board. Such assumption of control may be, and probably is, a breach of the agreement of 23-6-1950; but I do not think that such a breach is contempt of Court or is a mischief for the remedy of which the power of this Court under Art. 226 of the Constitution can be invoked.

[29] I have referred to the conduct of the District Board, and said that it has been disingenuous. The conduct of the petitioning Company has also been far from strictly correct. If the District Board has shown an anxiety to assume control of the undertaking before all the formalities of the purchase have been completed, the petitioning Company has in its turn obstructed at every step the speedy termination of the arbitral proceeding in connection with the settlement of the price which the District Board have to pay (see in this connection the proceedings before the arbitrators, copies where of have been filed before us). I have expressed my views on some of the contentions raised, for the disposal of the present applications; but in view of the conduct of the parties there is no reason why they should not be left to fight out their battle in a properly constituted suit in a Civil Court of competent jurisdiction. I do not think that this is a proper case for the issue of a writ of *mandamus* under Art. 226.

[30] For these reasons, I concur in the orders proposed to be passed by my learned brother.

D.H. *Petition dismissed.*

A. I. R. (38) 1951 Patna 242 *[C. N. 48.]*

DAS AND SINHA JJ.

Inderdeo Singh and others— Petitioners v. *The State.*

Criminal Revn. No. 488 of 1950, D/- 17-8-1950.

(a) Public Safety—Bihar Maintenance of Public Order (No. 2) Ordinance (IV [4] of 1949), S. 6 (2) —Public procession—What constitutes.

Where a procession is taken out at a public place, it is going along a public thoroughfare to a meeting which is admittedly public, the purpose of procession is public i. e., a purpose of a party as opposed to a private purpose, and it is open to the public or a class of the public to join in the procession, the reasonable inference from the proved facts is that the procession is public. [Para 6]

(b) Public Safety—Bihar Maintenance of Public Order (No. 2) Ordinance (IV [4] of 1949), S. 6 — Holding of procession—What amounts.

Where certain persons, who were members of Communist party led a procession arranged by the communist party, carried communist flags and were most vociferous in the slogans which the processionists shouted it must be held that such persons held the procession. [Para 7]

(c) Constitution of India, Art. 19 (1) (b), (3) — Unreasonable restrictions—Public Safety — Bihar Maintenance of Public Order Act (III [3] of 1950), S. 9.

The restriction imposed by the Bihar Maintenance of Public Order Act, so far as it relates to public processions, etc. was not unreasonable. [Para 8]

(d) Public Safety—Bihar Maintenance of Public Order (No. 2) Ordinance (IV [4] of 1949), S. 6 — Bihar Maintenance of Public Order Act (III [3] of 1950), S. 9—Whether *ultra vires*.

The words 'public safety' and 'public order' are interchangeable terms in the context in which they have been used and S. 6 of the Ordinance or S. 9 of the Act was not *ultra vires* the State Legislature. [Para 9]

Basanta Chandra Ghosh and D. K. Sinha — for Petitioners; Standing Counsel—for the State.

Das J.— The five petitioners have been convicted of contravening an order passed under S. 6, Bihar Maintenance of Public Order (No. 2) Ordinance, 1949, and sentenced to rigorous imprisonment for one year each. Section 6 of the said Ordinance, so far as it is relevant for our purpose, reads thus:

"The Provincial Government may, for the purpose of securing the public safety or the maintenance of public order, by general or special order, prohibit, restrict or impose conditions upon, the holding of or taking part in public processions, meetings or assemblies."

On 25-6-1949, the Provincial Government passed the following order purporting to act under the provisions of S. 6:

"In exercise of the powers conferred by sub-s. (1) of S. 6, Bihar Maintenance of Public Order (No. 2) Ordinance, 1949, and for the purpose of securing the public safety and the maintenance of public order, the Governor of Bihar is pleased to direct that no public meeting or procession shall be held without the permission of the District Magistrate or the Additional District Magistrate of the district;

Provided that this order shall not apply to marriage and funeral processions or to condolence meetings and public meetings held for purely literary purposes."

[2] The allegation against the petitioners was that on 15-8-1949, a day set apart for the celebration of independence of this country, the petitioners along with other members of the communist party took out a procession in order to join a public meeting convened by the said party near a lower primary school of village Kazi Fatu Chak, for the purpose of proclaiming the creed of the party and condemning those in charge of the Government of the country. The Sub-Inspector of Police of Barbigha police station, received an information that such meeting was going to be held, and having received that information on 14-8-1949, he went to the place on 15th, saw the procession and dispersed it before any meeting could be held. The five-

petitioners, it was alleged, headed the procession, carried communist flags and shouted slogans condemning capitalism and praying for the destruction of what had been termed as "Jawahar Raj" meaning probably the authority of the Prime Minister of India.

[3] The Courts below found the petitioners guilty of contravening the order quoted above, inasmuch as no permission of the District Magistrate or the Additional District Magistrate was taken for holding the procession in question.

[4] Learned counsel for the petitioners has addressed us at great length on the legality or otherwise of the conviction. He has raised several points, and I propose to deal with them briefly in view of the order which we are passing in this case.

[5] The first point urged before us is that there is no finding that the procession in question was a public procession. It is stated that in the charge or in the judgment of the trying Magistrate, there is no mention of the word "Public". It is argued that though the learned Sessions Judge who heard the appeal of the petitioners, stated in the concluding part of his judgment that the procession was a public procession, he did not really apply his mind to the question, nor did he find the necessary facts which would lead to the inference that the procession was a public procession. It is to be observed that s. 6 (1) of the Ordinance, which I have already quoted, refers to public procession, meeting or assemblies. Sub-section (2) of the said section explains what is meant by a pubic procession. That sub-section is in the following terms :

"For the purpose of sub-s. (1), any procession, meeting or assembly which is open to the public or to any class or portion of the public, whether held in a public or a private place and whether admission thereto is restricted by the issue of tickets or otherwise, shall be deemed to be a public procession, meeting or assembly, as the case may."

Learned counsel for the petitioners contends that the real test according to the explanation given in sub-s. (2), is whether the procession in question was open to the public or to any class or portion of the public. It is contended that no evidence was led on that point, and no finding arrived at by the Courts below that the procession in question was open to the public or to any class or portion of the public. In the circumstances, it is contended that the conviction of the petitioners was bad in law.

[6] Learned counsel for the petitioners has taken us through the evidence in the case. He has also referred us to a decision of the Bombay High Court in *Shankar Papayya* v. *Emperor*, A. I. R. (30) 1948 Bom. 177 : (44 Cr. L. J. 580). Having examined the evidence, we find that the following facts are sufficiently clear and established. The procession was being taken out or held at a public place. It was going along a public thoroughfare to a meeting which undoubtedly was public meeting, though called by the communist party in furtherance of the objects of that party. Learned counsel does not dispute that the meeting called for that day near the lower primary school was a public meeting. He has confined his argument to the question whether the procession was a public procession. It is clearly proved that the processionists were going to that public meeting. Secondly, the purpose of the procession, as also of the public meeting, was a public purpose,—the purpose of a party, as opposed to a private or individual purpose, the purpose being the furtherance of the objects of the communist party and the condemnation of the powers that be. The slogans which the processionists shouted, make that sufficiently clear. Thirdly, there is clear evidence, of at least, one witness, if not of more, that the procession was a procession of the communist party. There is clear evidence in the record that besides the five petitioners, there were others. There is also evidence that there were sight seers by the side of the road, as the procession went along a public thoroughfare. It is to be observed that the test laid down is not whether sight-seers actually joined the procession ; but that test is whether it was open to the members of the public or of a class of the public, to join in the procession. There is no evidence that the procession, while it was proceeding along a public thoroughfare, had imposed any restriction on the joining of any outsider in the procession, or of any sympathiser in the procession. In my opinion, the question is one of a reasonable inference from the facts established. I am of the view that the only reasonable inference from the facts proved in the case is that the procession was a public procession within the meaning of sub s (2) of S. 6 of the Ordinance. I may observe here that sub-s (2) of S. 6 of the Ordinance enlarges, rather than restricts, the ordinary concept of a public procession. Learned counsel for the petitioners has very vehemently contended before us that it would be throwing the onus on the accused person to draw an inference from the negative, namely, that there was no restriction against anybody joining the procession. His contention is that it was for the prosecution to prove affirmatively that a member of the public or a class of the public could join in the procession. As I have already said, the question is not really one of onus of proof, but of a reasonable inference to be drawn from the facts proved in the case. On that evidence I am satisfied that

the procession in question was a public procession within the meaning of sub-s. (2) of S. 6 of the Ordinance.

[7] Secondly, it is contended that S. 6 makes a difference between *holding* a public procession and *taking part* in a public procession. I agree that the distinction is between holding a procession and taking part in a procession; but, let it be remembered not between *holding* a procession and *taking out* a procession. Taking out a procession may mean the same thing as holding a procession. The juxtaposition in S. 6 of the Ordinance is between holding a procession or taking part in a procession. The distinction between the two is, I think, quite appreciable. A person walking along a street sees a procession passing if he is a person who is hesitant or of quiet disposition, he may merely look at the procession, and let it pass by. A person who is not so quiet, may join the procession, either for fun or because he sympathises with the object of the procession. That, in my opinion, would be taking part in a procession. But holding a procession imports, in my opinion, some idea of leading, arranging. convoking, etc. The facts proved in this case show that the procession was arrarged by the communist party. The petitioners are members of that party. The petitioners led the procession. They carried communist flags and were most vociferous in the slogans which the processionists shouted. In these circumstances, I do not think that the Courts below were wrong in finding that the petitioners held the procession in contravention of the order to which I have already made a reference. The entire set of circumstances has to be kept in mind; namely, a public meeting had been called for that day at the lower primary school by the same party which had arranged the procession, and the petitioners were leading the procession to that place. The words 'to hold' have innumerable shades of meaning. With regard to processions, public meetings, etc. the meaning given in the Oxford Dictionary is "to keep together, to keep in being, existence, or operation, to carry on; to convoke and preside over (a meeting assembly, council, or the like); to go through formally, perform (any proceeding or function); to keep. observe, celebrate (a festival); to carry on, sustain, etc." If the expression "to hold" is read in the context in which it occurs in S. 6 of the Ordinance and the ordinary meaning of the word, I do not think that it can be argued with success that the petitioners were not holding a public procession within the meaning of S. 6 of the Ordinance.

[8] This brings me to the last contention. The Ordinance in question was repealed by the Bihar Maintenance of Public Order Act, 1949, which came into force on 4-1-1950. The conviction in this case was recorded on 7-12-1949. The relevant portion of S. 26, Bihar Maintenance of Public Order Act, 1949, is in these terms :

"All proceedings commenced, officers appointed or authorised, rules and orders made, sentences passed or acts ordered or done, in exercise of any jurisdiction or power conferred by or under the provisions of the said Ordinance, shall be continued and be deemed to have been respectively commenced, appointed or authorised, made, passed, ordered or done under this Act and any enactment or document referring to any of the said provisions shall be construed to refer to this Act or to the corresponding provision thereof."

It is contended that the sentence which was passed on the petitioners under the ordinance will, under S. 26, Bihar Maintenance of Public Order Act, 1949, be deemed to be a sentence passed under the latter Act. The next step in the argument of learned counsel for the petitioners is that on 26-1-1950, the day on which the Constitution of India came into force, the Bihar Maintenance of Public Order Act was rendered void so far as the relevant section relating to the banning of public processions, etc. was concerned; because that section came in conflict with Art. 19 (1) (b), Constitution of India. Article 19 (1) (b), Constitution of India is in these terms :

"19 (1) All citizens shall have the right—

* * * * *

(b) to assemble peaceably and without arms."

It is contended that as the relevant section of the Bihar Maintenance of Public Order Act, 1949, became void on 26-1-1950, the sentence must also fall on that very day, and the petitioners could not be detained beyond that date under any sentence passed against them. This argument of learned counsel for the petitioners overlooks, in my opinion, an important clause, namely, cl. (3) of Art. 19, Constitution of India. That clause is in these terms :

"Nothing in sub-cl. (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause."

Therefore, the question is whether the relevant section of the Bihar Maintenance of Public Order Act relating to the banning of public procession, etc., was an unreasonable restriction in the exercise of the right conferred by Art. 19 (1) (b), Constitution of India. In my opinion, it is sufficient to state that the restriction imposed by the Bihar Maintenance of Public Order Act, so far as it related to public processions, etc., was not unreasonable; and therefore, it cannot be held that on 26-1-1950, the sentence passed against the petitioners fell along with the relevant section of the Bihar Maintenance of Public Order Act, 1949. The restriction actually imposed cannot be said to be unreasonable — judged by any standard (see in this connection *Dr. N. B. Khare* v. *The State of Delhi*, (A. I. R. (37) 1950

S. C. 211) : this apart from the question whether a sentence legally passed can be void by reason of repeal of the law under which it was passed.

[9] There is another branch of the argument. It is contended that in S. 6 of the Ordinance as well as in S. 9, Bihar Maintenance of Public Order Act, the expression used is "for the purpose of securing the public safety or the maintenance of public order." It is contended that under the Government of India Act, 1935, the Provincial legislature had no authority to make a law with regard to the public safety, but had authority to make a law with regard to the maintenance of public order only. It is contended that inasmuch as S. 9, Bihar Maintenance of Public Order Act, refers both to public safety or maintenance of public order (the word "or" being used in a disjunctive sense, it is contended), that particular section was beyond the Legislative competence of the Provincial legislature. In my opinion, the words "public safety" and "public order" are inter-changeable terms in the context in which they have been used. I am unable to agree with the contention that S. 6 of the Ordinance or S. 9, Bihar Maintenance of Public Order Act, 1949, was *ultra vires* the Provincial legislature.

[10] The contention raised on behalf of the petitioners fail. The only other question for consideration is the question of sentence. It is stated by learned counsel for the petitioners that they have already been in jail for more than six months, probably seven or eight months. It appears that the maximum sentence which could be imposed under the law was awarded against the petitioners. I do not think that the ends of justice require that in the present case the maximum sentence should be imposed. I think that the ends of justice will be fully met if the conviction of the petitioners is upheld, but the sentence is reduced to the period already undergone. I would accordingly, reject the petition, subject to the modification of the sentence referred to above. The petitioners should now be released from custody.

[11] **Sinha J.**—I agree.

D.H. *Order accordingly.*

A. I. R. (38) 1951 Patna 245 *[C. N. 49.]*

JHA C. J. AND REUBEN J.

Bashir and another — Petitioners v. *The State.*

Cri. Revn. No. 842 of 1950, D/- 16-8-1950.

Essential Supplies (Temporary Powers) Act (1946), Ss. 4, 7 and 8—Notification No. 538 P. C. of 9-1-1948 of Bihar Govt., has no effect of prohibiting transport of essential commodities from Bihar to place outside India.

According to the order, under S. 4 of the Central Government delegating its power of regulating or prohibiting production, supply or distribution of essential commodities, to the Provincial Government, the delegation was made subject to an important restriction, namely, "No order made in the exercise of the aforesaid powers shall have effect so as to prohibit or restrict the export, from any place in the province to any place outside India, of any articles or things." [Para 3]

Consequently, Notifn. No. 538 P. C., dated 9-1-1948 issued by the Bihar Government under the delegated powers, prohibiting the export of the essential commodities outside the limits of Bihar does not operate to prevent the transport of essential commodities from the Province to a place outside India (to Nepal) A. I. R. (33) 1946 Pat. 158, *Rel. on.* [Para 3]

S. Sarwar Ali—for Petitioners; *The Advocate-General—for the State.*

Reuben J.—The petitioners have been convicted by the 1st Class Magistrate of Kishanganj under S. 7, read with S. 8, Essential Supplies (Temporary powers) Act, 1946, (Central Act XXIV [24] of 1946), and sentenced each to rigorous imprisonment for four months. Also, the essential commodities, namely, paddy and rice, in respect of which the offence, of which they have been convicted is said to have been committed, have been forfeited under the provisions of the Act. The conviction, the sentence and the order of the forfeiture have been upheld in appeal by the Additional Sessions Judge of Purnea.

[2] The offence is found to have been committed by the petitioners by attempting on the night of 17-11-1948 at Baisabari Ghat, police station Thakurganj, to carry rice and paddy beyond the permitted limit to Nepal, in contravention of a notification (Notifn. No. 538 P. C., dated 9.1-1948) issued by the Bihar Government.

[3] It is contended on behalf of the petitioners that the order of the Government of Bihar in question does not operate to prevent the transport of essential commodities from the Province to a place outside India and, therefore, the action of which the petitioners have been found guilty was not in contravention of the Government order. Paddy and rice are essential commodities within the provisions of Act XXIV [24]. Under S. 3 of the Act, the Central Government is empowered by notified order to provide for regulating or prohibiting the production, supply and distribution of essential commodities, and trade and commerce therein. Under S. 4 the Central Government is empowered to delegate its powers under S. 3, among others, to a Provincial Government; this delegation to be subject to such condit ons, if any, as may be specified in the direction under S. 4. The delegation of powers in the present case was made under the Essential Supplies (Tem-

porary powers) Ordinance, 1946, and under S. 17 of Act XXIV [24] is to be treated as delegation made under the Act. The delegation was made subject to an important restriction, namely,

"No order made in the exercise of the aforesaid powers shall have effect so as to prohibit or restrict the export, from any place in the province to any place outside India, of any Articles or things."

The order of the Provincial Government which is found to have been contravened is as follows:

"No person shall export or carry or cause to be exported or carried by rail, river or road any quantity of any of the commodities specified in the schedule annexed hereto or any product thereof from any district in the Province of Bihar to any place outside the Province of Bihar except with the written permission of the Chief Controller of prices and supplies, Bihar:

Provided that a *bona fide* traveller may, without such permission, carry as part of his personal luggage any quantity not exceeding ten seers of each of the said commodities:

Provided further that nothing in this order shall apply to the export or carriage of commodities booked or despatched under Military Credit Notes."

It is admitted that the petitioners had no written permission from anybody and that they do not come within either of these provisos. But it is urged that the effect of the restriction placed on the powers of the Provincial Government is to prevent the order operating as against export from India into a foreign country.

[4] It has been strenuously argued in support of the conviction that the essence of the offence consists in the attempt which the petitioners were making to take the essential commodities outside the province. It does not matter, it is said, whether the articles were going to a place inside India or outside it; what is forbidden by the Provincial Government order is the removal of the prohibited articles from any place in the Province to any place outside. This order, however, must be read subject to the condition imposed by the Central Government when delegating power to the Provincial Government. That limitation says that the Government order shall not have effect to prohibit or restrict export from a place in the Province to a place outside India. Here we are concerned with articles which were in the act of being transported from Purnea into the adjoining country of Nepal. If it be held that the order of the Provincial Government applies to prevent the passage of these articles, it clearly contravenes the restriction aforesaid.

[5] It has been urged that the object of the restriction was to prevent a conflict between such order as might be passed by the Provincial Government and a permit for export that might have been issued by the Central Government allowing the transport from the Province to a foreign country. In other words, the argument is that the powers of the Provincial Government are limited to the restriction of export which is not sanctioned by a lawful permit. This interpretation involves the reading of the word "lawful" before the word "export" in the limitation as contained in the Central Government notification. I see no justification for reading this word into the notification.

[6] Thirdly, it was urged that the word "export" in the Central Government notification relates to export in the commercial sense, that is export for the purposes of trade; whereas the defence of the petitioners was that they were taking the paddy and rice for their own consumption. The word "export" has a well accepted dictionary meaning. It is derived from two Latin words; *ex*, meaning from, and *portare*, meaning to carry. In the context in which it occurs in the Central Government notification there is no reason for understanding it to be used in a special sense. The dictionary sense is the sense in which we find the word used in the Bihar and Orissa Excise Act of 1914. We find this also in the Dangerous Drugs Act, 1930, (Central Act II [2] of 1930).

[7] The present case is to my mind, exactly covered by a decision of this Court reported in *Kumanchand* v. *Emperor*, 24 Pat. 685: (A. I. R. (33) 1946 Pat. 158: 47 Cr. L. J. 945).

[8] On the above grounds I would allow this petition, set aside the conviction and sentences of the accused petitioners and direct that they be acquitted. They will now be discharged from their bail. The articles confiscated shall be returned to them. This will apply to the price, if the articles have been sold.

[9] **Jha C. J.**—I agree.

R.G.D. *Revision allowed.*

A. I. R. (38) 1951 Patna 246 *[C. N. 50.]*

SHEARER AND DAS JJ.

Sir Kameshwar Singh — Plaintiff v. *Province of Bihar—Defendant.*

Title Suit No. 1 of 1949, D/ 24-1-1950.

(a) Bihar Abolition of Zamindaris Repealing Act (IX [9] of 1950)—Act is *intra vires.*

The Bihar Abolition of Zamindaris Repealing Act is *intra vires* of the Provincial Legislature. The Repealing Act does not create any repugnancy, on the contrary it removes the repugnancy, if any, created by the Bihar Abolition of Zamindaris Act. The Act having been enacted by the proper legislative authority of the Province viz., the two Chambers and His Majesty represented by the Governor, is perfectly valid and the absence of assent of the Governor-General does not invalidate it. [Paras 4 & 8]

(b) Government of India Act (1935), S. 107 — Scope of.

Section 107 does not set up any enacting authority, nor does it deal with competency or power to legislate

in the strict sense of the term. It merely states what will happen in the case of inconsistency between Dominion law and Provincial Law, and in sub-s. (2) lays down how to get over a repugnancy of a particular character. It does not deal with the question of *ultra vires*, which is far more fundamental than mere repugnancy. [Para 8]

A Provincial law even with regard to a matter enumerated in the Concurrent List does not become bad, merely because the assent of the Governor-General has not been taken. The only effect of S. 107 is that, in the absence such assent, the Provincial law will be void to the extent of the repugnancy, may be in part or entirety. But S. 107 can have no application when there is no repugnancy. [Para 8]

Anno. Gov. of India Act, S. 107, N. 1.

(c) Constitutional Law—Ultra vires—Impugned Act repealed—Effect.

Where during the pendency of a suit for a declaration that a certain Act is unconstitutional and for an injunction restraining the Government from enforcing it the impugned Act, is validly repealed and is no longer on the statute book, the effect is to deprive the plaintiff of his cause of action for the suit and it is unnecessary to pronounce on its validity or otherwise. A Court will not decide a constitutional question which is merely academic and has no live relation to the rights of the parties: A. I. R. (26) 1939 P. C. 53, *Rel. on*; (1871) L.R. 4 H. L. 661 and (1837) 112 E. R. 360, *Distting.* [Paras 4, 10 and 11]

P. R. Das, N. C. Chatterji, S. P. Srivastava, Balbhadra Prasad Singh, Priya Nath Mitra, Raghunath Jha and Girendra Mohan Misra—for Plaintiff; Sir Alladi Krishnaswami Aiyar, M. C. Setalvad, The Advocate General Bihar, Bajrang Sahai and S. C. Chakraverty—for Defendant.

Shearer J.— The object of the British Parliament in enacting sub-s. (2) of S. 299, Government of India Act 1935, and of His Majesty the King in inserting in the Instruments of Instructions, which were issued under the Royal sign Manual to the Governor-General and to the Governors of Provinces, a direction not to assent to any bill regarding which they felt doubt, whether it did or did not offend against that section, was to secure owners of property in the enjoyment of their rights and to ensure that, in the event of the State, in exercise of the right known to American jurists as the right of eminent domain, depriving them of their property, they should receive compensation, meaning thereby the value in money of the property to the owner at the time at which he is called upon to relinquish it On 6-7-1949, the Governor General gave his assent to an Act entitled the Bihar Abolition of Zamindaris Act, 1948 (Bihar Act XVIII [18] of 1948). That Act empowered the Provincial Government to deprive proprietors and tenure-holders of their estates and tenures It provided or purported to provide, for the payment of compensation to them, but the compensation was not, and perhaps, in the circumstances of the case, could not be, compensation within the meaning of the term as used in such statutes as the Consolidation of Lands Clauses Act in England or the Land Acquisition Act in India. The plaintiff who is the owner of the largest and one of the oldest zamindaris in Bihar, thereupon instituted a suit in which he asked for a declaration that the Bihar Abolition of Zamindaris Act, 1948, was an unconstitutional law and for an injunction restraining the Government of Bihar from putting it into operation. The suit was instituted in the Court of the Subordinate Judge at Darbhanga, and on 25 11-1949, was removed to this Court to be tried by it in exercise of its extra-ordinary original civil jurisdiction on 9-12-1949, a bill, entitled the Bihar Land Reforms Bill, 1949, was published, and was later introduced in the Bihar Legislative Assembly. Many of the provisions contained in this bill are provisions which were contained in the Abolition of Zamindaris Act, 1948. Clause 44 of the bill contained the following: "The Bihar Abolition of Zamindaris Act, 1948, is hereby repealed." Subsequently, however, this clause in the bill was deleted and a separate Act, entitled the "Bihar Abolition of Zamindaris Repealing Act, 1950 (Bihar Act IX [9] of 1950)", was passed by the Bihar legislature. This Act was assented to by the Governor of Bihar on 18-1-1950, that is, on the day before that on which this suit was set down for hearing. A preliminary issue has therefore been framed as to whether, in consequence of this enactment, any cause of action, which the plaintiff had or may have had, has not been taken away and whether or not the suit can or ought to proceed.

[2] As I have just said, while assent to the Bihar Abolition of Zamindaris Act, 1948, was given by the Governor-General, assent to the Act which repeals, or purports to repeal it was given by the Governor. The main argument which had been addressed to us by Mr. P. R. Das for the plaintiff, on the preliminary issue is based on this circumstance and is, in short that the legislative body or authority which has purported to repeal the Act is not the legislative body or authority which enacted it. The legislative body or authority, it is said, consisted, in the former case, of the Governor and the two Chambers of the legislature, and, in the latter case, of the Governor-General and the two Chambers of the legislature. It is, Mr. P. R. Das said, axiomatic that the legislative body or authority which is competent to repeal an act must be the same legislative body or authority as enacted it, or a legislative body or authority having powers co-extensive with the powers of the legislative body or authority which enacted it. It necessarily follows, it is

suggested, that the repealing Act is null and void, that, in consequence, the impugned Act still remains on the statute book and that the plaintiff is entitled to show and, if he succeeds in showing, to obtain, a declaration, that the impugned Act is an unconstitutional law. The short answer to the contention put forward by the learned counsel for the plaintiff is, in my opinion, that the legislature which has repealed the Act is the same legislature as enacted it, namely, the legislature consisting of His Majesty and of the Bihar Legislative Assembly and the Bihar Legislative Council. Section 60 (1), Government of India Act, 1935, states:

"There shall for every Province be a Provincial Legislature which shall consist of His Majesty, represented by the Governor, and ..... in the Province of Bihar, two Chambers."

Section 75 of the Act states:

"A Bill which has been passed .... by both Chambers of the Provincial Legislature, shall be presented to the Governor, and the Governor shall declare either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom, or that he reserves the Bill for the consideration of the Governor-General."

Section 76 (1) states:

"When a Bill is reserved by a Governor for the consideration of the Governor-General, the Governor-General shall declare, either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom."

His Majesty is as much a branch of the legislature in each of the Dominions and of the Legislature in each of the States or provinces comprised in each Dominion, as he is a branch of the Parliament of the United Kingdom of Great Britain and Northern Ireland, which consists of His Majesty, the Lords Spiritual and Temporal, and the Commons. The circumstance that each of the Constitution Acts of the Dominions contain, or at one time contained, provisions authorising or requiring a Governor to reserve bills for the consideration of the Governor-General, and provisions authorising or requiring the Governor-General to reserve bills for the signification of His Majesty's pleasure, itself goes to show that the assent of the King to proposed laws is His Majesty's assent as a separate, independent and co-equal branch of the legislature in which the proposed law has been introduced (*Vide* Quick and Garran on the Constitution of the Australian Commonwealth, p. 689). In order to understand how provisions of this kind came to be inserted in the Constitution Acts of the Dominions, it is necessary to go back into history. The right of His Majesty to assent to, or withhold his assent from, any legislation proposed to be passed by a Colonial legislature is part of the royal prerogative. It would obviously have been in the highest degree inconvenient that, before any proposed law could be enacted and given effect to, the proposed law should actually be laid before His Majesty for his assent to be formally given to it. His Majesty's assent to a proposed law in some distant colony could not be so easily obtained as His assent to a bill which had passed through both Houses of the Imperial Parliament. Yet delay in obtaining His Majesty's assent might have had disastrous consequences. Powers were, therefore, given to the Governors of colonies to assent in His Majesty's name to proposed laws, their discretion in this matter being, however, limited by the Instrument of Instructions issued to them (*vide* S. 4, Colonial Laws Validity Act, 1865). In the first decade, after the passing of the British North America Act, 1867, no fewer than twenty-one bills were reserved by the Governor-General for the signification of His Majesty's pleasure (*vide* Egerton on Federations and Unions in the British Empire, p. 137). Shortly afterwards, however, the practice of reserving bills was abandoned, it being considered that the power of His Majesty to disallow Acts passed by a Dominion Legislature was sufficient for the protection of imperial interests. Finally, as a result of the resolutions of the Imperial Conference of 1930, a convention was established that Dominion Acts cannot constitutionally be disallowed by the Crown on the advice of British Ministers, nor can assent be refused to reserved bills, nor bills be reserved save on Dominion advice. By the Indian Independence Act, 1947, India became a Dominion, and sub-s. (3) of S. 6 of the Act provided that

"so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of laws until the signification of His Majesty's pleasure thereon shall not apply to laws of the Legislature of either of the new Dominions."

Nevertheless, although the Governor-General directly, and the Governors of Provinces indirectly, are no longer required by any Instrument of Instructions to reserve bills for the signification of His Majesty's pleasure, Governors are still required or authorised to reserve certain bills for the consideration of the Governor-General under sub-s. (2) of S. 107, Government of India Act. Section 90, British North America Act, 1867, similarly empowers the Lieutenant Governors of Canadian Provinces to reserve bills for the consideration of the Governor-General of Canada. A device invented by British statesmen a century ago for the protection of imperial interests and the prevention of international incidents has been made to subserve another and very different purpose. The provisions in the Constitution Acts of India and

Canada, to which I have just referred, are now used for substantially the same purpose, namely to ensure that a Provincial Legislature does not enact a law which is illegal or unconstitutional in whole or part, or a law clashing with the legislation of the Federal Legislature. The necessity for a provision of this kind in the Indian Constitution Act is the greater, as in a large number of matters the Federal and Provincial Legislatures have concurrent powers. Mr. P. R. Das, is, of course, correct to this extent, that an Act of the Provincial Legislature may be unconstitutional if it has received the assent of the Governor and yet would have been constitutional if it had received the assent of the Governor-General. It does not, however, at all follow that the criterion to be adopted in deciding whether a law is or is not unconstitutional, is to see whether it has been assented to in the name of His Majesty by the one representative of His Majesty or the other representative. The criterion must, in each case, be whether the Provincial law deals with a matter enumerated in the Concurrent Legislative List and, if so, whether it contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter. It may well be that the Bihar Abolition of Zamindaris Act, 1948, dealt with matters enumerated in the Concurrent Legislative List and contained provisions repugnant to the provisions of an existing law, or existing laws, of the Federal Legislature with respect to these matters. Presumably, it did, in fact, contain such provisions, or was believed to contain such provisions, as the object of reserving the bill for the assent of the Governor-General was to ensure that the bill should be subjected to scrutiny by the legal advisers of the Government of India in order that the Government of India might decide whether, if the effect of it was to make the law in certain matters in Bihar different from the law in these matters prevailing in other provinces, there was, on grounds of policy, any objection to this. It is important to notice that the checks on, or safeguards against, a clash between laws passed by the Federal and the Provincial Legislatures which were devised by the British Parliament and embodied in S. 107 (2) and other connected sections of the Government of India Act were twofold. In the first place, when a proposed law of a Provincial Legislature has the effect of altering or repealing an Act of the Federal legislature, it has to be reserved for the consideration of the Governor-General. Secondly, when the Governor-General has given his assent to such a proposed law and, in consequence, the law which obtains in that province is different from the law, which prevails in other provinces, no proposed law which has the effect of again altering that law, can be introduced in the Federal Legislature without the previous sanction of the Governor-General. While, however, the Federal Legislature cannot repeal the Provincial law unless the repealing bill has received the previous sanction of the Governor-General before it is introduced in the Federal Legislature there is clearly nothing to prevent the Provincial Legislature itself repealing it. The effect of the repeal is merely to restore the *status quo ante* and to bring the law in that province once more into conformity with the law prevailing in the rest of India. There is, on principle, no reason why, before such a course is taken by a Provincial Government, the Government of India should be consulted. In fact, as the original object of His Majesty in delegating to the Governors of Provinces authority to assent in His name to proposed legislation was to avoid unnecessary delay in His assent being obtained, there is every reason why an Act which merely repeals an existing Act, and does not purport to do anything more, should not be reserved

[3] Mr. N. C. Chatterji, who followed Mr. P. R. Das, for the plaintiff, put forward an argument which, I must confess, I had some difficulty in comprehending. The question or one of the questions, raised in the preliminary issue is as to whether the Bihar Abolition of Zamindaris Repealing Act, 1950, is *intra vires* of the Provincial Legislature. If, Mr. Chatterji said, the Bihar Abolition of Zamindaris Act, 1948, is itself void and of no effect the Bihar Abolition of Zamindaris Repealing Act, 1950, is similarly and necessarily void and of no effect. In other words, if I understood the argument correctly, Mr. Chatterji contended that it was impossible to distinguish between the two Acts and that, in consequence, we must consider and could not avoid deciding, whether the Bihar Abolition of Zamindaris Act, 1948, was or was not an unconstitutional law. There is, in my opinion, no substance in this argument. It is, of course, true that an unconstitutional law has no validity whatever, and that rights which it may purport to take away from individuals continue to exist to the same extent as they would have existed if the law had never been enacted. On the other hand, a law is not an unconstitutional law unless and until it has been so decided by a judicial tribunal competent to pronounce on its validity. Moreover, unless and until a question as to its validity is directly raised and a Court of law has no option but to decide it, the Courts must proceed on the assumption that the law is a valid law. In that situation, it appears to me that, if the validity of the repealing Act can be

questioned at all, it can be questioned only on the ground raised by Mr. P. R. Das, namely, that in enacting it the proper procedure was not followed, and for the reasons just given, that ground must fail. There is another and more cogent reason for our declining to go into the question which Mr. Chatterji asks us to, namely, that as the impugned Act has been repealed, the Government of Bihar is debarred from taking any action under it. If, however, no action can be taken under the impugned Act, the question as to whether that Act was or was not an unconstitutional law becomes a question of purely academic interest. Sir Alladi Krishnaswamy Ayyar, for the defendant, cited a number of authorities to show that the Courts will not decide such questions. One of these decisions namely, *Attorney-General for Alberta* v. *Attorney General for Canada*, 1939 A. C. 117 : (A. I. R. (26) 1939 P. C. 53), is very much in point. That was an appeal against an opinion expressed by the Supreme Court of Canada that two bills which had been introduced in the legislature of the Province of Alberta were *ultra vires* of that legislature. If the proposed laws had been enacted, no action could have been taken under them except under and in accordance with certain provisions contained in another Act, known as the Alberta Social Credit Act. During the pendency of the appeal this Act was, however, repealed. Lord Maugham, after observing that the bills could no longer be brought into operation, said:

"Since nothing can be done thereunder, the appeal from the order of the Supreme Court is one of no practical interest. It is contrary to the long established practice of this Board to entertain appeals which have no relation to existing rights created or purported to be created ; and their Lordships have, therefore, found it necessary to decline to hear arguments on this appeal in so far as it relates to the bills."

The other decisions cited were *Sun Life Assurance Co. of Canada* v. *Jervis*, 1944 A. C. 111 : (113 L. J. K. B. 174), and *Lawrence P. Mills* v. *W. Briggs Green*, 159 U. S S C. R. 651.

[4] Paragraph 10 of the plaint is as follows :

"The plaintiff is further advised and submits that his title to the said properties will subsist notwithstanding any notification that may be issued by the defendant declaring that the estates or tenures of the plaintiff have passed to and become vested in the Crown. He further submits that the promulgation of the said Act by the defendant constitutes an infringement, or a threatened infringement, upon his title to the properties collectively known as "Raj Reyasat Darbhanga" and that as a cloud has been thrown upon his title, he is entitled to a declaration that the said Act is wholly void and inoperative."

As I have already said, while the Bihar Abolition of Zamindaris Act, 1948, has been repealed, a bill which contains precisely the same provisions has been introduced in the Provincial Legislature. Mr. P. R. Das, for the plaintiff, made a great deal of this and said, more than once, that the cloud which had been cast on his client's title and which constituted his cause of action had not been dissipated. The defendant, however, does not deny the title of the plaintiff and the suit cannot be said to be a suit falling under Ill. (g), S. 42, Specific Relief Act. The intention of the Crown, as manifested in the bill now pending in the Legislative Assembly, is to deprive the plaintiff of his property in exercise of its sovereign powers. That the right or power of the State to deprive a citizen of his property is one of the incidents of sovereignty, there can be no question. In most democratic countries, the Constitution imposes on the exercise of this power a twofold limitation. In the first place, it is to be used only for the enjoyment and exercise of the powers conferred on the executive and, secondly, when it is used, it is to be used "on just terms", to borrow the expression used in the Australian Constitution Act (*vide* cl. XXXI of S. 51, Commonwealth of Australian Constitution Act). The people of India have adopted a Constitution and that Constitution is to come into operation in the course of this week. What limitations the Constitution imposes on the exercise of the right of eminent domain is a matter to be determined hereafter. For the present, it is enough to say that the Bihar Abolition of Zamidaris Repealing Act, 1950, is *intra vires* of the Provincial Legislature and that the effect of that Act is to deprive the plaintiff of the cause of action on which he sued. Mr. P. R. Das suggested that, as we were not a final Court of appeal, we ought to decide the other issues. We have, however, a discretion in the matter and, in my opinion, we would be exercising it wrongly if we went into the other issues. In the events which have happened, the suit cannot and ought not, in my judgment, to proceed. I would accordingly, dismiss it but would make no order for costs against the plaintiff. In order to avoid any misapprehension I wish to say that, as at present advised, I am not prepared to say that when a law is enacted and before it is put into operation or any action is taken under it, a person who may be prejudicially affected by it, is entitled to ask the Courts for a declaration that it is an unconstitutional law.

[5] **Das J.**—I agree.

[6] In view of the importance of the questions raised I would like to state, briefly and in my own words, the conclusions I have reached with regard to the preliminary issue—an issue raised by way of a bar to the suit being proceeded with, on the decision of which, I think, the fate of this suit depends. Mr. Setalvad appearing for the defendant has, I think, rightly pointed out that the preliminary issue consists

of three parts. As a matter of logical sequence, the questions involved in this issue may be stated in the following order—(1) Is the Bihar Abolition of Zamindaris Repealing Act, 1950 (Bihar Act IX [9] of 1950), hereinafter to be referred to as the Repealing Act, validly enacted ; (2) if so, does it take away the plaintiff's cause of action based on the Bihar Abolition of Zamindaris Act, 1948 (Bihar Act XVIII [18] of 1949), hereinafter referred to as the Abolition Act; and (3) should the suit proceed to trial on the other issues?

[7] As to question (1), Mr. P. R. Das appearing for the plaintiff has contended that the Repealing Act is not validly enacted. His main thesis is that the Abolition Act was passed by a different authority, and on the principle that the repealing authority must be the same as the enacting authority, the Repealing Act is bad for want of assent of the Governor-General, which assent was given to the Abolition Act on 6-7-1949. Mr. Das has developed his argument in the following way. He states that from Ss. 99 to 107, and in particular S. 107 (2), Government of India Act, 1935, as adapted by the India (Provisional Constitution) Order, 1947, follows the conclusion that the Governor-General is an integral part of the machinery for legislation when the Provincial Law relates to one of the matters enumerated in the Concurrent Legislative List, particularly to a field already occupied by an earlier Dominion law or existing law. The Abolition Act, according to him, contained provisions repugnant to or in conflict with, provisions of (a) the Civil Procedure Code, (b) the Transfer of Property Act, (c) the Contract Act, (d) the Trusts Act etc. : therefore, under the provisions of sub-s. (2) of S. 107, the Abolition Act required the assent of the Governor-General for its validity. If with regard to the Abolition Act the assent of the Governor-General was necessary, such assent is also necessary for the Repealing Act this, in substance, is the contention of Mr. Das.

[8] In my opinion, the contention has no sound foundation in law. Section 107, Government of India Act, 1935, does not set up any enacting authority, nor does it deal with competency or power to legislate in the strict sense of the term. It merely states what will happen in the case of in consistency between Dominion law and Provincial Law, and in sub-s. (2) lays down how to get over a repugnancy of a particular character. It does not deal with the question of *ultra vires*, which is far more fundamental than mere repugnancy. The position becomes, I think, quite clear, if one examines the provisions in Chap III, Part III, and Chap. I. Part V, Government of India Act, 1935 The former deals with the Provincial Legislature, and the latter with the Distribution of Powers. Under S. 60, the Provincial Legislature of Bihar consists of two Chambers and His Majesty represented by the Governor. That is the legislative body, or the enacting authority Section 73, etc. deal with legislative procedure. Section 75 states that a Bill which has been passed by both Chambers shall be presented to the Governor, and the latter shall declare either that he assents in His Majesty's name to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the Governor General. Section 76 says that when a Bill is reserved for the consideration of the Governor-General, the latter shall declare either that he assents in His Majesty's name to the Bill or he withholds assent therefrom. It is to be observed that the Governor or the Governor-General, as the case may be, acts in the name of His Majesty. Then come Ss. 99 to 107. Section 99 lays down the extent—territorial extent—of different legislatures. Section 100 delimits the field or subject-matter of legislation, with reference to three lists, respectively called the Federal Legislative List (List I), Concurrent Legislative List (List III), and Provincial Legislative List (List II). Under sub-ss. (2) and (3) of S. 100, the Provincial Legislature has power to make laws with respect to any of the matters enumerated in List III and List II. Then there is S. 107, which as I have already said, deals with inconsistency or repugnancy of a particular character. It would, I think, be wrong to assume from the provisions of S 107 that the Governor-General as representing His Majesty is part of the legislative machinery of a Province. The legislative machinery is indicated by S. 60, and not by S. 107. A Provincial law even with regard to a matter enumerated in the Concurrent List does not become bad, merely because the assent of the Governor-General has not been taken. The only effect of S. 107 is that, in the absence of such assent, the Provincial Law will be void to the extent of the repugnancy may be in part or entirety. But surely S. 107 can have no application when there is no repugnancy. The short answer to the argument of Mr. Das, based on S. 107, is that the Repealing Act does not create any repugnancy ; on the contrary, it removes the repugnancy, if any, created by the Abolition Act, the latter Act itself not being either a Dominion law or an existing law as defined in S. 311. The absence of the assent of the Governor-General does not, therefore, invalidate the Repealing Act, which has been enacted by the proper legislative authority of the Province, viz., the two Chambers and His Majesty represented by the Governor. The two decisions Mr. Das relied on are *Rev. Robert Dobie* v. *The Temporalities Board*, (1881) 7

A. C. 136 : (51 L. J. P. C. 26) and *Watson* v. *Winch*, (1916) 1 K. B. 688 : (85 L. J. K. B. 537). In the former the question raised was whether the Legislature of the Province of Quebec had power, in the year 1875, to modify or repeal the enactments of a statute passed by the Parliament of the province of Canada in the year 1858. It was held that the powers conferred by the British North America Act, 1867, S. 129, upon the legislature of Quebec to repeal and alter the statutes of the old Parliament of Canada were co-extensive with the powers of direct legislation with which the said Legislature was invested by the other clauses of the Act of 1867. The question was considered with reference to Ss. 91 and 92 of the British North America Act, which enumerate and define the various matters which are within the exclusive legislative authority of the Parliament of Canada, as well as those in relation to which the Legislature of the respective provinces have the exclusive right of making law. If it cannot be disputed in this case that the Provincial Legislature has power to make laws with regard to compulsory acquisition of land (Item 9 of List II) or land and land tenure, including rights in or overland, (Item 21 of List II) or even with regard to matters enumerated in List III, then on the principle of the decision in *Rev. Robert Dobie* v. *The Temporalities Board*, (1881) 7 A. C. 136 : (51 L. J. P. C. 26), that Legislature will have power to repeal, modify or alter such laws. The question of the assent of the Governor-General will come in, not with regard to the competency or power to legislate but in case there is any repugnancy of the kind mentioned in S. 107.

[9] The second decision on which Mr. Das relies does not lays down any proposition which is of any assistance to him, and it is not necessary to examine that decision.

[10] It remains now to consider another argument urged by Mr. Das but developed more fully by Mr. Chatterji who followed Mr. Das on behalf of the plaintiff. So far as I have been able to understand the argument, its constituent parts may be stated thus: (1) let it be assumed that the Abolition Act was *ultra vires*, being in contravention of the provisions of S. 299, Government of India Act, 1935; (2) on that assumption, the Repealing Act is also a nullity, because that which is *ultra vires* does not exist in law and cannot be repealed ; (3) therefore, it is necessary in this suit to decide whether the Abolition Act was *ultra vires*. In fairness to Mr. Chatterji I must make it clear that he did not state the constituent parts in the way in which I have stated them for the purpose of understanding the implications of his argument. So stated, I think the argument has the obvious fallacy that it assumes the very question to be decided. The Abolition Act was Provincial law till it was repealed, and the effect of the repeal is as if it never existed except as to transactions past and closed. Even assuming that the Abolition Act was bad, it is no longer in the statute book and no judicial intervention is called for with regard to something which does not exist, there being no past transaction under the Act which was never brought into force.

[11] We have been referred to a large number of decisions, some of which my learned brother has noticed, on the point that a Court will not decide a constitutional question which is merely academic and has no live relation to the rights of the parties. I think that it would be otiose on my part to re-examine those decisions, except two on which Mr. Das has relied. The point is summarised at pp. 338-339 of Cooley's Constitutional Limitations (Edn. 8) as follows :

"Neither will a Court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. While Courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extra-judicial disquisition is entitled. In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the Court may rest its judgment, and there by render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable."

In the present suit the plaintiff asks for two reliefs—(1) a declaration that the Abolition Act is *ultra vires* and void ; and (2) an order of injunction restraining the defendant and its officers from issuing any notification under S. 8, Abolition Act, in respect of the properties of the plaintiff. The Abolition Act, having been validly repealed, does not exist, and it is unnecessary to pronounce on its validity or otherwise, because the plaintiff has now no cause of action.

[12] The two decisions on which Mr. Das relied are *The Duke of Newcastle* v. *Robert Morris*, (1871) L. R. 4 H. L. 661 : (40 L. J. Bk. 4) and *Hitchcock* v. *Way*, (1837) 112 E. R. 360 : (6 Ad. & E. 942). In the latter case the action was brought against the acceptor of a bill of exchange by a *bona fide* holder. The bill was drawn and originally accepted in part payment

of a wager on horse-race. It was urged for defence that the bill was void by statute, 9 Ann., c. 14, sec. 1. For the plaintiff stat. 5 and 6, W. 4, c. 41, secs. 1 and 2 was relied upon. The latter Act repealed that part of the earlier statute which made the bill void, and enacted that any bill which, if the latter Act had not passed, would have been void, "shall be deemed and taken to "have been made, drawn" etc., "for an illegal consideration," and the same consequences shall ensue. In those circumstances it was held that the law as it existed when the action was commenced must decide the rights of the parties in the suit, unless the Legislature express a clear intention to vary the relation of litigant parties to each other. In the case before us the very cause of action is taken away by the legislature, and the question of determination of the rights of the parties cannot possibly arise. The other decision rested on the principle thus stated in the head-note :

"Where persons having, as a class, certain privileges, are by statute subjected to certain liabilities, their privileges being expressly reserved to them and other persons having the same privileges, are afterwards, as a class, subjected to the same liabilities, but nothing is said of their privileges, their privileges still continue to exist."

That principle has no application to the facts of the present case.

[13] There has been some argument before us as to the continued threat to the right of the plaintiff in the almost identical clauses of the Land Reforms Bill now pending before the legislature. Mr. Das has suggested that the intention of the defendant is to take advantage of S. 31 (4), Constitution Act, when it comes into force on 26-1-1950, so as to make the acquisition of the plaintiff's property, without payment of adequate compensation, not liable to question in any Court. We are, however, not concerned with questions of motive, expediency or policy, nor with legislative ethics. It may even be doubted if the introduction of a Bill by itself constitutes any threat: the Bill may or may not be passed, or may be passed with different clauses. These are all speculative matters, and, in my opinion, quite outside the province of judicial enquiry on the present occasion. Obviously, what the position of the plaintiff may be when some new law is made cannot be determined now.

[14] For these reasons, my conclusion is that all the three questions involved in the preliminary issue must be answered against the plaintiff, and the suit must fail on that ground.

[15] I also agree with my learned brother as to costs.

K.S. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 253 *[O. N. 51.]*

RAMASWAMI J.

Dewan Singh and others — Petitioners v. *Deo Narain Singh and others — Opposite Party.*

Criminal Revn. No. 737 of 1950, D/- 28-8-1950.

(a) Criminal P. C. (1898), S. 144 (4)—Order under —Clause (4) contemplates only change in nature of order and not a change in party against whom the order is made—Order changing party is without jurisdiction. [Para 3]

Anno : Cr. P. C., S. 144, N. 11, Pt. 3.

(b) Criminal P. C. (1898), S. 144—Order under — Revision—Interference with spent order—Practice of Patna High Court.

It is not the usual practice of the Patna High Court to interfere with an order of the Magistrate under S. 144, Criminal P. C., which has spent its force by lapse of time. But where the order affects the future rights of the parties, the High Court will interfere if it is illegal, even if the order has spent its force. Thus, where an order purported to have been passed under S. 144 (4) was without jurisdiction and, if it were not set aside, the parties would have been under misapprehension as to their rights to the crops which were standing, the order was set aside in revision though it had spent its force. 19 P. L. T. 796 and A. I. R. (20) 1933 Pat. 185, *Ref.* [Para 4]

Anno : Cr. P. C., S. 144, N. 15, Pts. 15, 18.

Nawal Kishore Prasad I and Devendra Prasad — for Petitioners; R. S. Sinha and A. K. Mitter — for Opposite Party.

Order. — The dispute in this case relates to 2 bighas being a portion of plot No. 537 in village Chak Pitambarpur. The petitioners claimed that the entire plot was recorded in the name of their ancestors, that they had been paying rent to the landlords for which they had obtained receipts and that they were in possession of the plot for a long time. The opposite party, on the contrary, asserted that in 1326 their ancestor Garib Das Singh had purchased the land by a *sada* sale-deed from Imrit Mahto. After the purchase of Garib Das Singh and after him the opposite party had come into possession of the land. On 17-3-1950, the Sub-Divisional Magistrate issued notice under S. 144, Criminal P. C., against one of the parties restraining them from going near the disputed land. On 9-4-1950, both the parties showed cause, and on 25-4-1950 the learned Magistrate made the order absolute in favour of party 1 and vacated the order against party 2.

[2] Party 1 moved the Additional District Magistrate of Patna who set aside the order of the Sub-Divisional Magistrate. Purporting to act under S. 144 (4), he rescinded the order made against party 1 and "made the order under S. 144 absolute against the petitioners."

[3] The first question in this case is whether this order made by the Additional District Magistrate is within his jurisdiction. In support

of this rule, learned counsel argued that under S. 144 (4), the Additional District Magistrate cannot substitute an order of his own forbidding the petitioners from going to the land and such an order was without jurisdiction. In my opinion, this argument is well-founded In *Ganpat Singh* v. *Emperor*, 3 Pat. L. J. 287 : (A. I. R. (5) 1918 Pat. 672 : 19 Cr. L. J. 880) a similar order passed by the District Magistrate of Gaya was held to be without jurisdiction. Learned counsel for the opposite party sought to distinguish this case on the ground that the Sub-Divisional Magistrate had made a conditional order in the first instance against the petitioners, but it is material to notice that on 25-4-1950 the Sub-Divisional Magistrate had expressly vacated the conditional notice against the petitioners. It is manifest that on 19-5-1950 the Additional District Magistrate had no jurisdiction to make an order under S. 144 absolute against the petitioners, for S. 144 (4), Criminal P. C., contemplates only a change in the nature of the order made and not a change in the party against whom it is made. In my opinion, that portion of the order of the Additional District Magistrate by which he has made the order under S. 144, Criminal P. C., absolute against the petitioners, is without jurisdiction.

[4] For the opposite party, it is pointed out that in any event the order of the Additional District Magistrate has spent its force by reason of expiry of two months to which its effect is confined, and the High Court ought not, therefore, to interfere in this case. This argument is correct for there are authorities to the effect that, it is not the usual practice of the Patna High Court to interfere with an order of the Magistrate which has spent its force by lapse of time. Learned counsel for the petitioners has pointed out that there are exceptional reasons in the present case. He has pointed out that the order was in the first place without jurisdiction, and, secondly, that there are crops standing, and if the order was not interfered with, parties may be under misapprehension as to their rights to the crops on the land. There are several authorities of this Court to the effect that where the order under S. 144 affects the future rights of the parties, the High Court will interfere if it is illegal, even if the order has spent its force. (See *Panchkesar Kuar* v. *Madho Singh*, 19 P.L.T. 796 and the *Joint Agents I. G. N. & R. S. N. Co. Ltd., Digha* v. *Chandra Ketu Narain Singh*, 14 P.L.T. 379 : (A. I. R. (20) 1933 Pat. 185 : 34 Cr. L. J. 717). In my opinion, there are circumstances in the present case which make it necessary for the High Court to interfere with the order of the Additional District Magistrate.

[5] On these grounds, I would make the rule absolute and set aside the order of the Additional District Magistrate dated 19-5-1950 by which he makes the order under S. 144, Criminal P. C., absolute against the petitioners with respect to the land in dispute.

D.R.R. *Rule made absolute.*

A. I. R. (38) 1951 Patna 254 *[C. N. 52.]*

JHA C. J. AND REUBEN J.

Madan Lal and others—*Appellants* v. *Ghasiram and others*—*Respondents.*

A. F. O. D. No. 228 of 1946, D/- 24-8-1950.

(a) T. P. Act (1882), S. 100—Creation of charge—Requirements.

The creation of a charge does not require the use of a particular form of words and a charge may be created even though the word "charge" is not used. All that is required is that the intention that the property shall be security for the payment of money is made clear and that the transaction does not amount to a mortgage, that is to say, there is no transfer of an interest in the property. [Para 4]

Anno. T. P. Act, S. 100, N. 5, Pt. 1

(b) T. P. Act (1882), S. 100—"Made security".

A compromise between the plaintiff and the defendant in terms of which a decree is passed and which embodies an agreement that the property in question shall remain attached by the civil Court until the decretal debt is satisfied and shall be liable to be sold for that debt does not show an intention to make the property the security and therefore does not create a charge. [Para 5]

Anno. T. P. Act, S. 100, N. 5.

(c) Civil P. C., (1908), O. 34, R. 1—Attaching creditor, if necessary party—T. P. Act (1882), S. 91 (f) (before amendment of 1929).

A judgment-creditor who has obtained execution by attachment of property which is subject to a mortgage is not a necessary party in a mortgage suit. [Para 10]

Anno. C. P. C., O. 34, R. 1 N. 6, Pt. 12.

(d) T. P. Act (1882), S. 91 (f) (before amendment of 1929)—Attaching creditor purchasing property subject to mortgage—Purchase pending mortgage suit—Right to redeem.

When an attaching creditor in execution of his decree, purchases the property which is subject to a mortgage, his right to redeem the mortgage under S. 91 (f) is extinguished. After the purchase, he can only seek to redeem the mortgage as being the owner of the equity of redemption. But, if his purchase is during the pendency of the mortgage suit, his interest is extinguished by the sale in execution of the mortgage decree. [Para 10]

Anno. T. P. Act, S. 91, N. 25.

(e) Deed — Construction — Adherence to plain meaning or express words.

Per *Jha C. J.*—In construing a written instrument the plain meaning of the express words are to be rigidly adhered to irrespective of the question of the intention of the parties. [Para 15]

(f) Deed—Construction—Construction of similar document, if binding.

Per *Jha C. J.*—When the question is one of pure construction of a written instrument, decision based upon the construction of another document, couched in similar but not the same language, is not binding as an authority. [Para 16]

S. C. Mazumdar and Atul Chandra—for Appellants; B. C. De and S. K. Mazumdar — for Respondents.

Reuben J.—This appeal by the plaintiffs has been filed in the following circumstances.

[2] The plaintiffs are members of a joint Hindu family. Braja Nath Marwari, a former *karta* of the joint family, filed Money Suit No. 753 of 1928 against Ram Chandra Singh Modak and others. During the pendency of the suit, under the provisions of O. 38 of the Civil P. C., he obtained attachment of three villages Dhargram, Aria and Bamadih, belonging to the Modaks. The attachment was effected on 15-7-1928. On 14-10-1928, the suit was decreed on compromise, the plaintiff getting a decree for Rs. 1,700 payable in certain instalments. The petition of compromise which was made part of the decree contained a provision:

"That on the defendants failing to pay other instalments by the due date the whole of the unpaid balance of the decretal amount shall fall due and shall be realised by execution with interest thereon at 12 per cent. per annum from the date of default till realisation of the said sum, by sale of the attached property. The order of the attachment before judgment to subsist till the decree money is not satisfied."

The decree was put in execution in the year 1930 and the three attached villages were sold in execution of the decree on 18-8-1931. The purchase was made by the joint family of the plaintiffs as decree-holders and the sale was confirmed on 5-12 1931. The property was sold subject to a simple mortgage executed on 2 4-1922, by the Modaks in favour of the defendants of the present suit. Previous to the execution sale and during the pendency of the execution proceedings, the defendants of this suit had, on 10-4-1931, sued the Modaks on the foot of the simple mortgage bond of April 1922. In this suit, the joint family of the plaintiffs was not impleaded, nor was it made a party to the suit after the auction-sale. The mortgage suit was disposed of on compromise between the Modaks and the defendants of the present suit on 6 1-1932. The defendants put the mortgage decree in execution (Ex. Case No. 537 of 1932) and, on 17-1-1933, purchased the three mauzas in execution of the mortgage decree. The sale was confirmed on 18-2-1933, and the decree-holders auction-purchasers took delivery of possession on 9-9-1933. On 24 4-1944, the plaintiffs brought the present suit to redeem the mortgage of April 1922, contending that they were necessary parties to the mortgage suit of 1931 and that, not having been impleaded, they still have the right to redeem the mortgage. The suit has been dismissed by the learned Subordidate Judge. Hence, the present appeal.

[3] The purchase by which the plaintiffs became the owners of the property concerned (was ?) during the pendency of the mortgage suit. As such, it is affected by the doctrine of *lis pendens*. The present right of the plaintiffs to redeem, therefore, depends on whether in the circumstances preceding their purchase of the property they were necessary parties to the mortgage suit of 1931. It is contended that they were necessary parties on two grounds, *firstly*, that by the compromise between Braja Nath Marwari and the Modaks, a charge on the property was created in favour of the joint family, and, *secondly*, that under S. 91 (*i*), T. P. Act, as it stood when they purchased the property in the execution sale, they were entitled to redeem the simple mortgage; this right cannot be taken away from them by any transaction or litigation between third parties.

[4] A charge is thus defined in S. 100, T. P. Act:

"Where immovable property of one person is by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."

Charges, therefore, may be divided into two classes, those created by an act of parties and those created by operation of law. According to the plaintiffs, the charge on which they rely was created by an act of the parties, namely, the agreement embodied in the compromise of 1928. It is well settled that the creation of a charge does not require the use of a particular form of words and that a charge may be created even though the word "charge" is not used. All that is required is that the intention that the property shall be security for the payment of money is made clear and that the transaction does not amount to a mortgage, that is to say, there is no transfer of an interest in the property, and it is contended strenuously that the intention is manifest that the property in question should be security for the decretal debt.

[5] I find myself unable to accept this contention for the simple reason that by the agreement no liability on the property was imposed beyond the liability already imposed upon it by law. The relationship between the parties was not merely that of creditor and debtor but of decree-holder and judgment-debtor. The property in question had been attached under the provisions of O. 38, Civil P. C. Under the provisions of R. 11 of this Order, the attachment would, in ordinary course, continue after the passing of the decree and the property was liable to sale in execution of the decree without re-attachment. This is all that is provided for in the first portion of the passage which I have cited above.

The second portion of the citation provides that the attachment shall subsist till the decree is satisfied. That, again, is merely a reproduction of the provisions of O. 38, R. 11. There is, therefore, no new liability which has been created by this compromise. All that has happened is that the judgment-debtor has agreed that the decree-holder may proceed in execution of the decree against certain property of the judgment-debtor. That such an agreement does not amount to a charge is clear from a perusal of the judgment in *Baiju Lal* v. *Thakur Prasad*, 18 Pat. 155 : (A.I.R. (36) 1939 Pat. 7.) Their Lordships were concerned with the question whether an attachment of property in execution of a decree creates a charge on that property. The reason given by them for answering this question in the negative apply *mutatis mutandis* to the present case. They pointed out, first of all, that all that is effected by an attachment is that the judgment-debtor is prevented from alienating it by a private transaction. This, however, does not affect court sales; for instance, where two decree-holders have attached the same property in execution of their money decrees but for some reason the decree-holder whose attachment is later succeeds in selling the property, the other decree-holder whose attachment is prior cannot again bring the property to sale. Had an attachment of the property created a charge, the later attachment would have been subject to the earlier one. So also the contention that an attachment creates a charge is inconsistent with the provisions of S. 73 of the Code relating to rateable distribution. This liability to court sales in execution of other decrees and to rateable distribution exists in the present case, and there is nothing in the compromise to avoid the liability. For the creation of a charge, it is necessary that the property in question should be made a security for the payment in question. This requires something more than an agreement not to alienate the property until the debt is satisfied in fact, a charge does not prevent alienation and a purchaser for value without notice of the charge gets a good title. It requires that the debt in question should be given a priority so far as this property is concerned. Such a priority is not created by a mere agreement that the property in question shall remain attached by the civil Court until the decretal debt is satisfied and shall be liable to be sold in execution for that debt. Hence, in my opinion, the compromise in this case does not show an intention to make the property the security and it did not create a charge.

[6] Reliance for the appellants was placed on the decision in *Sheo Narain* v. *Lakhan*, 24 Pat. 345 : (A. I. R. (32) 1945 Pat. 434). There, in addition to the agreement that the property would remain attached until the satisfaction of the entire decree, there were the words "and liable". It was these two words, imposing a liability on the property as distinct from a mere agreement that the property should remain attached and subject to execution, which were relied on by Beevor J., who delivered the leading judgment, for distinguishing the case from *P. Sivanna* v. *Venkatakrishnamurthi*, 19 I. C. 478 : (24 M. L. J. 474). Their Lordships in this latter case had to consider the effect of the following words in a compromise decree :

"Until the said amount of Rs. 13,000 is paid the items 17, 18, 19, 20 and 21 of these immovables of Sch. A should not be dealt with by defendants 1 and 2 in any manner."

They decided that these words did not create a charge, observing :

"The promise contained in the compromise not to alienate the property to third persons till the payment of the plaintiffs' debt is only a covenant not to create any interest in it in favour of others, there is no expression of an intention to create an interest in the plaintiffs' favour. It is quite possible that a debtor, if he is unwilling to create any charge over his property, may enter into a covenant not to charge it in favour of others while declining to create a charge in favour of a particular creditor."

With respect, I may observe that the term "an interest" has been used somewhat loosely. The distinction between a simple mortgage and a charge is that the former creates an interest in the property and the latter does not. The term "interest" as used here by their Lordships merely refers to the effect of the charge, which is that the chargee's debt gets, as regards the charged property, priority over other debts. The loose use of the term makes no difference to the reasoning with which I agree, namely, that unless the intention to make the property a security appears a charge is not created.

[7] Reference has been made to *Murat Singh* v. *Pheku Singh*, 7 Pat. 581 : (A. I. R. (15) 1928 Pat. 587) ; *Shiva Prasad Singh* v. *Beni Madhab*, 1 Pat. 387 : (A. I. R. (9) 1922 Pat. 529) and *Gobinda Chandra Pal* v. *Dwarka Nath Pal*, 35 Cal. 837 : (7 C. L. J. 492) cases which are clearly distinguishable on the facts. In *Murat's case* : (7 Pat. 584 : A. I. R. (15) 1928 Pat. 587) the relevant words occurred in a usufructuary mortgage bond :

'In the case of the aforesaid creditor being dispossessed of the holding in any way in that case he shall realise his dues from my one anna share in *mauzas* Dharwali and Gosainpur."

The intention to make this property security for the debt is evident. The relevant words in *Shiva Prasad Singh's case* : (1 Pat. 387 : A.I.R. (9) 1922 Pat. 529) are :

"This settled coal land, mines, ... shall ever be regarded as a security for the payment of the rent and cesses due, together with interest thereon due to you.

I shall not be competent by the sale gift, or remove the same, so long as the rent etc., due to you will remain unpaid."

Here, the property is expressly made security for the debt. This remark applies equally to the *case of Gobind Chandra Pal* : (35 Cal. 837 : 7 C. L. J. 492) where the relevant words are :

"That the properties specified in the schedule below shall be hypothecated for the realisation of the aforesaid money and that (we) the defendants shall not be able to create any incumbrance in the same."

Maina v. *Bachchi*, 28 ALL. 655 : (3 A.L.J. 551) which was also cited, relates to a consent decree for the payment of maintenance by the plaintiff and her representatives to the defendant. The relevant words in the petition of compromise were :

'If the plaintiff or her representatives should fail to pay to the defendant the aforesaid monthly sum at the end of each month, the defendant shall have power to recover monthly sum with interest at Re. 1 per cent. per mensem *from the property* decreed by instituting a suit as she should like."

Here, too, the intention to make the property a security is manifest and, by adding the words "by instituting a suit", the plaintiffs made it clear that they were creating a liability outside the ordinary liability of the judgment-debtor's property to be taken in execution of a decree for money.

[8] Some support for the proposition contended for on behalf of the appellants is afforded by the case of *Jawahir Mal* v. *Indomati*, 36 ALL. 201 : (A. I. R. (1) 1914 ALL. 187) The relevant words occurred in a decree *inter partes* on which the plaintiffs tried to base a suit for sale They were :

"I will not transfer this property by way of sale, a mortgage or gift, etc. so long as I do not repay this loan and if I do the transfer shall be void."

Their Lordships Richards. C. J and Banerji, J. differed as to the exact effect of the document, the former holding that it created a charge and the latter that the transaction amounted to a simple mortgage. Both, however, agreed that the intention of the executant of the document to make the property a security for the debt should be inferred. This inference was drawn by their Lordships, however, on the special circumstances of the case. Banerji, J. pointed out that the opening portion of the document is meaningless except on the assumption that the person who engrossed the document omitted to insert the word "mortgage" or "hypothecate" and in fact, the translators of the Court had inserted the word in order to give some meaning to the clause. This decision was followed by a Division Bench of Oudh Chief Court in *Narain Dass* v. *Murli Dhar*, 121 I C. 81 : (A. I. R. (16) 1929 Oudh 539). where their Lordships considered a stipulation in a consent decree in a money suit:

"That the defendant will not dispose of in any way his share in the Premier Aerated Company at Hazratganj until the satisfaction of the entire decretal amount."

Their Lordships differed from the decision in *P. Sivanna* v. *Venkatakrishnamurthi*, 19 I. C. 478 (24 M. L. J. 474), apparently, on the ground that that decision proceeded on a wrong idea that the creation of a charge requires the creation of an interest in the property. I have referred to this above. In my opinion, there is no reason to think that their Lordships of the Madras High Court were under a wrong impression on this point. The term "interest" was used by them in a non-technical sense, and this use does not in any way affect the correctness of their reasoning. Coming back to the facts of *Narain Dass* v. *Murli Dhar*, 121 I. C. 81 : (A. I. R. (16) 1929 Oudh 539), it must be noted that the property in that case was not under attachment. By the agreement in the compromise, therefore, the defendant placed upon himself some restriction as regards that property which did not exist from before. The agreement, therefore, was not like the agreement in the present case which imposed no new restriction either on the property or on the judgment-debtors. The remark I have just made applies also to the decision of a single Judge of the Nagpur High Court reported in *Ganga Prasad* v *Ratanchand*, I. L. R. (1941) Nag. 356 : (A. I. R. (26) 1939 Nag. 118), in which Niyogi, J. followed the decision in *Jawahir Mal* v. *Indomati*, 36 ALL. 201 : (A. I. R. (1) 1914 P. C. 187). The defendants judgment-debtors in a consent decree in the Court of Small Causes, Jubbulpore agreed not to alienate certain immovable property "till satisfaction of this decree" His Lordship pointed out that under S. 7, Civil P. C. the Small Cause Court is precluded from either issuing an injunction or attaching immovable property. He drew a distinction between a charge imposed by a decree of Court and a charge imposed by a private agreement. In view of the limitation on the powers of the Small Cause Court, he treated the case before him as governed by the principle relating to private agreements. From the facts of the case, it is clear that when the agreement between the parties was entered into, there was no restriction by operation of law or action of the Court on the right of the defendants to transfer the property. Such restriction as was placed on that power subsequently was due to the agreement alone. For the reasons I have given, the three decisions just referred to do not affect the view which I have expressed about the effect of the compromise of 1928.

[9] The conclusion to which I have arrived is supported by the decision of that learned Judge, Varadachariar J., in *Ayyappa Naicker* v. *Tha*-

yammal, A. I. R. (23) 1935 Mad. 17 : (154 I. C. 736). His Lordship was concerned with a compromise in an execution proceeding relating to property already attached in the proceeding. It specifically referred to the attachment and provided that the attachment should continue to remain in force. It went on to say that, if the instalments agreed on in the compromise were not duly paid, the decree-holder would be entitled to recover the full amount due under the decree by bringing the properties to sale without fresh attachment. His Lordship pointed out that the language used must be construed with reference to the circumstances as they stood at the time of the compromise, namely, that the property was already attached and formed the subject-matter of the execution proceeding. He referred to O. 20 R. 11 (2), Civil P. C., which provides that, when a judgment-debtor is given an indulgence by way of instalments, the Court may grant that indulgence on such terms as to the attachment of the property or taking of security from him or otherwise as it thinks fit. This only carries out, he observes, the probable intention of the parties when the decree-holder is willing to oblige the debtor by postponing the payment. In the absence of expressed words creating a security, he saw no reason to think that the parties would have preferred such protection as the creation of a security would have afforded to the advantages arising from the continuance of the attachment which had already been made. These are observations which apply exactly to the present case. The terms of the compromise with which we are concerned provided nothing beyond the liability already existing at the time when the compromise was entered into. Therefore, there is no reason to think that the intention was to substitute for the protection given by the Civil Procedure Code the protection afforded by the creation of a charge. In the course of his decision, his Lordship makes an observation which supports the distinction drawn by Niyogi, J. between private agreements and other agreements and thus furnishes an explanation applicable to the decision in *Jawahir Mal* v. *Indomati*, 36 ALL. 201: (A. I. R. (1) 1914 P. C. 187). His Lordship observes:

"It may be conceded that ordinarily when parties refer in a document to particular properties, as a source from which debt is to be paid or by the sale of which a debt is to be realised, there is some indication of an intention to make the property more directly liable than on a mere enforcement of a personal liability".

His Lordship adds in words which apply exactly to the case before us :

"Where, however, as in the present case, the facts recited in the document itself clearly show why the document refers to particular properties, and it also appears in what manner the properties are to be made available for the obligations arising under the document, it will not be right to ignore these circumstances and imply a kind of general intention to create security".

An attempt has been made to distinguish the present case from the reported cases on the ground that there was here a combination of two rights given to the decree holders, namely, a right under the compromise and a right by reason of the attachment of the property by the civil Court. I have already explained that under the compromise the decree-holders got nothing in addition to the rights they already had under the attachment, and this is one of the reasons which I have given for holding that no charge was created by the compromise.

[10] I come now to the second point urged on behalf of the appellants, that they had a statutory right to redeem the simple mortgage and this right cannot be taken away from them by any transaction or litigation between third parties. The statutory right is claimed by them under S. 91 (f), T. P. Act, as it stood on the date of the compromise. The section then read:

"Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of the mortgaged property;

(f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property. . . . . ".

When the mortgage suit was instituted, this section stood in its present form, and the only clause which can possibly apply is Cl. (a) :

"any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same."

It is not necessary for the purposes of the present case to decide whether S. 91, in its original or in its amended form applies. We may assume that the original form of this section which expressly mentions the judgment-creditor who has obtained execution by attachment applies It has been held in *Baiju Lal* v. *Thakur Prasad*, 18 Pat. 155: (A. I R. (26) 1939 Pat. 7), that, even where the original form of S. 91, applies, such a judgment-creditor is not a necessary party in a suit based on the mortgage The correctness of this decision has been sought to be questioned on the ground that their Lordships did not consider the aspect of the matter which has been formulated as the second point urged on behalf of the appellants. A complete answer to this objection is furnished by the following passage from the judgment of Chatterji J. at p. 168 of the report:

"There is a still greater difficulty in the way of the plaintiffs. Whatever rights they might have as attaching decree-holders, their attachment and with it those rights came to an end when they became the purchasers of the attached properties on 9 9 1918. After their purchase, they could no longer exercise their right of redemption as attaching decree-holders".

Here, the right of the decree-holders to redeem the mortgage under the old S. 91 (f), remained in existence till their purchase of the property in August 1931—I am assuming for the purposes of argument that the old section applies to the present case. When they became the purchasers of the property, however, that right was extinguished by their own act. After the purchase, they could only seek to redeem the mortgage as being the owners of the equity of redemption. But, as their purchase was *pendente lite*, they acquired the property subject to the pending litigation and their interest was extinguished by the sale in execution of the mortgage decree.

[11] In passing, a reference was made to *Mt. Fatima Begam* v. *Bansidhar*, A. I. R. (19) 1932 ALL. 356: (136 I. C 810). The decision in that case is set out in the following head-note:

"*C*, who held a simple money-decree against *B*, attached the property mortgaged by *B*, in favour of *A*, in execution of his decree before the institution of the mortgage suit by *A*, and purchased same in auction-sale held in execution of his decree after the institution of the mortgage suit, and subsequently *A*, obtained a decree in the mortgage suit (in which *C*, was not impleaded) and purchased the same property in execution of his decree but was resisted in taking possession by *C*. *Held*: that *A*, was entitled to the property purchased by him as against *C* but *C*, had the right to redeem the property and should have been made a party to *A*'s suit".

This is exactly contrary to the view taken in *Baiju Lal* v. *Thakur Prasad*, 18 Pat. 155, (A. I. R. (26) 1939 Pat 7). Their Lordships held that a person entitled under the old S. 91 (f), T. P. Act to redeem a mortgaged property is a necessary party under O. 34, R 1, Civil P. C. In the *Patna case*, however, it was pointed out that O. 34, R. 1, speaks of persons "having an interest. . . . . in the right of redemption" and they have given reasons for holding that this expression is not identical with "persons having the right to redeem". I am bound by the previous decision of this Court, which accepted the view of the Calcutta and Madras High Courts in preference to that of the Allahabad High Court.

[12] On the above findings, this appeal fails, and I do not feel called upon to consider a point of limitation urged on behalf of the defendants-respondents, which is that the plaintiffs have not obtained a sale certificate for their purchase on 18-8-1931, that they have not obtained delivery of possession in pursuance thereof and have never been in possession of the property, and that, therefore, by the time they instituted the suit on 24-4 1944, they had no subsisting interest in the property.

[13] For the reasons given above, I would dismiss this appeal with costs.

[14] **Jha C. J.** — I agree. The question whether a charge was created by "act of parties" under the petition of compromise depends upon the construction of the document itself. I read the document as a whole and construe the words in the context in which they have been used. It does not appear to me from the language used that there is any word or expression appearing in the four corners of the instrument itself from which it can be inferred that a charge was created by the parties on the properties under attachment. We were referred to some decisions, which have been discussed by my learned brother, where it was held on the interpretation of certain words that a charge had been created but those decisions cannot be used by us as a guide in deciding what the true meaning of the words used in the compromise petition is. It is well settled that in construing a document two cardinal rules of construction have to be borne in mind.

[15] (1) In construing a written instrument the plain meaning of the express words are to be rigidly adhered to irrespective of the question of the intention of the parties. In elucidating this principle, Lord Wenslevdale in the case of *Monypenny* v. *Monypenny*, (1861) 9 H. L. C. 114 at p. 146: (31 L. J. Ch. 269) has laid down the rule of construction thus:

"The question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed: a most important distinction in all cases of construction, and the disregard of which often leads to erroneous conclusion."

[16] (2) When the question is one of pure construction of a written instrument, decision based upon the construction of another document, couched in similar but not the same language, is not binding as an authority. In support of this rule, I may quote the observation of Jessel, M. R., in the case of *Aspden* v. *Seddon*, (1875) 10 Ch. 394 at p. 397: (44 L. J. Ch. 359):

"No Judge objects more than I do to referring to authorities merely for the purpose of ascertaining the construction of a document; that is to say, I think it is the duty of a Judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another Judge upon an instrument, perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument, and say that a certain construction was put upon it and that it differs only to such a slight degree from the document before you, that you do not think the difference sufficient to alter the construction, you miss the real point of the case, which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the Judge who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have, in fact, no guide whatever . . . . . There is, first document A, and a Judge formed an opinion as to its construction. Then

came document B, and some other Judge has said that it differs very little from document A -- not sufficiently to alter the construction—therefore he construes it in the same way. Then comes document C, and the Judge there compares it with document B, and says it differs very little, and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has by this process come to be construed in the same manner."

[17] He reiterated the same principle in the case of *In re New Callao*, (1883) 22 Ch. D. 484 at p. 488 : (52 L. J. Ch. 283) and put the proposition thus :

"Nothing is better settled than that the construction put upon an instrument by a Court of law or equity is not binding on another Court of law or equity, even of inferior jurisdiction, as regards the construction of an instrument couched in somewhat similar language."

Collins, M. R. in the case of *Foulger* v. *Arding*, (1902) 1 K. B. 700 at p. 704 : (71 L. J. K. B. 499) has also put the canon of construction thus :

"It appears to me that a lamentable waste of judicial time and power is often involved in examining decisions with regard to the meaning of words which, with one context, are capable of one meaning, and, with another context, of another meaning."

Therefore, bearing in mind these cardinal canons of construction, I find myself unable to agree with the contention of the appellant that the three items of properties mentioned in the petition of compromise were made security for the payment of the debt due to the appellant.

V.R.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 260 *[C. N. 53.]*

IMAM AND SARJOO PRASAD JJ.

Ramnivas Khandelwal and another—*Appellants* v. *Mt. Mariam*—*Respondent.*

A. F. O. O. No. 71 of 1950, D/- 15-9-1950.

(a) Workmen's Compensation Act (1923), S. 30 (1) (a)—Defective order—Appeal.

Although an order of the Commissioner is defective in form in that the amount of compensation is not specified as a lump sum, the appellant cannot be deprived of his statutory right of an appeal on account of this defect. [Para 3]

Anno. Workmen's Comp. Act, S. 30 N. 4.

(b) Workmen's Compensation Act (1923), S. 30 (3)—Appeal filed in time—Delay in filing certificate—Condonation—Sufficient cause.

Where the appeal was filed in time but it was not accompanied by the certificate of the Commissioner and by the time it was filed the appeal had become time-barred, and it was urged that the time occupied in taking a certified copy of the order appealed against should be taken into consideration in applying S. 5, Limitation Act and that the appeals under the Act, not being very common, the procedure of filing a certificate was unknown to the counsel:

Held that these were sufficient grounds for extension of time in order to condone the delay in filing the certificate. [Para 5]

Anno. Workmen's Comp. Act, S. 30 N. 4.

(c) Workmen's Compensation Act (1923), S. 19 (1)—Question whether person is workman—Commissioner's jurisdiction to decide—It and when ousted.

All that S. 19 means is that if there is an agreement between the parties in regard to the question whether the injured person is or is not a workman, the jurisdiction of the Commissioner to decide it is ousted. But the section does not provide that even if there is no agreement between the parties on this point, and even though the materials might indicate that the employee was not a workman at all as contemplated by the law, yet the Commissioner should assume that he was a workman and proceed to award compensation. [Para 8]

Anno. : Workmen's Comp. Act, S. 19 N. 1.

(d) Workmen's Compensation Act (1923), S. 2 (1) (n)—Daily wage earner if workman.

A daily wage earner may be regarded as a workman provided he fulfils the other conditions of the definition. [Para 9]

Anno. Workmen's Comp. Act, S. 2 (1) (n) N. 6.

G. P. Das and Shambhu Nath—for Appellants ; Basanta Chandra Ghose—for Respondent.

Sarjoo Prasad J.—This is an appeal under S. 30, Workmen's Compensation Act (VIII [8] of 1923) preferred on behalf of the employer against whom an award of compensation has been made by the Commissioner appointed under the Act. The appellant has been directed to pay a sum of Rs. 2,400 by way of compensation to the respondent who happens to be the widow and dependent of the deceased Farid Khan said to be a workman employed by the appellant.

[2] The facts giving rise to this appeal are that Farid Khan, the husband of the respondent, Mt. Mariam, was employed as a mason by the appellant in construction of a building. The case of the appellant is that this building was a residential building, the appellant himself being a trader in mica. The said mason was employed on a wage of Rs. 2/8 per day. He had worked for five or six days on the said construction, when he fell down from the roof of the house which was under construction and received injuries as a result of which he subsequently died by midnight of the same day. This unfortunate incident happened on 4-12-1948. On 5-12-1948, the appellant informed the police about the death of the respondent's husband, and on 14-12-1948, the appellant is said to have paid a sum of Rs. 1900 and another sum of Rs. 500, in all Rs. 2,400 to the respondent for which he obtained a receipt duly signed by her. This receipt is dated 14-12-1948, and has been produced by the appellant. It shows that the widow received Rs. 2,400 by way of compensation and by agreement waived all claims against the appellant for compensation. The respondent Mt. Mariam does not specifically dispute the genuineness of the receipt but she alleges that she

received only a sum of Rs. 500 on the death of her husband and was not paid any more money. It appears that the police thereafter submitted a final report in which they stated that Farid Khan was working as a mason over the building of the appellant and he fell down from the roof of the building which is 14′ high from the level of the ground while he was setting bricks on the northern wall of the building. The report also shows that Mt Mariam is alleged to have been paid Rs. 500 out of a sum of Rs. 2,400 and it was further reported that the proprietor might be asked to pay compensation to the widow. On this report, it appears that a proceeding for payment of compensation under the Workmen's Compensation Act was started and subsequently on 23.12-1949, a petition was also filed on behalf of the respondent claiming compensation to the tune of Rs. 2,000. On this application having been filed which was, as the Commissioner says, to "regularise the demand," the appellant was ordered by an order dated 27-12-1949, to deposit the amount into the sub-treasury which may be found on calculation payable to the widow of the deceased, the respondent in this appeal.

[3] This appeal has been accordingly filed against the order of the Commissioner, dated 27-12-1949, which purports to be an order awarding compensation. Now, S. 30 (1) (a), Workmen's Compensation Act is that an appeal shall lie to the High Court from an order of the Commissioner awarding as compensation a "lump sum." The order does not indicate that any lump sum has been fixed in the order in question, but there is no order on the record showing that any lump sum had been fixed except the previous order in which tentatively the appellant had been asked to deposit a sum of Rs 2000 by way of compensation. The appellant submits that in pursuance of this order dated 27-12-1949, a sum of Rs. 2400 calculated to be payable as compensation he has been called upon to deposit. Therefore the defect in the form of the order cannot deprive him of a right to appeal which is available to him under the law. There is no doubt that this appears to be the final order passed in the case, and although the order is defective in form, yet the appellant cannot be deprived of his statutory right of an appeal on account of this defect in the garb in which the order has been clothed. It is under this order that he has been directed to pay the lump amount of compensation of Rs. 2400. Therefore, this order is undoubtedly an appealable order provided it conforms to the other requirements of the law, namely that the appeal involves a substantial question of law and that it is not otherwise barred.

[4] On behalf of the respondent, a preliminary objection has been raised as to the maintainability of the appeal, though of course in reply to the arguments of the learned counsel for the appellant The contention is that the appeal is time barred. According to the contention of the respondent, the appeal was filed on 25-2-1950. It is urged that the appeal could not have been against the order dated 27-12-1949, and that it was really against the order dated 28-11-1949, under which the amount of compensation was fixed. The respondent says that the appeal, beyond 60 days from the date of this order dated 28-11-1949 is hopelessly barred under S. 30 (2) of the Act. The order dated 28-11-1949, is not the order appealed against and could not have been the order appealed against. The memorandum of appeal quite clearly shows that the appeal is directed against the order of the Commissioner dated 27-12 1949. That apart, it is quite clear that the order dated 28-11-1949 was not a final order. The order reads thus :

> "It appears that the amount of Rs. 2,000 compensation was calculated roughly. Call second party to file papers regarding service length and other particulars regarding service of the deceased by 10.12."

[5] Evidently this order was not a final order because the Commissioner required further evidence to determine the amount of compensation paid and it was only when the further materials were produced before him that the final order was passed on 27-12-1949. It cannot, therefore, be contended with any show of reason that the appeal should be taken as against the order dated 28-11-1949, and not the one dated 27-12-1949. I have already pointed out that even this order is defective in form because even here the amount of compensation has not been a specified as a lump sum, but it is the only final order on the record in pursuance of which the appellant has been directed to pay the amount of compensation and there is no other final order. Therefore I am bound to assume that this is the order which fixed the lump amount of compensation, and is, therefore, appealable. The appeal is, therefore, within 60 days from the order appealed against and is not barred by limitation. The respondent has, however, raised another argument in support of her contention that the appeal is barred even if it is held that the appeal is directed against the order dated 27-12-1949. Section 30 (1) in its last proviso enjoins that no appeal by an employer under cl. (a) shall lie unless the memorandum of appeal is accompanied with a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against. It is contended that no such certificate accompanied the memorandum of appeal

at the time when it was filed but subsequently when the attention of the appellant was drawn to this fact, he produced a certificate and filed it in Court after making the necessary deposit on 2-3-1950. By that time, the contention of the respondent is that the appeal had become already time barred. This contention is undoubtedly a serious contention. On the language of the section it is doubtful whether when an appeal has been filed within the period of limitation allowed by law, it would be time-barred merely because it is not accompanied with a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against. It says that no appeal by an employer under sub-cl. (a) shall lie unless the certificate is given. In other words, if the certificate is not produced at some stage before the hearing of the appeal, the appeal will not be entertained. The limitation of 60 days applies to the preferring of an appeal. It is no doubt true that the certificate in question may be a very material document which the law enjoins to be filed in order that the appeal may be entertained, but I feel doubtful whether merely because of the non-production of this certificate within the period of limitation the appeal will become barred. In this case, the certificate was produced on 2-3-1950, and the appeal itself had been filed within the period of limitation. But even if it is assumed for the sake of argument that the memorandum of appeal without being accompanied by the certificate in question was incompetent, the question arises whether time could be extended by this Court and the delay in the production of the certificate in question condoned. There is no doubt that under S. 30 (3) of the Act the provisions of S 5, Limitation Act, apply to appeals under this section. The appellant has, therefore, asked us to condone the delay, if any, on the ground that there was sufficient cause for doing so. It is urged that there was some time occupied in taking a certified copy of the order appealed against, and that time should be taken into consideration in applying S. 5, Limitation Act, and it is also urged that appeals under the Workmen's Compensation Act, not being very common, the procedure of filing a certificate was unknown to the learned counsel, Mr. G P. Das, (who himself is a counsel of long standing and experience), until the matter was brought to his notice by the stamp report. In my opinion, these are sufficient grounds for extension of time in order to condone the delay in filing the certificate of the Commissioner as required by the law. There is no doubt no formal application before us under S. 5, Limitation Act, but these undisputed facts are there; and we can take into consideration these factors in deciding the question of limitation. That being so, I hold, in the first place, that the appeal is not barred, and even if it were taken to be so, the delay, if any, should be condoned under S. 5, Limitation Act.

[6] Turning to the merits of the appeal, the learned counsel for the appellant has urged three points for our consideration. He contend's that the deceased was not a workman within the meaning of the Workmen's Compensation Act; (2) that the amount of compensation was not properly determined as required by S. 5, Workmen's Compensation Act; and (3) that there being already an agreement under which the liabilities of the parties had been adjusted and a memorandum filed in Court, the Commissioner acted with material irregularity in not recording the memorandum in a register prescribed by law under S. 28, Workmen's Compensation Act. I will deal with these points in the order in which they have been urged.

[7] The word "workman" has been defined in S. 2 (n) of the Act. I shall refer only to the relevant portion of the definition. "Workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is: (ii) employed on monthly wages not exceeding three hundred rupees, in any such capacity as is specified in Scb. II. For the appellant it is contended that the employment of Farid Khan, the deceased, was of a casual nature and he was employed otherwise than for the purpose of the employer's trade or business. The deposition of witness 1 on behalf of the appellant is that Farid Khan commenced work in the house of his master only 5 or 6 days before he died, and his *malik* deals in mica, and that Farid Khan did not do any work in the mica business. It is, therefore, argued that he did not come within the definition of the word "workman" under the Workmen's Compensation Act. It is further to be noticed that Scb. II provides the following as answering the definition of "workman" within S. 2 (1) (n) of the Act subject to the provision of that section. It provides under Art. (viii) of Scb II that

"any person employed in the construction, repair or demolition of (a) any building which is designed to be or is or has been more than one storey in height above the ground or twenty feet or more from the ground level to the apex of the roof is a "workman" under the Act."

Now, there is no evidence here that the building from which Farid Khan fell and received the injuries was a building of this type. On the contrary, the final report submitted by the police on the basis of which the proceedings appear to have been started shows that the deceased fell

down from the roof of a building which was only 14 feet high from the level of the ground while he was setting bricks on the northern wall of the building. Neither party has argued before us that this report has not been properly brought on the records of the case and has not been proved by the person who made the report. But as it appears to have been the basis of the proceedings about which I presently have to make my comments, it seems to have been admitted in the record by the Sub-divisional Magistrate who also happens to have the power of a Commissioner under this Act. Now, there is no finding by the learned Commissioner as to whether Farid Khan, the person employed, answers the description of a workman having regard to these material considerations urged on behalf of the appellant. The respondent, however, contends that it is not open to the appellant to raise this question now before this Court. The respondent points out that when notice was issued to the appellant to show cause why he should not deposit a sum of Rs. 2000 by way of compensation by the Commissioner, he did not urge before him that the deceased Farid Khan was not a workman within the meaning of the Act, and that, therefore, no action could be taken against the appellant. But, on the other hand, he filed a petition in reply stating that Mt. Mariam, widow of the deceased Farid Khan, the present respondent, had amicably settled up the matter with the appellant and the appellant in pursuance thereof had paid a sum of Rs. 2400 instead of Rs. 2000 to her in presence of respectable gentlemen for which she had granted a written receipt of the payment. It is, therefore, urged that the appellant having failed to raise this contention before the learned Commissioner, it was not necessary for him to determine whether the deceased Farid Khan was or was not a workman within the meaning of the Act. Reliance is placed on S. 19 (1) of the Act which says :

"If any question arises in any proceedings under this Act as to the liability of any person to pay compensation (including any question as to whether a person injured is or is not a workman)...the question shall, in default of agreement, be settled by a Commissioner."

[8] It is argued that there being apparently no disagreement in regard to this question, it was not for the Commissioner to settle it. Section 19 does not altogether bar the consideration of the question as to whether a person injured is or is not a workman. All that it means is that if there is an agreement between the parties in regard to this question, then the jurisdiction of the Commissioner to decide it is ousted. But the section does not provide that even if there is no agreement between the parties on this point, and even though the materials might indicate that the employee was not a workman at all as contemplated by the law, yet the Commissioner should assume that he was a workman and proceed to award compensation. Here the contention of the appellant in evidence appears to have been that he was a casual employee and not employed for the purposes of the mica trade or business which is really the trade and business of the employer. This does not appear to have been challenged in the evidence of the respondent, yet the matter was left undecided by the learned Commissioner who proceeded to assess the amount of compensation. I can quite understand a case where parties have definitely agreed both as to the person for whom compensation is claimed being a workman and also as to the amount of the compensation. In such a case undoubtedly the jurisdiction of the Commissioner is ousted, and it would not be necessary for him to decide this question. But on the language of S. 19, it is difficult for me to hold that even where the point is a moot point, and even where the evidence might indicate that the employee was not a workman as required by the law, the Commissioner will have no jurisdiction to decide those points. In fact, the very object of the Act is for payment of compensation in respect of an injury caused to a "workman," and if an individual is not a workman at all, he may have his remedies under some other law for recovery of damage, but not under the Workmen's Compensation Act. In the petition which was filed by the appellant in answer to the show cause notice it is not anywhere shown that the appellant admitted that Farid Khan, the deceased was a workman as understood by the Workmen's Compensation Act. It is true he says that the matter had been settled between the widow of the deceased and the appellant amicably in presence of respectable gentlemen, but it is nowhere admitted that the deceased was a workman as understood by the Workmen's Compensation Act. The question, therefore, in my opinion, was an important question and should have been considered by the learned Commissioner before deciding about the compensation payable to the respondent.

[9] The next contention is also important. Section 5 of the Act deals with the method of calculation of wages. Clause (a) of the section applies to those cases where the workman has, during the continuance of not less than twelve months immediately preceding the accident, been in the service of the employer who is liable to pay compensation. This clause will not evidently apply to the present case because the employee had been working in the building only 5 or 6 days before he died. Clause (b) of the

section applies to those cases where the whole of the continuous period of service immediately preceding the accident during which the workman was in the service of the employer who is liable to pay the compensation was less than one month, and cl. (c) applies in all other cases where the monthly wages shall be thirty times the total wages earned in respect of the last continuous period of service immediately preceding the accident from the employer who is liable to pay compensation divided by the number of days comprising such period. Now from the language of the section it is plain that the specific clause applicable to the present case would be cl. (b) because the whole of the continuous period of service immediately preceding the accident was less than one month. It is true that the employee in this case had not been on monthly wages. From the evidence it appears that he was getting Rs. 2-8-0 a day. It was pointed out by Beaumont C. J., in *Ellermans' City and Hull Lines* v. *Asis Thomas*, A. I. R. (25) 1938 Bom. 110 : I. L. R. (1938) Bom. 44 that

"the reference to employment on monthly wages in S. 2 (1), sub cl. (n), means employment at wages which do not exceed an average of Rs. 300 a month. It seems to me quite impossible, reading this Act as a whole to say that it was limited to workmen who are employed by the month so that it would not include workmen employed by the day or by the week or by the year. If that were the meaning of the Act, every employer could get out of it by employing his workmen otherwise than by the month. I feel no doubt whatever that the meaning of the expression 'monthly wages not exceeding three hundred rupees' means wages which do not exceed an average of Rs. 300 a month."

From this it follows that a daily wage earner also may be regarded as a workman provided he fulfils the other conditions of the definition. I am at present on the question of method of calculation of wages and I was saying that cl. (b) is the specific clause of S. 5 which would apply to the present case. Now, if this is a provision under which the assessment should be calculated, then the assessment does not appear to have been legally made. Under cl. (b), it should be either on the basis that the monthly wages of the workman should be deemed to be the monthly average amount which during the twelve months immediately preceding the accident was being earned by the workman employed on the same work by the same employer, or, if there was no workman so employed, by a workman employed on similar work in the same locality. For the appellant it has been rightly contended that there is no evidence given in this case to prove either of the two factors on which the wages may be calculated in the case of the deceased worker with whom we are concerned. The Court below appears to have proceeded to assess the amount of compensation on the basis of the calculation as provided in cl. (c) of S. 5. This, in my opinion, was an incorrect basis. As I have said, the calculation should have been made under cl (b) of S. 5 and the materials required to be proved in making that calculation should have been called for, if available.

[10] I shall now come to the third contention advanced by the appellant which, in my opinion is the most substantial contention. The appellant contends that the amount of a lump sum payable as compensation had been settled by agreement between the widow of the deceased worker, the present respondent, on the one hand, and the appellant, on the other, and a memorandum of the same had been prepared in the form of a receipt which bears the thumb impression of the respondent and has been witnessed by six other witnesses, one of them being a District Board overseer. The document has been produced and has been marked as Ex. B in the case. As this is a very material document I may as well reproduce the whole of its contents. It runs as follows :

"I am Mariam Nissa, widow of Farid Jan deceased, resident of Kharagdiha, P. S. Jamua, district Hazaribagh and I admit as follows :

That my husband died on 4-12-48 meeting an accident.

That I am fully satisfied that the Company which employed him is quite innocent.

That having received Rs. 2400 (twenty four hundred rupees) by way of compensation I put my signature and pen mark. In future I will have no claim against the company."

(His Lordship referred to the evidence and proceeded : The evidence of these witnesses which I have no reason to doubt in the least very clearly indicates that the document in question was a genuine document and contained an agreement between the parties in regard to the amount of compensation and the payment thereof. The agreement ought to have been recorded by the learned Commissioner as provided in S. 28, Workmen's Compensation Act. The learned Commissioner, however, refused to record the same. In doing so he made the following observation:

"Though evidence has been recorded, I do not find it necessary to go into it. I find from perusal of S. 8 (1), Workmen's Compensation Act (VIII [8] of 1923) that payment should be made through the Commissioner and any payment made directly by an employer shall not be deemed to be a payment of compensation. In this case the payment, if at all made, has definitely not been made through the Commissioner. The opposite party says that there was mutual agreement and as such the payment was made outside the Court. But in that case the opposite party should have at least informed the Court or should have executed a memorandum of agreement as required under Ss. 28 and 29 of the Act . . . . "

[11] Now, this, in my opinion, seems to be a clear misconception of the provisions of the law.

The document (Ex. B) is clearly a memorandum which shows that the compensation payable had been settled by an agreement between the parties, and the memorandum in question had been produced before the Commissioner. The law then requires that the Commissioner shall on being satisfied as to its genuineness record the memorandum in a register in the prescribed manner. I do not understand what the Commissioner means by saying

"in that case the opposite party should have executed the memorandum of agreement as required under Ss. 28 and 29 of the Act."

The memorandum was already there executed by the respondent and bearing her thumb mark witnessed by several witnesses most of them being disinterested residents of the place, and having considered the evidence, I feel no doubt in my mind that it was a genuine agreement If the learned Commissioner had applied his mind to the provisions of the law and proceeded to consider the evidence as I have done, I have no hesitation in thinking that he would have come to the same conclusion, namely, that the memorandum regarding the agreement was a genuine memorandum, and, therefore, the Commissioner was bound to record the same in a register as prescribed by the law. The Commissioner has not proceeded to do so. I have, therefore, no option but to set aside the order of the learned Commissioner and to direct that the memorandum in question should be registered by him as required by Ss. 28 and 29 of the Act. I consider it unnecessary to send the case on remand for the purpose of determining the genuineness of the document when on a consideration of the evidence, I feel that there is no doubt as to its genuineness. In this view of the matter it would be unnecessary now for the Commissioner to decide the other two questions raised by the learned counsel for the appellant inasmuch as the agreement in question concludes the matter.

[12] I cannot, however, part with this case without making a few observations in regard to the irregularity of the procedure adopted by the learned Commissioner even from the very stage of the initiation of the proceedings. A reference to the order sheet shows that the proceedings were initiated as early as 5-1-1949, not on any claim for compensation filed by the respondent as required by S. 10 (a) of the Act but upon the report of the police. It is true that in rare cases the Commissioner may decide any claim to compensation in any case notwithstanding that notice had not been given or the claim had not been preferred in due time as provided in sub-s. (1) of S. 10, if he is satisfied that the failure to give notice or to prefer a claim was due to sufficient cause. There is no such case here. In fact the lady, the respondent, never moved in the matter at all and very probably never intended to move in view of the settlement between the parties. But the Sub-divisional Magistrate who was also the Commissioner issued notice on the police report directing the appellant to show cause why he should not pay Rs. 2,000 by way of compensation to the dependent of the deceased worker. When no reply was received to this notice, he directed an acknowledgment due registered letter to be sent to the appellant to deposit the money by 30-4-1949. Then on 30-4-1949, the appellant filed a petition to which I have already referred in course of my judgment. In this petition the appellant stated that the matter had been amicably settled between the parties, and that the widow of the deceased Farid Khan had been paid Rs. 2400 as compensation and filed a receipt (Ex. B) in support of the same. This petition accompanied as it was with the memorandum Ex. B must be treated as one under S. 28 of the Act. The Commissioner then directed notice to be issued on the widow to appear before him for verification. He does not appear to have been conscious at this stage of the existence of S. 28, Workmen's Compensation Act, as his subsequent order shows, yet it must be assumed that the order of 30-4-1949, asking the widow to appear for verification purports to have been under S. 28 of the Act. On the next date the respondent did not appear, and the Commissioner directed the Sub-Inspector of police to make her appear before him on 10-6-1949, and on 10th of June the respondent appeared for the first time when she denied having received the entire Rs. 2400 but admitted receipt of only Rs. 500. She was then called upon to produce her witnesses to prove *her* case. It should be noted that on this date when she appeared she did not prefer any claim for compensation. After two adjournments on 8-8-1949, she produced a witness. But as this was not sufficient, she was asked to produce all the witnesses on the next date, that is, 20-8-1949, when her witnesses were examined and the case was adjourned to 13th of September for the evidence of the opposite party, that is, the appellant. The second party, meaning the appellant, produced his witnesses on 5-10-1949, when his witnesses were examined. The Commissioner then directed the matter to be put up for hearing on 8-11-1949, which was again adjourned to the 23rd of November when he heard the parties and directed that the matter should be put up on the 10th of December for orders. Thus he should have proceeded to decide on the evidence whether the memorandum Ex. B was or was not a genuine agreement

between the parties. This he did not do but in the mean time on 23-11-1949, a claim petition for the first time was filed by the respondent which the learned Commissioner says was "to regularise the demand". Now, the Commissioner having heard the evidence in regard to the genuineness of the agreement should have proceeded to decide this matter. But as I have shown from his order he refused to do so and then on the application filed on 23 11-1949 he passed the order of compensation. If the learned Commissioner had observed the procedure laid down under the law, the parties would have been saved much of the unnecessary cost and harassment caused to them. I do not mean to suggest that the claim petition filed on the 23rd November was beyond time because the workman's death occurred on 4-12-1949. But even this claim petition was not a regular claim petition. It is quite apparent that it had been filed at the end of the proceedings when the parties had been heard in regard to this matter of genuineness of the settlement, and adduced their evidence on the point. There is an allegation made in the petition that some notice of claim was served upon the employer but no such notice has been produced on the record. In my opinion, therefore, most of the procedures adopted by the learned Commissioner appear to have been illegal and misconceived. The procedure which may be deemed to be regular is from the stage of his order dated 30-4-1949, up to the stage of his order dated 23 11-1949, when he again erred in entertaining the petition for compensation dated 23-11-1949, filed by the respondent which he erroneously thought was to regularise the demand. I have held that there was a genuine agreement between the parties as required by S. 28 of the Act, and, therefore, the agreement should be registered by the Commissioner as it was his bounden duty to do so.

[13] In the circumstances, I would allow the appeal, set aside the order of the learned Commissioner directing the payment of compensation by the appellant, and I would order that the settlement by agreement as embodied in Ex. B being a genuine settlement, this memorandum should be recorded by the Commissioner in a register as prescribed by law and the case disposed of accordingly. I do not think that it would be proper in this case to award any costs to the appellant, and I would, therefore, direct that each party should bear its own costs throughout.

[14] **Imam J.** — I agree to the order proposed.

V.R.B. *Appeal allowed.*

A. I. R. (38) 1951 Patna 266 *[C. N. 54.]*

REUBEN AND DAS JJ.

Shri Subodh Gopal Bose — Petitioner v. *Dalmia Jain & Co., Ltd. and others—Opposite Party.*

Misc. Judicial Case No. 77 of 1950, D/- 19-9-1950.

(a) Civil P. C. (1908), O. 39, R. 1—Land—Prima facie title.

There cannot be an order of injunction with regard to a piece of land unless there is a finding that the party which seeks the order of injunction has satisfied the Court about his *prima facie* title to, and possession of, the land. [Para 4]

Anno. C. P. C., O. 39, R. 1, N. 3.

(b) Civil P. C. (1908), O. 39, R. 1—Erroneous order of injunction—Breach.

The party against whom an order of injunction is made cannot disregard the order on the ground that it is erroneous in any particular. Right or wrong, the injunction order binds him, and he disregards it at his peril. [Para 5]

Anno. C. P. C., O. 39, R. 1, N. 18.

(c) Criminal P. C. (1898), S. 144—Order under — Effect.

The Magistrate cannot by an order under S. 144, Criminal P. C. determine questions of title or possession; nor can such an order afford protection to a party against whom an order of injunction is passed. [Para 9]

Anno. Cr. P. C., S. 144, N. 8.

(d) Civil P. C. (1908), O. 39, R. 1—Party to order of injunction—Breach—Plea of different capacities.

A party to an order of injunction cannot with impunity, disobey the order by assuming, or taking on, a different capacity in respect of the act or acts which constitute a breach of the order of injunction. [Para 10]

Anno. C. P. C., O. 39, R. 1, N. 18.

(e) Civil P. C. (1908), O. 39, R. 1 — No formal order drawn—Breach.

Where in accordance with the practice of the High Court no formal order of injunction is drawn up a party to the order cannot plead ignorance of the terms of the order but other persons who are not in a position to know the exact terms cannot be said to have committed a breach of the order. [Para 14]

Anno. C. P. C., O. 39, R. 1, N. 18.

P. R. Das, Arun Chandra Mitra, A. K. Bose and S. N. Bose for Petitioner; K. K. Verma, P. N. Gour, R. P. Katriar, Thakur Guru Sewak Singh and Advocate-General—for Opposite Party.

Das J. — On the application of Sri Subodh Gopal Bose, whom I shall hereafter call the petitioner, this Court issued a rule on the opposite parties, eight in number, to show cause why they should not be proceeded against for contempt of Court, either for wilful disobedience of an order of injunction passed by this Court on 16-12 1949, or for aiding or abetting the said disobedience. The opposite parties are (1) Messrs. Dalmia Jain and Co. Ltd., a Company registered under the Companies Act, 1913, and carrying on business with their registered office at Dalmianagar, Police Station Dehri in the district of Shahabad ; (2) Sri R. N. Pandey. Sub divisional Magistrate, Sasaram; (3) Sri B Singh, Sub-Inspector of Police, Police Station Rohtas, district

Shahabad; (4) Sri Hari Dutt, described as Attorney for Messrs. Dalmia Jain and Co. Ltd.; (5) Sri K. B. Upadhaya, described as Secretary of Messrs. Dalmia Jain and Co, Ltd. and of Messrs. Rohtas Quarries Ltd.; (6) Sri Fakirchand Maheswari, Quarry Manager, Rohtas Quarries Ltd.; (7) Sri Shanti Prasad Jain, alleged to be the managing Director of Messrs. Dalmia Jain and Co. Ltd.; and (8) the Rohtas Quarries Ltd., a company registered under the Companies Act, 1913, and carrying on business with their registered office at Dalmianagar, Police Station Dehri in the district of Shahabad.

[2] The facts and circumstances which led to the order of injunction referred to above, have been set out in detail in *Subodh Gopal Bose* v. *Provinces of Bihar*, A.I.R. (37) 1950 Pat. 222 :(31 P.L.T. 100). It is, I think, unnecessary to set out again those facts in detail. There have been a series of protracted litigation with regard to upper and lower Murli hill, and the facts relating to that litigation have been stated and re-stated in several reported decisions, to some of which a reference was made by us in *Subodh Gopal Bose* v. *Province of Bihar*, A. I. R. (37) 1950 Pat 222 : (31 P. L. T. 100). All that is necessary in the present case is to give a very brief resume of the facts so far as they are relevant here.

[3] On 1-4-1908, Messrs. Kuchwar Lime and Stone Co., Ltd., obtained leases from Government in respect of Murli hill. Messrs. Octavius Steel Co. were then the managing agents of the Kuchwar Lime and Stone Co. Ltd. The two leases were for twenty years, and related one to upper Murli hill and the other to lower Murli hill. It may be noted that in the lower Murli hill, Government did not have any right in the surface. On 10-12-1910, in Notification No. 3050-L. A. of that date, Government delaclared its intention to aquire a semi-circular piece of land in lower Murli hill, within village Sambauta, comprising an area of 30.97 acres for the construction of sidings of the Dehri Rohtas Tramway Co., now known as the Dehri Rohtas Light Railway Co. The acquisition was completed and possession delivered on 12-7-1912. The position of this semi-circular piece of land will appear from the map which was prepared at the time of the acquisition. This map is marked 'Y' and is part of the annexure to the affidavits filed on behalf of Messrs. Dalmia Jain and Co. Ltd., Messrs. Octavius Steel Co. were also the managing agents of the Dehri Rohtas Light Railway Co. at the time. In 1913, the record-of-rights was finally published; but the survey maps of the two villages Baknaur and Sambauta, within which lower Murli hill was comprised, were prepared in the years 1911-12. They are Exs. A-1 and A2 forming part of the annexures of the affidavits filed by the petitioner. In 1916-17, a further acquisition was made of 1.533 acres within lower Murli hill, for a re-alignment of the Murli siding in village Sambauta. The map relating to this second acquisition is marked 'X.' I should have stated that in the declaration relating to the acquisition of 1910-12, it was made clear that only the surface land was being acquired and

> "only such parts of the mines and minerals as may be necessary to dig or carry away or used in the construction of the work for the purpose of which the land was being acquired."

On 31-3-1928, the leases of 1908 came to an end. On 1-4-1928, Government granted two fresh leases in favour of Kuchwar Lime and Stone Co. Ltd. In between 1908 and 1928, Kuchwar Lime and Stone Co. Ltd., had purchased the rights of the tenants and the *maliks* in the surface land of lower Murli hill as also such other rights as the tenants had. There is a reference to this aspect of the matter in Para 3 of our judgment in *Subodh Gopal Bose* v. *Province of Bihar*, A. I. R. (37) 1950 Pat. 222: (31 P. L. T. 100). What exactly was purchased will be referred to in greater detail when I deal with the arguments of the parties. On 15-5-1929, the Dehri Rohtas Light Railway Co. Ltd., gave in lease to Messrs. Kuchwar Lime and Stone Co. Ltd., their rights in the acquired land except a very small portion. This lease is Ex. K, and the relevant map, which has been called the lease map, is Ex. K1. Messrs. Kuchwar Lime and Stone Co. Ltd., went into voluntary liquidation in 1933. On 30-9-1933, there were two documents in favour of the present petitioner, and that is the date on which the petitioner first comes into the arena One was an agreement with the petitioner for sale of the lessee's right which Messrs. Kuchwar Lime and Stone Co. Ltd., held in upper and lower Murli hill. The other was a conveyance in favour of the petitioner in respect of certain grants, estates and lands described in sch. A to the deed. So far as the present case is concerned, the important items are items 7, 8 and 9 of Sch. A. Items 7 and 8 relate to village Baknaur, and item 9 relates to village Samhauta. In item 7, all rights of the vendor in plot No. 168 of village Baknaur were conveyed, and by item 9, all rights of the vendor in 59 bighas 13 kathas and 18 dhurs, more or less, of certain survey plots in village Samhauta including plot No. 44, were conveyed. It is important to bear in mind these two plots, plot No. 168 of village Baknaur and plot No. 44 of village Samhauta; because the acts which, it is alleged, constitute contempt of this Court are stated to have been committed on those two

plots. The deed of agreement gave rise to litigation which went up to the Privy Council. With the details of that litigation we are not concerned, and I am omitting those details, except merely to state that the petitioner started quarrying operations in upper and lower Murli hill as the local agent of Messrs. Kuchwar Lime and Stone Co Ltd., pending sanction of Government of the proposed assignment of the lessee's right in favour of the petitioner. This sanction was not, however, given. An attempt was made to stop the petitioner from carrying on the quarrying operations, and Government purported to forfeit the leases in favour of Messrs. Kuchwar Lime and Stone Co. Ltd., and agreed to grant leases in favour of another party known as Kalyanpur Lime Works Ltd This resulted in litigation, the details whereof I am omitting. The upshot of it all was that the petitioner, after a short break, resumed possession and continued the quarrying operations. On 10-8-1943 Messrs Dalmia Jain and Co Ltd. became the managing agents of the Dehri Rohtas Light Railway Co On 31-3-1948 the leases in favour of Messrs. Kuchwar Lime and Stone Co. Ltd., came to an end. Trouble again arose between the petitioner and the local *khasmahal* officers to which a reference has been made in our judgment in *Subodh Gopal Bose* v. *Province of Bihar*, A I. R. (37) 1950 Pat. 222 : (31 P. L. T. 100). On 10-8-1949, Government granted leases of upper and lower Murli hill to Messrs. Dalmia Jain and Co. Ltd. On 11-8-1949, the petitioner instituted a suit (Title Suit No. 51 of 1949) against (1) the State of Bihar, (2) the Collector of Shahabad, (3) the Additional Sub-divisional Officer, Sasaram, and (4) Messrs. Dalmia Jain and Co. Ltd. On the same day, the petitioner prayed for an order of injunction against the defendants. The prayer was rejected by the Subordinate Judge of Sasaram. There was an appeal to this Court, and on 16-12-1949, this Court passed an order of injunction.

[4] It is necessary now to state what order this Court passed. After stating the principles which the Court has to keep in mind in granting or refusing to grant a temporary injunction, we considered the claim of the petitioner separately with regard to upper and lower Murli hill. With regard to upper Murli hill, we did not accept the case of the petitioner, and refused the prayer for injunction. With regard to lower Murli hill, however, we stated:

"The claim of the appellant with regard to lower Murli hill stands on a different footing. On the materials placed before us the appellant has made out a *prima facie* case of title to the surface land of lower Murli hill...It is clear to us that the appellant has made out a *prima facie* case of title, both with regard to the surface land of lower Murli hill and the right to quarry lime-stone and manufacture lime in the area of lower Murli hill."

On the question of possession we said:

"As to the possession of the surface land of lower Murli hill, there is very little doubt. The appellant is in possession and has kilns, buildings, bungalows, dwelling houses, tram lines, railway sidings, fixed plant and machineries, etc., thereon. It is obvious that very serious injury would be caused to the appellant if he is asked to remove them pending the hearing of his suit. It would be irreparable injury for the avoidance of which he is entitled to ask for an order of injunction—both on the grounds of *prima facie* title and balance of convenience."

The operative portion of the order reads thus :

"The prayer for an order of injunction in respect of upper Murli hill is refused; but the appellant will get an order of injunction, pending the decision of his suit, restraining the respondents from dispossessing or disturbing the possession of the appellant in respect of lower Murli hill."

We made an exception as to one matter to which a reference must now be made. There was some argument before us as to whether upper Murli hill could be approached by an old District Board road thus avoiding the necessity of going over any part of the surface land of lower Murli hill owned and possessed by the petitioner. With regard to this matter, we said:

"It is possible, however, that on some occasions the men of Dalmia Jain and Co. Ltd., did some work on upper Murli hill. Whether they approached by an old District Board road, the existence of which has been disputed before us, or went over the surface land of lower murli hill in order to reach upper Murli hill cannot be decided on the materials before us."

Therefore, we made an exception in the operative portion of our order and said:

"We are giving no decision as to the existence or otherwise of an old District Board road to reach upper Murli hill. But under the order of injunction which we are passing, the respondent will have no right to go to upper Murli hill over any part of the surface land of lower Murli hill owned and possessed by the appellant."

The expression "owned and possessed" by the appellant has given rise to much argument before us. I think that the proper way of interpreting that expression is to find out what an ordinary person will understand upon a plain reading of it in the context in which it has been used; in other words, the question is—is there anything in that expression which is likely to mislead the person who is to obey the order upon a plain reading of it? It is clear that the order must be read as a whole, and a party to the order cannot take the plea that he does not know the whole of the order. It is sufficiently clear from the extracts which I have quoted above that we found that the petitioner had made out a *prima facie* case with regard to the surface land of lower Murli hill as also the right to quarry lime stone and manufacture lime in the area of lower Murli hill. On the question of possession also, we gave a finding in favour of the petitioner. Having given those findings, we

made an exception with regard to the old District Board road, provided such a road was in existence and in use at the relevant time. But we made it clear that under the order of injunction which we passed the respondents had no right to go to upper Murli hill over any part of the surface land of lower Murli hill owned and possessed by the appellant. The contention raised on behalf of the opposite parties before us is that we did not give any finding as to possession or title over every bit of land within lower Murli hill, and we left at large the question of such title and possession over particular pieces of land within lower Murli hill, to be determined if and when an occasion arose: in other words, the contention is that even with regard to lower Murli hill, the petitioner had to prove his *prima faice* title and possession over any bit of land regarding which a dispute might arise as to whether the order of injunction related to it or not. In my opinion, such a contention is not tenable. The order of injunction would be meaningless if the land or area to which it related were to be left in a state of uncertainty; for, that would be the result of the contention urged on behalf of the opposite parties. The expression "owned and possessed" in the operative part of the order can have only one meaning to an intelligent reader, namely, that it related to the surface land in the area of lower Murli hill over which we found that the petitioner had made out a *prima facie* case of title and possession, with the only exception of the old District Board road. It was necessary to use the expression "owned and possessed," which expression must, however, be read in the light of and in consonance with the findings given by us—because we were making an exception with regard to an old District Board road the existence or location of which could not be determined on the materials which we had before us at the time when we passed the order. I do not think that there is anything in the expression "owned and possessed" which is likely to mislead any person who reads the whole order with ordinary commonsense and intelligence. I find it very difficult to understand how there can be an order of injunction with regard to a piece of land unless there is a finding that the party which seeks the order of injunction has satisfied the Court about his *prima facie* title to, and possession of the land. Messrs. Dalmia Jain and Co. Ltd., who were a party to the suit, as also a party to the injunction order, can have been under no misapprehension with regard to this matter. The schedule to the plaint of the suit thus described the area of lower Murli hill regarding which the petitioner claimed his right of title and possession:

"All that surface, subsoil and mineral rights in the portion of land known as lower Murli hill comprising an area of about 250 bighas within the Banskati Mahal situate in pergana Rohtas Touzi No. 4771 Tahsil Circle Sasaram Thana and Sub-District Sasaram, District Shahabad bounded on the North by the fields of Dullay Singh Achaibar Nau, Barhuhi Nala and field of Mangru Dusadh, on the East by Old District Board Road, on the West by Dehri Rohtas Light Railway Line, on the South by Old District Board Road field of Hira Singh, house and field of Jagdhari Ahir, house of and field of Ratan Ahir, house of Badhai Ahir, house of Budhi Ahir, house and field of Gopi Nau, Road leading from Barhuhi to Baknaur."

We have checked the boundaries with reference to the maps filed before us, and there can be no doubt that the area in question included both plots, Plot No. 168 of Baknaur and Plot No. 44 of Samhauta. In the course of the arguments before us in the appeal relating to the injunction order, it was not admitted by the respondents that the entire extent of the surface land was owned by the petitioner. We stated as follows in our judgment:

"As to lower Murli hill, it is not admitted that the entire extent of the surface land is owned by the appellant."

In spite of that, we found that the petitioner had made out a *prima facie* case of title and possession in respect of lower Murli hill. In my opinion, there is no scope for any misunderstanding.

[5] One point may be made clear at this stage. The question whether our injunction order was erroneous or not cannot be a question at issue at this stage. The matter has been thus put in Kerr on Injunctions, Edn. 6, p. 668:

"An order for an injunction must be implicitly observed, and every diligence must be exercised to obey it to the letter. However erroneously or irregularly obtained the order must be implicitly observed so long as it exists. A party affected by it cannot disregard it or treat it as a nullity, but must have it discharged on a proper application."

The point is obvious and need not be laboured. If the order of injunction was erroneous in any particular, the proper procedure for the party against whom it was made was to move us for rectification of the error. The party against whom the order is made cannot disregard the order on the ground that it is erroneous in any particular. Right or wrong, the injunction order binds him, and he disregards it at his peril.

[6] I now propose to set out in detail the acts of disobedience which are alleged by the petitioner against several members of the opposite party. It would, I think, be convenient if these acts are classified under four heads—(1) the act or acts on Plot No. 168 of village Baknaur relating to the alleged old District Board road; (2) the act or acts alleged with regard to the acquired land of 32 acres and odd in Plot No. 44 of village Samhauta; (3) the act or acts alleged

with regard to the construction of a siding, which for the sake of convenience I shall hereafter refer to as the new siding, on Plot No. 44 between the main line of the Dehri Rohtas Light Railway and the acquired land near the Directors' bungalow ; and (4) the act or acts alleged with regard to the old Murli hill siding, stated to be the outer boundary of the land acquired in 1910-12.

[7] I would first take up the case of Messrs. Dalmia Jain and Co. Ltd., with regard to the aforesaid acts, and then consider separately the cases of the other members of the opposite party; because the position of all the members is not the same with reference to the acts alleged.

[8] It seems to me that the position is quite clear with regard to Plot No. 168. This plot is undoubtedly a part of the area of lower Murli hill. Item 7 of Sch. A of the conveyance of 30-9-1933, in favour of the petitioner refers to this plot. The maps which show the existence of an old District Board road are Ex. H, a plan of Murli hill showing the *khasmahal* and the Banekati portion of the Murli hill proposed to be leased out to Messrs. Octavius Steel Company in 1908, Ex. J; a plan of Murli hill prepared in 1908 by the khas mahal authorities, and Ex. Y, the plan of the acquisition of 1910-12. The existing position of this alleged road is shown in Ex. M, a map prepared by an *amin* on behalf of Messrs. Dalmia Jain and Co., Ltd. The two survey maps of Baknaur and Samhauta do not show the existence of any District Board Road going up to upper Murli hill. It is, however, clear from a comparison of the maps which have been filed that what is now claimed to be the old District Board road was not an old District Board road at the time when the maps of 1908 and 1910 were prepared. Those maps show that the old District Board road passed along the boundary of Plot No. 168 and did not cut through it. It entered upper Murli hill near boundary pillar 1. The road which Messrs. Dalmia Jain and Co., are now claiming and using as the old District Board road cuts right through Plot No. 168 and enters upper Murli hill between boundary pillars 2 and 3. Obviously, the road which is now claimed as the old District Board road is not the same as the old District Board road shown in the maps of 1908 and 1910-12. As a matter of fact, the later maps show that lime quarries had been dug on or near the site of the old District Board road. Probably, that is the reason why the survey maps do not show the existence of any old District Board road. It is probable that Kuchwar Lime and Stone Co. Ltd., who were the undoubted lessee at the time of both lower and upper Murli hill, made some sort of a road for their own use which cut through Plot No. 168. Be that as it may, it is clear that the old District Board road, as shown in the maps, is not the one which Messrs. Dalmia Jain and Co. Ltd., are now claiming and using. It has not been disputed before us that Messrs. Dalmia Jain and Co. Ltd., have used this road which cuts across Plot No. 168. Such user of Plot No. 168 amounts to a contravention of the injunction order, as it does not come within the exception of the old District Board road which we made in our order for injunction. Jagadish Prasad, the amin, who prepared the map, Ex. M, said in para. 5 of his affidavit :

"That I have shown in the map the old District Board road in Plot No. 168 through which Dalmia Jain and Co. Ltd., is going to upper Murli hill. There is no other passage other than the said District Board road to go to upper Murli hill in Plot No. 168".

It is obvious that if the road which Messrs. Dalmia Jain and Co. Ltd., are now using be not the old District Board road, as the maps on the record show that it is not, then Messrs. Dalmia Jain and Co. Ltd. are not entitled to use that road, which cuts through Plot No. 168 owned and possessed by the petitioner. Such user amounts to a contravention of the order of injunction.

[9] The learned Advocate-General has referred us to two orders of the Sub-divisional Magistrate of Sasaram in respect of this road. One order is dated 24-9-1949, which we had seen before passing the order of injunction. The other order is dated 26-12-1949, made absolute on 13-2-1950 The preliminary order mentioned "old District Board road which passes by the south-eastern boundary of lower Murli hill near Plot No. 168". The final order proceeds on the assumption that the road used was the old District Board road—an assumption which is clearly wrong. These orders of the Sub-Divisional Magistrate cannot exonerate Messrs Dalmia Jain and Co. The Sub-Divisional Magistrate cannot by an order under S. 144, Criminal P. C., determine questions of title or possession; nor can such an order afford protection to a party against whom the order of injunction is passed. Taking the most favourable view possible, it can only be said that the Sub-Divisional Magistrate as also Messrs. Dalmia Jain and Co. Ltd. wrongly thought that the existing road was the old District Board road, though it was not so. Even then it would be a breach of the order of injunction, though not that kind of misconduct which involves wilful disobedience. (After dealing with other acts of disobedience by opposite party 1, his Lordship proceeded.)

[10] Having dealt with the acts which are stated to constitute contempt of this Court's order of injunction, I now turn to an important question of law. The learned Advocate General

has very strenuously contended before us that except for the act or acts committed on Plot No. 169, the other acts have been committed by the Dehri Rohtas Light Railway Co. Ltd., which was not a party either to the suit or to the injunction matter. As a matter of fact, the Dehri Rohtas Light Railway Co. Ltd., is not a party even to this proceeding. It is stated that Messrs. Dalmia Jain and Co. Ltd., as lessees, and Messrs. Dalmia Jain and Co. Ltd., as managing agents of the Dehri Rohtas Light Railway Co. Ltd., are two separate entities. The argument of the learned Advocate-General is that if there has been any disobedience by Messrs. Dalmia Jain and Co. Ltd., as managing agents of the Dehri Rohtas Light Railway Co., the disobedience is really by the Dehri Rohtas Light Railway Co., against whom there was no order of injunction. It is contended that disobedience by a person who was not a party to the proceeding does not constitute contempt, and even if Messrs. Dalmia Jain and Co. Ltd., as lessees, incited or aided the disobedience, they are not liable for contempt of Court. The learned Advocate-General relied on the decision in *S. N. Banerjee* v. *Kuchwar Lime & Stone Co. Ltd.*, A. I. R. (25) 1938 P. C. 295: (17 Pat 770). That was a case in which Government and its servants were restrained by an injunction from disturbing the possession of the Kuchwar Lime and Stone Co. Ltd. There was an appeal to the Privy Council which was dismissed. The Kalyanpur Company contended that they were not bound by the injunction, and resumed quarrying operations on 2-3-1936, and on the next day informed the Chief Inspector of Mines and the Collector that they had done so. The Collector replied on 16 3-1936 that they were taking this course at their own risk. On the 18th of March, the solicitors of Kuchwar Lime and Stone Co., sent a letter to the Collector, to the Commissioner and the Chief Secretary to Government protesting against the trespass committed by the Kalyanpur Co. On 28-3-1936, the Collector of Shahabad wrote a letter in which it was stated that the Kalyanpur Company were not parties to the suit which was brought against Government by the liquidators of the Kuchwar Lime and Stone Co. Ltd., and the decree passed by the High Court did not give Government authority to eject their present lessees. The Collector requested the Kuchwar Lime and Stone Co. Ltd., to take such legal action against the Kalyanpur Company as they were advised. It was in respect of this letter that this Court found Government, the Managing Director and the Manager of the Kalyanpur Company guilty of contempt—Government being in contempt by direct breach of the injunction, and the other two by aiding and abetting Government. The Privy Council held that the letter of the Collector dated 28-3-1936, did not constituts a breach of the injunction order. Their Lordships stated:

"But the surface of Lower Murli belonged to Mr. Bose and the immediate right to possession of the surface of Upper Murli and of the minerals in both belonged to the respondents. It was for the respondents who either had the immediate right to possession or were in possession under the order of the Court and not for the Government who were not in possession to eject the Kalyanpur Company, if ejection was to be effected. Indeed the respondents might at any time have made that Company defendants in the original action. The Government was under no duty to act; their duty was to leave those who claimed to be entitled to possession of the soil to take the appropriate measures."

Their Lordships further pointed out that the letter was a statement of fact necessitated by the Communication to which it was a reply and set out considerations which weighed with the Government in deciding to take no action. Dealing with the question of aiding and abetting, their Lordships pointed out that where the party enjoined has not broken the injunction it is impossible to hold that any other person has aided or abetted them in breaking it. Their Lordships did not accept the wide proposition that the doing by any one of an act which was forbidden by the injunction was itself an offence. In my opinion, the facts of the case on which the learned Advocate-General has relied are quite different from the facts before us. Here the case is that Messrs. Dalmia Jain and Co. Ltd., have committed a breach of the order of injunction. It is true that Messrs. Dalmia Jain and Co. Ltd., had two capacities—one as lessee from Government and the other as managing agent of the Dehri Rohtas Light Railway Co. Therefore, the question in the present case is not whether a person who is not a party to the injunction order has disobeyed it and another person is stated to have aided or abetted the disobedience. The question is whether a party to an order of injunction can, with impunity, disobey the order of injunction by assuming, or taking on, a different capacity in respect of the act or acts which constitute a breach of the order of injunction. Mr. P. R. Das has referred to the observation of an American author, Spelling in his Treatise on Injunctions and other Extraordinary Remedies. The observation which will be found at p. 937 of Vol. II (Edn. 2) reads as follows:

"Defendants duly served with an injunction are personally responsible for a violation of the order, in *whatever capacity they acted*, and from whatever motives."

I have underlined (here italicised) the words on which Mr. P. R. Das has relied. The observation is based on certain decisions of State Courts of America which are not available to us. There is an

English decision to the same effect to which Mr. Das has drawn our attention. The decision is *Avery* v. *Andrews* (1882) 51 L. J. Ch. 414 : (46 L. T 279). It appears that an order of injunction was passed against three persons, Andrews Lely and Mogg, restraining them from dividing amongst the members of the Loyal Brunswick Lodge of the Independent Order of Odd Fellows, Manchester Unity Friendly Society, the sum of £ 2000. On the 2nd of November, three other gentlemen were appointed trustees that is to say there being an injunction against three gentlemen in their character of trustees to prevent their doing a certain act, they immediately upon that injunction retired, and three other members of the society stepped into their shoes in their places in the character of trustees. Then, on a subsequent date, the sum of £.2000 was divided amongst the members of the society. Kay J. made the following observations :

"If anybody, though not a person actually named in the injunction, chooses to step into the place of the man who was named, and to do the act which he was enjoined from doing, he has committed a very gross contempt of this Court".

His Lordship treated the old and the new trustees all alike, and held them all guilty of contempt. In my opinion, the same principle should apply in the present case. Messrs. Dalmia Jain and Company Ltd., were the party against whom the order of injunction was made; they were well aware of the order and its contents. I do not think that it is open to them to say that they disobeyed the order of injunction in another capacity, and therefore, are not liable for contempt. If that were the law, then it would be easy for a party to disobey an order of this Court by merely assuming a different capacity in respect of the acts which constitute a disobedience of the Court's order. The legal contention raised by the learned Advocate-General must therefore, be overruled.

[11] There cannot be any doubt that Messrs. Dalmia Jain and Co. Ltd., opposite party 1, has been guilty of contempt of Court.

[12] I now proceed to consider the cases of the other members of the opposite party. The case of opposite party 8, the Rohtas Quarries Ltd., and opposite party 6, Quarry Manager, Rohtas Quarries Ltd., can be disposed of in a few words. No definite allegation has been made against the Rohtas Quarries Ltd., and Mr. P. R. Das has frankly conceded that he does not press his case against them.

[13] Sri Hari Dutt, opposite party 4, and Sri K. B. Upadhyay, opposite party 5, are constituted Attorney and Secretary respectively of Messrs. Dalmia Jain and Co. Ltd. The allegations against them are contained in paras 39 and 50 of the affidavit of Mr. Medan Lal. As against opposite party 5, it is stated in para. 39 that he tried to cross through the new road on Plot No. 168 on 23-12-1949. In para. 40, it is alleged that opposite parties 4, 5 and 6 have gone into lower Murli hill on 5-1-1950, when the Sub-Divisional Magistrate inspected the locality. In my opinion, these allegations, even if accepted as correct, do not make them liable for contempt of Court.

[14] There is a further point in connection with these members of the opposite party. It appears that in accordance with the practice of this Court, no formal order of injunction was drawn up in this case. Messrs Dalmia Jain and Co. cannot plead ignorance of the terms of the order of injunction, because they were a party to the order. But other members of the opposite party may not have been in a position to know the exact terms of the order of injunction, and it cannot be said that by going into lower Murli hill when the Sub Divisional Magistrate visited the locality, they committed a breach of the order of injunction.

[15] Against Sri Shanti Prasad Jain, opposite party 7, the allegation in para. 41 of the affidavit of Mr Medan Lal is :

"That opposite party 7 who is the Managing Director of opposite party 1 is the man who is directing all the operations to flout the order of injunction of this Hon'ble Court."

This allegation has been stoutly denied. In the affidavit of Mr. M. L. Burman, it has been stated that opposite party 7 is not the Managing Director of opposite party 1, and that the allegations are false. On the materials before us it cannot be held that Sri Shanti Prasad Jain is either the Managing Director of Dalmia Jain and Co. Ltd., or was directing the operations which constituted a breach of the order of injunction. Our attention has been drawn to O 39, R. 5, Civil P. C., but I do not think that it has any application, in the absence of any reliable evidence, that Sri Shanti Prasad Jain was guilty of any personal action which the order of injunction sought to restrain.

[16] Then, remain the Sub-Divisional Magistrate of Sasaram, opposite party 2 and the Sub-Inspector of Police, police station Rohtas, opposite party 3. The allegations against them are contained in paras 31 to 38 of the affidavit of Mr Medan Lal. In paras. 20 to 29 also allegations were made that opposite party 1 got reports submitted by opposite party 3, and on these reports, the Sub-Divisional Magistrate passed orders in contravention of the order of injunction. I have carefully examined the affidavits filed by the Sub-Divisional Magistrate as also by the Sub-Inspector of Police. I do not think that any collusive reports were submitted by the Sub-

Inspector of Police, nor am I prepared to hold that the orders under S. 144, Criminal P. C., passed by the Sub-Divisional Magistrate were *mala fide*. Mr S. N. Bose, who argued this part of the case on behalf of the petitioner, conceded before us that the Sub-Inspector of Police was not guilty of any bad faith. He reported about the apprehension of a breach of the peace, when such an apprehension actually arose. As to the orders passed by the Sub-Divisional Magistrate, I have only two comments to make. My first comment is that some of the orders were passed after the order of injunction, and it was the duty of the Sub-divisional Magistrate to find out what the order of injunction was. Secondly, the Sub-divisional Magistrate, when he did know the terms of the order of injunction, failed to notice our finding as to *prima facie* title and possession. But to say that the orders of the Sub-divisional Magistrate were incorrect is not the same thing as to say that he was actuated by bad faith in respect of the orders which he passed. I do not think that the Sub-divisional Magistrate can be held guilty of having aided or abetted the disobedience of the order of injunction.

[17] The net result, therefore, is as follows: Messrs. Dalmia Jain and Co. Ltd., opposite party 1, are guilty of disobeying the order of injunction which we passed on 16-12-1949. I would accordingly pass an order, under the provisions of sub-r. (3) of R. 2 of O. 39, Civil P. C., that the property of Messrs. Dalmia Jain and Company Ltd. in upper and lower Murli hill be attached. I would discharge the rule as against the other members of the opposite party. Messrs. Dalmia Jain and Co. Ltd. must pay the costs of the petitioner, and we assess the hearing fee at ten gold *mohurs*. Opposite parties 3, 6 and 8 will be entitled to their costs from the petitioner, as they were unnecessarily made parties : hearing fee, three gold *mohurs*. There will be no order for costs in favour of other members of the opposite party.

[18] There is one other matter which should be mentioned. When we passed the order of injunction, we had the possibility in mind that it might be impossible for Messrs. Dalmia Jain and Co. Ltd. to work on upper Murli hill without any right of access through lower Murli hill. It is somewhat unsatisfactory that the work on upper Murli hill should stop because of the absence of any right of access. But this unsatisfactory result is inherent in the situation, in which the conflicting rights of the parties with regard to upper and lower Murli hill are so inextricably entwined. There was an attempt at compromise, but nothing came out of it. It is, however, very necessary that this unsatisfactory state of affairs must not be allowed to continue a day longer than is necessary. In connection with an injuction matter in which the Kalyanpur Lime Works Ltd. were the petitioner, we passed an order that the suit must be taken up for hearing within one week of the re-opening of the Civil Courts after the Puja holidays. In this case also, there should be a direction by this Court so that the hearing may be expedited as far as possible. We accordingly direct that the Subordinate Judge of Sasaram give precedence to this suit and take up the hearing immediately after the hearing of the suit by the Kalyanpur Co. Ltd., so that the hearing of both these suits may be concluded before the end of the year. It is stated at the bar that issues have been framed and the suits is ripe for hearing. The learned Subordinate Judge will direct the parties to get ready with their evidence, oral and documentary, as soon as possible. All interlocutory matters should be finished as expeditiously as possible, so that the suit may be taken up immediately after the conclusion of the suit by the Kalyanpur Works Ltd.

[19] **Reuben J.** — I agree with the order proposed by my learned brother and the reasons given by him. There is very little to add.

[20] The area in dispute in Misc. Appl. No. 303 of 1949, the case in which we passed the order of injunction, was specified in detail at the foot of Subodh Gopal Bose's plaint, and in the miscellaneous appeal there was no doubt as to the extent of the land covered by the dispute. Lower Murli referred to in our order in that case includes the land in Plot No. 44 which was acquired for the Debri Bohtas Light Railway. Bose expressly claimed title and possession over the entire surface of lower Murli throughout the proceedings (*vide* his plaint, his petition filed before the Subordinate Judge for a temporary injunction and his petition for an *ad interim* injunction in the miscellaneous appeal before this Court). Our finding in the miscellaneous appeal was in his favour, the only exception being as to the "old District Board Road". Hence, it was not open to Dalmia Jain & Co., Ltd. (for convenience I shall hereafter refer to them as Dalmia Jain) to treat the acquired area as not in the possession of Bose. Stress was laid before us in the present proceeding on the use of the words "owned and possessed" in para. 18 of our order as reported in *Subodh Gopal Bose* v. *Province of Bihar*, A.I.R. (37) 1950 Pat. 222 (31 P.L.T. 100). Our finding as to possession precedes this paragraph, and there can be no doubt that it relates to the whole surface of lower Murli. The exception to the finding was dealt with in para. 18, namely, the "old District Board Road,"

and it was only in contrast to this that the words "owned and possessed" were used.

[21] The maps filed before us in the present proceeding point to the conclusion that the "old District Board Road" no longer exists. The road is not shown at all on the map prepared by the Survey and Settlement Department in 1911-1912. Nor is the road to be found in the Land Acquisition map dated 29-12-1949 prepared for the acquisition of the disputed land

"for carrying on quarrying operations, erection of plaints, buildings, office, quarters etc. in village Samahuta and village Baknaur,"

although this map shows o .er roads. The conclusion I have suggested is supported even by the map dated 10-8-1949 prepared in the office of the Collector of Shahabad and showing the area of 82.766 acres of lower Murli leased out by Government to Dalmia Jain. The road shown in that map by broken lines corresponds to the position of the "old District Board road" as it was depicted in the earlier maps referred to by my learned brother, which position is different from that occupied by the existing track which Dalmia Jain claim as the "old District Board road." The fact that the other roads on this lease map are drawn in continuous lines suggests that the "old District Board road" is no longer in existence as such. The name "old District Board road" is itself significant and suggests the reason why no records are produced from the office of the District Board to support its existence; the reason is that the road has been abandoned.

[22] That the old Murli siding was existing before the acquisition of 1910-1912 appears also from the map of the Survey and Settlement Department, which shows the siding but not the acquisition. It was the only siding on the land before October 1949 and would, therefore, appear to be the siding mentioned in sch. B appended to the sale deed executed by Kuchwar Lime and Stone Co. Ltd. on 30-9-1933 in favour of Bose. It seems probable also that this is the siding referred to by the Collector of Shahabad in his letter No. 690 dated 14-7-1949 directing the Kuchwar Lime and Stone Co. Ltd., to vacate possession of lower Murli in favour of Dalmia Jain and to remove their movables including the "siding", therefrom. The *mala fides* of the claim now set up to the siding would appear from the fact that the case originally made out was that the siding was leased to Kuchwar Lime and Stone Co. Ltd. by the Dehri Rohtas Light Railway Co. Ltd., which lease, according to Dalmia Jain, has been terminated by notice with effect from 1-1-1950 (*vide* para. 18 of the affidavit of M. L. Burman). In the argument before us, it was admitted by the learned Advocate-General that the siding was outside the lease.

[23] My learned brother has given reasons for rejecting the defence that Dalmia Jain are protected because they acted as the managing agents of the Dehri Rohtas Light Railway Co. Ltd. I would add that on the facts the defence has no merits. It is Dalmia Jain who have taken the lease of the underground rights from Government; the Railway Company has nothing to do with these rights. M. L. Burman expressly admits in para. 15 of his affidavit that Dalmia Jain are quarrying in the acquired area, that is to say, within the area covered by our injunction. Again, with reference to the two sidings, the learned Advocate-General argued, *inter alia*, that Dalmia Jain have admittedly the right to quarry in upper Murli and, therefore, the Railway Company was entitled to transport the quarried materials consigned by Dalmia Jain To my mind, this is exactly where the trouble arises with reference to these sidings. The new siding has been opened and the old one has been seized by the Railway Company solely to enable Dalmia Jain to send away the stuff quarried by them. But Dalmia Jain cannot get their stuff to either of the sidings without passing through lower Murli which is forbidden by our injunction. The list of despatches, Ex. J, filed with the petition of Bose shows that Dalmia Jain have sent several consignments of quarried materials by the railway since the order of injunction was passed. It cannot be pretended that this was done by them as agents of the Railway.

D.H. *Order accordingly.*

A. I. R. (38) 1951 Patna 274 *[C. N. 55.]*

REUBEN AND JAMUAR JJ.

Badri Narain Singh — Appellant v. *Bageshwari Prasad Dubey and others—Respondents.*

A. F. O. D. No. 324 of 1946, D/- 21-3 1950.

(a) Evidence Act (1872), S. 115 — Estoppel by conduct.

Where a purchaser of a share of property which was subject to a mortgage was allowed apparently without question to get his name mutated in respect of the share and in the *batwara* proceedings, in the presence of the mortgagee, and was similarly allowed without question to get a *patti* corresponding to the share:

Held, that these facts did not mean anything more than that the mortgagee and the other co-proprietors thought that the purchaser by the purchase acquired the entire share. If, however, they were under a misconception, and in fact the purchaser only acquired a smaller interest by the purchase, their conduct in not opposing the mutation and in not questioning the correctness of the purchaser's share in the *batwara* proceedings would not create an estoppel against them. [Para 9]

Anno. Evidence Act, S. 115, N. 3.

(b) Bihar and Orissa Public Demands Recovery Act (VII [7] of 1914), S. 25 (1) — Certificate sale — Representation.

A property belonging to five persons was sold in execution of a certificate filed for the recovery of cess under the Act. In the certificate, three certificate-debtors were mentioned. It was apparently assumed that the entire property was vested in the three certificate-debtors and there was no idea then that there were other persons also interested in it. Subsequently, the property was sold in execution of a simple mortgage decree and was purchased by the defendant. The plaintiff who had purchased the property in execution of the certificate and who was not impleaded in the mortgage suit brought a suit for a declaration that his title was unaffected by the mortgage and for recovery of possession of the property :

***Held*, that the idea that the three certificate-debtors were there in a representative capacity could not have been present in the certificate proceedings and hence they did not represent the entire property sold.**

[Para 12]

Held further, that the plaintiff was not entitled to recover possession of the entire property but only the interest of the certificate-debtors. [Para 14]

Lal Narayan Sinha and T. P. Sinha —for Appellant; S. C. De, P. Jha and Jugeshwar Pd. —for Respondents.

Reuben J.—This is an appeal against a decree of the Additional Subordinate Judge of Gaya.

[2] In village Kusahan Pipra there was a Tauzi No. 2578, comprising several separate accounts. We are concerned here with a share of two annas recorded in separate account No. 7 which formerly belonged to one Gajraj Singh, and on his death passed to his widow Pachhlari Kuer. It is common ground that on her death the property passed to Fateh Bahadur and Tika Ram, sons of Gajraj's divided cousin Uttim Singh, whose other sons Bishwanath and Bhondu were then dead. In the year 1923, a certificate under the Bihar and Orissa Public Demands Recovery Act, 1914, was filed for the recovery of arrears of cess due in respect of separate account No. 7. In execution of this certificate, the share was sold on 29-10 1923 and was purchased by Harbans Prasad Dubey, the original plaintiff in the suit. By this time Fateh Bahadur and Tika Ram were dead. Three certificate-debtors were named in the certificate, Mathura and Matukdhari, sons of Fateh Bahadur, and Parichhit, son of Bishwanath. The sale was confirmed in due course and Harbans took delivery of possession on 23-8-1924 and got himself recorded as proprietor of this share on 6-5-1925. At that time, a *batwara* proceeding was pending in respect of Tauzi No. 2578. Harhans intervened, was allotted a new Tauzi No. 11210, in respect of the two anna interest purchased by him, and got delivery of possession over it on 2-5-1928. In the meantime, Mortgage Suit No. 66 of 1927 had been instituted in respect of the two annas share on the foot of a simple mortgage bond executed by Fateh Bahadur and Tika Ram. For some reason, Jwala Prasad Dubey, father of Harbans, was impleaded in the suit instead of Harbans, and although a decree was obtained against him in the Court of first instance, the suit was dismissed against him by the High Court in appeal on the ground that Harbans was the real purchaser in the certificate sale. On 8-1-1937, Tauzi No. 11210 was sold in execution of the decree in mortgage Suit No. 66 of 1927 and was purchased by Mahabir Prasad, defendant 1 in the present suit, from whom the appellant before us derives his title, and the purchaser obtained delivery of possession in June 1937. The present suit was brought for a declaration that Harbans Dubey's title was unaffected by the mortgage, and for confirmation of his possession over the suit property, and in the alternative for recovery of possession.

[3] The defence taken was that Harbans purchased the property as *benamidar* of the certificate-debtors and that the real owners of the property were fully represented in the mortgage suit; secondly, that even conceding that Harbans was the real purchaser he acquired merely the right, title and interest of the certificate debtors.

[4] The learned Subordinate Judge has rejected the first contention but has accepted the second. As regards possession he has found that Harbans was dispossessed. Relying on *Ganga Prasad Singh* v. *Mt. Ganeshi Kuer*, A.I.R. (31) 1944 Pat. 119 : (22 Pat. 761), he has held that the plaintiffs are entitled to recover possession of the entire property.

[5] In appeal, the issue of *benami* was not seriously pressed before us, but it was urged that the plaintiffs are entitled to recover possession only of the portion of the property representing the right, title and interest of the certificate debtors. On the other side, it was urged, *firstly* that the question of the passing of only a share by the certificate sale should not have been allowed to be raised, *secondly* that the certificate-debtors represented the entire interest and so the entire interest passed, *thirdly* that the *batwara* proceedings cannot be reopened, and that if by the *batwara* a larger *patti* has been given to Harbans than his real interest warrants this cannot be helped; the mortgagors must seek their remedy against the portion allotted in the *batwara* to the proprietors who are entitled to the remaining fraction of the two anna share. Before the Subordinate Judge the plaintiff also set up the case that Fateh Bahadur and Tika Ram threw the two-annas share into the joint family stock, and that in a subsequent partition of the joint family property

this two-anna share was allotted to Matukdhari, Mathura and Parichhit. The Subordinate Judge disbelieved the story of partition. According to him the descendants of Uttim are still joint, and Fateh Bahadur and Tika Ram did not throw the two-anna share into the joint family stock; this property therefore descended to their sons and grandsons, and Partichhit had no share in it at all. This finding has not been challenged before us.

[6] Thus, four points arise for consideration ; (1) Were the defendants entitled to contend that only a fraction of two annas passed by the certificate sale? (2) Can the *batwara* proceedings be reopened ? (3) Did the certificate-debtors represent the entire interest ? and (4) Are the plaintiffs entitled to recover possession of the whole two annas even though their interest is confined to a fraction ?

[7] As regards the first point, it is urged that on the plaint and the written statement originally filed in the suit the question does not arise. This is true, but the question is raised by an amendment of the written statement which was allowed by the Subordinate Judge in April 1946. It was within the discretion of the Subordinate Judge to allow the amendment, and I am unable to say that he has not exercised his discretion in a judicial manner.

[8] Coming to the second point, there might have been some force in it if the *patti* allotted to Harbans in the *batwara* had been intended to represent a smaller share, corresponding to the interest of the certificate-debtors. In such a case, apart from considerations such as fraud or collusion, it may not have been open to the civil Court to go behind the *batwara*. Here, however, the *patti* was admittedly intended to represent the whole two-annas interest. There can be no question, therefore, of looking for substituted security elsewhere.

[9] For the third point much stress has been laid on the fact that Harbans Dubey was allowed apparently without question to get his name mutated in Register D in respect of the two-anna share, and that in the *batwara* proceedings, in the presence of the mortgagee Lal Narayan Singh, he was similarly allowed without question to get a *patti* corresponding to this share. These facts do not mean anything more than that the mortgagee and the other co-proprietors thought that Harbans by the purchase acquired the entire two anna interest. If, however, they were under a misconception and in fact Harbans only acquired a much smaller interest by the purchase, their conduct in not opposing the mutation and in not questioning the correctness of Harban's share in the *batwara* proceedings would not create an estoppel against them, and the question of representation is still open to investigation.

[10] The position here is that Fateh Bahadur and Tika Ram inherited the property in equal shares when Pachhlari Kuer died. After them their shares would pass to their sons. The sons of Tika Ram, whose branch is still in existence, are not among the certificate debtors. Fateh Bahadur had four sons, of all whose branches are still in existence; of them only two sons, Mathura and Matukdhari, were named as certificate-debtors. As the property came to them from their father it would be ancestral property between them and their sons, of whom Mathura had three and Matukdhari four at the time of the certificate sale (*vide* p. 32, Parts I and II of the Paper Book); their interest in Tauzi No. 11210 was therefore $16 \times \frac{1}{2} \times \frac{1}{4} \times \frac{1}{4}$ annas=10 *dams* and $16 \times \frac{1}{2} \times \frac{1}{4}$ 1/5 annas=8 *dams* respectively. As I have already mentioned, the third certificate-debtor had no interest in the property. So, unless it can be held that the certificate-debtors represented the entire interest the certificate sale was operative to pass only an interest of 18 *dams* in the Tauzi.

[11] It has been decided in several reported decisions that the principle of representation does not apply to the procedure of realising public demands by means of certificates (*Vide Sheaat Hosain* v. *Sasi Kar*, 19 Cal. 783, *Mohammad Abdul Hai* v. *Gujraj Sahai*, 20 Cal. 826 : (20 I.A. 70 P.C.) *Rupram Namasudra* v. *Ishwar Namasudra*, 6 C. W. N. 302 and *Mt. Raja Kuer* v. *Ganga Singh*, 13 C. W. N. 750 (1 I. C. 197). In spite of this, we find that the Legislature in S. 26 (1), Bihar and Orissa Public Demands Recovery Act, 1914, enacted that by a certificate sale merely the right, title and interest of the certificate-debtor passes even if the property itself is mentioned. It was pointed out in *Baijnath Sahai* v. *Ramgut Singh*, 23 I. A. 45: (23 Cal. 775 P. C.) that the provisions for the recovery of public demands by means of certificates are very stringent. They must therefore be strictly interpreted. Our attention has been drawn to *Kameshwar Singh* v. *Ishwari Pd. Singh* 21 P. L. T. 503: (A. I. R. (27) 1940 Pat 692) and *Manrup Mandal* v. *Badri Sao*, A. I. R. (29) 1942 Pat. 383: (202 I. C. 62), but these are both case, of certificates for the recovery of arrears of rent, which are excluded by S. 26 (3) from the provisions of S. 26 (1) *vide*, *Hari Prasad Singh* v. *Lal Behari Saran Singh*, 19 Pat. 618: (A. I. R. (27) 1940 Pat. 328 F B.). There is one reported case in which seemingly the principle of representation was applied to certificate procedure, *Bindeshwari Prasad* v. *Shiva Datt*, 19 P. L. T. 328: (A. I. R. (25) 1938 Pat. 315 F.B.) but that was on the special circumstances

of the case (*vide Hari Prasad Singh* v. *Lal Behari Saran Singh*, (19 P. L. T. 618: A. I. R. (27) 1940 Pat. 328 F.B.) *ante* at pp. 635-69).

[12] Here, on the facts and on the case set up by the plaintiff, the case of representation cannot stand. According to the plaintiff, the entire property was vested in three certificate-debtors, and it was apparently assumed in the certificate proceeding that this was so. There was no idea then that there were other persons also interested in it. Hence, the idea that the three certificate-debtors were there in a representative capacity cannot have been present. This distinguishes the case from *Binaesnwari Prasad* v. *Shiva Dutt Singh*, (19 P. L. T. 328: A I. R (25) 1938 Pat. 315 F.B.) *ante* where the Certificate Officer investigated the point and held in the certificate proceedings that the certificate-debtor represented the entire interest.

[13] For the last point, reliance is placed on *Ganga Prasad Singh* v. *Mt. Ganeshi Kuar*, A. I. R. (31) 1944 Pat. 119: (22 Pat. 761). This is the authority which was also relied on by the learned Subordinate Judge. But the facts are different in one important particular. Here, although Harbans was in possession of the entire tauzi, his title extended only to a fraction of it; as regards the rest he was a trespasser. By the mortgage sale the title of Harbans remained unaffected, but the title to the remaining portion of the tauzi passed to the auction-purchaser. As regards this portion, the plaintiff is in the position of a trespasser seeking possession against a rightful owner, and cannot succeed. He cannot set up a title by adverse possession, because his adverse possession did not affect the mortgagees, the mortgage being a simple one *Aditya Kumar Ray* v. *Dhirendra Nath*, A. I. R. (37) 1950 Cal. 92: (53 C. W. N. 899). Nor can he rely on the fact that he acquired the title to the entire equity of redemption by prescription because, his adverse possession having started in 1924, his title by prescription became perfected during the pendency of the mortgate suit. On the principle laid down in *Ganga Prasad Singh* v. *Mt. Ganeshi Kuer*, (A. I. R. (31) 1944 Pat. 119 : 22 Pat. 761) *ante* the plaintiff cannot be asked to redeem his share of the tauzi, and to this extent he is entitled to succeed.

[14] In the result I would allow the appeal in part and modify the decree of the Subordinate Judge by directing that the plaintiff recover only a share of 18 *dams* in tauzi NO. 11210. The parties will get costs proportionate to their success throughout.

[15] **Jamuar J.**—I agree.

V.B.B. *Appeal partly allowed.*

A. I. R. (38) 1951 Patna 277 *[C. N. 56.]*

DAS AND SARJOO PRASAD JJ.

Girija Nandan Singh and others — Appellants v. *Girdhari Singh and others—Respondents.*

A. F. A. D. No. 1677 of 1947, D/- 27-3-1950.

(a) Hindu law — Partition — Evidence of — Unregistered deed of partition—Admissibility in evidence—Registration Act (1908), S. 49.

The word "partition" involves two concepts; (i) change of status and (ii) division of property to prove either or both of which no documentary evidence is required at all. On evidence of actual division of property between the parties, and possession of respective shares in accordance with that division by them accompanied by their conduct which is inconsistent with anything except the factum of separation, the Court of law can hold, apart from any instrument of partition, that the parties had separated in status and effected partition of the family properties.

An unregistered deed of partition and deeds purporting to be sale-deeds between various parties to the partition, though not admissible to prove partition, can be referred to under S. 49, Registration Act, 1908, for the purpose of showing that the parties were dealing with properties in their separate possession on the footing that there had been a partition: A. I. R. (33) 1946 P. C. 51, *Rel. on Case law discussed.* [Para 13]

Anno. Regn. Act, S. 49, N. 29.

(b) Stamp Act (1899), S. 35 — Registration Act (1908), S 49—Comparison.

Section 35, Stamp Act, enacts that no instrument chargeable with duty shall be admitted in evidence "for any purpose." Section 49, Registration Act, is not rigorous in its application. It only says that the document required by S. 17 to be registered shall not be received as evidence of "any transaction affecting such property." This contrast in the language is further stressed in the proviso to S 49 under which an unregistered document affecting immovable property may be received as evidence (i) of part performance of contract, or (ii) as evidence of any collateral transaction not effected by the instrument. [Para 12]

Anno. Regn. Act, S. 49, N. 2.

(c) T. P. Act (1882), S. 53A — Unregistered deed of sale—Possession delivered—Deed is admissible to prove part performance. [Para 19]

Anno. T. P. Act, S. 53A, N. 26; Regn. Act, S. 49, N. 12.

Shambhu Prasad Singh and Bishun Kumar Singh —for Appellants; Lalnarain Sinha, Ramananda Sinha, Shyam Nandan Prasad Singh and Harsans Kumar—for Respondents.

Sarjoo Prasad J. — This appeal has been presented by the plaintiffs in a suit for partition in which the plaintiffs claimed partition of certain raiyati lands comprised in Khatas NOS. 109, 177 and 178 in village Jamri, pargana Pahra, District Gaya.

[2] The facts giving rise to this appeal may be indicated as follows: One Jiyan Singh had five sons. The plaintiffs are sons of Ambica Singh, one of the sons of the said Jiyan Singh, whereas defendant 1, Girdhari, is another son of Jiyan. and defendants 2 and 3 are the sons of defendant 1. Defendants 4 to 11 are the descen-

dants of the other three sons of Jiyan. It is the admitted case of both parties that the other sons of Jiyan became separate during the lifetime of their father, but Ambica, the plaintiffs' father, and defendant 1 continued to be members of the joint family governed by the Mitakshara school of Hindu law. The plaintiffs' case is that subsequently the plaintiffs' father Ambica, also became separate from the defendants but the disputed lands continued to be jointly in their possession, and consequently, they were entitled to a partition of those lands. The plaintiffs further stated that these lands were the exclusive property of the plaintiffs and defendants 1 to 3 with which defendants 4 to 11, the descendants of the other sons of Jiyan, had no connection whatsoever. It may be stated here that Khatas Nos. 109 and 177 have very small areas but Khata No. 178 comprises the largest area and consists of several plots.

[3] Defendant 1 who filed a separate written statement denied that the lands belonged to him and Ambica jointly. According to him, the lands were partitioned between him and the father of the plaintiffs in 1325F., shortly after the survey. He further stated that his father Jiyan who remained joint with him and his brother Ambica died, and on his death defendants 4 to 11 also contributed to the expenses of his *sradh*, and in consideration thereof both Ambica and himself agreed to give to them Plots Nos. 1407, 1438, 1600 and 1646 of Khata No. 178. These plots, therefore, according to him belong to defendants 4 to 11 with which neither defendants 1 to 3 nor the plaintiffs have any concern. Defendants 4 to 11 filed a separate written statement in which they claimed that the lands of the four Khatas jointly belonged to all the parties, and that they were wrongly recorded in the survey only in the names of Ambica and Girdhari. They claimed that the khatas were privately partitioned amongst the parties in the year 1330F, and as a result of this partition they got the lands of Khatas Nos. 178 and 109 as described in their written statement Their written statement shows that they claimed Plots Nos. 1438, 1646 and 1407 appertaining to Khata No. 178 as a result of this partition along with two other plots which did not include Plot No. 1600. At the trial, however, it appears, defendants 4 to 11 gave up their case in the written statement and accepted the case of defendant 1 to the effect that the lands of the three Khatas in dispute belonged actually to the plaintiffs and defendants 1 to 3 but defendants 4 to 11 were subsequently allotted the four plots of khata No. 178 as stated in the written statement of defendant 1. They further accepted the case of defendant 1 that the lands of the disputed Khatas had been already partitioned between the plaintiffs and defendants 1 to 3.

[4] It may be also stated that the case of defendant 1 was that at the time of the alleged partition in 1325F., two schedules were prepared by way of memoranda in respect of the lands allotted to each party, namely, the plaintiffs' father Ambica and defendant 1. On this memoranda, the arbitrators put their signatures and handed over one copy to this defendant and another copy to the plaintiffs, and that since the date of partition both the parties entered into separate possession and occupation of the lands allotted respectively to them and have been appropriating the produce thereof. He accordingly contended that the plaintiffs' suit for partition in respect of the disputed lands was not maintainable.

[5] The learned Subordinate Judge who tried the case held: (1) that the branches of the plaintiffs and defendants 1 to 3 had before the survey separated from the other sons of Jiyan Singh, and that the disputed Khatas came to be allotted to the branches of the plaitiffs and defendants 1 to 3 only; (2) that subsequently in 1333F. on the death of the widow of Jiyan Singh, Ambica, the father of the plaintiffs, and defendant 1 allotted four of the plots of khata No. 178, as mentioned in the written statement of defendants 1 to 3, to defendants 4 to 11; and (3) that ever since 1325F. the plaintiffs or their father and defendants 1 to 3 have been in separate possession of the plots respectively alloted to them on partition of the disputed lands. He accordingly found that there had been a partition between the plaintiffs and defendants 1 to 3 as far back as the year 1325F., and that the parties were in separate possession of the lands allotted to them on partition, and accordingly he dismissed the plaintiffs' suit with costs.

[6] On appeal, the Additional District Judge of Gaya affirmed the decision of the learned Subordinate Judge. He held:

"In view of the important rent receipts and the facts and circumstances I agree with the learned Subordinate Judge and accept the defendants' case that the lands were already partitioned and fractional parts out of them as alleged have been given to the three brothers and their descendants."

He, therefore, dismissed the appeal, and it is against this concurrent decision of the Courts below that the present second appeal is directed.

[7] Mr. Shambhu Prasad Singh who argued the appeal on behalf of the appellants has presented three points for our consideration: (1) that Ex. C series were inadmissible in evidence and the decision of the Courts below is vitiated because it depends very largely upon a consideration of these materials; (2) that Ex. C. series which were intended to prove partition in 1325F

and the allotment of four of the plots of khata 178 to defendants 4 to 11 being inadmissible under Ss. 91 and 92, Evidence Act, no other evidence could be given to prove the said partition and allotments and (3) that in any case Plot No. 1600 not having been claimed in the written statement of defendants 4 to 11, the Courts below should have decreed partition of this plot when admittedly the disputed khatas originally belonged exclusively to the plaintiffs and defendants 1 to 3 alone, defendants 4 to 11 having no interest therein.

[8] I shall deal with the first two points together they being corelated (sic). To appreciate the argument of the learned Counsel, it may be useful to state the nature of the impugned documents. It may be observed at the outset that their inadmissibility was never raised before either of the two Courts below. It may also be observed that the learned counsel has not placed the documents before us or any translated copy thereof to enable us to decide for ourselves from the contents of the documents in question as to whether they are or they are not admissible. We have, therefore, to gather the nature of the documents from the judgments under appeal. The impugned documents are Ex. C to C-6. The Courts below have relied upon these exhibits as genuine and there is no doubt in my mind that the documents are genuine, and the learned counsel for the appellants has not disputed the fact of their genuineness, Ex. C is said to have been prepared at the time of the partition of the lands in 1345F between Girdhari and the father of the plaintiffs, Ambica Singh, Exs. C-1 to C-3 are said to have been prepared and given to the respective three brothers the other sons of Jiyan and their descendants signed by Girdhari Singh when subsequently the four plots were given to them, whereas Exs. C-4 to C-6 are said to have been prepared and given to the respective brothers the ancestors of defendants 4 to 11, signed by the plaintiffs' father, Ambica Singh, in respect of the aforesaid plots allotted to them out of khata 178. These Exs. C-1 to C-6 purport to be sale-deeds conveying the interest in four of the plots in khata 178 to defendants 4 to 11. All these documents were unstamped and unregistered. We are informed that these documents were impounded and stamp duty in respect of these documents have already been realised; therefore, these documents cannot be said to be defective or inadmissible under the Stamp Act.

[9] The appellants' argument in regard to Ex. C is that Ex. C being a partition deed to show different allotments to the branches of the plaintiffs and defendants 1 to 3 should have been duly registered inasmuch as it is conceded by the respondents' counsel that they related to property of a value more than Rs. 100. Reliance is placed on S. 17 (1) (b), Registration Act, which requires that non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immovable property shall be registered. In regard to the alleged sale deeds, Exs. C-1 to C-6 it is not conceded that the value of the subject-matter of properties respectively affected by them was Rs. 100 or upwards. We, therefore, cannot assume in the absence of any evidence on the point that the said documents necessarily require registration under S. 17 (1)(b), Registration Act. In regard to them reliance is, however, placed on S. 54, T. P. Act, which provides that a transfer of immoveable property of a value of less than one hundred rupees, may be made either by a registered instrument or by delivery of the property. It is contended that as the transfers in the present case were under the documents in question, the documents had to be registered. Therefore, the alleged deed of partition Ex. C as also the alleged sale deeds Ex. C 1 to C 6 required registration under the law, and they not having been registered by operation of S. 49, Registration Act, they could not affect any immovable property comprised therein or be received as evidence of any transaction affecting such property.

[10] The question therefore, which arises for consideration is whether the aforesaid documents were inadmissible under S. 49, Registration Act, and whether, if they were inadmissible under S 91 and S. 92, Evidence Act, any other evidence could be given to prove the partition and the allotments in question. A large number of decisions have been cited at the Bar in support of the respective contentions of the parties. The appellants' learned counsel contends that the documents aforesaid being inadmissible, it was not permissible for the Courts below to look into any other evidence for the purpose of proving partition and allotments as alleged by the defendants, and therefore, the plaintiffs' suit for partition had to be decreed. The learned counsel for the respondents, on the other hand, contended that even if the said documents may be held to be inadmissible as evidence of the transaction affecting such immovable property, the documents could be certainly used for the collateral purpose of proving the nature and character of the possession of the parties in respect of the properties in dispute. It may be that for the purpose of proving the title to the property the documents may be inadmissible, but there is nothing to debar the Court from look-

ing into those materials in deciding the question of possession as exclusively claimed by the defendants in respect of the lands which were the subject-matter of that partition. In regard to Ex. C-1 to C-6, the further argument available to the defendants is that the said documents which purport to be sale-deeds could also be relied upon by the defendants under S. 53A, T. P. Act as permitted by the proviso to S. 49, Registration Act, the defendants in consideration of the sale-deeds in question having been put in possession of the disputed four plots allotted to them by way of part performance.

[11] I have examined the decisions cited at the Bar with great interest, and I confess to a feeling of confusion and bewilderment in the maize (*sic*) of conflicting judicial pronouncements on the point.

[12] Fortunately for me a recent decision of the Judicial Committee of the Privy Council throws a good deal of light upon the problem, and that also because the facts appear to be parallel to the facts in the present case. I refer to the decision in *Ram Rattan* v. *Parma Nand* 73 I. A. 28 : (A. I. R. (33) 1946 P. C. 51). The appeal arose out of a suit for partition in respect of joint family properties. The defendants contested the suit alleging previous partition and referred to certain memoranda in their written statement which constituted an instrument of partition. The documents were unstamped and unregistered. One of the issues framed in the case was whether there was a previous partition as alleged by the defendants. The trial Judge held that the said memoranda were inadmissible, and in the absence of written evidence between the parties, he could not rely upon other evidence on their part. In appeal, the High Court held that the oral evidence proved partition as alleged by the defendants, and even if the documents, the memoranda in question, were inadmissible they could be used to corroborate the oral evidence for the purpose of proving the factum of partition as distinct from its terms. The Judicial Committee did not agree with the opinion of the High Court that the documents which required to be stamped and registered could be used to corroborate the oral evidence for the purpose of proving partition because under S. 35, Stamp Act, no instrument chargeable with duty shall be admitted in evidence for *any purpose*.... Their Lordships, therefore paid no regard to the documents in question, but nonetheless agreed with the High Court in thinking that the oral evidence proved partition as alleged by the defendants I may quote their own words :

"In their Lordships' view the evidence establishes a physical division of much of the joint property in February, 1939, and this is only consistent with a severance in the status of the parties having taken place."

This their Lordships did in spite of the fact that counsel for the appellant contended on the strength of S. 91, Evidence Act, that the factum of partition could not be proved by oral evidence, when the terms of the alleged partition had been reduced to writing. It is true that S. 91, Evidence Act, is not specifically referred to in their judgment but that their Lordships did not consider it as a bar to looking into the other materials on record for the purpose of proving partition is more than apparent from their findings.

[12a] It is important to remember that in the above case the Privy Council was dealing with the wider prohibition contained in S. 35, Stamp Act. They make it quite explicit in observing :

"It is unnecessary to consider the effect of S. 49, Registration Act, because the documents in question not being stamped the *wider prohibition* contained in the Stamp Act applies...."

In the present case we are concerned not with the "wider prohibition" under S. 35, Stamp Act, but if I may use the expression the "narrower prohibition" as contained in S. 49 Registration Act, the documents impugned in this case having been impounded and the stamp duty realised, as already pointed out by me Section 35, Stamp Act, enacts that no instrument chargeable with duty shall be admitted in evidence 'for any purpose". Section 49, Registration Act is not so rigorous in its application. It only says that the document required by S. 17 to be registered shall not be received as evidence of "any transaction affecting such property" and this contrast in the language is further stressed in the proviso to S. 49, Registration Act, under which an unregistered document affecting immovable property may be received as evidence (i) of part performance of contract, or (ii) as evidence of any collateral transaction not effected by the instrument. That unregistered documents have been so used for collateral purposes in evidence is borne out by a very large number of decisions. I may incidentally refer to two other decisions of the Judicial Committee by way of illustration: *Varada Pillay* v. *Jevarathnammal*, 43 Mad. 244: (A.I.R. (6) 1919 P.C 44), in which a registered deed of gift was referred to for ascertaining the nature and character of the possession held by the donee though the documents could not be used as evidence of title. In that case their Lordships pointed out that where the donor did not effect a registered deed of gift but allowed the donee to enter into possession of the gifted property for over 12 years, the donee's title became perfected as against the heirs of the

donor. I may quote here the observation of Viscount Cave who delivered the judgment of the Board in that case :

"In other words, although the petitions and order do not amount to a gift of land, they lead to the inference that the subsequent receipt of the rents by Duraisani was a receipt in the character of donee and owner of the land and, therefore, in her own right and not as trustee or manager for her mother and aunt."

Again in *Rajangam Ayyar* v. *Rajangam Ayyar*, 46 Mad. 373: (A. I. R. (9) 1922 P. C. 266), the Judicial Committee of the Privy Council held that an unregistered deed of partition could be put in evidence for the purpose of proving a division of status in a joint Mitakshara family. It would be needless to multiply authorities on the point.

[13] The word "partition" involves two concepts (i) change of status and (ii) division of property. Severance of status does not require to be proved by any documentary evidence at all, nor is it necessary that for the purpose of proving actual division of property between the members of a joint family a written instrument is essential. Where, therefore, there is evidence that there was an actual division of property between the parties, and that they went into possession of their respective shares in accordance with that division, and there are also circumstances to show that the conduct of the parties are inconsistent with anything except the factum of separation, a Court of law may very well hold, apart from any instrument of partition, that the parties had separated in status and effected partition of the family properties. This, in my opinion, would be a perfectly legitimate course to adopt, and this is the course which has been adopted in the present case by the Courts below in coming to their findings on the question of partition. I may again refer here to a passage in the judgment of the lower appellate Court on the point. It says :

"Therefore Exs. C-1 to C-6 had lost the primary importance in face of the large body of the rent receipts which by themselves very definitely gave support to the case of the defendants. But supported by the receipts the documents Exs. C series also were reliable."

It is not therefore, that the lower appellate Court has primarily relied upon the impugned documents in coming to a finding of partition. It has relied upon the receipts and other materials on the record to prove this disruption of status and division of property between the plaintiffs and the defendants based as it was upon the separate possession of the parties and their separate dealings with the properties ever since 1326 F., as alleged by the defendants. In my opinion, the documents in this case could be referred to for the collateral purpose of showing that the parties were dealing with the properties in their separate possession on the footing that there had been a partition between the members of the family as stated by defendant 1 to 3 in their written statement

[14] I must, however, briefly refer to some of the other cases on which reliance has been placed by the learned counsel for the appellants who, I must say, has argued the case with great care and perseverance. He relies upon a decision of this Court in *Ramautar Singh* v. *Juthi Tatma* 18 P. L. T. 1012. I must say at first sight that the decision in question lends a plausible support to his argument. There a plaintiff had sued for possession of land basing his title on an unregistered patta. The Courts below allowed the plaintiff to prove his title by the production of rent receipts and by general circumstances and by using the unregistered patta for a collateral purpose. The High Court set aside the decree holding that the patta was inadmissible being unregistered, and the other evidence in the case could not be taken into consideration for the purpose of proving the plaintiff's title to the lands in suit. Their Lordships in their judgment sought to rely upon a previous decision of this Court in *Janki Kuer* v. *Brij Bhukan*, 5 P L T. 541: (A.I.R. (11) 1924 Pat. 641), which is really the crux of the above decision. On an examination of the earlier decision, it appears if I may say so with respect, that it does not fully support the conclusions of their Lordships. In the earlier case in question Sir Dawson-Miller C. J. who delivered the judgment of the Court quite clearly laid down that a document which is inadmissible in evidence for the purposes mentioned in S. 49, Registration Act, may nevertheless be admitted in evidence for a collateral purpose, as for example, to explain why a transferee under a deed imperfect through lack of registration was in possession or to prove the nature of that possession. They also held that, if the acts of the parties disclose a state of affairs consistent with the existence of an agreement mutually recognised and acted upon as if the instrument were binding upon the parties, then, although the written document may be defective as a valid and finally concluded agreement, such defects may be supplied by the subsequent actings and conduct of the parties, and their Lordships relied upon, amongst other cases, the decision of the Judicial Committee in *Varada Pillai* v. *Jeevaratnammal*, 43 Mad. 244 : (A. I. R. (6) 1919 P. C. 44), already referred to by me above the other weakness of the decision in *Ramautar, Singh* v. *Juthi Tatma*, 18 P. L. T 1012 is, if I may point out, that there is no reference to an earlier decision of this Court which is also a Division Bench judgment in *Keshwar Mahton* v. *Sheonandan Mahton*, A. I. R. (16) 1929 Pat. 620 : (10 P. L. T. 449). In that case also their

Lordships held that where a contract of the sale of the immovable property has been reduced to writing and is followed by delivery of possession, a party is not debarred under S. 91, Evidence Act to prove his possession as a means of conveying the property. This decision shows clearly that the fact that there was an unregistered instrument did not stand in the way of proving title by delivery of possession where under the law title could pass in that manner. To a similar effect is another Division Bench decision of this Court in *Mt. Besar Kuar* v. *Ramhit Singh*, 21 P. L. T. 1063 : (A. I. R. (28) 1941 Pat. 167).

[15] Another case on which very strong reliance has been placed by the learned counsel for the appellant is Full Bench decision of the Madras High Court in *Ramayya* v. *Achamma*, I. L. R. (1945) Mad 160 : (A. I. R. (31) 1944 Mad. 550 F.B) in which case it was definitely held that where a deed of partition is inadmissible in evidence for want of registration the partition cannot be proved by evidence apart from the deed. It appears that a reference to the Full Bench was occasioned in view of a conflict between the decision of Kumaraswami Sastri, J. sitting with Venkatasubba Rao, J. in *Ramu Chetty* v. *Panchammal*, A I. R (13) 1926 Mad. 402 : (92 I. C. 1028) and that of Patanjali Sastri, J. in *Veera Raghava Rao* v. *Gopalarao*, 1941-2 M. L. J. 707 : (A. I. R. (29) 1942 Mad 125). In the latter case Patanjali Sastri, J. held that where a deed of partition is inadmissible by reason of the fact that it has not been registered, a co-sharer who happened to be in sole enjoyment of a particular property could not sue to eject another co-sharer who had disturbed his possession when he based his title on the partition deed. The judgment of Patanjali Sastri J. was approved in Letters Patent Appeal to which Leach C. J was himself a party; and Leach C J. when delivering the decision of the Full Bench approved of the view which he took in agreement with Patanjali Sastri J in affirming the latter's decision in Letters Patent Appeal. The Full Bench decision does not assign any other material reason for the purpose of not adopting the decision in *Ramu Chetty* v. *Panchammal*, A. I. R (13) 1926 Mad. 402 : (92 I. C. 1028) as good law when that decision was based upon the earlier decisions of the Judicial Committee in *Varada Pillai* v. *Jeevarathnammal*, 43 Mad. 244: (A.I.R.(6) 1919 P. C 44) and *Rajangam Ayyar* v. *Rajangam Ayyar*, 46 Mad. 373. (A. I. R (9) 1922 P C 166). There is also no consideration in the Full Bench judgment of S. 49, Registration Act and the proviso to the section. It is interesting to refer in this connection to a subsequent decision of the Madras High Court in *Subba Naidu* v. *Varadarajulu Naidu*, I. L. R. (1947) Mad. 694 : (A. I. R. (35) 1948 Mad 26). I say it is interesting because the judgment in this case has been delivered by Patanjali Sastri J. himself whose decision was approved by the Full Bench. This was also a case of partition between members of a joint family. In order to establish that there was a complete partition, the defendant in the suit relied upon an unregistered '*koorchit*' or instrument of partition purporting to evidence a partition arrangement among the members of the family including the plaintiff and the defendant. The trial Judge held that the document not having been registered could not be "looked into for any purpose." An application was made before the High Court for admission of the rejected '*koorchit*' as additional evidence under O. 41, R. 27, Civil P. C. It was contended for the appellant that the Court below had erred in holding that the unregistered '*koorchit*' was inadmissible "for any purpose." His Lordship upheld the contention and observed :

"This contention is clearly right. Unlike the Stamp Act which renders an instrument not duly stamped inadmissible 'for any purpose' the Registration Act prohibits its admission only for certain purposes (S. 49). *Ramayya* v. *Achamma*, I. L. R. (1945) Mad. 160 (A I. R. (31) 1944 Mad. 550 F. B.) relied on by the learned Judge lends no support to this view."

His Lordship also upheld the appellant's contention that the document was admissible to prove the adverse character of the possession of defendant 1 in respect of the lands which were allotted to him under the '*koorchit*' though such allotment was ineffectual for want of registration. When the attention of his Lordship was drawn to the decision of the Judicial Committee in *Ram Rattan* v. *Parmanand*, 73 I. A. 28 : (A.I.R. (33) 1946 P. C. 51) his Lordship observed :

"It will thus be seen that the oral evidence considered by their Lordships was in support of the plea that, there having been a previous partition, the suit 'in the present form' i. e. framed as one for partition did not lie. In other words, their Lordships considered the oral evidence to find out whether the fact of a partition prior to the suit was established."

In that view, his Lordship drew a distinction between the Full Bench decision in *Ramayya* v. *Achamma*, I. L. R. (1945) Mad. 160 : (A. I. R. (31) 1944 Mad. 550 F. B.) and the decision of the Privy Council in *Ram Rattan* v. *Parma Nand*, 73 I. A. 28: (A. I. R. (33) 1946 P. C. 51). I may refer to another decision of the Madras High Court in *Koyatti* v. *Imbichi Koya*, A I. R. (33) 1946 Mad. 534: (1946-1 M. L. J. 454) where Somayya J. observed as follows :

"The Judicial Committee did not refer to the difficulty of admitting other evidence when the transaction was admittedly reduced to writing and that writing was inadmissible either under S. 35, Stamp Act, or under Ss. 17 and 49, Registration Act. But there is no doubt that the Judicial Committee had no difficulty

in finding a partition on other evidence. But whether other evidence is admissible to prove the details of the partition is still open to doubt. It is not clear whether oral evidence was accepted only in proof of the division in status or to prove the details of the partition. When the question directly arises hereafter in this Court, we may have to consider whether the Full Bench decision in *Ramayya* v. *Achamma*, I L. R. (1945) Mad. 160 : (A. I. R. (31) 1944 Mad. 550 F. B.) is good law after the decision of the Judicial Committee."

[16] Whatever the position may be in regard to suits for ejectment and recovery of possession based upon a claim of partition, it is quite clear that in the present case we can safely follow the principle as already indicated by me above that the documents were admissible for a collateral purpose to determine the nature and character of possession, and that the other materials on the record could also be taken into consideration for the purpose of coming to a decision that the possession in question was referable to a division of properties between the parties concerned. In doing so I prefer to rest my decision on the judgments of the Judicial Committee and the Division Bench judgments of this Court, all of which I have already discussed above.

[17] I may also refer to another decision cited by the appellants' counsel in support of his contention. I mean a decision in *Subramanian* v. *Lutchman*, 50 I. A. 77 : (A. I. R. (10) 1923 P. C. 50). In that case the Judicial Committee observed :

"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created and would come within S. 17 of the Registration Act."

This was a case of an equitable mortgage where a mortgage could be created by depo-it of a document of title without writing, but it was held that the general rule was inapplicable when a deposit was made accompanied with an actual written charge. In that case their Lordships said :

"You must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed."

The other case relied upon by the learned counsel for the appellants *Bhukan Mian* v. *Radhika Kumari Debi*, 19 P. L. T. 489 : (A.I.R. (25) 1938 Pat. 479) is also a case of mortgage. In a case to enforce a mortgage one may well be required to prove the terms of the contract, and that can only be done by production and proof of the document itself in which the terms are embodied and not by evidence aliunde.

[18] In view of the findings indicated by me above that the parties have been in separate possession of the properties ever since 1325 F, as alleged by the defendants, the suit for partition filed by the plaintiffs is not maintainable. I have, therefore no hesitation in accepting the finding of the two Courts below in this appeal and in my opinion, there would be no useful purpose served in remanding the case to the Court below for a fresh finding on the question of adverse possession or ouster as suggested by the learned counsel for the appellants. The evidence which has been accepted by the Courts below quite clearly indicates that the parties have been in separate possession of their respective lands.

[19] As to his last contention that in any case Plot NO 1600 should be divided, I find that there is no substance in this contention. It is true that in the written statement defendants 4 to 11 opened their mouth a little too wide; but, as observed by the Court of appeal below, at the trial they accepted the case set out in the written statement of defendant 1, and confined their claims only to the four plots of khata 178 mentioned in the said written statement which included Plot NO. 1600. It has been found on the evidence that these plots were actually allotted to defendants 4 to 11 sometime in the year 1333 F. after the death of the widow of Jiyan Singh. This fact, as held by the Courts below, is borne out by the receipts; as also by the documents Exs. C-1 to C 6 which, in my opinion, are admissible not only for the collateral purpose of proving separate possession but also admissible in proof of part performance under S 53A T. P. Act; and also by the oral evidence on the point. That being so, on this point again the appeal is concluded by a finding of fact against the appellants.

[20] In the result, the decision of the Courts below is maintained, and the appeal fails, and it must be dismissed with costs.

[21] **Das J.** — I agree.

D.R.R. *Appeal dismissed.*

A. I R. (38) 1951 Patna 283 *[C.N. 57.]*

RAMASWAMI J.

Sheopujan Singh and another—*Petitioners* v. *Chandi Singh and others*—*Opposite Party.*

Civil Revn. No. 101 of 1950 D/- 20-9-1950.

(a) Civil P. C. (1908), O. 25, Rr. 5 and 3 — Death of appellant — Claim by several persons in opposition to each other to be legal representatives—Withdrawal from case by some—Order as to representative character whether one under O. 21, R. 3 or R. 5—Matter if can be subsequently re-opened.

Where separate petitions are filed on behalf of different persons (including *A* and *B*) claiming to be substituted in place of the deceased appellant and subsequently some of them withdraw from the case and admit that *A* and *B* are really the sole reversioners of the deceased and upon it an order substituting *A* and *B* is passed the order is made under O. 22, R. 5 and not under O. 22, R. 3. In such a case, the Court has no jurisdiction to cancel the order and re-open the question and hold upon further evidence that *C* had a better claim to be substituted in place of the deceased. [Para 4]

Anno. Civil P. C., O. 22, R. 3, N. 15; O. 22, R. 5, N. 2 and 8.

(b) Civil P. C. (1908), S. 151—Petition for setting aside compromise decree — Fraud upon party — Inherent power.

Where one of the parties alleges not a fraud upon the Court but only that his consent to compromise was procured by fraud, the Court cannot investigate the matter either in review or in exercise of its inherent power, and the only remedy of the party is to institute a suit to set aside the decree on the ground of fraud. [Para 5]

Anno. Civil P. C., S. 151, N. 6 Pt. 7.

Lalnarain Sinha and S. P. Srivastava—for Petitioners; K. D. Chatterji and Pratap Narain Sinha —for Opposite Party.

Order. — The question to be decided in this case is whether the learned Subordinate Judge had jurisdiction to substitute opposite party Chandi Singh and sons of Ramgovind Singh in place of Sheopujan Singh and Rampujan Singh whom he had already substituted by a previous order in place of Mt. Jamurata Kuer, who had instituted the appeal.

[2] The material facts are that Kailash Singh had obtained a decree against Mt. Jamurata Kuer in a suit for specific performance of contract. Jamurata Kuer filed an appeal against the decree but on a subsequent date, that is, 11-2 1949, she died. On 24 2-1949 one Jagat Singh filed a petition for being substituted in her place alleging that he had been adopted by the deceased Jamurata Kuer and claimed to be her legal heir and representative. On the same date, Rajkishore Singh filed another petition claiming that he is the daughter's son of Sahebjada Singh, husband of Mt. Jamurata Kuer, and asked to be substituted in place of the deceased appellant. On 4-3-1949 one Sheolakhan Singh filed a petition claiming that he was the nearest agnate of Sahebjada Singh. On 13-5-1949 Sheopujan Singh and Rampujan Singh filed a petition asking that they should be substituted since they were the nearest agnates of Sahebjada Singh. The learned Subordinate Judge fixed 13-8-1949 for hearing substitution matter. On that date Sheolakhan Singh, Rajkishore Singh and Jagat Singh filed separate petitions praying for permission to withdraw from the case and alleging that Sheopujan Singh and Rampujan Singh were really the next reversioners of Sahebjada Singh and they should be substituted in place of Jamurata Kuer, the deceased appellant. After hearing lawyers the learned Subordinate Judge ordered that Sheopujan Singh and Rampujan Singh should be substituted.

[3] On 31-8-1949, Ramgovind Singh applied for substitution claiming that he was the nearest agnate of Sahebjada Singh and Sheopujan and Rampujan were strangers and ought to be removed from the record of the case. On 5-9-1949 Chandi Singh filed a petition containing allegations to the similar effect. On 25-10 1949 Ramgovind Singh died and his sons were permitted to prosecute the petition on his behalf. After hearing the evidence adduced the learned Subordinate Judge cancelled his previous order dated 13 8-1949 by which he substituted Sheopujan Singh and Rampujan Singh in place of the deceased Jamurata Kuer. On the contrary he ordered that Chandi Singh and the sons of Ramgovind Singh had a better claim and they ought to be substituted in place of the deceased appellant.

[4] In support of this rule, Mr. Lalnarain Sinha argued that the learned Subordinate Judge had no jurisdiction to cancel the previous order of substitution made on 13-8-1949 nor was he entitled to reopen the matter and hold upon further evidence that Chandi Singh and the sons of Ramgovind Singh had a better claim to be subsituted in place of Jamurata Kuer. In my opinion this argument is well founded and must succeed. It is manifest that the order of the learned Subordinate Judge dated 13-8-1949 is one made under O. 22, R. 5 which enacts as follows:

"Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court."

From the narrative of facts, it will be seen that after the death of Jamurata Kuer separate petitions were filed on behalf of different persons claiming to be substituted in place of the deceased appellant. It is true that on 13-8 1949 Sheolakhan Singh, Rajkishore Singh and Chandi Singh filed petitions praying for permission to withdraw from the case and admitted that Rampujan and Sheopujan were really the sole reversioners of Sahebjada Singh. Upon this the learned Subordinate Judge made an order that Sheopujan and Rampujan should be substituted. Even so it is apparent that this order is made under O. 22, R. 5 and not under O 22 R. 3 which applies only where there is no dispute as to who is legal representative of a deceased party to the appeal. Reference may be made to *Oula* v. *Bepathee*, 17 Mad. 210 : (3 M. L. J. 289) in which it was held that S. 365 presupposes that the party

claiming to represent a deceased plaintiff is his legal representative. But if there is a dispute as to whether any person is or is not legal representative of the deceased party it should be determined by the Court under R. 5 of O. 22. If the order dated 13-8-1949 is not a mere formal act but it is a judicial determination that Sheopujan and Rampujan were the legal representatives of the deceased appellant it must be held that the learned Subordinate Judge had no jurisdiction to cancel that order and to reopen the question merely on the subsequent allegation of Chandi and Ramgovind that fraud had been practised by Jamuna Singh. On behalf of the opposite party, Mr. K. D. Chatterji placed reliance upon *Vatsalabai* v. *Sambhaji Pandurang*, 43 Bom. 168: (A. I. R. (5) 1918 Bom. 100). But the facts of that case may be clearly distinguished. A suit had been filed by five persons, one of whom R died while the suit was pending. Thereupon an application was made on behalf of minor G, son of the plaintiff 1 that he should be brought on the record as heir and legal representative of the deceased R relying upon an alleged adoption. The Subordinate Judge granted the application and amended the record by substituting G's name for that of R. Subsequently, the minor daughters of R having learnt of the application applied that G's name should be deleted and their name should be brought on the record in his place as G's adoption was fictitious. The Subordinate Judge held that he could not alter his previous order in view of R. 3 of O. 22, Civil P. C. The High Court interfered on the ground that under R. 5 of O. 22 the Subordinate Judge had the power to correct the order previously made and to determine who were the real legal representatives of the deceased plaintiff. It is patent that the Subordinate Judge had made the previous order under R. 3 of O. 22 and since the subsequent petition was filed within the period of limitation it is obvious that the Subordinate Judge was bound to determine the question as to who were the legal representatives of the deceased plaintiff. In the present case, the facts are manifestly different for the Subordinate Judge had made the previous order dated 13-8-1949 under R. 5 since the dispute had already arisen as regards proper persons to be substituted in place of the deceased Jamurata Kuer.

[5] Mr. K. D. Chatterji also tried to support the order of the Subordinate Judge on the ground that under S. 151 he had inherent jurisdiction to cancel the previous order to meet the end of justice. But the principle is well settled that a Court has no inherent power to do that which is prohibited by the Code. In *Sadho Saran Rai* v. *Anant Rai*, 2 Pat. 731: (A. I. R. (10) 1923 Pat. 483) it was held by a Division Bench that a Court was not competent either in review or under its inherent powers to set aside a compromise decree on the ground that the consent of the parties to the compromise was obtained by fraud. A distinction was drawn in cases where fraud is practised upon a party and where fraud is practised upon Court. There are authorities to the effect that a Court has inherent power to correct its own proceedings when it is satisfied that in the passing of a particular order it was misled by one of the parties. But where one of the parties alleges not a fraud upon the Court but only that his consent to compromise was procured by fraud the Court cannot investigate the matter either in review or in exercise of its inherent power and the only remedy of the party is to institute a suit to set aside the decree on the ground of fraud. Applying these principles to the present case, it is obvious that there is no allegation that the Court was misled by any fraud practised upon it and the learned Subordinate Judge had no jurisdiction under S. 151 to cancel his order dated 13-8-1949 by which he substituted Sheopujan Singh and Rampujan Singh in place of the deceased Jamurata Kuer.

[6] For these reasons I would set aside the order of the learned Subordinate Judge dated 4-2-1950 and restore his previous order dated 13-8-1949 by which Rampujan Singh and Sheopujan Singh were substituted in place of the deceased appellant.

[7] This application is accordingly allowed with costs. Hearing fee one gold mohar.

V.B.B. *Application allowed.*

A. I. R. (38) 1951 Patna 285 *[C. N. 58.]*

SARJOO PRASAD J.

Harendra Nath Pathak—Petitioner v. *The State.*

Criminal Revn. No. 760 of 1950, D/- 12-9-1950.

(a) Criminal P. C. (1898), Ss. 539B and 144 — Decision, if can be based merely on local inpection — Local inspection in proceeding under S. 144 of Code.

A person disposing of a judicial proceeding should never base his decision on merely a local inspection. There is, no doubt, some amount of latitude in S. 144 proceeding. But even then it is a judicial enquiry and if a Magistrate makes a local inspection, that may be only for the purpose of appreciating the materials produced by the parties and not for making extra-judicial assumptions of his own. [Para 4]

Anno. Cr. P. C., S. 144, N. 1; S. 539-B, N. 5.

(b) Criminal P. C. (1898), S. 561 A — Expunging of remarks.

The High Court has the power to expunge objectionable remarks made by a Magistrate in an order passed

by him against a person without making him a party to the proceeding or giving him opportunity to explain his conduct. [Para 4]

Anno. Cr. P. C., S. 561-A, N. 7, Pt. 1.

P. K. Bose—for Petitioner; B N. Mitter and A. K. Mitter — for Second Party to the Section 144 proceeding.

Order. — This application relates to the expunging of certain remarks made by the Sub-Divisional Magistrate of Aurangabad in an order disposing of a proceeding under S. 144, Criminal P. C. The petitioner was not a party to the said proceeding and yet it is said that the learned Magistrate made those unwarranted and unjustified remarks without making him a party to the proceeding or giving him an opportunity to explain his conduct. The petitioner is an Honorary Magistrate of the sub-division and he is also the Manager of the Kunda Estate, known as the Bengali Estate in the district of Gaya. The circumstances which led to the proceeding under S. 144, relate to a dispute with regard to an area of about 66 bighas of land situate in village Sansha, police station Daudnagar, in the sub division of Aurangabad. The petitioner states that 19 bighas and odd of these lands belonged to one Rameshwar Gosain, of which the Kunda Estate and other co-sharers were the landlords. The Estate obtained a decree for rent against this Rameshwar Gosain and, in execution of the said decree, the lands in question were sold and purchased by the decree-holder landlord of which the landlord obtained delivery of possession sometime in 1939. It is then stated that in 1940-41, the landlord, of which the petitioner is the Manager, settled the said lands measuring 19 bighas and odd along with the other lands which have been recorded as *ghairmazruamalik* with Ramchander Ahir, Bharat Ahir and others. It appears that subsequently in August 1949 there was a proceeding under S. 144 between these settlees under the landlord and the outgoing tenants Rameshwar Gosain and others, in which proceeding the settlees were party 1 while Rameshwar Gosain and others were party 2. In that proceeding, an application was filed on behalf of the Kunda Estate by the petitioner supporting the settlement in favour of party 1 to the preceeding. The learned Magistrate disposed of the proceeding on making a local inspection, and the entire finding appears to have been based upon the local inspection made by the Sub-Divisional Magistrate himself. The petitioner alleges that a few months before the initiation of the 144-proceeding, party 2, Rameshwar Gosain and others had filed a complaint against the settlees and also against the men of the landlord in which they complained that the members of party 1, the settlees, were trying to dispossess Rameshwar Gosain and others by force. In that case, the complaint was dismissed by the Sub-Divisional Magistrate himself in which he found that the outgoing tenants, Rameswar Gosain and others had no right and interest in the lands in question and that they should if at all, have recourse to civil Courts. The petitioner alleges that, in view of that decision, the 144-proceeding should not have been decided against the new settlees, who were party 1 in that case, and the learned Magistrate did so merely because he was inimical to the petitioner and, in the course of his order made those unwarranted observations. It appears that party 1, to the 144-proceeding had moved the District Magistrate against the order under S. 144, but the learned Additional District Magistrate, while disposing of the application, refused to interfere because the order under S. 144 had spent its force, though the Additional District Magistrate realised that the order of the Sub-Divisional Magistrate had been passed without properly or duly considering all the facts and circumstances relating to the dispute. The petitioner appears to have moved the District Magistrate also for expunging the remarks in question and for making a reference for the purpose to this Court. But the learned Additional District Magistrate of Gaya, who heard the said application, rejected the same on 11-4-1950, observing that it would be immaterial to take any action on those observations, because he had already found when rejecting the application against his order under S. 144, that the findings of the learned Sub-Divisional Magistrate were not correct. The petitioner has, therefore, now moved this Court for expunging the remarks made by the Sub-Divisional Magistrate. The remarks complained of are to be found at various places in the course of the order and they have been stated in para. 7 of the application. Paragraph 7 (A) refers to the remark which runs as follows:

"There was no sign of habitation within a few miles except the lonely houses of these Gosains who have lived in this jungle and sandy tract for years and years and have now become a victim of the wrath of the absentee landlord Bengal Kunda Estate in this case and their powerful Manager Babu Harnedra Nath Pathak who also happens to be a Honorary Magistrate of the place and who are bent upon driving out these powerful Gosains tenants from their lands."

7 (B): "I am surprised that the Manager who happens to be a Hony. Magistrate should file such a false petition making false allegation which is contrary to facts and farthest from truth."

7 (c). "The intention of the Kunda Estate is now to settle lands of these Gosains tenants with other tenants of the village and to make them fight and cause bloodshed and riot which is most reprehensible conduct of the proprietor and his Manager. I am convinced from my local inspection and I am constrained to remark that the conduct of the Manager of Kunda Estate has been most reprehensible in acting in this manner."

A rule was issued by this Court calling upon the learned Sub-Divisional Magistrate to show cause why these remarks should not be expunged from the order in question, but it appears that the learned Magistrate has been either transferred or has gone on leave, and no explanation has been submitted by the Magistrate who passed this order. A notice was also served upon the State of Bihar who are the opposite party to this application, but, on their behalf also no one has appeared to oppose this application. The application is, however, opposed by Mr. B. N. Mitter, counsel appearing on behalf of the persons who were party 2 to the proceeding under S. 144.

[2] I should like to say as little as possible against the order of the learned Magistrate disposing of the proceeding under S. 144, because I have no desire to prejudice the case of party 2, but I must observe that the procedure adopted by the learned Magistrate in disposing of the proceeding under S. 144 was really extraordinary. The dispute related to a large area of land and it was a dispute as to the possession of immovable property. He himself observed that some of the tenants were on the side of the landlord while some of the tenants whose interest is said to have been sold off were opposing the landlord and the other set of tenants. In such a case, if there was an apprehension of breach of the peace, the proper proceeding was a proceeding under S. 145 and the matter should have been decided in such a proceeding, but the Magistrate, instead of adopting the proper procedure known to the law in the circumstances of the case, proceeded to dispose of the matter under S. 144 and that also not upon any material but largely and mainly upon his local inspection. I do not find from the record that there was any memorandum prepared by the learned Magistrate of this local inspection nor has such a memorandum been referred to in the order itself. It appears that, in connection with a previous dispute between the parties in respect of some of these lands, the matter was decided by the same learned Magistrate on 7-1-1949. There, it appears, party 2 to the proceeding had alleged that they were likely to be dispossessed of the lands in question by the new settlees, that is, the members of party 1 in collusion with the landlord and, therefore, action should be taken against them. On this complaint, there was an enquiry by the Magistrate and the said learned Magistrate himself dismissed the complaint under S. 203, Criminal P. C. In dismissing the complaint, the learned Magistrate himself observed as follows :

"The landlord has appeared and he has produced the *Dakhaldehani* papers showing that the lands of the complainant were sold for arrears of rent and purchased in court auction sale and delivery of possession was obtained on several occasions in the years 1938 and onwards .... it is admitted before me by the complainant that he has not paid any rent for the lands up to the year There is no case worth the name which the complainant can claim in this Court. His remedy lies in the civil Court. The complainant s allegation does not disclose any criminal offence nor is it plausible story."

[3] After this emphatic observation made by the learned Magistrate himself, it was singularly inappropriate on his part to proceed under S. 144, Criminal P. C., and what is worse to dispose of this proceeding not by taking any evidence in the case or after making the landlord a party but on his local inspection. I am, however, not concerned with the 144-proceeding itself, except, incidentally, to show that the remarks made in his order as to the petitioner and his conduct were quite unjustified, because the learned Magistrate had not made the petitioner a party to the proceeding nor had he called for the production of evidence in support of his allegation in the petition filed by him that the Estate had settled the land with party 1. If he had called for these documents and made the petitioner a party, he would have found, presumably, as he himself did find on a previous occasion, that the allegations were correct. The Additional District Magistrate, while disposing of the proceeding, observed that "the dispute related to possession over a vast tract of lands, measuring about 66 bighas which should not have been dealt with and disposed of by a summary proceeding under S. 144, Criminal P. C.... the proper course for the Magistrate in such disputes was to decide the question of possession once for all in a regular proceeding under S. 145, Criminal P. C. It appears that the landlords, after having obtained *dakhaldehani*, settled the lands with the applicants who are armed with *hukumnama* and rent receipts in respect of the lands and whose documentary evidence of possession cannot easily be brushed aside. There was furthermore a criminal case in respect of some of these very lands and between the same parties. The same Magistrate had by his order dated 7-1-1949, dismissed the complaint under S. 203, Criminal P. C., and in that substantive case of O. P. Rameshwar Gossain who was directed to Civil Court for the remedy of his claim, the learned Sub-Divisional Magistrate had accepted the delivery of possession in favour of the landlords from whom the applicants base their claim."

[4] Either these materials were before the Magistrate or these materials which were produced before him on the previous occasion were not before him. If these materials were before him, as the order of the learned Additional District Magistrate appears to indicate, then indeed it is very surprising that he should have disposed of the 144-proceeding without reference to them and yet he should have suggested in his order that the conduct of the Manager of the Estate was most reprehensible and that he had filed a false petition making false allegations

which were contrary to facts and farthest from truth. These strong observations should never have been made by the learned Magistrate without either consulting the materials which were placed before him and on which on a previous occasion he had himself been convinced, or at least without giving an opportunity to the petitioner be present before him to explain the allegations made in the petition. Indeed, in the circumstances of the case it is most remarkable that he should have made these remarks and he should have gone back upon his own findings on a previous occasion. Mr. B. N. Mitter, appearing for party 2 to the S. 144 proceeding suggested that probably at the time of the passing of his order, the learned Magistrate was not aware of the order which he had passed on a previous occasion, that is, on 7-1-1949. In the first place, I cannot imagine that, at least, party 1 who were the settlees under the landlord would not have drawn the attention of the Magistrate to his previous order; but, even if it were so, the Magistrate should have realised the risk of making these *ex parte* assumptions against the conduct of the petitioner, who was an Honorary Magistrate of the locality and was the Manager of a fairly big estate in the Sub-division as it appears from the materials and whose apparent respectability could not be lightly questioned. *Prima facie*, there was no reason to distrust the allegations made in the petition. It is true that the learned Magistrate made his own local enquiry. But it has been repeatedly pointed out that a person disposing of a judicial proceeding should never base his decision on merely a local inspection. There is, no doubt, some amount of latitude in a S. 144-proceeding. But even then the learned Magistrate should have remembered that it is a judicial enquiry and if he makes a local inspection, that may be only for the purpose of appreciating the materials produced by the parties and not for making extra-judicial assumptions of his own. I, therefore, see not the slightest justification for the remarks which have been made by the learned Magistrate in the course of that order. The Additional District Magistrate did not think it fit to make a reference to this Court because in his opinion the order had already spent its force, and he had observed that the findings of the learned Magistrate were incorrect. The petitioner has a just grievance in this matter. It was quite wrong on the part of the Magistrate to have made those remarks against him and, in my opinion, this is a fit case in which the remarks should be directed to be expunged. The petitioner has alleged that the learned Sub-divisional Magistrate made those remarks because he was inimically disposed towards him and that he also disposed of the 144 application contrary to his own findings on a previous occasion on account of this enmity. Be that as it may, the Magistrate has not submitted any explanation, and it would be unnecessary for me to decide as to what the motives of the learned Magistrate actually were, though his order, to my mind, appears somewhat incomprehensible in view of the previous order which he had himself passed. In any case I consider that this application for expunging the remarks of the learned Magistrate must be allowed. That this Court has the power to do so in a case like this can hardly be questioned in view of the provisions of S. 561A, Criminal P. C., and, if reference to any decision is necessary, reference may be made to the decision in *Karamat Ullah* v. *Emperor*, A. I. R. (27) 1940 Lah. 42: (41 Cr. L. J. 380).

[5] The rule is accordingly made absolute.

V.R.B. *Rule made absolute.*

A. I. R. (38) 1951 Patna 288 *[C. N. 59.]*

RAMASWAMI J.

Ramcharitar Sah — Petitioner v. *Bifai Mahto and others—Opposite-Party.*

Civil Revn. No. 463 of 1950, D/- 20-9-1950.

Civil P. C. (1908), S. 11—Suit for rent and ejectment — Question of title expressly raised and decided—Ex parte decree—Question if operates as res judicata.

Where in a suit for recovery of house rent and ejectment the question as to title of the plaintiff is directly and expressly raised by the defendant, the decision on the question of title will operate as *res judicata* in a subsequent suit for rent even though the suit is decreed *ex parte* due to absence of the defendant on the date of final hearing: A. I. R. (13) 1926 Cal. 650 *Rel on.* **[Paras 3 & 5]**

Anno. C. P. C., S. 11 N. 14, 19.

A. K. Choudhury and Prem Lal — for Petitioner; S. K. Mitra and Satyanand Kumar—for Opposite Party.

Order.—The question involved in this case is whether the Small Cause Court committed any error of law in refusing to return the plaint for being filed in proper Court having jurisdiction to determine the question of title.

[2] The plaintiff brought the suit claiming rent of a house which he alleged the defendants had taken on monthly rent. The main ground of defence was that the plaintiff had no title and the defendants had not taken settlement of the house from him. The learned Munsif held that it was not open to the defendants to raise question of title since the doctrine of *res judicata* will operate. In 1946 the plaintiff had previously brought a title suit against the defendants for recovering house rent and for ejectment. In that suit the defendants appeared and filed written statement but on the date fixed for final

hearing the defendants were absent and the suit was decreed *ex parte*. The defendants preferred an appeal which was dismissed by the District Judge. In second appeal the decree was modified by the High Court. The claim for arrear of rent was granted but the plaintiff was not granted a decree for ejectment since the notice to quit was held to be invalid in law. The Small Cause Court held that the decision in the previous suit would operate as *res judicata* and it was not open to the defendants to agitate again the question of title. Accordingly, he refused to return the plaint under S. 23, Small Cause Courts Act.

[3] In support of this rule, Mr. Prem Lall contended that the Small Cause Court was erroneous to hold that the question of title was barred on the principle of *res judicata*. In my opinion, this argument is not correct. Learned counsel referred to *Pardip Singh* v. *Ramsunder Singh*, A. I. R. (36) 1949 Pat. 510: (30 P.L.T. 434) and contended that the question of title had been gone into only incidentally and collaterally in the previous suit and so the decision would not be *res judicata*. The principle is well settled that the decision in a rent suit is not *res judicata* on the question of title unless the question of title was expressly raised and was expressly decided between the parties and in each case it is necessary to examine carefully the decision in the rent suit before any opinion can be formed as to whether it operates as *res judicata* on the question of title or not. The difference will be apparent from two Privy Council decisions, viz., *Ruh Bahadoor Singh* v. *Mt. Lucho Kuer*, 12 I. A. 23: (11 Cal 301 P. C.) where it was held that the decision was not *res judicata* as the question of title had been gone into only incidentally and collaterally, and *Radhamadhub Holdar* v. *Manohar Mookerji*, 15 I. A. 97: (15 Cal. 56 P. C.) where the question of title was directly decided in a rent suit and the decision was held to be *res judicata*. As explained in *Gnanada Gobindo Choudhur's case*, 43 C.L.J. 146 : (A. I. R. (13) 1926 Cal. 650). "the essence of the doctrine of *res judicata* is that where a material issue has been tried and determined between the same parties in a proper suit and in a proper Court as to the status of one of them in relation to the other or as to the right or title claimed by one of them against the other, the same question cannot be agitated by them again in another suit. In the case of suits for rent or other recurring liability the cause of action for suits for successive period are different. In the case of such suits, for the doctrine to apply, it will have to be shown that the question of right or liability not merely for the period in the previous suit but that for all times or once for all was directly and substantially in issue and was tried and determined. If a direct issue on the point was raised and decided, the decision would be *res judicata* in respect of any suit for subsequent period."

Applying the principle in the present case I am of opinion that in the previous suit question of title was directly and expressly raised and decided between the parties and the decision will operate as *res judicata*. It should be noticed at the outset that the previous suit was not only for recovery of arrears of rent but also for ejectment of the defendants. In the judgment of the trial Court the following passage is material:

"The suit is heard *ex parte*. Exhibit 1 is the patta dated 13-12-44 which proves the settlement of the aforesaid land with the plaintiffs. Exhibit 2 is the office copy of the notice and Ex. 3 is the postal receipt. P. W. 1 has proved that the plaintiffs made the hut and let it out to the defendants at a monthly rental of Rs. 5."

In the course of the appellate judgment the learned District Judge states:

"To substantiate their story of settlement of the disputed hut with defendants on monthly rental of Rs. 5 and to show that the defendant did not pay rent for the disputed hut for eleven months, the plaintiffs examined plaintiff 2 and got the original patta (Ex. 1) by which the land on which the disputed house stands was settled with plaintiffs by the previous owner Parmeswar Pd. Choudhary, duly proved. The deposing plaintiff has stated on oath that after taking settlement of the land on which the disputed hut stands, they constructed the disputed hut on it, and then let it out to the defendants on a monthly rental of Rs. 5 on the 1st Fagun, 1352 Fs. This deposing plaintiff has further stated on oath that after paying rent for one month, the defendants stopped payment of rent from Chait, 1352 fs. The plaintiffs also got the notice of eviction which they sent to the defendants by registered post before the filing of this suit, duly proved, and there being no rebutting evidence to falsify the plaintiffs' claim the learned Munsif, I think, was quite justified in decreeing the plaintiffs' suit on the evidence adduced by the plaintiffs, and hence I hold accordingly and decide this point too against the appellant."

[4] In second appeal the High Court affirmed the decree for rent but set aside the decree for ejectment since there was no valid notice to quit.

[5] It is manifest that the question of title was directly and substantially in issue in the previous suit and the learned Munsif was, in my opinion, correct in holding that the decision would operate as *res judicata* in the present suit. The learned Munsif, therefore, committed no error of law in declining to return the plaint under S. 23, Small Cause Courts Act.

[6] For these reasons I would dismiss this application with costs. Hearing fee one gold mohar.

K.S. *Revision dismissed.*

A. I. R. (38) 1951 Patna 289 *[C. N. 60.]*

AGARWALA C. J.

Shital Prasad Burman—*Petitioner* v. *Manbahal Singh*—*Opposite Party.*

Criminal Revn. No. 231 of 1949, D/- 2-8-1949.

Penal Code (1860), Ss. 478, 482—Trade mark—Infringement of—Mark not registered—Evidence to establish ownership—Trade mark in surname.

What the Court has to determine is whether the trade mark claimed by the complainant is distinctive mark, that is to say, a mark which is adopted to distinguish the goods of the proprietor of the particular trade mark from those of other persons. For that purpose it is necessary to ascertain the extent to which the user of that mark has rendered it in effect distinctive of the goods in question. [Para 2]

A declaration of ownership for the purpose of registration is not evidence of legal ownership of a trade mark, for such a declaration represents nothing more than the opinion and claim of the declarant. [Para 2]

The right to a surname that a man uses is shared with every person who elects to use the same name and consequently he has no monopoly in it. [Para 2]

Where the complainant was a manufacturer of a fever mixture which had acquired a reputation in fever cases and was sold by the name of Burman's Juri Tap in a red coloured carton with a design which had not been registered, the evidence that is required is that the complainant had established a trade mark in the name Burman and that persons bought the complainant's medicine because it was contained in his carton, that is to say a person who received the complainant's carton would rely on finding in it the medicine which he intended to purchase. If there was no such evidence then any one selling medicine in a carton so similar to that of the complainant as to mislead a purchaser into believing that he was actually purchasing the complainant's medicine would not be infringing the complainant's Trade Mark. [Para 2]

Anno. Penal Code S. 478, N. 1 ; S. 482, N. 1.

Baldeva Sahay and Shivanugrah Narain—for Petitioner ; Nageshwar Prasad and S. R. Ghoshal — for Opposite Party.

Order.—The petitioner has been sentenced to pay a fine of Rs. 500 on a conviction for an offence under S. 482, Penal Code. The complainant is a manufacturer of a patent medicine which has apparently acquired a reputation in fever cases and calls it by the name of Juri Tap. This is sold in a red-coloured carton which, on one side has the figure of an emaciated man with the caption "Before Use", and, on the opposite panel, the figure of a healthy looking individual with the "caption", "After Use." On the third panel is the name "Juri Tap" and a five pointed star. On the same panel the name and address of the manufacturer, that is to say, the complainant, is given. This is "Dabur Dr. S. K. Burman Limited, Calcutta." The accused sells a similar medicine in a carton very much like that of the complainant's carton. It is the same colour ; it has the same pictures of the emaciated and the healthy man. On the third side of the carton is the name "Juri Tap," but above this name there are the words "Amritsudha." On this panel the name and address of the manufacturer is given as S. P. Burman and Company, Benares, Cawnpore." There is also under the name "Juri Tap" a six-pointed star. Near the star on the complainant's carton are the initials S. K. B., whereas in the centre of the star of the petitioner's carton is the word "Om" in Hindi. To a casual observer the cartons are so alike that unless one took the trouble to examine it more than cursorily it would be difficult not to be deceived into accepting the medicine in the petitionsr's carton for the medicine in the complainant's carton.

[2] Section 432 renders punishable the use of any false trade mark or any false property mark unless the user is able to prove that he acted without intent to defraud. The expression trade mark is defined in S. 478, as amended by the Merchandise Marks Act, 1941, as including a trade mark registered under the Trade Marks Act, 1940, and any mark used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right to use the mark. At the relevant time no part of the design on the carton of the complainant or the petitioner had been registered under the Trade Marks Act, 1940, although I am told applications for registration were pending. This case, therefore, has to be decided with reference to the second part of the definition of trade mark given in S. 478, Penal Code. The complainant relied on declarations which had been made in his application for registration which referred to a previous declaration made in 1905 and also to catalogues which he had issued over a course of many years for the purpose of establishing that he had been using this particular carton and device on it for a very long time. It has, however, been pointed out in the case of *Loke Nath* v. *Ashwini Kumar De*, I.L.R. (1938) 1 Cal. 665: (A.I.R. (25) 1938 Cal. 216 : 39 Cr. L. J. 537) that a declaration of ownership for the purpose of registration is not evidence of legal ownership of a trade mark for such a declaration represents nothing more than the opinion and claim of the declarant. What the Court has to determine is whether the trade mark claimed by the complaint is distinctive mark, that is to say, a mark which is adopted to distinguish the goods of the proprietor of the particular trade mark from those of other persons. For that purpose it is necessary to ascertain the extent to which the user of that mark has rendered it in effect distinctive of the goods in question. For that purpose the evidence that is required is that persons bought the complainant's medicine because it was contained in his carton, that is to say, a person who received the complainant's carton would rely on finding in it the medicine which he intended to purchase. If there was such evidence then any one selling

medicine in a carton so similar to that of the complainant as to mislead a purchaser into believing that he was actually purchasing the complainant's medicine would be infringing the compalinant's Trade Mark. But in this case there is no such evidence. In fact, the only person who appears to have given any relevant evidence in that matter at all says that this medicine is mostly used by illiterate villagers and that what they ask for is "Burman's Juri Tap." If the complainant had established a Trade Mark in the name Burman, the petitioner would, in my opinion, be guilty under S. 482 in this case. But, as was pointed out in *In re Cadbury Brothers Application*, (1915) 1 Ch. 331: (84 L. J. Ch. 242) the right to a surname that a man uses is shared with every person who elects to use the same name, and consequently, he has got about as much monopoly in it as he has in the air that he breathes. It is true that the surname of the petitioner is not Burman, nor is he a Burman by caste, but he does apparently use that name for his trade purposes and is entitled to do so, so long as he does not infringe the right of anybody else, that is to say, the Trade Mark of anybody who has secured a right to the use of the name Burman as a Trade Mark, which it is very difficult to prove in the case of a surname. I would have been compelled and been happy to uphold the conviction of the petitioner in this case if there were evidence on record to satisfy me that for any considerable time the public who bought fever mixture under the name 'Juri Tap" did so on the strength of its being sold in the complainant's carton. But as I have already indicated, the evidence in that respect is lacking. The conviction and sentence of the petitioner must, therefore, be set aside.

V.B.B. *Conviction set aside.*

A. I. R. (38) 1951 Patna 291 *[C. N. 61.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Ganesh Ram — Appellant v. *Baikunthesh Prasad Singh and others—Respondents.*

A. F. O. O. No. 77 of 1948, D/- 13-4-1950.

(a) Civil P. C. (1908), O. 41, R. 17, O. 3, R. 1 — Appearance — Counsel withdrawing from appeal—Presence of appellant in Court—Effect—Dismissal for default.

Where on a petition for adjournment being rejected the counsel for the appellant withdraws on the ground that he is not ready to argue the appeal and the appellate Court dismisses the appeal for default of the appellant, the dismissal is one within the ambit of O. 41, R. 17. The mere presence of the appellant in the Court does not make any difference for unless he is there for the purpose of conducting his case, there is no appearance. [Paras 5, 7]

Anno. C. P. C., O. 41 R. 17 N. 2 and 3; O. 3, R. 1 N. 3.

(b) Civil P. C. (1908), O. 41, R. 33 — Power of appellate Court in adjusting rights.

The power contained in R. 33 extends to those cases where as a result of the appellate Court's interference with the decree in favour of the appellant further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. [Para 10]

Anno. C. P. C. O. 41 R. 33 N. 3.

D. N. Varma and Chandra Sekhar Prasad — for Appellant; Gorakh Nath Singh and Ugrah Singh — for Respondents.

Ramaswami J. — This appeal is presented against the order of the District Judge of Shahabad refusing to restore an appeal which had been dismissed for default.

[2] The plaintiffs had brought a suit for redemption of a rehan bond alleging that they had deposited the amount in Court under S. 83, T. P. Act and had also caused a notice thereof served upon the defendant. In spite of the service of notice the defendant refused to give possession of the land and the plaintiffs therefore claimed mesne profits for the period subsequent to the date of the deposit of the rehan money. The defendant contested the suit on the ground that the plaintiffs had no right to redeem. The trial Court granted a decree for redemption but rejected the claim for mesne profits on ground that there was no evidence adduced to prove that plaintiffs had made the deposit on the alleged date. Against this decree the defendant filed an appeal. The plaintiffs filed a cross objection with respect to the claim for mesne profits which had been disallowed by the trial Court.

[3] The learned Judge fixed 16-9-1947 for hearing the appeal. On that date counsel for the appellant stated that his client reached Arrah at 11 A. M. and so he was not ready to argue the appeal. Learned counsel asked for a short adjournment but the Court rejected the petition and also dismissed the appeal for default of the appellant. The Court heard the cross-objection of the respondents *ex parte* and granted him a decree for mesne profits which should be ascertained in future proceedings. The defendant then applied under O. 41, R. 19 for rehearing the appeal. The learned District Judge rejected this application on the ground that no sufficient cause was shown for the non-appearance of the appellant on the date fixed for hearing.

[4] On behalf of the respondents a preliminary objection is related (debated?) that this appeal is incompetent since the learned District Judge had not dismissed the appeal for default and O. 41, R. 19 was therefore not applicable. It was pointed out on the respondents' behalf that both the appellant and his counsel were present in Court and after the petition for adjournment had been rejected the counsel for the appellant withdrew on the ground that he was not ready

to argue the case. In support of his argument learned Counsel cited *Mathura Das* v. *Narain Das*, A. I. R. (27) 1940 ALL. 248 : (I. L. R (1940) ALL. 220), and *Raghubar Singh* v. *Gouri Charan Singh* A. I. R. (5) 1918 Pat. 259: (46 I. C. 492). In the Allahabad case, *Mathura Das* v. *Narain Das*, A. I. R. (27) 1940 ALL 248 : (I. L. R. (1940) ALL. 220), there is no doubt an observation that in the case of an appearance by an appellant who was not prepared to argue the appeal O. 41, R. 17 would not be applicable. But this authority is inconsistent with the current decisions of the Patna, Calcutta and Madras High Courts as will be presently shown. *Raghubar Singh* v. *Gouri Charan*, A. I. R. (5) 1918 Pat. 259 : (46 I. C. 492) the question to be decided was whether a compromise petition according to which the parties had agreed that the suit should be dismissed could be set aside by an application under O. 9, R. 9. It should be added that according to the terms of the compromise petition the Subordinate Judge had dismissed the suit and the plaintiffs alleging that by practice of fraud their thumb-marks were taken on the compromise petition had applied for setting aside the order of dismissal. A Bench of this Court of dismissal in accordance with the terms incorporated therein could be set aside or reviewed in accordance with the procedure laid down in O. 9, R. 9. Obviously the material facts in the present case are different. On the other hand in *Lalji Sahu* v. *Lachmi Narain Singh*, 3 Pat. L. J. 355 : (A. I. R. (5) 1918 Pat. 351), it was held that the presence of the plaintiff in Court was not an appearance within the meaning of O. 9, R. 8 if the pleader of the plaintiff is absent. In *Muhammad Bakar Ali* v. *Chulhai Mahton*, 4 Pat. L. J. 712 : (A. I. R. (7) 1920 Pat. 589), the defendant was ready on the date to which the suit had been adjourned but the plaintiff's pleader appeared and stated that he was unable to adduce any evidence and it was ordered that the suit be dismissed for default of the plaintiff. Upon these facts the learned Judges held that the dismissal was a dismissal under O. 17, R. 2 and not under R. 3, and therefore, no appeal lay from the order. In order that there may be an appearance within the meaning of O. 9 or O. 17 by a pleader the pleader must be duly instructed and able to answer all material questions. If a party to a suit is represented by a pleader the presence of such party in Court would not constitute an appearance. In *Damodar Das* v. *Rajkumar Das*, 1 Pat. 188 : (A. I. R. (9) 1922 Pat. 485), the facts are almost parallel with the present case. In that case the defendant was personally present at the hearing but his pleader took no part in the trial save to ask for an adjournment which was refused. Thereafter the Court after hearing the plaintiff's evidence and argument sdeereed the suit. Dawson-Miller, C. J. held that the decree was *ex parte* and was liable to be set aside for sufficient cause under O. 9, R. 13. The eminent Judge observed that the mere presence of a party in Court, unless he is there for the purpose of conducting his case, is not an appearance within the meaning of the Code of Civil Procedure; nor does the presence of his pleader who has been instructed to represent him on previous occasions constitute an appearance unless he is instructed to represent him on the occasion in question and attends for that purpose.

[5] The *cursus cures* of the Patna High Court is consistent with *Gopala Row* v. *Maria Susaya Pillai*, 30 Mad. 274 : (17 M. L. J. 225) in which the plaintiff's pleader appeared on the date on which the (case ?) was posted for hearing. He applied for adjournment which was refused by the Court. The pleader declined to proceed with the suit and the plaintiff who was present in Court took no steps. Thereupon the suit was dismissed. It was held in these circumstances that the dismissal of the suit was a dismissal for default and that the plaintiff could apply for restoration of the suit. The High Court observed that a plaintiff "fails to appear" within the meaning of S. 102 (of the old Code) when his pleader declines to proceed with the suit and it made no difference that the party was present in Court. A similar view was taken by a Full Bench of the Calcutta High Court in *Satish Chandra* v. *Apara Prasad*, 34 Cal. 403 : (5 C.L.J. 247 F.B.).

[6] It should be stated that a similar rule has been adopted in English Courts. In *Robinson* v. *Chadwick*, (1878) 7 Ch. D 878 : (47 L.J.C.H. 607) the plaintiff did not appear in person, but counsel appeared on his behalf and asked for an adjournment; the application was refused; thereupon counsel for the plaintiff declined to proceed. Fry J. held that he could only deal with the case as if the plaintiff had not appeared at the trial, as indeed, in substance, he had not; and the learned Judge made an order for dismissal under R. 19 of O. 36 of the old Supreme Court Rules.

[7] For these reasons I hold that the appeal is competent under O. 41, R. 19 and the preliminary objection taken on behalf of the respondents must fail.

[8] For the appellant it was contended that sufficient cause had been shown for restoring the appeal. It was pointed out that the cross-objection was admitted on 26-6-1947 and the appeal was adjourned to 21-8-1947, for hearing; on this date the Court was engaged in sessions and so the hearing adjourned to 16-9-1947. For the appellant evidence was given that he missed

railway train on the previous date and the morning train by which he reached Arrah on 16-9-1947 was three hours late. The appellant met his pleader at about 12 noon. As the appeal was called on for hearing soon after, it was argued for the appellant, that the pleader was not ready to argue the appeal. The learned District Judge has not specifically disbelieved the plea of the appellant that the morning train was late. If this part of the case be true it is obvious that the appellant cannot be held responsible for delay in reaching the Court for giving instructions to his pleader. There may be some amount of negligence on the appellant's part for having missed the train on the previous date. But upon the whole I consider that sufficient cause has been made out by the appellant for restoration of the appeal.

[9] For the respondents however an important objection is raised that no appeal had been preferred by the appellant from the order of the learned District Judge allowing the cross-objection with respect to the mesne profits. It was contended for the respondents that in the absence of such an appeal the order of District Judge granting mesne profits has become final and cannot be interfered with by the High Court. Learned counsel relied upon *Hira Nand* v. *Mahbub Elahi*, A. I. R. (31) 1944 Lab. 174 : (213 I. C. 217). In that case the District Judge had dismissed an appeal for default and had allowed cross objection preferred by the respondent. The plaintiff appellant then made an application for restoring the appeal but this was disallowed by the District Judge. Against this order dismissing his application for restoring the appeal the plaintiff moved the High Court and Beckett J. held that there was sufficient ground for restoration. The appeal was therefore restored and sent to the District Judge for decision on its merits. When the appeal came for rehearing before the District Judge an objection was raised on behalf of the defendant-respondent that, inasmuch as the Court had, at the time of allowing his cross-objection, come to the conclusion that the plaintiff had failed to establish the contract and that order had not been set aside, the decision allowing the cross-objection must be held to have become final and operated as *res judicata* between the parties. This objection prevailed before the District Judge and the appeal was dismissed. A second appeal was preferred in the High Court which held that the order for restoration of the appeal would not have resulted *ipso facto* in setting aside the order of dismissal passed in the cross-objection. Unless steps were taken to get rid of the order passed on the cross-objection that order continued to be binding upon the parties and was bound to affect the decision of the appeal if in disposing of the cross-objection it was necessary for the Court to come to a decision on facts which would affect the merits of the appeal itself. But this case is not quite relevant for the present appeal for the question in debate is not what would be the effect of an order which does not set aside the decree of the learned District Judge allowing mesne profits to the respondents, but the question is whether we should in exercise of the jurisdiction conferred by O. 41, R. 33 direct not only that the appeal should be reheard but also that the cross-objection should be reheard after we had previously vacated the order of the learned District Judge passed thereon.

[10] Order 41, R. 33 is to the following effect :

"The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or cross-objection."

The rule has been newly introduced in the Code of 1908. Its object is clearly to enable the Court to do complete justice between the parties. Its terms are very wide and in a proper case it gives the appellate Court ample discretion to pass any decree or make any order to prevent the ends of justice from being defeated. Having regard to the wide language of the rule it is not expedient to lay down any hard and fast rule regarding its true scope. Involving as it does an exercise of judicial discretion the question whether the Court should exercise the powers in a particular case would no doubt depend upon the special facts and circumstances of the case. It may be conceded that the discretion is not to be exercised in an arbitrary manner nor in such a way as to abrogate the other provisions of the Code with respect to the institution of appeals and cross-objections and the like. But there is ample authority for the view that the power contained in R. 33 extends to those cases where as a result of the appellate Court's interference with the decree in favour of the appellant further interference is required in order to adjust the rights of the parties in accordance with justice, enquity and good conscience (see for instance, *Jawahar Banu* v. *Shujaat Hussain Beg*, 43 ALL 85 : (A. I. R. (8) 1921 ALL 367) and *Gangadhar* v. *Banabashi*, 22 C. L. J. 390: (A. I. R. (1) 1914 Cal. 722). In the latter case Jenkins C. J. observes: "There is no doubt that the words of that rule are widely expressed, but they must be applied with discretion" and later on the learned Judge adds that no hard and fast rule could be laid down. A similar opinion was

pressed by Sir Asutosh Mookerjee in *Abjal Majhi* v. *Intu Bepari*, 22 C. L. J. 394: (A. I. R. (3) 1916 Cal. 260). In a Full Bench case *Subramania Chettiar* v. *Sinnammal*, 53 Mad. 881: (A. I. R. (17) 1930 Mad. 801 F B.) it was held that R. 33 conferred wide powers upon the appellate Court and there was no warrant for limiting the application of the rule only to cases where further interference was required to adjust rights between the parties. In any event upon the facts disclosed in the present case I am satisfied that the orders of the District Judge dismissing the appeal and allowing the cross objection was interdependent and incapable of being dissociated from each other. That being so, it is manifest that we ought in this case to exercise the discretion conferred by R. 33 for further interference is required in order to adjust rights between the parties, which further interference has been rendered necessary because the *ex parte* order dismissing the appeal is set aside and it is being restored for rehearing.

[11] For the reasons set forth I should allow this appeal, set aside the orders of the learned District Judge dated 16th and 17th September 1947, dismissing Title App. No. 162 of 1947 *ex parte* and allowing the cross-objection filed by the respondents. Both the appeal and the cross-objection are restored and the learned District Judge should dispose of them according to law after further hearing. It is desirable that the rehearing should be done with as great expedition as possible.

[12] **Sarjoo Prasad J.**—I agree. Even if it be assumed for the sake of argument that O 41, R. 33 has no application to the case, there is no reason why under our inherent powers we could not direct all orders passed subsequent to the order under and depending thereon to be set aside.

V.S.B. *Appeal allowed.*

A. I. R. (38) 1951 Patna 294 *[C. N. 62.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Babu Prasad Jha and others — *Appellants* v. *Mahabir Jha and another*—*Respondents.*

A. F. O. O. No. 115 of 1948, D/- 11-4-1950.

(a) Civil P. C. (1908), O. 32, R. 7—Application of —Application for reference to arbitration—Recording of reason under rule, if necessary.

The principle of O. 32, R. 7 applies to an application for reference to arbitration pending the suit. The rule does not expressly require that the Court must record reasons for granting the permission. All that it requires is that the Court should apply its mind to the matter before granting such leave. [Para 3]

Anno. C. P. C., O. 32, R. 7, N. 15.

(b) Civil P. C. (1908), O. 32, R. 7—Application on behalf of minors made on later date—Effect.

Where in a suit the parties who are majors agree to refer the matter in suit to an arbitrator it is not necessary that the application on behalf of the next friend of the minor plaintiffs and the guardian *ad litem* of the minor defendant should be along with the joint petition for reference to arbitration. In such a case where the application on behalf of the minors is made on a later date, it is enough if the permission under O. 32, R. 7 is actually given before an order of reference is made by the Court. [Para 4]

Anno. C. P. C., O. 32, R. 7, N. 3, 15.

Ratikant Choudhury—*for Appellants*; *Baidyanath Jha*—*for Respondents.*

Sarjoo Prasad J.—This appeal is on behalf of the plaintiffs and is directed against an order refusing to set aside an award. Mr. Rati Kant Choudhury who appears on behalf of the appellants has put forward two contentions before us. First is that the award is invalid because it was passed upon a reference to which minors were parties but there was no proper compliance with the provisions of O. 32, R. 7 granting permission to the guardians of the minors to enter into the agreement for reference to arbitration. The second point urged on behalf of the appellants is that the case should be remanded because no opportunity was given to the plaintiffs to examine the arbitrator who gave the award. I shall deal with the two objections seriatim.

[2] It appears that plaintiffs 3 and 4 who are the sons of plaintiff 1 were minors and they were represented by their father and natural guardian plaintiff 1 in the suit. On the side of the defendants, defendant 2, the son of defendant 1, was a minor and he was represented in the suit by a pleader guardian *ad litem*. On 3-7-1947 an application was filed praying that the suit be referred to the arbitration of one Babu Janki Raman Prasad Misser. On that date it appears that there was no application filed on behalf of the minor plaintiffs and the defendant for permission to enter into the compromise. On 7-7-1947 the next friend of the minor plaintiffs and the guardian *ad litem* of the minor defendant filed a petition praying for permission to enter into the agreement to refer the matter to arbitration. On that petition having been filed the Court recorded an order granting permission and thereafter the Court passed an order for referring the case to the arbitration of the arbitrator concerned. Learned counsel for the appellants submits that there has not been sufficient compliance with O. 32, R. 7 first because in granting permission the Court merely observed "permitted" without recording any reasons for granting such permission. In the second place he submits that this application for leave to enter into the agreement for reference to arbitration should have been made along with the application itself which was filed on 3-7-1947 and that not having been done the order is illegal. In my opinion both these contentions

are without any substance. Under O. 32, R. 7 no particular formula is necessary and the Court is not bound to give reasons for granting permission to the guardian *ad litem* to enter into the agreement for reference or for compromise. If any authority is needed for this purpose we may refer to a decision of this Court in *Ishan Chandra* v. *Nilratan*, 2 Pat. 538; (A. I. R. (10) 1923 Pat. 375) which has been followed in a number of other cases by this Court. Kulwant Sahay J. who delivered the judgment in that case observed as follows:

"In order to attract the provisions of O. 32, R. 7, Civil P. C. it is enough to show that the attention of the Court was directly called to the fact that a minor was a party to the compromise and that the leave of the Court was obtained on petition or in some way not open to doubt. No particular formula is necessary to be used by the Court in order to grant the leave and when it is shown that an application was made by the guardian to the Court asking for leave to enter into the compromise and the Court makes a note of that application and passes a decree in terms of the compromise, it must be held that the leave of the Court was expressly recorded within the meaning of O. 32, R. 7 of the Code."

The learned Judge relied upon a decision of the Judicial Committee of the Privy Council in *Manohar Lal* v. *Jadunath Singh*, 33 I. A. 128: (28 ALL. 585 P. C.) for the principle which he laid down in that decision. I with great respect concur with the view expressed by his Lordship in that case.

[3] In this case there was an application filed on behalf of the guardian *ad litem* as well as the guardian of the minors to enter into the agreement to refer the dispute to arbitration. That petition is referred to by the Court in the order to which reference has been made by me above and after that the Court recorded the order permitting the guardians to enter into the agreement on behalf of the minors. Learned counsel for the appellants has relied upon an earlier decision of this Court in *Ramgulam Sahu* v. *Durga Pershad*, 6 Pat. L. J. 190: (A. I. R. (18) 1921 Pat. 14). But that case has been fully discussed in *Ishanchandra* v. *Nilratan*, 2 Pat. 538 (A. I. R. (10) 1923 Pat. 375), and distinguished there. In distinguishing the decision in *Ramgulam Sahu* v. *Durga Pershad*, 6 P. L. J. 190: (A. I. R. (8) 1921 Pat. 14) Kulwant Sahay J. pointed out that on the evidence in that case the Judges came to an express finding that there was evidence on the record to suggest an inference that the Court never intended to exercise its judgment on the question whether the settlement was for the benefit of the minor and under those circumstances it was held that the compromise decree was not binding on the minors. In this case it is quite clear that the Court was conscious of the interest of the minors and the Court did apply its mind to the application which was presented to him seeking permission to enter into the agreement for reference to arbitration on behalf of the minors. If under these circumstances the Court granted the permission required, the Court evidently applied its mind to the matter and I have no reason to think that in recording the permission the Court did not act as provided by the law under O. 32, R. 7. I may here refer to the language of the rule itself which requires that a next friend or guardian for the suit shall not without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit. The principle of the rule applies with equal force to an application for reference to arbitration. The rule does not expressly require that the Court must record reasons for granting the permission. All that it does require is that the Court should apply its mind to the matter before granting such leave and in this case we find that the Court did apply its mind to the petition on which the permission was granted to the guardian *ad litem* of the minor plaintiffs and to the guardian *ad litem* of the minor defendants.

[4] As to the second part of his contention under O. 32, R. 7, learned counsel for the appellants has relied upon certain observations made in a Full Bench case of the Allahabad High Court in *Marian Bibi* v. *Amina Bibi*, I. L. R. (1937) ALL. 317 : (A. I. R. (24) 1937 ALL. 65 F.B). In that case the second point which was referred to the Full Bench for consideration was formulated as follows: If the answer to the above question, (viz., "whether Para. 1 of Sch. 2, to Civil P. C., is subject to the provisions of O. 32, R. 7") is in the affirmative, should the leave of the Court for the agreement to refer the suit to arbitration be obtained before an application for an order of reference is made, or leave can be granted by the Court even after the award has been delivered? Mr. Choudhury contends that the leave of the Court should have been obtained before the application for an order of reference was made. It is true that the question has been a bit widely formulated if I may say so with respect to the learned Judges who decided the case. But it simply means that the permission should be granted under O. 32, R. 7 before an order of reference is made by the Court. In that case, as it appears from the facts, there was no order granting such a permission to the guardian *ad litem* of the minor to enter into the agreement for reference to arbitration at all. That being so their Lordships held that the reference was invalid and could not bind the minors. In the present case it is clear from the order sheet that

the order granting permission to the guardians on behalf of the minors was made before the Court finally passed order directing the case to be referred to the arbitrator. The observations made by the learned Judges in *Mariam Bibi* v. *Amina Bibi*, I. L. R. (1937) ALL. 317: (A. I. R. (24) 1937 ALL. 65 F.B.) have been explained by a Division Bench of this Court in *Dharnidhar* v. *Phulkumari*, 24 Pat. 529: (A. I. R. (32) 1945 Pat. 391). That was a case which related to the validity or invalidity of a compromise arrived at between the parties to the suit. The compromise took place on 30.1.1943 and the application for getting it recorded was filed in April 1944. An argument was advanced before their Lordships that after the adult members had entered into the compromise and filed terms thereof in Court it was not open to the guardian *ad litem* to make an application for leave to compromise on behalf of the minors on those terms. Their Lordships repelled that contention and held as follows:

"The prohibition contained in R. 7 of O. 32 against a next friend or a guardian *ad litem* entering into an agreement or compromise without the leave of the Court being expressly recorded, in my opinion, does not go to the length of saying that a compromise entered into by the adult members may not be sanctioned by the Court even if the application for recording the compromise is accompanied by an application on behalf of the guardian *ad litem* for the leave of the Court. . . . . It is only when negotiation has reached the stage of settlement that the guardian-*ad litem* would be in a position to know the exact terms on which the contending parties would agree to settle their differences. Only when that stage has been reached, it is possible for the guardian *ad litem* to obtain the necessary sanction of the Court. Hence, in my opinion, if the leave of the Court is granted to the guardian-*ad litem* before the compromise is actually recorded, the terms of R. 7 of O. 32 of the Code would be substantially complied with, because until the compromise has been recorded, it does not become operative between the parties so far as the pending litigation is concerned."

These observations would apply with equal force to the present case. It is true that in this case the application on behalf of the next friend of the minor plaintiffs and the guardian *ad litem* of the minor defendant was filed a few days later after the joint petition for reference to arbitration had been filed on 3-7-1947. Nevertheless the direction to refer was not made until the permission had been granted to the guardians concerned. That being so, in my opinion, there has been sufficient compliance with the law and I do not think that there was any illegality in the reference to arbitration which is binding upon the minors concerned.

[5] I will next come to the other point raised by the learned counsel for the appellants, viz., that he was not given sufficient opportunity to examine the arbitrator. In his petition of objection to the arbitration he made certain vague allegations about misconduct on the part of the arbitrator. The award is a sufficiently long document in which the arbitrator appears to have fully considered the pros and cons of the matter. But in any event we find from the order-sheet that sufficient time was given to the appellants to examine the arbitrator concerned. If the appellants were actually serious in establishing their case of misconduct they could have examined themselves or any other witness on the point which they have failed to do. The learned Subordinate Judge therefore was fully justified in eventually rejecting their application for time on 23 2-1948 and in the passing order which he did in adopting the award given by the arbitrator. The learned Subordinate Judge has rightly pointed out that there was no evidence adduced on behalf of the objector to show that the arbitrator failed to examine any or all the materials placed before him nor was there evidence to show that he was guilty of any misconduct. In the circumstances I do not see any merit in this appeal which must fail and is dismissed with costs.

[6] **Ramaswami J.**—I agree.

V.S.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 296 [C. N. 63.]

SHEARER AND JAMUAR JJ.

Mahabir Singh and others — *Appellants* v. *The State.*

Criminal Appeal No. 69 of 1950, D/- 12-9-1950.

(a) Evidence Act (1872), S. 114 — Possession of stolen property soon after theft — Presumption is not that person is receiver of stolen property.

When soon after the commission of a theft, a person is found in possession of the stolen property, the presumption that ordinarily arises is not that he has received it knowing it to be stolen but that he has stolen it. The inference that he is a receiver ought not to be drawn unless there is some circumstance going to show that he did not obtain it direct from the owner or the person in possession, but from some other person who was himself the actual thief. [Para 1]

Anno. Evi. Act, S. 114, N. 7.

(b) Evidence Act (1872), S. 114 — Recovery of stolen goods from house belonging to co-owners — Accused eldest in household, present at time of recovery — Presumption.

Where a bag containing stolen goods is recovered from a house, it is not enough to show that the accused were co-owners of the house. But where, one of the accused who was the eldest of the family was present at the time of the recovery and the bag was recovered from such a place that he must have been aware of its existence, it can be presumed that he had control over the bag and was therefore in law in possession of it either exclusively or jointly with other members of the household. The other accused, who were co-owners of the house, but were not present cannot however be fixed with the criminal liability. [Para 1]

Anno. Evi. Act, S. 114, N. 7.

(c) Criminal P. C. (1898), S. 423 — Acquittal can be altered into conviction, provided sentence is not enhanced—Trial on two charges under Ss. 395 and 412, Penal Code—Lower Court not adopting procedure under S. 236, Criminal P. C. and erroneously recording formal order of acquittal of one of charges —Technical error will not be allowed to result in accused receiving far less severe sentence than he deserved—Criminal P. C. (1898), S. 236. [Para 2]

Anno. Cr. P. C., S. 423, N. 33; S. 236, N. 10.

S. C. Chakravarty—for Appellants; *Standing Counsel—for the State.*

Shearer J.—This is an appeal by five men who have been convicted by the learned Assistant Sessions Judge of Monghyr under S. 412, Penal Code. Three of them have been sentenced to undergo R. I. for 5 years, while the other two have been sentenced to undergo R. I. for 3 years. In addition, each has been sentenced to pay a fine of Rs. 200 or, in default, to undergo R. I. for 3 months more. On 1-2-1949, a young Brahmin, Achhutan and Pathak, who is an employee of a firm of cloth dealers in village Bakhri, went to Begusarai to purchase cloth for his firm and for two other firms at Bakhri. An employee of one of the other two firms went to Begusarai with him. A considerable quantity of cloth was purchased, and was put up in eleven bags and afterwards Achhutanand Pathak hired a bullock cart driven by one Bankey Gope. The bags were put on this bullock cart, and Bankey Gope and Achhutanand Pathak set out for Bakhri in the latter part of the night. When the cart had reached a point on the road two miles or so away from Begusarai, it was stopped by a number of men armed with *lathis*. These men assaulted Achhutan and Pathak and took away six of the bags. They also deprived Achhutanand Pathak of his personal belongings and of a not inconsiderable sum of money. Achhutan and Pathak went on along the road for another mile until he met a *dafadar*, and then went back with this *dafadar* to Begusarai where he lodged a first information at 7 A. M. The appellants Mahabir and Basudeo are brothers, and the appellant Balmiki is a son of the former. The other two appellants, Ramautar and Borham, who are also brothers, are related to, and are neighbours of, Mahabir. On 16-2-1949 it is said that the houses of these appellants were searched and the greater part of the property taken away by the dacoits was recovered. It was not, and could not be, denied that Achhutanand Pathak was the victim of a dacoity and that the cloth, which was produced in Court at the trial, was part of the property taken away by the dacoits. The defence set up was the very extraordinary one that the cloth had been recovered in quite different circumstances and that the appellants had been victimised by the police at the instigation of one Bishwanath Singh Sharma who is an honorary Magistrate at Begusarai and also a *zamindar* of Harakh, the village to which the appellants belong. It is true that there has been some litigation between this honorary Magistrate and some of the appellants, and it is also true that some of the persons, who attended as witnesses at the search, were shown to have some connection with Bishwanath Singh Sharma. No fewer than four sub-inspectors of police and an assistant sub-inspector took part in the searches, and the searches were witnessed by as many as four persons belonging to the neighbourhood. There is, clearly, no reason to distrust the evidence of the sub-inspector and of the search witnesses as to what occurred on 16-2-1949, in Harakh. The suggestion that the police, having recovered part of the stolen property, allowed some of the real culprits to go scot free and fabricated a mass of evidence to procure the conviction of men they knew to be quite innocent is preposterous. Assuming, for the moment, that there is evidence to show that each of the two sets of appellants was in possession of so much of the cloth as was recovered from their respective houses, the question that arises is whether or not the learned Assistant Sessions Judge was correct in convicting them of receiving. On this point, the Court below has, in my opinion, misdirected itself. When, soon after the commission of a theft, a person is found in possession of the stolen property, the presumption that ordinarily arises is not that he has received it knowing it to be stolen but that he has stolen it—*Reg.* v. *Langmean*, (1864) L. & C. 427: (10 L. T. 350). The inference that he is a receiver ought not to be drawn unless there is some circumstance going to show that he did not obtain it direct from the owner or the person in possession, but from some other person who was himself the actual thief. Such a circumstance may, for instance, be that the person found in possession of it is a woman who is not likely to have been the principal offender or a pawn broker or similar individual to whom the actual thief may have turned for assistance in getting rid of his booty. In this particular case there was no reason why the Court below should have inferred that any of the persons found in possession of the stolen property was a receiver and every reason why it should have inferred that he was one of the dacoits. In the first place, the appellants Mahabir and Balmki were picked out at a test identification by Achhutanand Pathak who said at the trial that he remembered seeing them among the decoits. Mr. S. C. Chakraverty, for the appellants, has said that it must still have been dark when the

dacoity was committed and a matter of great difficulty and perhaps quite impossible, for Achhutanand Pathak to have recognized any of his assailants. The first information was lodged at 7 A. M., and, having regard to the distance which Achhutanand Pathak had to travel before reaching the Police station, it looks as if he had made a mistake in saying, as he did in the first information, that the occurrence took place, at 4 A. M. In point of fact, it must, I think, have taken place, as he said at the trial, somewhat later. The dacoits had, to unyoke the bullocks and upset the cart, and Achhutanand Pathak was, quite certainly, in close contact with them for an appreciable time. I see no reason why he should not have been in a position to recognize some of the dacoits again, and his conduct in picking Mahabir and Balmiki out at the test identifications can only be reasonably explained on the assumption that he had in fact seen them among the dacoits. It is true that, at the test identification at which the appellant Mahabir was put up. Achhutanand Pathak picked out four non-suspects. There were two other suspects besides the appellant Mahabir, and it is not at all clear from the report of the honorary Magistrate, who held it, that the mistakes, which Achhutanand Pathak made, were mistakes as to the identity of Mahabir or as to the identity of the other suspects. In any case, the recovery of part of the stolen property from premises occupied by the appellants Mahabir and Balmiki goes to show that, in picking them out at the test identifications, Achhutanand Pathak can scarcely have mistaken them for other persons who were not present at the test identification. If he, in the first instance, picked out a non suspect instead of Mahabir and it is not at all clear to me that he did—the reason, presumably, was that there was some resemblance between the two men. The real question which arises in the appeal, and which has been argued with much ability by Mr. S V. Chakraverty, is as to whether or not there is evidence to show that any of the property which was recovered was in the possession of the other three appellants. Mr. S. C Chakraverty, relying on *Emperor* v. *Santa Singh*, I. L. R. (1945) 26 Lah. 137: (A. I. R. (31) 1944 Lah. 339: 46 Cr. L. J. 1 F.B.), which decision was followed by a Division Bench of this Court in *Sahendra* v. *Emperor*, 26 Pat. 46: (A. I. R. (35) 1948 Pat. 222: 49 Cr. L. J. 445), contended that it was not enough for the prosecution to show that the appellants were co-owners of the houses from which the stolen property was recovered. That, in my opinion, is a correct statement of the legal position. The appellant Ramautar was, however, at his house when the sub-inspector went to search it. The *sarees* and *dhotis*, which were recovered, were in a sack which was of such a size, and was found in such a position, that Ramautar must have been perfectly well aware of its existence. Ramautar was the eldest member of the family in the house at the time, and it must, I think, in the circumstances be presumed that he had control over the sack, and was, therefore, in law, in possession of it either exclusively or jointly with other members of his household. There is no reason to suppose that he has at any time said that it was brought into the premises by some other member of the family and, even if he had, one might safely presume that Ramautar had ratified this man's action and had adopted his possession as his own also. At the trial, as I have already said, the defence set up by Ramautar and his relations was that the stolen property was not in fact recovered from them at all. Borham Singh, the brother of Ramautar, was not in the village when the search took place, nor was the appellant Basudeo. There is so far as I can ascertain from the record no evidence to show when they had last been in their respective houses prior to the search. in this situation, while the prosecution can point to conduct on the part of Ramautar which shows that he was in possession of the stolen property, It cannot point to similar conduct on the part of either Borham or Basudeo. The mere circumstance that these two appellants are co-owners of the premises from which the stolen property was recovered is by itself wholly insufficient to establish any criminal liability. The appeals of Basudeo Singh and Borham Singh ought in my opinion, to be allowed. The convictions and sentence imposed on them ought to be set aside, and the fines, if already paid, ought to be refunded to them. The convictions of the remaining appellants ought, in my opinion, to be altered from one under S. 412 to one under S. 395, Penal Code, the sentences, however, being maintained. The appellant Balmiki Singh must now surrender to his bail and serve out the unexpired portion of his sentence.

[2] Mr. S. C. Chakravarty, for the appellants contended that this Court had no jurisdiction to alter an order of acquittal to one of conviction and that, if it was not satisfied that these three appellants were receivers, it had no option but to direct that they should be released and set at liberty forthwith. This would be a most extraordinary result. The decisions on which Mr. Chakravarty relied for this part of this argument were *Kishan Singh* v. *Emperor*, A. I. R. (14) 1928 P. C. 254: (29 Cr. L. J. 828), *Mohammad Sharif* v. *Rex*, A. I. R. (37) 1950 ALL 380:

(51 Cr. L. J. 1040) and *Malak Khan* v. *Emperor*, A. I. R. (33) 1946 P. C. 16: (47 Cr. L. J. 489). These decisions do not, however, support the view for which Mr. Chakravarty has contended. In fact, one at least of the decisions namely *Mohammad Sharif* v. *Rex*, A. I. R. (37) 1950 ALL. 380: (51 Cr. L. J. 1040) is an authority to the contrary. Bhargava J. there referred with approval to an earlier Full Bench decision of the Allahabad High Court in *Zamir Qasim* v. *Emperor*, A. I. R. (31) 1944 ALL. 137:(46 Cr. L. J. 38 F. B.). It was there pointed out that, while a Court of appeal may alter a finding of acquittal into one of conviction, it cannot, in doing so, enhance the sentence and that, in consequence, where a person has been convicted of culpable homicide and ought, in the opinion of the appellate Court, to have been convicted of murder, the appellate Court cannot set aside the conviction for culpable homicide and substitute a conviction for murder. The reason, however, as was there stated, is that, if a conviction for culpable homicide is altered to a conviction for murder, the sentence must be enhanced if the sentence imposed by the trial Court is a sentence of imprisonment and not a sentence of transportation for life. Section 423, Criminal P. C., however, while empowering an appellate Court to alter a finding imposes a condition that, in doing so, it should not enhance the sentence. Apart from this, it must, in my opinion, be presumed that the learned Assistant Sessions Judge, in trying the appellants on two charges one under S. 395 and the other under S. 412, Penal Code, was adopting the course sanctioned by S. 236, Criminal P. C. That being so, instead of recording a formal order acquitting the appellants on one of the two charges, the learned Assistant Sessions Judge ought to have stated that, in his opinion, the facts showed that the appellants were receivers and not dacoits. The purely technical error committed by the learned Assistant Sessions Judge in recording a formal order of acquittal cannot, possibly, result in a man who, through another error committed by the Court below, has received a far less severe sentence than he deserved, escaping any punishment at all.

[8] **Jamuar J.**—I agree.

R.G.D. *Order accordingly.*

A. I. R. (38) 1951 Patna 299 *[C. N. 64.]*

DAS AND SARJOO PRASAD JJ.

Ramjanam Tewary and another — Defendants—Appellants v. *Bindeshwari Bai—Plaintiff—Respondent.*

A. F. O. O. No. 276 of 1947, D/-21-3-1950.

(a) Civil P. C. (1908), O. 23, R. 3 — Lawful compromise of suit— Each party blaming other for its breach —Power of Court to inquire into question as to who was at fault.

Where both parties to a suit invite the Court to record a compromise adjusting the dispute between them, as embodied in their joint petition, but each party blames the other for not carrying out the terms of the compromise, the Court does not act illegally in investigating as to who was at fault in commiting breach thereof. [Para 8]

Anno. C. P. C., O. 23, R. 3, N. 6.

(b) Civil P. C. (1908), S. 107, O. 41, R. 1— Question whether there is completed agreement between parties—Question of law or fact—Civil P. C. (1908), Ss. 100-101.

The question whether or not there has been a completed agreement between the parties is largely a question of fact and depends also upon how the parties themselves regarded the matter. If they themselves regarded the matter as one of concluded agreement between them, it is not open to the Court to say specially when all the terms have been embodied in the joint petition filed by them inviting the Court to record the compromise as embodied in the petition, that there was no concluded agreement. [Para 10]

Anno. C. P. C., Ss. 100-101, N. 28; S. 107, N. 14; O. 41, R. 1, N. 13.

(c) Civil P. C. (1908), O. 23, R. 3, S. 151—Consequential orders to give effect to compromise—Jurisdiction of Court to pass.

The Court had complete jurisdiction to make consequential orders in order to give effect to the terms of the compromise and to record the same.

Where a Court, having seisin of the matter, accepts a deposit of money, on the refusal of a party to the compromise to accept the same in accordance with its terms, the Court is acting *ex dabito justitiae* and has complete jurisdiction to do so whether as an act incidental to recording the compromise itself or under exercise of its inherent powers. [Para 14]

Anno. C. P. C., S. 151, N. 1; O. 23, R. 3, N. 18.

(d) Civil P. C. (1908), O. 23, R. 3—Subject-matter of suit—Meaning.

The question whether a particular term of a compromise relates to the subject-matter of the suit has to be answered on the frame of the suit the relief claimed and the matters which arose for decision in the case on the pleadings of the parties. The term is comprehensive enough and if the compromise relates to all those matters which fell to be decided in the case, it could not be said that any part of the compromise was beyond the subject-matter of the suit.

Where the compromise is really an adjustment of the rights and differences in respect of all matters in dispute between them whether as framed in the plaint or set up by way of defence in the written statement and the compromise purported to be a final settlement and adjustment of these disputes on a fair and satisfactory basis acceptable to all, it must be held to relate to the suit. [Para 16]

Anno. C. P. C., O. 23, R. 3, N. 19.

Awadh Behari Saran and Amar Nath Singh—for Appellants; Tarkeshwar Nath and Janeshwar Singh—for Respondent.

Sarjoo Prasad J. — This appeal has been preferred against an order of the learned Subordinate Judge of Chapra adopting a compromise arrived at between the parties under O. 23, R. 3, Civil P. C. In my opinion, it is a very unfortunate litigation and it should not have

been allowed to develop. It will presently appear from the facts stated below that a litigation of this character amounts to an abuse of legal processes.

[2] The appeal in question arises out of two title suits which were being tried together before the learned Subordinate Judge, the parties to the suits being common. One of the suits, Title Suit No. 72/7 of 1944/46 was instituted by the plaintiff-respondent, Bindeswari Bai, for specific performance of a contract of sale in respect of a house belonging to defendants 1 and 2 who are the appellants in this Court. These appellants have a house in Mahalla Ratanpura of the town of Chapra. One portion of this house is a two-storied building and other portion is one storied. The plaintiff, Bindeshwari Bai, who carries on the profession of singing and dancing in the town of Chapra, came to occupy the two storied-portion of the house in question as a tenant on rent whereas it appears from the evidence that the other portion of the house, which is one storied, was in the occupation of the defendant Ramjanam Tewary himself. The plaintiff's case in this suit was that on 12-1-1944, the defendants agreed to sell to her the two storied portion of the house in her occupation offering to execute the sale deed within a period of six months, and on 13-1-1944 accordingly a sum of Rs. 2,000 was paid as earnest money to the defendants-appellants. On 21-6-1944, defendant 1 purchased a stamp-paper worth Rs. 112-8-0 for the execution of the sale deed in question, but later on the defendants failed to do so on one pretext or another. The plaintiff thereafter sent a notice to the defendants asking them to execute the sale deed in question, but the defendants sent a rejoinder refusing to do so and making certain counter allegations, one of them being that there was a contract for sale of both portions of the house in question for a consideration of Rs. 10,000. The plaintiff accordingly instituted the suit referred to above for specific performance of contract as alleged by her.

[3] The defendants filed their written statement in the suit. In their written statement they did not dispute the fact that there was a contract on 11-1-1944, in pursuance of which a sum of Rs. 2000 had been paid as earnest money to the defendants on 13-1-1944. They allege, however, that the contract in question was in connection with the sale of the entire house holding No. 512/513/496 old and new, including the pucca portion on the east and the wall to its west and the tiled portion of the house further west, all specified in Sch. B of the written statement for a total sum of Rs. 10,000. They also alleged that the agreement further was that the sale deed should be executed within a period of three months from the date of contract when the balance of Rs. 8000, the consideration money, would be paid by the plaintiff to the defendants and that not having been done, the defendants did not execute the sale deed in question. The other suit, namely, Title Suit No. 249/39 of 1944/45 was instituted by the defendants-appellants against the plaintiff, Bindeshwari Bai, for arrears of rent and for ejectment. As I have said, with the consent of parties the two suits were made analogous and were being tried together by the learned Subordinate Judge.

[4] When the hearing of the suit was proceeding on 17-4-1947, the pleaders of the parties informed the Court that the dispute between them had been settled by a compromise, and that a regular compromise petition would be filed later. On the day following the parties filed a joint petition embodying therein the terms of the compromise which showed that on the payment of a sum of Rs. 7750 to the defendants-appellants by the plaintiff the defendants would execute a sale deed with respect to both the portions of the house in favour of the plaintiff. It is this compromise petition which has been the subject-matter of controversy in this appeal. In this petition the parties further prayed that at least seven day's time should be allowed to them within which the sale deed would be executed and a regular petition filed in Court for disposal of the case. The hearing was accordingly adjourned to 24-4-1947, to enable the defendants to execute the sale-deed in favour of the plaintiff on payment of Rs. 7750. It appears, however, that the sale deed was not executed by the defendants, and on the 24th as soon as the Court sat, the Courts then being held in the morning, a petition was filed on behalf of the plaintiff-respondent, Bindeswari Bai, stating that the defendants were evading execution of the sale deed, though the plaintiff was ready with the sum of Rs. 7750 for payment to the defendants under the terms of the compromise aforesaid. The Court then called the other party and after hearing both sides, a final draft of the sale deed was approved with their mutual agreement. This draft is Ex. 5 in the case. In spite of all this, it appears that the sale deed was neither executed by the defendants nor presented for registration, and at about 11 a. m. the same day the plaintiff was driven to the necessity of filing a petition in Court stating that although the sale deed had been prepared according to the agreed draft, the defendants-appellants had made themselves scarce and, therefore, she prayed for permission to deposit the sum of Rs. 7750 in Court. The Court tried through the defendants' pleader to secure their attendance before it, but being unable to do so,

it finally directed the money to be deposited in Court. This deposit the Court had to accept presumably in view of the terms of the agreement which was to the effect that if the sum of Rs. 7750, the balance of the consideration amount, was not paid by 24-4-1947, the plaintiff Bindeshwari Bai would forfeit her claim to the house and to the earnest money of Rs. 2000 already paid to the defendants.

[5] On the following day, that is, 25-4-1947, separate petitions were filed on behalf of the plaintiff and the defendants in which both parties respectively claimed that the terms of the compromise should be given effect to and the suits should be disposed of in favour of the respective parties. The petition of the defendants filed on that day is rather important. In that petition the defendants stated that in the above two suits already referred to, the parties had come to terms and had accordingly filed a petition of compromise on 18-4-1947, to the effect that the plaintiff in Title Suit No. 72/7 of 1944/46 would buy the disputed house and the western thereof for a sum of Rs. 9750 out of which Rs. 2000 having already been paid, the balance of Rs. 7750 was payable to the defendants on 24-4-1947. They, however, alleged that on 24-4-1947, which was the date, according to them, for the registration of the sale deed in question, the defendants were all along waiting near the registration office to admit execution and to receive the consideration money, but the plaintiff did not either herself present the sale deed or make over any fair copy thereof to the defendants for presentation before the sub-registrar. They, therefore, stated that the plaintiff was responsible for not acting up to the terms of the compromise presumably because she had not the required money in her hands to meet the balance of the consideration amount. The defendants, therefore, prayed in the petition that the failure on the part of the plaintiff to carry out the terms of the compromise could not stand in the way of the enforcement of the terms thereof, and they accordingly prayed to the Court that the compromise should be recorded, and that in view of the plaintiff's failure to carry out its terms, her suit namely Title Suit No. 72/7 of 1944/46 should stand dismissed and Title Suit No. 249/39 of 1944/45 filed by the defendants against the plaintiff should stand decreed. I have referred in some detail to this petition of the defendants as it will have a material bearing upon the contentions advanced before this Court. The plaintiff on the contrary, alleged that the failure, if any, to carry out the terms of the compromise was on the part of the defendants and that she was all along ready with the consideration money and the fair draft for the execution of the sale deed, but the defendants themselves avoided execution thereof by making themselves scarce with the result that she was compelled to deposit the amount in Court. She accordingly prayed that the compromise should be recorded and the terms thereof given effect to in her favour.

[6] The learned Subordinate Judge was, therefore, confronted with the question as to who was at fault in not acting up to the terms of the compromise as the parties very seriously contended that neither of them was at fault but that the fault lay with the opponent. It was on this point alone that evidence was adduced by both the parties and both of them seemed to be agreed that there was a concluded agreement between them as embodied in the petition filed before the Court on 18-4-1947. The learned Subordinate Judge having fully discussed the evidence on the point came to the finding which is, in my opinion, wholly justified that "there has been a compromise in these cases and that the plaintiff, Bindeshri Bai, has acted upon the terms of the compromise". He also came to the finding, again I must say rightly, that the defendants "themselves made it impossible for the plaintiff to present the document for registration before the Sub-Registrar". Then findings and the evidence on that point has not been assailed before this Court, and, in my opinion, could not be successfully assailed. After coming to this finding, the learned Subordinate Judge held on the authority of the decision of the Judicial Committee of the Privy Council in *Hemanta Kumari Devi* v. *Midnapur Zamindari Co. Ltd.*, 47 Cal. 485: (A. I. R. (6) 1919 P. C. 79) that the entire compromise as embodied in the joint petition of the parties dated 18-4-1947, should be incorporated in the decree, and that the operative part of the decree should be confined only to the subject-matter of the suit which in his view was only a portion of the house, namely, the portion in occupation of the plaintiff herself. In regard to this portion the learned Subordinate Judge held that the decree was executable. In regard to the other portion of the house, he, however, directed that the plaintiff would be at liberty to bring a separate suit for specific performance of the contract on the basis of the compromise decree. The result of recording the compromise was that Title Suit No. 72/7 of 1944/46 instituted by the plaintiff was decreed, whereas the other suit filed by the defendants was dismissed in terms of the compromise petition.

[7] It is against this order of the learned Subordinate Judge that the present appeal is directed, and it is rather unfortunate, as I said in the beginning, that a lawful agreement of this character adjusting the dispute between the

parties and validly as between them should be sought to be avoided by the defendants, one of them, Ramjanam Tewari, being himself as I find from the record, a man of some education and a retired Inspector of Police. This is all the more surprising when it is found that the factum of the agreement has not even been impugned by the defendants.

[8] Mr. Awadh Behari Saran who appears for the appellants has contended, in the first place, that the learned Subordinate Judge has acted illegally in going into the question as to who was at fault in not carrying out the terms of the compromise. He submits that all that the learned Subordinate Judge was entitled to do was to enquire whether the suit had been adjusted wholly or in part by any lawful agreement or compromise between the parties, and to record such a compromise, if any, and pass a decree in accordance therewith in so far as it related to the suit. It was not his business to enter into any investigation as to who was at fault in committing a breach thereof. It is true that under O. 23, R. 3, Civil P. C., the Court's duty is to enquire whether there has been any lawful agreement or compromise adjusting the dispute between the parties and to record such a compromise if found to exist. On the point that there was a lawful agreement, both parties appear to have been agreed and had invited the Court to record the compromise as embodied in their joint petition dated 18-4-1947; but they wanted to take advantage of the term in their favour in having consequential orders passed in their respective suits pending before the learned Subordinate Judge. In doing so, the parties threw the blame upon each other and that necessitated the enquiry by the Court. The learned Subordinate Judge himself points out:

"I may mention in the very beginning that these cases have acquired undue importance in view of the fact that the parties are very seriously contending that neither of them are at fault, and that the fault lies with their opponent."

Parties adduced evidence accordingly, and therefore the Court could not but enter into the question. In one sense the determination of the question was also material because it affected the orders to be passed in the disposal of the two suits pending before him as based upon the terms of the compromise petition itself. I do not, therefore, see that there was anything wrong in the procedure adopted by the learned Subordinate Judge. I may in this connection refer to a decision of Sir George Rankin in *Haridas Modak* v. *Ramdas Modak*, 34 C W. N. 1068 : (A. I. R. (8) 1931 Cal 205). This case was relied upon by the appellants' counsel himself in connection with another point. In this decision Sir George Rankin appeals to have deprecated the omission to adopt such a procedure. Criticising the conduct of the learned Judge below his Lordship observed :

"What the learned Judge could have done at the instance of the plaintiff or defendant was to make an enquiry as to whether the defendant had failed to do what he had promised and whether he had failed by reason of some cause afforded by the plaintiff. The learned Judge did not purport to do that at all . . . ."

In my opinion, therefore, the procedure adopted by the learned Subordinate Judge was correct and necessitated by the circumstances of the case and the conduct of the parties themselves.

[9] The next argument on behalf of the appellants is that there was no concluded agreement between the parties, and that the petition filed on 18 4-1947, on behalf of the parties did not contain the terms of any concluded compromise, but that the final agreement adjusting the suit depended upon the execution of the sale-deed and the payment of the consideration money of Rs. 7,750 on 24-4-1947, which contingencies had to be fulfilled before a final compromise could take place between the parties. Reliance is placed upon para. 7 of the said petition to support the contention that the parties asked for seven days' time during which the sale-deed was to be executed and a regular petition was to be filed in Court for disposal of the case. This contention, in my opinion, quite clearly shows that the parties had compromised both the suits and under the terms of the compromise the defendants were to execute a registered sale-deed in favour of the plaintiff, Bindeshwari Bai, in respect of the entire pucca and kutcha houses NOS. 512/496 as per boundaries given in the petition. It further shows that the amount of consideration settled between the parties was Rs. 9,750 out of which Rs. 2,000 having been already paid, the balance of Rs. 7,750 was to be paid by the plaintiff to the defendants in one lump sum within seven days from that date, that is, by 24-4-1947, failing which the plaintiff was to forfeit her claims to the house and to the earnest money already paid by her ; and there was a further penalty provided, namely, that she was to be ejected from the house in her occupation and the Title suit filed by the defendants, namely, 249/39 of 1944/45 was to be decreed, whereas Title Suit NO. 72/7 of 1944/46 was to be dismissed. It further appears from the petition that if this money was paid on 24-4-1947, then the sale-deed would be executed and the defendants would not make any claim for the subject-matter of the suit instituted by them which suit in that case was to be dismissed, whereas the plaintiff's title suit was to be decreed and the parties were to bear their own costs. It is not only that the terms have been stated with sufficient clarity in the compromise

petition but that the parties themselves intended it to be a final adjustment between them and they regarded it as the final adjustment and compromise of their disputes. I have already referred to their petition dated 25-4-1947, in which the defendants themselves regarded this petition dated 18-4-1947, as a petition of compromise adjusting the dispute between the parties and inviting the Court to accord the said compromise by noting that Title Suit No. 72/7 of 1944/46 should stand dismissed and Title Suit No. 249/39 of 1944/45, namely, the suit filed by the defendants should stand decreed. We further find that in another petition of rejoinder dated 29-4-1947, filed by the defendants, they again reiterated the same position and regarded this petition dated 18-4-1947, as a lawful agreement [between?] them adjusting the disputes in the suits pending before the learned Subordinate Judge. In that rejoinder petition they again prayed that the plaintiff by her non-performance of the terms of the compromise had forfeited her rights, and that therefore the compromise should be recorded in favour of the defendants. Even in the grounds of appeal before this Court there is no ground taken that this was not a concluded agreement between the parties. In view of these facts it is not open to the appellants to raise this contention before this Court.

[10] The learned counsel for the appellants, however, says that this contention raises a pure question of law on the construction of the petition dated 18-4-1947. The question whether or not there has been a completed agreement between the parties is largely a question of fact and depends also upon how the parties themselves regarded the matter. If they themselves regarded the matter as one of concluded agreement between them, it is not open to us to say specially when all the terms have been embodied in the joint petition filed by them that there was no concluded agreement. The question whether the sale-deed was executed or not would not affect the terms of the compromise because there was no penalty attached to it, and this could as well be done in execution of the compromise decree. Paragraph 7 of the petition itself shows that the parties made a prayer for *at least* seven days' time during which the sale-deed could be executed. The term "at least" indicates that a discretion was left to the Court to grant even a shorter or longer time for the purpose, and it was not a matter entirely in the region of contract made by the parties.

[11] The learned counsel for the appellants has relied in this connection upon a case to which reference has already been made by me in an earlier part of the judgment viz., the decision in *Haridas Modak* v. *Ramdas Modak*, 34 C. W. N. 1068 : (A. I. R. (18) 1931 Cal. 205). In that case the question was whether a certain petition filed in Court could be regarded as a completed agreement between the parties. Even as an illustrative case the decision is entitled to great respect being a decision of Sir George Rankin. It is not very clear from the report, however, as to what the contents of the petition were, but it appears that in the last clause of that petition there was a recital to the effect that "the parties will complete everything before Thursday next" and the case was accordingly adjourned to that date. We do not know what this recital actually connotes and whether those things which were left to be completed by the parties had any material bearing upon the other terms contained in the petition. Under those circumstances, it was held that it was not a completed agreement between the parties. But whatever the facts of the case may have been, the principle embodied in that decision entirely supports my view. As his Lordship put it, the real question is :

> "What was the bargain between the parties ? Did the parties mean to commit themselves to the bargain as it was stated on 20th November or did they mean to wait till Thursday and then have a completed settlement . . . . It was abundantly clear to my mind that the intention was the latter."

[12] Now putting the same question here, the answer is obvious that the parties meant to commit themselves to the bargain as contained in their application dated 18-4-1947. There is nothing to show in the whole body of that application that if the sale deed was not executed, it was open to either of the parties to resile from the terms of the agreement as embodied in the petition nor did they ever intend to do so as I have already shown from the various petitions filed by the parties subsequent to this application and from their conduct as stated above. The learned counsel has also relied upon a decision of a single Judge in *Shah Nawaz* v. *Ghulam Mohammad*, A. I. R. (33) 1946 Lah. 78 : (223 I.C. 623) in which it has been held that any agreement providing for a decree one way or the other being passed in future on the happening or not happening of a certain contingency cannot in law be regarded as an adjustment. The language though widely framed has to be read in the light of the facts of that case which was a case relating to an agreement between the parties to a suit for its being decided in favour of the plaintiff or the defendant according as the defendant did or did not take oath on the Holy Quran. Such an agreement did not amount to an adjustment within the meaning of O. 23, R. 3, Civil P. C. An agreement of this character cannot *prima facie* amount to an adjustment of matters in dispute

in the suit, and, therefore, could not be given effect to under O. 23, R. 3, Civil P. C. It depends upon a special oath being taken by a certain person which under the law he cannot be compelled to take. That being so, such an agreement cannot come within the meaning of O. 23, R. 3. The said decision, therefore, cannot be any guidance to us in deciding the present appeal. I, therefore, find that there is no substance in this point as well.

[13] The next point taken by the learned counsel for the appellants is that the decree is illegal inasmuch as it purports to decree the plaintiff's suit which in effect means that the plaintiff's claim for the sale in respect of one of the houses only for a consideration of Rs. 6,000 is decreed. This contention is incorrect on the very face of the decree passed by the learned Subordinate Judge. What the learned Subordinate Judge has done is that he has decreed the suit of the plaintiff in terms of the compromise petition. He has not split up the consideration amount at all. He has held that the total consideration is Rs. 9,750 as embodied in the compromise petition, and that the contract refers to the sale of both the houses. But following the decision of the Privy Council in *Hemanta Kumari Debia's case*, (47 Cal. 485 : A. I. R. (6) 1919 P.C. 79) he confines the operative part of the decree which is the executable part only to the house in occupation of the plaintiff, because in his opinion that was the subject-matter of the title suit instituted by her. In respect of the other house, he held that although the entire consideration amount has been paid, the plaintiff would be entitled to bring another suit for specific performance on the basis of the compromise decree, because he thinks that that part of the decree could not be an executable decree. This aspect of the case we will have to consider at a later stage. But I do not see how the decree splits up the consideration at all, and, in my opinion, this contention is wholly misconceived.

[14] The last point urged on their behalf is that the Court had no jurisdiction to accept the deposit of the money made by the plaintiff-respondent, Bindeshwari Bai, on 24-2-1947. The validity or invalidity of the acceptance of this deposit does not in any manner affect the legality of the compromise itself. This position is not contested by the learned counsel for the appellants. His contention, however, is that the acceptance of the deposit was beyond the powers of the Court acting as it did within the four corners of O. 23, R. 3, Civil P. C. It has to be remembered that the deposit was in accordance with the terms of the compromise itself, and the Court having seisin of the matter, it is difficult for me to comprehend why he could not accept the deposit when the defendants refused to take the money or avoided execution of the sale deed. The Court had complete jurisdiction to make consequential orders in order to give effect to the terms of the compromise and to record the same. In doing so, the Court was acting *ex debito justitiae* and had complete jurisdiction to do so whether as an act incidental to recording the compromise itself or under the exercise of its inherent powers.

[15] I have dealt with all the points urged on behalf of the appellants. As I have shown; there is no substance in any of the points raised, and I see no reason to interfere with the decision under appeal. The only matter which now remains for consideration is whether the decree passed by the learned Subordinate Judge is correct. If the subject-matter of the suit embraces only one of the houses, then I have no doubt that the decree is correct and is in consonance with the decision of the Judicial Committee of the Privy Council in *Hemanta Kumari Debia's case*, (47 Cal. 485 : A. I. R. (6) 1919 P. C. 79) followed by the learned Subordinate Judge. If, on the other hand, the subject-matter of the suit embraces both the houses belonging to the defendants and referred to in the compromise, then the decree of the Court below needs modification. We can make this modification under O. 41, R. 33, Civil P. C., notwithstanding the fact that there is no appeal by the plaintiff-respondent. I may as well observe that at one stage counsel for the appellants himself submitted that the subject-matter of the suit covered both the houses.

[16] The question then boils down to this : What is meant by the expression subject-matter of the suit ? No hard and fast rule can be laid down as to the meaning of this expression which will inevitably depend upon the facts of each case. The question whether a particular term of a compromise relates to the subject-matters of suit has to be answered on the frame of the suit, the reliefs claimed and the matters which arose for decision in the case on the pleadings of the parties. The term is comprehensive enough and if the compromise relates to all those matters which fell to be decided in the case, it could not be said that any part of the compromise was beyond the subject-matter of the suit. There is a large body of authority to show that where a compromise relating to matters outside the scope of the suit is a part of the consideration for the agreement as to matters in suit, the entire compromise as an integral whole must be recorded and decreed as relating to the suit whether they otherwise relate to the suit or not. But the present case stands

on a stronger footing. Here the defendant-appellants themselves contended that the contract for sale related to the sale of both the houses referred to in the compromise petition. That being so, the matter whether the contract for sale related only to one house or to both the houses was entirely within the scope of the suit, and had to be decided in the case. Parties, therefore, could come to an agreement in regard to this matter and agree that the contract in question related to both the houses. In fact that is what they have done and the compromise, therefore, as affecting both the houses falls within the subject-matter of the suit. In *Charu Chandra v. Sambhu Nath*, 3 Pat. L. J. 255 : (A. I. R. (5) 1918 Pat. 507 F.B.) which is a Full Bench decision of this Court, it has been observed by Atkinson J. at p. 268 of the report that where as in the present case :

"the compromise was really an adjustment of the rights and differences in respect of all matters in dispute between them whether as framed in the plaint or set up by way of defence in the written statement ; and that the compromise purported to be a final settlement and adjustment of these disputes on a fair and satisfactory basis acceptable to all."

it must be held to relate to the suit which expression should receive an extended construction. It must be, therefore, held that the compromise in so far as it relates not only to the house in occupation of the plaintiff but also in respect of the other house referred to therein has to be regarded as forming the operative part of the decree with the result that the entire compromise decree could be executable as such.

[17] Subject to this modification relating to the form of the decree, the appeal fails and must be dismissed with costs.

[18] **Das J.** — I agree entirely. The appeal has no merits ; and it is really an attempt, not very creditable, at getting out of a concluded bargain — possibly because the price of the houses has gone up since the compromise.

V.B.B. *Decree modified.*

A. I. R. (38) 1951 Patna 305 *[C. N. 65.]*

REUBEN AND SINHA JJ.

Jagdhari Koeri and others—*Petitioners* v. *Ambika Singh and others*—*Opposite-Party.*

Criminal Revn. No. 45 of 1950, D/- 29-6-1950.

(a) Constitution of India, Art. 214 (2)—"Shall be deemed to be"—Meaning of.

Article 214 (2) does not relate to the period of time after the commencement of the Constitution and the words 'shall be deemed to be" indicate that it is not meant for converting the Provincial High Court into a State High Court. [Para 5]

(b) Constitution of India, Arts. 224, 214 (2)—Reappointment of Judge resigning on 24-1-1950.

A Judge of the Provincial High Court who resigned on 24-1-1950 can be appointed as a Judge of the corresponding State High Court under Art. 224 as, though such a person is not a Judge of the Provincial High Court on 25-1-1950 the identity of the Provincial High Court is not changed between 24-1-1950 and 25-1-1950. [Para 6]

(c) Constitution of India, Art. 134 (1) — New plea.

The point that the Magistrate decided under S. 145, Criminal P. C. the question of possession with reference to title which was not raised before the High Court in revision cannot be allowed to be raised at the stage of application under Art. 134 (1) (c). [Para 14]

(d) Constitution of India, Art. 134 (1) (c) — Ground for—Question of fact.

The point that certain evidence should not have been accepted by the Magistrate proceeding under S. 145, Criminal P. C., is a question of fact and cannot be a ground on which a certificate can be granted. [Para 14]

(e) Constitution of India, Arts. 214 (2), 366 (14) and Explanation (b) to Art. 217 (2)—Scope of Explanation (b) to Art. 217 (2).

The Explanation (b) to Art. 217 (2) does not conflict with the definitions in Art. 214 (2) and Art. 366 (14). [Para 11]

Gorakhnath Singh—for Petitioners.

Reuben J.—This is an application for a certificate under Art. 132, Cl. (1) and Art. 134, Cl. (1) (c), Constitution of India. It is directed against an order of Agarwala, J. dismissing a petition in criminal revision directed against an order of the Deputy Magistrate, Aurangabad, under S. 145, Criminal P. C.

[2] The constitutional point raised relates to the validity of the appointment of the Hon'ble Judge. Sir C. M. Agarwala retired as Chief Justice of the Patna High Court on 21-1-1950, that is to say, before the commencement of the Constitution of India. He was appointed to sit again as a Judge of this Court, that is to say, of the High Court which came into existence after the commencement of the Constitution of India, under the provisions of Art. 224, Constitution of India, which provides that

". . . . the Chief Justice of a High Court for any State may at any time . . . . . request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State."

The contention is that Sir C. M. Agarwala was never a Judge of the High Court of this State or of any other High Court within the meaning of Art. 224.

[3] The relevant definitions of the term High Court as used in the Constitution of India occur in Art. 214, Cl. (2) and Art. 366, Cl. (14) of the Constitution.

[4] Article 214, Cl. (2), which occurs in the chapter dealing with the High Courts in the States, is as follows :

"For the purposes of this Constitution the Court exercising jurisdiction in relation to any Province immediately before the commencement of this Cons-

titution shall be deemed to be the High Court for the corresponding State."

The High Court for the Province of Bihar, of which Court Sir C. M. Agarwala was a Judge, must under this provision be deemed to be the High Court for the State of Bihar. It is contended, however, that this clause relates to the period of time after the commencement of the Constitution of India and that this clause merely provides for the Provincial High Court becoming the State High Court as from that date. Secondly, it is urged that, even if this clause be interpreted as meaning that the Provincial High Court shall be deemed for the purposes of this Constitution to be the State High Court, this will not validate the appointment of Sir C. M. Agarwala under Art. 224, because he resigned on 24-1-1950 and, therefore, was not a Judge of the Provincial High Court immediately before the commencement of the Constitution of India.

[5] I am unable to accept the first contention. It is cl. (1) of Art. 214 which provides that there shall be a High Court for each State. Under Art. 216, it shall consist of a Chief Justice and such other Judges as the President may, from time to time, deem it necessary to appoint, the manner of the appointment of such Judges being provided by Art. 217. Further, Art. 376 provides that the individual Judges of the Provincial High Court, "holding office immediately before the commencement of this Constitution", shall, in the absence of election otherwise, become on the commencement the Judges of the State High Court. Chapter V of Part VI of the Constitution contains other provisions relating to the State High Court which is thus brought into being. Clause (2) of Art. 214, therefore, appears unnecessary for converting the Provincial High Court into the State High Court. Rather, if that had been the intention of this clause, it would have provided that the Provincial High Court exercising jurisdiction immediately before the commencement of the Constitution shall be, not merely shall be deemed to be, the High Court for the State. Such a provision, by the way, would appear to be a contradiction in terms, for the Provincial High Court and the State High Court are necessarily two different entities.

[6] There is also no force in the second contention, namely, that Sir C. M. Agarwala was not a Judge of the Provincial High Court, immediately before the commencement of the Constitution. Article 224 authorises the appointment of any person who "has held" the office of a Judge of a High Court within the meaning of that Article. Under cl. (2) of Art. 214, the Provincial High Court which was exercising jurisdiction immediately prior to the commencement of the Constitution is to be deemed to be a State High Court. Sir C. M. Agarwala, even though he was not a Judge of the Provincial High Court on 25th January had held the office of a Judge of the Provincial High Court, and the identity of that Provincial High Court was not changed between 24th January when Sir C. M. Agarwala resigned and 25th January, the day immediately preceding the commencement of the Constitution.

[7] Clause (14) of Art. 366 contains a general definition of the term High Court and is as follows :

"(14) 'High Court' means any Court which is deemed for the purposes of this Constitution to be a High Court for any State and includes

(a) any Court in the territory of India constituted or reconstituted under this Constitution as a High Court, and

(b) any other Court in the territory of India which may be declared by Parliament by law to be a High Court for all or any of the purposes of this Constitution."

It incorporates cl. (2) of Art. 214, which relates only to the position, as regards the Constitution of India, of the Provincial High Courts.

[8] The interpretation which I have placed on the term High Court under the Constitution, namely, that it includes the Provincial High Courts, is supported, in my opinion, by Art. 220, which provides that

"No person who has held office as a Judge of a High Court after the commencement of this Constitution shall plead or act in any Court or before any authority within the territory of India."

If this term means a High Court in existence from after the commencement of the Constitution, no one could be a Judge of such a High Court previous to the commencement of the Constitution and, therefore, the words "after the commencement of this Constitution" in Art. 220 would be unnecessary.

[9] Stress has been laid on Art. 220 as showing the unconstitutionality of the appointment in question. It is urged that the intention of the Constitution is that a Judge of a High Court holding office subsequent to the commencement of the Constitution shall not practise as a lawyer in India, whereas Sir C. M. Agarwala resigned on 24th January to avoid this bar of practice. Even if this presumed intention of the legislature was admissible as a guide to the proper interpretation of the Statute, I do not think that this argument helps the petitioners. I have two reasons for saying this. First of all, the corresponding provision in Art. 128 for the attendance of retired Judges at sittings of the Supreme Court permits the attendance of a person who has held the office of a Judge of the Federal Court, although such a person is not subject to the disability regarding practice contained in cl. (7) of Art. 124 of the Constitution. Secondly,

both Art. 128 and Art. 224 provide that the person attending the sittings of the Court by request under these Articles shall, while so sitting and acting, have all the jurisdiction, powers and privileges of a Judge of that Court, but shall not otherwise be deemed to be a Judge of that High Court, an exception which appears to be directed to save the right of practice where the person in question has, previous to the appointment, got such a right.

[10] A reference has been made to Expln. I to cl. (3) of Art. 124 of the Constitution as being inconsistent with the interpretation which I have placed on the term High Court. This explanation defines the term High Court with reference to the qualifications necessary for the appointment of a person as a Judge of the Supreme Court, namely, that he must have been a Judge of a High Court for at least five years or an advocate of a High Court for at least ten years. It provides that in this clause the term High Court means

"a High Court which exercises, or which at any time before the commencement of this Constitution exercised, jurisdiction in any part of the territory of India."

This is a special definition of the term and does not conflict with the definitions contained in Art. 214, cl. (2) and Art. 366, cl. (14).

[11] A reference has also been made to the corresponding provisions in Art. 217 relating to qualifications for appointment as a Judge of a High Court. These provisions, it appears to me, do not help the petitioners. Sub-clause (b) of cl. (2) of that Article requires that the person in question must have been an Advocate of "a High Court in any State specified in Sch. I or of two or more such Courts in succession." Reliance is placed on Expln. (b) to this clause, which is as follows:

"In computing the period during which a person has held judicial office in the territory of India or been an advocate of a High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before 15-8-1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be."

It is urged that this explanation was unnecessary, if the term High Court in the Constitution includes the Provincial High Court. It is clear, however, from the first portion of this explanation that it is intended to provide for those areas which before 15-8-1947 were included within India as defined by the Government of India Act, 1935, but which passed out of the Dominion of India by the separation of Pakistan from India. The explanation is intended to give the person in question the advantage of any service in a judicial office or as an advocate rendered by him in such an area before the creating of the Dominion. The explanation is, therefore, necessitated by the peculiar circumstances and does not conflict with the definitions in Arts. 214 (2) and 366 (14).

[12] For the reasons given above, I consider that there is no substantial question of law as to the interpretation of the Constitution and the application under Art. 132 (1) must be dismissed.

[13] On the merits, three points are urged: (1) that the Magistrate decided the question of possession with reference to title, (2) that the proceedings under S. 145, Criminal P. C. were bad *ab initio* for want of a notice to the parties specifying the area in dispute, and (3) that the finding of the Magistrate regarding the land comprised in holding No 17 is unsupportable.

[14] The first point does not seem to have been raised before Agarwala J., and the petitioners cannot be allowed to raise it at this stage. The second point has been dealt with by Agarwala J., under whose directions as the Chief Justice of the Provincial High Court the Magistrate was required to serve a notice of particulars. He found that, instead of serving a notice the Magistrate called upon the parties to specify the lands claimed by them and that the particulars given by the second party were accepted by the first party, so that there was a specific area of land forming the subject-matter of the proceeding and both parties were fully aware of the details of that land. In these circumstances. Agarwala J., held that there had been a substantial compliance with this direction. The defect, if any, therefore, was of a formal nature and curable under S. 537, Criminal P. C. The third point is purely a question of fact, it being contended that the evidence of possession relating to the land comprised in holding No. 17 should not, in the circumstances of the case, have been accepted by the Magistrate. This is not a ground which the petitioners were entitled to urge in the criminal revision, and is still less a ground on which a certificate can be granted.

[15] For these reasons, I would refuse the certificate asked for under Art. 134 (1) (c).

[16] **Sinha J.**—I agree.

D.H. *Certificate refused.*

A. I. R. (38) 1951 Patna 307 *[C. N. 66.]*

SARJOO PRASAD J.

Rajbanshi Thakur—Petitioner v. *Chandey Jha and others—Opposite Party.*

Crminal Revn. No 868 of 1950, D/- 12-9-1950.

(a) Criminal P. C. (1898), S. 522—Show of force.

If at the time of taking forcible possession of the property the accused threatened to assault the com-

plainant or, in his absence, any of his men or even his neighbour, that would amount to criminal force or show of criminal force as required by S. 522. [Para 4]

Anno: Cr. P. C. S. 522 N. 3.

(b) Criminal P. C. (1898), S. 522—Dispossession.

Where a criminal trespasser enters upon property and prevents the rightful possessor from coming into possession of it, dispossession is said to have taken place, and, if the trespasser was guilty of some force or intimidation when he prevented the other party from entering upon the property, a Magistrate would be justified in taking action under S. 522. [Para 4]

Anno: Cr. P. C. S. 522 N. 4.

(c) Criminal P. C. (1898), S. 522 (3) — Court to which application lies.

Where an order under S. 522 is passed by the same judgment by which the accused are convicted by the trial Court and the Court of appeal affirming the order of conviction interferes with that part of the judgment relating to the order under S. 522, the petition in revision against decision of the appellate Court cannot be considered as an independent application under S. 522 and can be entertained under S. 522 (3). [Para 5]

Anno: Cr. P. C. S. 522 N. 11.

(d) Criminal P. C. (1898), S. 439 — Misapprehension of law.

Where the order under S. 522 by the lower appellate Court is based upon misapprehension of the law as laid down in certain High Court decisions the High Court will interfere in revision. [Para 5]

Anno: Cr. P. C. S. 439 N. 16.

Nand Lal Untwallia—for Petitioner; G. P. Sahi—for Opposite Party.

Order.—This is an application filed by the petitioner, who was the complainant in the case, for setting aside the order of the lower appellate Court in regard to the direction made by the trial Court for restoration of certain property under S. 522, Criminal P. C. The dispute in question related to plot No. 1529, on which, it is alleged, stands the residential house of the petitioner, he having no other place of abode except the house in question. The petitioner's case is that he had been coming in possession of the house and the land since long and had been residing therein with his two minor nephews. On 31-5-1949, when the two minor nephews were away to their *nanihal* and the petitioner himself had gone to the local Registry Office at Balsand in order to register certain deed after locking the house, the opposite party, in the absence of the petitioner, along with one Loknath Thakur raided the house with deadly weapons, broke open the lock of the house and forcibly entered and occupied the house and looted the articles therein. One of the prosecution witnesses, prosecution witness 2, who saw the occurrence, informed the petitioner about it. On receiving the information, the petitioner rushed back to his house and found the accused persons there sitting armed with deadly weapons. He says that he attempted to go inside the house, when the accused persons threatened to assault him. The petitioner then lodged the first information report and, after investigation, the accused were put on trial under Ss. 380, 448 and 454, Penal Code.

[2] The defence of one of the opposite party and Loknath Thakur was that they had nothing to do with the land or the house and had taken no part in the occurrence whereas the defence of two other accused persons, Chandey Jha and Taranand Jha, was that plot No. 1529 claimed by the petitioner and plot No. 1530 as also the house standing on them belonged to the opposite party and, by partition, plot No. 1529 and the house standing thereon were allotted to the share of opposite party Chandey Jha and that he was in possession of the house accordingly. The accused denied the occurrence as alleged by the prosecution and, on the other hand, stated that the petitioner had forcibly tried to enter the house and committed assault and looted all the properties. There was a counter case also started on the allegations made by the accused opposite party, but it was found to be false and a proceeding under S. 211, Penal Code against Chandey Jha is pending, arising out of that counter case.

[3] In regard to the trial of the accused persons based upon the information lodged by the petitioner, the trial Court found that the prosecution case had been fully established, and convicted the accused opposite parties under Ss. 380, 454 and 448, Penal Code. The trial Court, however, acquitted Loknath Thakur giving him the benefit of doubt. The trial Court further directed that, as the complainant petitioner had been deprived of his house by criminal force, he should be put in possession under S. 522, Criminal P. C. Against that order of sentence and conviction passed by the trial Court, there was an appeal to the learned Additional Sessions Judge, who confirmed the order of sentence and conviction passed by the trial Court. The Court of appeal below held that:

"There was no reason to interfere with the finding of the trying Magistrate regarding the forcible entry by the appellants before him."

And he, therefore, came to the conclusion that the order of sentence and conviction passed against the accused must be upheld. The Court of appeal below, however, relying upon certain decisions of the Lahore High Court thought that, as the possession of the house had been taken in the absence of the petitioner, it was not, therefore, a case for the application of S. 522, Criminal P. C. He accordingly set aside the order of the learned Magistrate passd under S. 522 of the Code under which the trial Court had directed restoration of possession of the property to the petitioner. It is against this portion of the order

of the Court of appeal below that the present application is directed.

[4] Counsel for the petitioner has rightly contended that the order of the Court below setting aside the order passed by the trying Magistrate is clearly misconceived and proceeds upon a misapprehension of the principles laid down in the decisions referred to in the judgment of the Court below. He contends that, if at the time of forcible entry the act of the accused is attended with criminal force or show of criminal force, the provisions of S. 522, Criminal P. C. would be attracted. The force may be not only in regard to the complainant, who may be absent at the time, but it may be against the complainant or his men or it may be directed against a neighbour who protests against the conduct of the accused. He also contends that, after the petitioner had been dispossessed of the property in his absence when the petitioner went back to recover possession of the property, if he was forcibly prevented from doing so, even then the provisions of S. 522, Criminal P. C. would be attracted to the case. For this purpose, he relies upon the statement of prosecution witness 2 about the occurrence, which is as follows:

"About two months ago on a Tuesday in the morning I saw all the four accused at the door of P. W. 1 breaking his lock. I protested. They broke the lock and entered the house. They had, on protest, threatened to assault me and I raised hulla. People came including P. Ws. I saw them removing boxes, etc. from the back door. . . .

I then went to Belsand and informed P. W. 1 whom I met at the Registration Office. The others also had intervened and the accused had abused and threatened them."

Learned counsel for the petitioner laid special emphasis on the statement that, when the witness protested, he was threatened with assault and so were the other persons who intervened. He says that this evidence quite clearly indicates that the offence of which the accused were convicted was attended by criminal force or show of criminal force and, by such force or show of criminal force, the petitioner had been dispossessed of the immovable property in question. He also relies upon the statement made by the petitioner himself at the time of trial, the relevant portion of which runs as follows :

"I ran to my house with him and found Chandey Jha, Loknath Thakur, Ram Lal Gope, all sitting at my darwaza. Chandey was armed with garasa, Ram Lal Gope had bhala and Loknath Thakur had lathi. I found lock broken. I attempted to go in when the three persons aforesaid moved to assault me and I then moved away and approached the Mohalla people. The informant had told me that with P. Ws. he had rebuked the accused persons but they had threatened to assault."

Here, it is stated that, even when the petitioner wanted to regain possession of the property, he was threatened with assault and these people were sitting there at the darwaza armed with deadly weapons. It is true that the Court of appeal below has not approached the evidence from this point of view. That Court proceeded to decide the matter merely on the footing that, because the dispossession happened during the absence of the petitioner therefore, S. 522, Criminal P. C. had no application to this case. But the trial Court had considered all this evidence, though, of course, the specific passages had not been referred to in the judgment of the trial Court. It must be assumed that, when the trying Magistrate directed restoration of possession of the property under S. 522, Criminal P. C., he had in mind those features of the evidence. It must be remembered that both the Courts below have fully relied upon the evidence of these prosecution witnesses in coming to their findings in favour of the petitioner's possession and in assessing the guilt of the accused. At one stage, I was inclined to remand the case for a finding on this point, but I think it would be unnecessary to do so, because both the Courts below have accepted the evidence of these witnesses to be correct. In that view, it would now be sheer waste of time to send back the case for a consideration of the case afresh. These materials being there, it cannot but be held that the opposite party accused in this case were convicted of an offence attended by criminal force or show of criminal force, and, as a result of their conduct, the petitioner was deprived of the house and the land in question. I would very briefly refer to the decisions which have been relied upon in support of the case of the petitioner. The two cases relied upon by the Court of appeal below are *Bihari Lal* v. *Emperor*, A. I. R. (21) 1934 Lah. 454 : (36 Cr. L. J. 59) and *Narain Singh* v. *Panna Lal*, A. I. R. (27) 1940 Lah. 460 : (42 Cr. L. J. 160). These two cases are merely an authority for the proposition that criminal force contemplated by S 522, Criminal P. C. must refer to force applied to a human body and not to any inanimate object. In *Bihari Lal's case*, (A. I. R. (21) 1934 Lah. 454 : 36 Cr. L. J. 59) what happened was that the accused had taken possession of a certain house by breaking open the lock in the absence of the person in possession. It was argued that the mere fact that the accused had broken open the lock was sufficient to amount to criminal force as required by S. 522 of the Code. This contention was naturally not accepted by the learned Judge who decided the case. The decision in *Narain Singh's case*, (A. I. R. (27) 1940 Lah. 460: 42 Cr. L. J. 160) also, is to the similar effect. These decisions nowhere said that, if at the time of taking forcible possession of the property the accused threatened to assault the complainant

or, in his absence, any of his men or even his neighbour, that would not amount to criminal force or show of criminal force as required by S. 522, Criminal P. C. The decision in *Rameshwar Singh* v. *Emperor*, 4 Pat. 438 : (A. I. R. (12) 1925 Pat. 689 : 27 Cr. L. J. 137) quite clearly shows that the criminal force may be either against the complainant or against his party, and, if there is such criminal force or show of criminal force, then the trying Magistrate would be justified in taking action under S. 522 of the Code and direct possession to be restored to the person dispossessed. On the other proposition, where a criminal trespasser enters upon property and prevents the rightful possessor from coming into possession of it, dispossession is said to have taken place, and, if the trespasser was guilty of some force or intimidation when he prevented the other party from entering upon the property, a Magistrate would be justified in taking action under S. 522, Criminal P, C.; there are also a number of authorities. Reference may be made to *Mt. Chhabia* v. *Ram Charan*, A. I. R. (30) 1943 ALL. 7: (44 Cr. L. J. 164) and *Mahatir* v. *Rex*, A. I. R. (36) 1949 ALL. 228: (50 Cr. L. J. 338). In this latter case, their Lordships observed as follows :

"Use of criminal force or show of force, or criminal intimidation must all be with reference to a person and not with reference to property.

Use of criminal force means actual use thereof; criminal intimidation connotes a threat of use of force to another person. Show of force, therefore, must be something different from these two. It may fall short of the use of force or of a threat to use force. Where the accused or his accomplices having entered upon the land do not quit the land when the true owner protests against such unauthorised entry and are ready to fight, the offence can be said to have been attended to by 'show of force'. Show of force may consist in the physical presence of the accused, his servants or companions in such a way that the true owner is put to the fear that if he tried to regain possession by force he will be met by force.

In such a case the dispossession of the true owner is not complete till he appears on the scene, protests and has to go away. The case is covered by S. 522 and an order for restoration of possession can be passed by the Court."

As I have shown from the evidence discussed above, all these elements were present in this case. It would be useless to multiply authorities on the point, because the principles appear to be well settled and in consonance with the right interpretation of the provision of the law.

[5] On behalf of the opposite party Mr. Sahi has very strongly submitted that it is not open to this Court in revision to pass an order of restoration. According to him, there is no application perding before this Court against the order of sentence and conviction passed against the accused and, therefore, it was not open to this Court to entertain an application merely against that part of the order of the Court below which set aside the decision of the trial Court directing the restoration of possession under S. 522, Criminal P. C. In other words, Mr. Sahi's contention amounts to this that this application is in the nature of an independent application made to this Court for taking action under S. 522, Criminal P. C. Mr. Sahi relies for this contention on several decisions but it would not be necessary for me to refer to those cases in detail, because I do not regard this application as an independent application under S. 522, Criminal P. C., filed before this Court. Here, the order under S. 522 was passed by the same judgment by which the accused were convicted by the trial Court. Against that order of conviction as also against the order passed under S. 522, Criminal P. C., the accused had preferred an appeal to the Court of appeal below, and the Court of appeal below, although affirming the order of sentence and conviction passed against the accused, interfered with this part of the judgment of the trial Court. In my opinion, there is absolutely no reason why the petitioner should not be allowed to move against this part of the order of the Court below. Section 522, cl. (3) of the Code is quite clear on the point that the High Court can exercise its power of revision in regard to such an order. The decision on which Mr. Sahi has strongly relied is the decision in *Ashwini Kumar Das* v. *Shashankamohan Basu*, 59 Cal. 1153 : (A. I. R. (19) 1932 Cal. 750 : 33 Cr. L. J. 868). Now, this decision, in my opinion, does not help Mr. Sahi and and has no application at all. This was a case where the application under S. 522 was made beyond the period of limitation provided in that section. Their Lordships pointed out that such an application could not be entertained by the Magistrate, as the section specifically limits the powers of the Magistrate to do so to the time when he convicts an accused person or to any time within one month from the date of such conviction. The other case on which reliance has been placed by him is *Abdul Mannan* v. *Raiyab Ali*, A. I. R. (34) 1947 Cal. 390 : (48 Cr. L. J. 908). The observations made in this case if taken outside the context might lead to an impression that the observations help the contention of the learned counsel. But, if one remembers the facts of the case, then the observations cannot be invoked to the assistance of the contention raised by Mr. Sahi. In that case, neither the Court of first instance nor the Court of Session had passed any order under S. 522, Criminal P. C., when disposing of the appeal or when convicting the accused. Subsequently, the complainant in the case moved the learned Additional Sessions Judge who had heard the appeal and prayed for an order under S. 522 of

the Code. The learned Additional Sessions Judge at first referred the matter to the trial Court, but, in the meantime, the presiding officer had been transferred and the officer who succeeded him returned the case to the Additional Sessions Judge observing that he was not the appellate Court and more than one month had elapsed. Thereafter, the Additional Sessions Judge passed the order directing the restoration of possession of the property. This was clearly a wrong order passed by the Additional Sessions Judge, and it is in respect of this order that Lodge J. observed :

"In my opinion, the occasion for the exercise of the power conferred upon the Court of appeal, confirmation, reference or revision by S. 522 (3) arises only when an appeal or reference or revision against the order of conviction is pending before that Court.... But it seems to me that the Court of appeal, confirmation, reference or revision is subject to the same limitation as the Court of first instance, and the Court of appeal, confirmation, reference or revision must pass the order of restoration of possession when upholding the conviction or at any time within one month from the date of the order in appeal, confirmation, reference or revision upholding the order of conviction. I am unable to accept the view that a Court of appeal, confirmation, reference or revision can pass an original order under S. 522 at any time whatsoever."

This case is clearly beside the point and, in my opinion, does not support the contention advanced on behalf of the opposite party. Mr. Sahi then contended that there was no finding of the Court of appeal below as to whether the possession in question was attended by force or show of criminal force and, therefore, this Court should, at any rate, remit the case to the Court of appeal below for such a finding. I have already said that it is not necessary to do so in view of the fact that the evidence of witnesses, relevant passages from which I have quoted above, was relied upon by the Courts below, and it was on their evidence that the order of sentence and conviction was upheld by the Court of appeal below. Learned counsel also contends that, at any rate, it was a matter of discretion and with this exercise of discretion I should not interfere. In my opinion, this argument is also without any substance. I have pointed out above that the decision of the Court of appeal below interfering with the order of the trial Court was based upon a misapprehension of the law as laid down in the two Lahore decisions. If the Court below had appreciated the law aright, I have no doubt it would not have interfered with the decision of the trial Court, and the circumstances of the case are such that if the matter is further delayed the petitioner would be deprived of the use of the residential house, which it is alleged by the petitioner is the only residential house for him and his two minor nephews. In the circumstances, I see no reason why the order of the Court of appeal below setting aside the order of the trial Court under S. 522, Criminal P. C. should not be set aside.

[6] I would accordingly make the rule absolute and restore the order of the trial Court passed under S. 522, Criminal P. C.

D.H. *Rule made absolute.*

A. I. R. (38) 1951 Patna 311 *[C. N. 67.]*

SARJOO PRASAD J.

Sukh Lal Gope and another—Petitioners v. *Satyadeo Prasad and others—Opposite Party.*

Criminal Revn. No. 864 of 1950, D/- 12 9-1950.

(a) Criminal P. C. (1898), S. 139A — Procedure under.

The procedure laid down in S. 139A requires, first, that the party against whom a provisional order has been made, shall appear before the Magistrate and deny the existence of the public right in question; and, secondly, he shall produce some reliable evidence; and, thirdly, that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then the Magistrate's jurisdiction to continue the proceeding ceases. He has no jurisdiction to weigh the evidence and decide on which side the balance leans. The criterion is that the Magistrate should find evidence supporting the denial, which he can pronounce reliable. It is only at that stage in the nature of an *ex parte prima facie* evidence, and if that evidence is *per se* reliable, then the Magistrate should hold his hands and refer the parties to have their dispute settled in the civil Court. [Para 2]

Anno. Cr. P. C., S. 139A, N. 7.

(b) Criminal P. C. (1898), S. 133—Obstruction in respect of water channel.

Obiter—Obstruction in respect of a water channel where only some people claim a right of irrigation does not attract the operation of S. 133. [Para 2]

Anno. Cr. P. C., S. 133, N. 13.

Kameshwar Dayal — for Petitioners ; Rameshwar Prasad—for Opposite Party.

Order. — This application must succeed on the short point that there has been no compliance of the mandatory provisions of S. 139-A, Criminal P. C. The petitioners in the case were second party to the proceeding which was taken under S. 133 of the Code.

[2] A petition was filed in May 1947 by Satyadeo Prasad, party 1, for action under S. 133 against the petitioners with respect to these very plots. In that proceeding it was held that the dispute was of a civil nature and did not come within the purview of S. 133. This order was upheld by the District Magistrate who was moved to make a reference to the High Court. In the meantime, in May 1948, a proceeding under S. 144 was started against the parties on the report of the police. The Subdivisional Magistrate held a local inspection, and on his local inspection he was of the view that plot No. 271 was an *alung* and plot No. 272 was a *garha* or a ditch, and

although it was recorded as *ghairmazrua malik*, it was serving the purpose of irrigation and reservoir of water. H also found that portions of plots Nos. 271 and 272 had been settled by the *malik* with the petitioners who had made certain constructions upon the lands, i. e. plots Nos. 271 and 272. He accordingly discharged the proceeding under S. 144 and advised opposite party to take fresh proceedings under S. 133. To what extent a fresh proceeding under S. 133 would be justified in the circumstances when a previous proceeding in regard to these plots had failed would be a matter for consideration by the learned Magistrate when disposing of the proceeding under S. 139-A. It appears, however, that after a notice to show cause had been issued, party 2 appeared and denied the existence of a public right on 14-6-1949, and then he was called upon to lead evidence under S. 139-A. The proceedings were then transferred for disposal to the learned Magistrate against whose order this application has been filed. The learned Magis rate held a local inspection in December 1949 and he appears to have heard the parties, as he says, on 3-6-1950 and then passed the present order. The order itself discloses that he seems to have taken evidence of the opposite party, as in his order he refers to a *fard ab-pasi* produced by them, and he also appears to have allowed the opposite party to cross-examine the witnesses produced by the petitioners in the proceeding under S. 139A. In my opinion, there appears to be some misconception about the nature of the procedure to be adopted under S. 139-A. The procedure has been indicated in *Thakur Sao* v. *Abdul Aziz*, 4 Pat. 783 : (A.I.R. (13) 1926 Pat. 170 : 27 Cr. L. J 9) where Mullick J. pointed out that the procedure laid down in S. 139-A of the Code, requires, first, that the party against whom a provisional order has been made, shall appear before the Magistrate and deny the existence of the public right in question; and, secondly, he shall produce some reliable evidence: and thirdly, that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then the Magistrate's jurisdiction to continue the proceeding ceases. He has no jurisdiction to weigh the evidence and decide on which side the balance leans. Ross J. agreed with that decision, and he also observed that the criterion is that the Magistrate should find evidence supporting the denial, which he can pronounce reliable. That is necessary and that is sufficient to oust his jurisdiction. Therefore, it is not open to the Magistrate to balance the evidence at the stage of the proceeding under S. 139A. Here, what the Magistrate appears to have done is that he relies upon the evidence of the witnesses, but he says that their admissions in cross-examination show that there was some kind of a public right in the lands in question. He also refers to the *fard ab-pasi* in order to support his conclusion a document which was produced by the opposite party. As I have said, at that stage it is not for him to take evidence of the opposite party. It is only for him to see whether there is reliable evidence in support of the denial of the existence of any public right in respect of the disputed lands. That evidence may not be complete for the purpose of negativing the public right claimed if balanced with the other evidence and materials on record adduced by the other side. It is only at that stage in the nature of an *ex parte prima facie* evidence, and if that evidence is *per se* reliable, then the Magistrate should hold his hands and refer the parties to have their dispute settled in the civil Court. In this case there is an additional factor that there was already a proceeding under S. 133, and in that proceeding it was found that the dispute was of a civil character, and, therefore, the Magistrate refused to take action under S. 133. It is also pointed out by Mr. Kameshwar Dayal on behalf of the petitioners relying upon a decision of this Court in *Harnandan Lal* v. *Rampalak Mahto*, 18 Pat. 76 : (A. I. R. (26) 1939 Pat. 460 : 40 Cr. L. J. 837) that obstruction in respect of a water channel where only some people claim a right of irrigation does not attract the operation of S. 133, Criminal P. C. I would therefore direct that the order of the learned Magistrate should be set aside. He should only consider the evidence adduced on behalf of the petitioner and see if that evidence is reliable to support his denial. He should also consider the other circumstances to which I have referred and then decide whether having regard to those facts it would be desirable for him to proceed under S. 137, Criminal P. C., but in no case should he look to the evidence of the opposite party for the purpose of coming to such a decision. With these observations I would make the rule absolute.

R.G.D. *Rule made absolute.*

A. I. R. (38) 1951 Patna 312 *[C. N. 68.]*

DAS J.

Mt. Basmattia Malahin—Appellant v. *Kailash Chandra Singh and others—Respondents.*

A. F. A. D. No. 1387 of 1948, D/- 4-1-1950.

Tenancy Laws—Bihar Tenancy Act (VIII [8] of 1885), Ss 20 and 21—*A* and *B* co sharers of *bakasht land*, *A's* interest being in *thika* of *B*—*B* settling land some thirty years ago in favour of *C's* father who came in possession as *raiyat*—Father and after him *C* continuing in possession as *raiyat*—In execution of mortgage decree obtained by *D*, inter-

est of *A* purchased by *D*—Pending mortgage suit interest of *A* sold in favour of *E* in execution of money decree—*E* getting possession of proprietary interest of *A* from *thikadar B* and recognising *D* as tenant—Suit by *C* against *D* for declaration of title and possession—*D*, held, had acquired right of occupancy by operation of law and was not liable to be ejected by *C*. [Para 6]

G. P. Das, K. K. Sinha and U. C. Sharma—for Appellant; Lalnarain Sinha, Shamsul Huda and Indra Bhanu Singh—for Respondents.

Judgment.—This is a second appeal by defendant 1st party. The suit out of which the appeal has arisen was a suit for a declaration of title and confirmation of possession, or in the alternative recovery of possession of two bighas 8 kathas and 19 dhurs out of plot No. 1233 of khata No. 12 of village Dafapur *alias* Ismailpur bearing touzi No. 10142. The case of the plaintiffs-respondents was that the disputed land was bakasht land of the malik. The old touzi No. of the village was 1070, and in that touzi one Haribar Prasad Singh had one anna five dams interest. The Manjauli concern, an indigo planting concern, was the other co sharer. It is not in dispute that the interest of Haribar Prasad Singh to the extent of one anna and five dams was in thika of the Manjauli concern. In the village there was a large area of bakasht lands. Haribar Prasad Singh executed certain mortgages with regard to his interest in 1914 and 1915. In 1921 and in 1922, Haribar Prasad Singh executed two mortgages in favour of the plaintiffs-respondents by which the earlier mortgages were to be paid off. On the basis of the said two mortgages the plaintiffs respondents instituted two suits in 1929. The suits were decreed in 1934, and in execution of the decree the property mortgaged was sold including the bakasht lands which fell to the share of Haribar Prasad Singh. The sale took place on 19-11-1940, and delivery of possession was taken on 7-8-1941. When the mortgage suits were pending there was a partition, and the interest of Haribar Prasad Singh was carved into a separate new touzi bearing No. 10142. It is not in dispute that the disputed land was part of the bakasht lands allotted to Haribar Prasad Singh by the aforesaid partition. The case of the plaintiffs respondents was that they came in possession of the disputed land after the purchase and delivery of possession referred to above. There was an interference with their possession in December 1942, and hence the suit for a declaration of their title and confirmation of possession, or in the alternative recovery of possession.

[2] The defence of the present appellant was that the disputed land was settled with her father by the Manjauli concern some thirty years ago, and her father remained in possession on payment of rent to the Manjauli concern. After the death of her father the appellant remained in possession on payment of rent to the Manjauli concern. During the pendency of the mortgage action by the plaintiffs-respondents the interest of Haribar Prasad Singh was sold in favour of the defendants second party in execution of a money decree. The defendants second party got possession of the proprietary interest of Haribar Prasad Singh from the thikadar, the Manjauli concern, and the defendants second party also recognised the appellant as a tenant in respect of the lands and granted receipts for payment of rent. The appellant claimed that she had acquired a right of occupancy in the lands and was not, therefore, liable to be ejected.

[3] The learned Munsif, who dealt with the suit in the first instance, held that there was a *bona fide* settlement in favour of the appellant, and the plaintiffs-respondents were entitled to receive the rent only but were not entitled to eject the appellant. On that finding he dismissed the suit. The learned Subordinate Judge, who heard the appeal, found that there was a temporary settlement in favour of the appellant's father by the Manjauli concern, but accepted the contention made on behalf of the plaintiffs respondents to the effect that the settlement made by the Manjauli concern could not enure byond the period of the thika and that the Manjauli concern could not by its action bind the lessor. In that view of the matter, the learned Subordinate Judge held that the appellant had not acquired any permanent occupancy right and was, therefore, liable to be ejected by the plaintiffs respondents who had acquired the interest of Haribar Prasad Singh by the purchase in execution of their mortgage decree.

[4] Two points have been urged before me on behalf of the appellant. Firstly, it is contended that in an action in ejectment it was for the plaintiffs-respondents to prove that either they or their predecessors in interest had been in khas possession within twelve years of the suit. Secondly, it is contended that the appellant had acquired a right of occupancy in the lands by operation of law by reason of the provisions of Ss. 20 and 21, Bihar Tenancy Act. I think the second point is decisive of this appeal, and I propose, therefore, to consider the second point at some length.

[5] There is a clear finding by the final Court of fact that there was a temporary settlement of the lands by the Manjauli concern in favour of the appellant's father. In one part of the judgment the appellate Court seemed to think that the lands might have been given to the appellant's father in lieu of services to the Manjauli concern, it being admitted that the

father of the appellant was a servant of the Manjauli concern. It was, however, nobody's case that the lands were given to the appellant's father in lieu of services. On the contrary, the clear case of the appellant in Para. 12 of the written statement was that the lands had been settled with her father by the Manjauli concern, which had accepted rent, and that the appellant also paid rent as a raiyat in respect of the lands after the death of her father. The learned Subordinate Judge has expressed the finding of fact in the following words :

"It appears that the respondent was holding the land as a temporary settlee during the thica period of Manjhauli Kothi. She continued her possession over it when the possession of the disputed Touzi went to defendants second party. She seems to be under the wrong impression that the length of possession has given her indefeasible rights in the suit land. Under that impression of consciousness she cut and removed the *Simal* tree. But as said above the length of possession under the peculiar circumstances of this case can hardly confer valid *qaimi* right in it upon her."

At another place in the judgment the learned Subordinate Judge has stated that the Manjauli concern as a thikadar of the disputed land could not have settled the land with the defendant or her father beyond the thika period and could not legally bind the lessor by its action. The learned Subordinate Judge appears to have lost sight of the provisions of Ss. 20 and 21, Bihar Tenancy Act. Under S. 20, every person, who, for a period of twelve years, whether wholly or partly, before or after the commencement of this Act, has continuously held as a raiyat land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village. Under S. 21, every person who is a settled raiyat of a village within the meaning of S. 20, shall have a right of occupancy in all land for the time being held by him as a raiyat in that village. If, therefore, the finding of the learned Subordinate Judge that the appellant's father and thereafter the appellant continued to hold the lands as a raiyat continuously during the thika period of the Manjauli concern is a correct finding, then the appellant has, by operation of law, acquired a right of occupancy in the lands by reason of the provisions of Ss. 20 and 21, Bihar Tenancy Act referred to above. This aspect of the learned Subordinate Judge seems to have lost sight of.

[6] Mr. Lal Narain Sinha appearing on behalf of the plaintiffs respondents has contended that the learned Subordinate Judge did not correctly appreciate the legal position, and, therefore, did not apply his mind to the question whether there was a temporary settlement by the Manjauli concern and whether the appellant or her father continuously held the land as a raiyat for a period of twelve years. He suggested that as the application of Ss. 20 and 21, Bihar Tenancy Act, was not specifically considered by the learned Subordinate Judge, the case should go back on remand for a finding as to whether the appellant or her father held the land continuously as a raiyat for a period of twelve years. In my opinion, there is no necessity for a remand. I have quoted the exact words in which the learned Subordinate Judge expressed his finding. They show that he found clearly that the appellant was a temporary settlee during the thika period of the Manjauli concern, and she continued her possession over it as a raiyat. We know that the thika period of the Manjauli concern did not come to an end till the defendants second party took possession of the interest of Harihar Prasad Singh by purchase in execution of their money decree. That was some time after 1929 when the mortgage action was brought. The allegation in the written statement was that, the temporary settlement was made by the Manjauli concern in favour of the appellant's father some thirty years ago, which would take one back to the year 1914. If, therefore, the appellant's father and thereafter the appellant was in possession as a raiyat from 1914 to some time after 1929, the period would be much more than twelve years. An attempt was made before me to show that the appellant based her title not on a settlement made by the Manjauli concern, but on a settlement alleged to have been made by the defendants second party during the pendency of the mortgage action by the plaintiffs respondents. It appears that the word 'settlement' has been rather loosely used, and the judgment of the learned Munsif gives one the impression, that the appellant claimed that a final settlement was made with her during the time when the defendants second party were in possession. Learned counsel for the parties have, however, read out the relevant paragraphs of the written statement to me, and it is clear from those paragraphs that the appellant claimed that a settlement had been made in favour of her father some thirty years ago and her father came in possession as a raiyat, as a result of that settlement. Her father continued in possession as a raiyat and thereafter the appellant continued in possession as a raiyat continuously during the thika period, and she continued in such possession even after the defendants second party obtained possession of the interest of Haribar Prasad Singh from the Manjauli concern. That being the position, it is clear to me that the appellant had acquired a right of occupancy by operation of law and was not liable to be ejected by the plaintiffs-respon-

dents who had purchased the interest of Harihar Prasad Singh in execution of their mortgage decree and had obtained delivery of possession in 1941.

[7] The result, therefore, is that the appeal is allowed, the judgment and decree of the learned Subordinate Judge are set aside and those of the learned Munsif are restored. The appellant will be entitled to her costs throughout.

V.R.B. *Appeal allowed.*

A. I. R. (38) 1951 Patna 315 *[C. N. 69.]*

MEREDITH AND RAMASWAMI JJ.

Abdul Kabir and others — Plaintiffs — Appellants v. *Mt. Jamila Khatoon and others — Defendants — Respondents.*

A. F. O. D. No. 387 of 1946, D/- 5-1-1950.

(a) Muhammadan law — Gift — Property in possession of mortgagee — Validity.

The gift of land in possession of the mortgagee is valid, as possession in connection with Muhammadan law of gift means only such possession as the nature of the subject of the gift is capable of. A gift of mere equity of redemption in land in possession of the mortgagee is therefore valid and conveys good title to the donee : *Case law referred* ; 21 All. 165 and A.I.R. (9) 1922 Cal. 422, *Foll.* [Paras 5 and 6]

(b) Transfer of Property Act (1882), S. 43—Principle of rule of estoppel by deed.

The rule of estoppel by deed is that if a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. Thus where a person having a partial interest in certain property transfers a larger interest and subsequently acquires that interest, S. 43 applies and the transferee is entitled to the interest so acquired by the transferor : A. I. R. (8) 1921 P. C. 112, *Ref.* [Para 6]

Anno. T. P. Act, S. 43, N. 2, 10.

(c) Co-sharer — Rights of, against trespasser.

Although a co-sharer by himself cannot get against trespasser a decree for ejectment from the whole of the land, he can get a decree for joint possession to the extent of his share. He has to work out his further rights by means of a suit for partition : *Case law referred.* [Para 9]

(d) Deed — Construction — Sale of property by description — Description partially correct and partially incorrect —Rejection of incorrect portion.

Where in a deed of sale the description is partially correct and partially incorrect and the former part is sufficient to identify the subject-matter intended to be conveyed while the latter does not apply to any subject, the erroneous part should be rejected on the maxim *falsa demonstratio non nocet.* The principle is that so much of the description as has no application being laid aside as mere surplusage what remains should be sufficient to identify the thing really meant. [Para 10]

Anno. T. P. Act, S. 8, N. 20, Pt. 19a.

Baldeo Sahay, Shiva Anugrah Narain and Bajrang Sahay—for Appellants; B. C. De, K. D. De and S. C. Ghose — for Respondents.

Ramaswami J.—In the suit, which is the subject of this appeal, the plaintiffs claimed that on 16-2-1938, they had purchased holding NO. 221 of Giridin town, area about 3 bigahs 8 kathas, by registered kobala from defendants 4 and 5, Md. Ishaw and Abdul Jabbar. The relationship of the parties will appear from the following pedigree.

MOHAN MIAN

Bulaki (by 1st wife)	Bibban (D. 3)
	Guldasta (D. 2)

Ishaq D. 4.	Jabbar D. 5.	Mt. Jamila D. 1.	Mt. Hasiba D. 6.

The plaintiffs alleged that defendants 4 and 5 had previously sold 3 kathas of holding NO. 224 to Mohammad Qasim who in his turn sold to Guldasta and Mt. Bibban (defendants 2 and 3). After having made the purchase, defendants 2 and 3 encroached upon holding NO. 221, built houses and garages thereon, cut down the trees of the orchard and appropriated the fish from the tank. The plaintiffs, therefore, asked for a declaration of their title to holding NO. 221 described in schedule of the plaint and for possession thereof. Defendants 2 and 3 contested the suit on the ground that defendants 4 and 5 had no title to the land in dispute. When Bulaki died, his father Mohan Mian was alive and so inherited one-sixth of Bulaki's share. In lieu of the share, Mohan obtained $2\frac{1}{4}$ bighas, of which he made a verbal gift to his daughter Mt. Bibban. The latter also purchased about 3 kathas from Md. Qasim and obtained settlement of 2 kathas from Equitable Goal Company. After amalagamating all the portions, Mt. Bibban constructed dwelling houses, garages and sunka well. Defendants 2 and 3 denied that they made any encroachment on holding NO. 221. Mossomat Jamila, defendant 1 alleged that Bulaki made an oral gift of the entire holding in her favour at the time she was married.

[2] Upon these contentions, the learned Subordinate Judge held that the plaintiffs were entitled to 0/9/4 share of holding NO. 221 and that defendants had made encroachment. As the plaintiffs failed to prove the exact measure of encroachment, the learned Subordinate-Judge refused to grant decree for ejecting the defendants. Against this decree, the plaintiffs have preferred this appeal. A cross-objection has been filed on behalf of defendants 1, 2 and 3.

[3] The first question to be examined is whether Ishaq and Jabbar had legal right to convey the entire sixteen annas share of holding NO. 221 by the registered kobala. On behalf of the respondents, it was argued that Jabbar and Ishaq could make a valid transfer only of their shares and not of Hasiba or Jamila, who did not exe-

cute the kobala. It was pointed out that in the petition of compromise (Ex. 7) the two sisters had agreed that the Jharia property should be sold to Md. Qasim, but as regards the Giridih property, the sisters had only authorised Abdul Jabbar to be the manager on their behalf. For the appellants, it was argued that since sisters had been benefited by the sale the brothers had the legal right to convey their shares, that they had implied authority to sell for the benefit of the joint estate. The argument has some attraction but it is invalid, for, the compromise petition expressly confers upon the two brothers the right to manage and not the right to sell the properties. In view of the express stipulation in the compromise decree, it is not possible to hold that there was an implied contract by which the two sisters authorised the brothers to sell.

[4] On behalf of the appellants it was stated that subsequent to the execution of the kobala, Mt. Habiba executed a registered deed of relinquishment with respect to her share, in favour of Jabbar. It was argued that Jabbar acquired through this document the undivided share of Hasiba in property in dispute. But it is apparent that Hasiba executed the deed of relinquishment on 28.3 1938, before Jabbar and Isbaq redeemed the mortgage. The challan (Ex. 20a) shows that the mortgage amount was deposited in Court on 29-11-1938. For the respondents, it was maintained that Mt. Hasiba merely relinquished her share in the equity of redemption, that such a relinquishment was not valid under Mohammadan law. This contention is based mainly on the authority of two Bombay cases, *Mohinuddin* v. *Manchershah* 6 Bom. 650 and *Ismail* v. *Ramji Sambhaji*, 23 Bom 682: (1 Bom. L.R. 177), in which it was held that property in possession of a mortgagee, and not in the actual possession of the donor was incapable of being the subject of a gift according to the rule of Mohammadan law. But the authority of these cases is highly doubtful. In his celebrated treatise Mr. Ameer Ali observes that the Bombay High Court has misconceived the Mohammedan law:

"This view, it is respectfully submitted, is founded upon an erroneous apprehension of the Hanafi law, under which seisin is requisite for hypothecation. According to the correct view of the Hanafi doctrine on the subject there is nothing in it to preclude the mortgagor from granting his equity of redemption to another. And, as the property forms the security for the debt, the transferee obtains the right to redeem the property subject to the payment of the debt" (Mohamedan Law Vol. I, 4th Edn., p. 66).

[5] In an Allahabad case, *Anwari Begum* v. *Nizamuddin Shaha*, 21 ALL. 165 : (1899 A. W. N. 8), the High Court in accordance with this view held that the gift of property attached by the Collector for arrears of revenue and taken possession of by him under a local law was valid :

"There is no doubt that the principle of Mohamedan law is that possession is necessary to make a good gift, but the question is, possession of what? If a donor does not transfer to the donee, so far as he can, all the possession which he can transfer, the gift is not a good one. As we have said above there is, in our judgment, nothing in the Mohamedan law to prevent the gift of a right to property. The donor must, so far as it is possible for him, transfer to the donee that which he gives, namely, such rights as he himself has; but this does not imply that where a right to property forms the subject of a gift, the gift will be invalid, unless the donor transfers what he himself does not possess, namely the *corpus* of the property. He must evidence the reality of the gift by divesting himself, so far as he can, of the whole of what he gives."

The same principle has been laid down in *Tara Prasanna* v. *Shandi Bibi*, 49 Cal. 68: (A. I. R. (9) 1922 Cal. 422) in which the High Court held that the gift of land in possession of the mortgagee was valid and that possession in connection with Mohammadan law of gift meant such possession as the nature of the subject of the gift is capable of.

[6] In the present case, I am satisfied that the deed of relinquishment (Ex. 3) is, upon its true construction, a deed of gift of Mt. Hasiba of her share in favour of Jabbar. In my opinion, the Calcutta and Allahabad decisions are correct and the gift made by Mt. Hasiba of a mere equity of redemption is valid under the Mohammadan law and effectively conveyed that title of Mt. Hasiba to her brother Jabbar. If this conclusion is correct, it follows that S. 43, T. P. Act would directly operate and the plaintiffs would be entitled to the share of Mt. Hasiba in the property in dispute In *Tilakdhari Lal* v. *Khedan Lal*, 47 I. A. 239: (A I.R. (8) 1921 P. C. 112) Lord Buckmaster stated the rule of estoppel by deed as follows:

"If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes."

The principle of 'feeding by estoppel' is based also on the equitable doctrine that a man who has promised more than he can perform must make good his contract when he acquires the power of performance. In *Holroyd* v. *Marshall*, (1860-62) 10 H. L. C. 191 : (33 L. J. Ch. 193) the House of Lords decided that if the future goods which were to form the subject of a future sale or mortgage were sufficiently earmarked at the time of the contract and were such that equity might decree specific performance of it, equity will place the property in a state of anticipatory isolation so as to give the beneficial interest therein to the intended transferee, directly the property comes into existence or falls into the hands of the intending transferor.

[7] It is then necessary to examine the claim of defendants 2 and 3 that they had title to the land in dispute on account of an oral gift said to have been made by Mohan. According to the defence case, Mohan was alive when Bulaki died and acquired one sixth share of the inheritance of Bulaki. The defendants allege that in lieu of his share of inheritance, Mohan obtained 2½ bighas of land of which he made an oral gift to Bibban. In support of their case, the defendants exhibited rent receipts (Exs. E to E5) of which Ex E3 is most important. In this receipt it is stated that after the death of Bulaki, Mohan was mutated for 2½ bighas with the boundaries stated therein. Exhibits E4 and E5 are the receipts granted by Abdul Hamid (D. W. 5) who stated that he was one of the co-sharers entitled to rent. For the appellants, it was maintained that these receipts were forged. It was pointed out that in Ex. E3 the western boundary is described as "pond and land of Bulaki that was given to Jamila Khatoon". It appears unusual in the first place that the area and the boundaries of the land should be specified in the rent receipt. That the description of the western boundary is false is apparent from the fact that Jamila Khatoon did not contest the case though she filed written statement. She alleged that Bulaki had made oral gift of the entire holding No. 221 at the time of her marriage. But her case is falsified by the important circumstance that in the partition suit Jamila asserted that holding No. 221 (Old holding No. 172) was joint property and that she had merely share therein. Since the claim of Jamila is false it is impossible to hold that Ex. E-3 is a genuine document. It follows that no reliance ought to be placed on the rent receipts produced by the respondents. In my opinion the learned Subordinate Judge rightly held that Mohan was not alive at the time of the death of Bulaki and that Mohan made no gift of the land in dispute to Bibban.

[8] As regards the one-third share of Ishaq, there is evidence that Ishaq executed a *baimoqasa* deed on 7-11-1930 in favour of his wife Mt. Naboolan in lieu of her dower debt. Soon after, Naboolan died and the share devolved upon her minor daughter Mt. Tahrunnissa, Md. Ishaq husband and Mt. Hajra as sharers and Israil, Nikael and Israfeel three brothers as residuaries. The share of Mr. Ishaq was four annas, but Mt. Tahirunnissa the minor daughter died later on and her eight annas share accrued to Ishaq. At the time Ishaq executed the sale-deed he was, therefore, entitled only to 12 annas out of his one-third share in the property in suit. On behalf of the appellants, it was nevertheless argued that the *baimoqasa* deed was benami and not acted upon. It was also pointed out that on 23-1-1943 Mt. Hajra, Israil, Nikael and Israfeel executed a deed of release in favour of the plaintiffs (Ex. 9). But it is important to notice that these executants have not been impleaded in the suit and it is impossible to decide in their absence whether the *baimqasa* deed is benami or whether the deed of release is a genuine document. Upon the facts proved, it must be held that the plaintiffs have acquired title only to 12 annas out of the share of Ishaq.

[9] On behalf of the respondents the argument was stressed that since Mt. Hajra, Israil, Nikael and Israfeel have not been impleaded, the plaintiffs cannot get a decree for ejectment. But this argument is not tenable. Although a co-sharer by himself cannot get, against a trespasser a decree for ejectment from the whole of the land, he can get a decree for joint possession to the extent of his share. He has to work out his further rights by means of a suit for partition. Vide *Hulodhur Sein* v. *Gooroo Das Roy*, 20 W. R. 126 ; *Radha Proshad* v. *Esuf*, 7 Cal. 414 : (9 C L R. 76) and *Naresh Chandra* v. *Haydar Sheikh Khan*, 49 C. L. J. 83 : (A.I.R. (16) 1929 Cal. 28). In the last case Rankin C.J., observed as follows :

"A theoretical and highly important question is raised as to whether or not one co-sharer can maintain a case of trespass in the absence of other co-sharers against the trespasser so as to get an order of eviction as distinct from an order of joint possession with the trespasser. That is a matter which has long been considered in this Court. The position as regards the execution of such an order and that position as regards the theory of the matter have, in practice, been in this Court dealt with by giving a decree for joint possession together with the trespasser and leaving it to the plaintiff to work out his further rights by a suit for partition. I do not think that there is anything unusual in the form of the decree."

In the present case, therefore, I am of opinion that the plaintiffs ought to be granted a decree for joint possession for twelve annas share with defendants 1, 2 and 3 of the land in suit.

[10] The next question to be investigated is, what did the sale-deed (Ex. 1) purport to convey to the plaintiffs ? The document describes the property sold as "a piece of land" within the compound walls, wherein the orchard and the tank, "situate at Giridih within the Municipal area of Giridih," bearing holding No. 221 constituting dar-mokarrari interest of the declarants situate as per boundaries, specified below :

North	South	East	West
House of Sakhawat and others.	Passage for coming in and going out.	Road and house of Sabamat Mian and others.	House of Karu Pandit and others.

On behalf of the appellants it is pointed out that no area is mentioned in the deed, that the respondents have not exhibited Municipal

registers to show whether holding No. 221 had the boundaries as stated in the document. The respondents stated that the boundaries to the north, west and south are correct but boundary to the east has been wrongly mentioned. They asserted that holding No. 221 contained no orchard but only a tank and measured less than one bigha. It is apparent on a perusal of the kobala that the land conveyed is described not only (1) as holding No. 221 but (2) as containing an orchard and a tank (3) with the boundaries specified. For the appellants, learned advocate said that the Municipal register was not available. Even if it be assumed that the Municial boundaries are not consistent with the boundaries as described in the sale deed, it does not follow that the holding number will prevail against the other descriptions stated in the document. In this context, it is necessary to reiterate that the land conveyed is described in the kobala as containing an orchard and a tank. In my opinion, the leading description is the statement of the boundaries and the statement that the land is situate within compound walls containing an orchard and a tank. The statement of holding No. 221 is supplementary and is not dominant. Where the description is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended, while the latter does not apply to any subject, the erroneous part should be rejected on the maxim *false demonstratio non nocet*. The principle is that so much of the description as has no application being laid aside as mere surplusage what remains is sufficient to identify the thing really meant.

[11] In the present case, other evidence on the record supports the appellants' case that the land conveyed is about 3 bighas in area and comprises the orchard and tank within the compound walls. In the plaint of the present suit the land is described as comprising an orchard and a tank, holding No. 221, measuring 3 bighas with the boundaries given in the kobala. In the plaint of the partition suit, (Ex. 6), the land is described as "within the compound walls of the orchard and tank, holding No. 172" and with the same boundaries as stated in the kobala. The deed of release (Ex. 9) executed by Mt. Hajra also described the disputed land as laying "within the compound walls of the orchard, holding No. 221, area about 2 bighas" and with identical boundaries. The same boundaries are ascribed to the land in dispute by Mt. Hasiba in the deed of relinquishment (Ex. 3) dated 28 3-1938. In Ex. 9 (a), the deed of release executed by Ishaq and Jabbar also the land is described as comprising 3 bighas with the boundaries stated in the kobala. In this context, reference should be made to the survey Khatian (Ex. 1) in which the land is described as belonging to Skh. Bulaki *laying east* of the pond of Skh. Bulaki and comprising area of 0.99 acres. Upon a proper construction of the kobala (Ex. 1) therefore, it is plain that the land conveyed included 0.99 acres equal to 2½ bighas, with the boundaries stated therein and comprising an orchard and a tank within the boundary walls.

[12] Upon these grounds, it is manifest that the plaintiffs should be granted a declaration that they are entitled to 0-12-0 annas share of the land in dispute as described in schedule 'kha' of the plaint. The plaintiffs are also entitled to a decree for joint possession of twelve annas share with defendants 1, 2 and 3 of the land in dispute.

[13] Accordingly, I should allow this appeal and order that the plaintiffs should be granted a decree in the above terms with proportionate costs against the contesting defendants in both the Courts. The cross objection is dismissed.

[14] **Meredith J.** — I agree.

D.R.R. *Appeal allowed.*

A. I. R. (38) 1951 Patna 318 *[C. N. 70.]*

RAMASWAMI J.

Isari Tiwari and others — *Appellants* v. *Bindeshwari Pandey and another* — *Respondents.*

A. F. A. D. No. 1921 of 1948, D/- 7-2-1950.

Civil P. C. (1908), O. 7, R. 7—Events happening after suit—Grant of relief on basis of altered conditions.

As a general rule a suit is to be tried in all its stages on the cause of action as it existed at the date of its commencement. As an exception to this rule, a Court may take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. [Para 3]

(*Held*, that in the circumstances proved in the case the Court ought not to have taken notice of subsequent events.)

Anno. C. P. C., O. 7 R. 7 N. 4 Pts. 1 to 4.

S. K. Mitter and Mrs. D. Lall — for Appellants; Harinandan Singh and K. B. N. Singh — for Respondents.

Judgment.—In this suit the plaintiffs alleged that they and defendant 2 were members of a joint Mitakshara family; that on 15 6-1945 defendant 2 executed a sale deed in favour of defendant 1 with respect to his undivided share of the joint family properties; that the sale deed was without consideration or legal necessity and defendant 1 obtained no title by virtue thereof. The plaintiffs therefore asked for a

declaration that the sale deed dated 15.6.1945 was illegal and not binding upon them. Defendant 1 contested the suit on the ground that the sale deed was for consideration and legal necessity. He further alleged that on 3.11.1945 after the institution of the suit defendant 2 executed another sale deed with respect to the same properties. It was also alleged that on 29-8-1945 defendant 1 had given notice to the plaintiffs that he would separate from the joint family. Defendant 1 therefore pleaded that his title has become perfected in any event. The learned Munsif found that the sale deed was genuine and for consideration. But he held that before the institution of the suit defendant 2 and the plaintiffs were joint and so by executing the sale deed dated 15.6 1945 defendant 2 obtained no title to the undivided share of the joint properties. As regards the second sale deed dated 3.11.1945 the learned Munsif held that by virtue of the notices, Exs. C to C/5, defendant 2 became separate from the plaintiffs and by the execution of the sale deed defendant 2 conveyed a valid title to defendant 1 with respect to the properties in suit. The learned Munsif therefore dismissed the suit.

[2] In appeal the learned Subordinate Judge held that "the plaintiffs were in possession and defendant 1 was entitled to seek partition" and therefore "modified the judgment of the learned Munsif to that extent."

[3] In support of the appeal the main argument addressed is that the lower Courts committed an error of law in taking notice of events which had happened since the institution of the suit. Reference was made to *Raicharan Mandal* v. *Biswanath*, 20 C. L. J. 107 : (A. I. R. (2) 1915 Cal. 103) where Asutosh Mookerjee J. observed that as a general rule a suit was to be tried in all its stages on the cause of action as it existed at the date of its commencement. As an exception to this rule a Court may take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions in cases where it is shown that the original relief claimed has by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. In the present case the lower Courts have committed an error of law in holding that the general rule was not applicable. In the plaint the plaintiffs had challenged that the sale deed dated 15 6-45 executed by defendant 2 was illegal and not binding upon them. Having found that the family was joint at the date the kobala was executed it is not clear why the lower Courts held that the grant of the relief asked for in the plaint was inappropriate in the circumstances of the case. It is true that defendant 1 had alleged that by the notices (Exs. C. series) defendant 2 had communicated his intention to separate. He further alleged that on 3.11-1945 after the institution of the suit defendant 1 executed a second kobala in favour of the plaintiffs for the same properties. These facts were not admitted by the plaintiffs who, on the contrary, denied that defendant 1 sent the alleged notices of separation or that the second kobala was genuine or executed for consideration. There was no specific issue raised or decided by the learned Munsif on the question of separation of defendant 2 after the institution of the suit and also on the validity of the second kobala. In the circumstances proved in this case I hold that the Courts ought not to have taken notice of events which are alleged to have happened since the institution of the suit or afford relief to defendant 1 on the basis of the altered condition alleged.

[4] Nevertheless it was argued for the respondents that since the grant of a declaratory decree was discretionary the High Court ought not in second appeal to interfere with that discretion. But it is a well-settled principle that a Court of Justice ought not to exercise its discretion in arbitrary or capricious manner. As I have shown, the lower Courts have committed an error of law in the present case in taking notice of subsequent events and in refusing to grant relief to the plaintiffs for that reason it must be held that the lower Courts have not exercised the discretion in a legal manner.

[5] For these reasons therefore I would allow this appeal and reverse the decree of the lower Courts and decree the suit in favour of the plaintiffs. But in the circumstances of the cases I do not propose to make any order as to costs.

[6] Leave to appeal under the Letters Patent is refused.

G.M.J. *Appeal allowed.*

A. I. R. (38) 1951 Patna 319 *[C. N. 71.]*

DAS J.

Abdul Rahim — Appellant v. *The King.*

Criminal Appeal No. 457 of 1949, D/- 31-1-1950.

Explosive Substances Act (1908), S. 6—Meaning of — Mere presence of accused in room along with his brother who was found guilty under Act, does not make him guilty under S. 6—Failure to disclose what had happened in room does not make accused accessory.

The proper meaning of S. 6 is that anybody who procures, counsels, aids, abets, or is accessory to the commission of any offence under the Act, shall be punished under S. 6. Where except one solitary fact that the accused occupied the same room with his brother,

who was found guilty under the Act, where marks of blood were found, there was nothing against the accused, he cannot be found guilty under S. 6; his failure to disclose the explosion of a bomb or that some men have been injured by such an explosion will not make him an accessory to the commission of an offence under the Act, though the failure to disclose what had happened may be reprehensible. [Para 4]

Anno. Expl. Subs. Act, S. 6, N 1.

Safdar Imam — for Appellant; The Standing Counsel — for the Crown.

Judgment. — The appellant, Abdul Rahim, has been convicted under S. 6, Explosive Substances Act (VI [6] of 1908) and sentenced to rigorous imprisonment for five years by the learned Additional Sessions Judge of Monghyr. The appeal was originally preferred on behalf of three persons, Abdul Rahim, Noor Mohammad and Jainul. The appeal was dismissed as against the two latter persons, but admitted only so far as Abdul Rahim was concerned.

[2] The short facts are these. On 2-6-1947, at about 10.30 P. M. a constable named Lakshmi Singh heard the sound of an explosion from the house of one Qudrat Mian in muhalla Kunjrapati Sadar Bazar of Jamalpur town. The sound which the constable heard appeared to him to be the sound of the explosion of a bomb. The constable informed the officer in charge of the Jamalpur police station. This officer took a police force and, accompanied by the Divisional Inspector and a Magistrate, went to the house in question which consisted of several rooms was occupied by members of many families belonging to different communities. In one of the rooms which was occupied by the present appellant and his brother Noor Mohammad, were found some blood-stained clothes and blood-stained cotton. There were also marks of blood on the floor of the room. Noor Mohammad had some stains of blood on the clothes which he wore. In another room occupied by two other persons, were found two bottles containing explosive powder. Jainul, one of the persons who was arrested as an inmate of the house, had injuries on his person. Next morning one Chamru Mian was found in the room occupied by Noor Mohammad and his brother. Chamru Mian had multiple injuries on his person, injuries caused by the splinters of an exploded bomb. Chamru Mian made a statement, which was recorded by a Magistrate. The two bottles containing powder were subsequently examined by the chemical analyst who found that the powder was explosive powder.

[3] On the above facts 19 persons, mostly inmates of the house, were put upon trial. The learned Sessions Judge acquitted 16 holding that there was no case against them under any of the three sections mentioned in the charge against them, namely, Ss. 4, 5 and 6, Explosive Substances Act. With regard to three of the accused persons, namely, Noor Mohammad, Jainul and Abdul Rahim, the learned Sessions Judge found that they were guilty under S. 6, Explosive Substances Act.

[4] The point which has been urged before me on behalf of the appellant Abdul Rahim is that on the facts found no case has been made out against the appellant. In my opinion, this point is good and should be accepted. So far as Abdul Rahim is concerned, the only fact established by the prosecution is that he and his brother Noor Mohammad occupied a room in the house in which room marks of blood were found. It is not necessary in this appeal to consider the effect of the stains of blood on the clothes of Noor Mohammad. Noor Mohammad's appeal was dismissed, and it is unnecessary to consider whether Noor Mohammad came within the mischief of S. 6, Explosive Substances Act. That section reads as follows :

"Any person who by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever, procures, counsels, aids, abets, or is accessory to, the commission of any offence under this Act shall be punished with the punishment provided for the offence."

It is not in dispute that there is no evidence in this case that Abdul Rahim either procured, counselled, aided or abetted the commission of the offence; nor is there any evidence that Abdul Rahim, either supplied the money, or solicited for money, or provided the premises, or supplied the materials, for the commission of any offence under the Explosive Substances Act. Learned counsel for the Crown has raised the point for consideration as to whether Abdul Rahim can be said to be an accessory to an offence either under S. 4 (b) or S. 5, Explosive Substances Act. The word 'accessory' has been defined in the Concise Oxford Dictionary as a "helper in any act, or one who is privy to it". It is worthy of note that the words 'procures, counsels, aids, abets or is accessory to' come before the words 'the commission of any offence under this Act'. Therefore, the proper meaning of the section must be, in my opinion, that anybody who procures, counsels, aids, abets or is accessory to the commission of any offence under the Act shall be punished under S. 6. Therefore, the question is: Was the present appellant Abdul Rahim accessory to the commission of an offence either under S. 4 (b) or S. 5, Explosive Substances Act? I have already stated that except one solitary fact that the appellant occupied the same room with his brother Noor Mohammad where marks of blood were found, no other fact has been proved against the appellant. It is also known

that the bomb was manufactured or possessed not in the room occupied by Noor Mohammad and his brother, but in some other room. The statement which Chamru Mian, the man who was making the bomb and who later on escaped to Pakistan, made does not mention the name of the present appellant. Chamru Mian had stated there that he and Jainul were making bottle bombs. It seems to me clear on the prosecution case itself that there are no proved facts on which it can be held that the appellant, Abdul Rahim, was an accessory or abettor to the commission of an offence under the Explosive Substances Act. It is true that when the police party searched the house, Abdul Rahim did not say that a bomb had exploded causing injuries to some persons. It is likely that the injured person or persons were brought into the room which the appellant occupied: that would explain the presence of marks of blood in that room. But I do not think that the failure to disclose the explosion of a bomb or that some men have been injured by such an explosion makes the man, who is guilty of such failure, an accessory to the commission of an offence under the Act. Failure to disclose what had happened may be reprehensible, but the question before me is whether such failure necessarily makes the person guilty of such failure, either a helper in the act or a privy to the act which constitutes the offence. In my view, the answer to this question must be in the negative. Further more, there is I think, a well recognised distinction between an accessory to the commission of an offience, and an accessory after the fact.

[5] For these reasons, I am of the view that on the facts of the prosecution case itself Abdul Rahim does not come within the mischef of S. 6, Explosive Substances Act. The result, therefore, is that the appeal is allowed and the conviction and sentence are set aside. It is directed that the appellant, Abdul Rahim, be acquitted, and set at liberty forthwith.

R.G.D. *Appeal allowed.*

A. I. R. (38) 1951 Patna 321 *[C. N. 72.]*

MEREDITH AND RAMASWAMI JJ.

Ganga Prasad Modi—Appellant v. *Nagarmal Modi and another—Respondents.*

A. F. O. O. No. 365 of 1947, D/- 21-9-1949.

Arbitration Act (1940), S. 30 — Misconduct of arbitrator — Omission to give notice to parties and taking evidence behind their backs amounts to misconduct. [Para 4]

Anno: Arb. Act, S. 30 N. 10 pts. 18, 32.

P. R. Das, Sarju Prasad, A. B. N. Sinha and Awadh Kishore Prasad — for Appellant; L. K. Jha and Nand Lal Untwalia—for Respondents.

1951 Pat./41 & 42

Meredith J.—This appeal is directed against an order rejecting an application for passing a decree in terms of an award in an arbitration held out of Court. The appellant was the applicant. The Court below has rejected the application and set aside the award on the ground of misconduct on the part of the arbitrator, and the question is whether that finding of misconduct was justified. The alleged misconduct is that the arbitrator took evidence behind the backs of the parties with regard to the most important question in dispute, and based his decision on that evidence.

[2] In the award the arbitrator says:

"The main dispute in this case is regarding one share of Calcutta Stock Exchange the value of which has considerably increased. This was purchased on 15-8-1937, for a sum of Rs. 20,000. . . . . I made enquiries at Calcutta on 7-1-1946, in this connection from Babu Jagannath Gupta and two other gentlemen of share market and fixed the valuation at Rs. 1,01,000."

Later he says:

"The parties did not adduce any oral or documentary evidence except the account books and statements of Babu Nagarmal Modi and Chandi Prasad Modi and Ganga Prasad Modi and Madanlal Modi."

It is admitted that when these gentlemen were examined in Calcutta neither the appellant nor either of the two respondents were present.

[3] In the petition of objection to the application of the appellant, the respondents simply said that the evidence had been taken behind their backs. The arbitrator has not been examined by either party, but the appellant himself gave evidence, and one of the respondents also gave evidence. The appellant in his evidence said:

"I am the sole applicant. The arbitrator informed the opposite party 1 and myself at the same time on 5th or 6th January 1946, that he would be in Calcutta on 7-1-1946, and that he would be in the Stock Exchange at 12 noon on 7-1-46 and that we should meet him there. Opposite Party 1 was appearing for both the opposite parties before the arbitrator."

As against this, the respondent who gave evidence said:

"The arbitrator did not inform the opposing parties that he would be at Calcutta on 7-1-1946 and that he would examine witnesses or take evidence there."

There is no definite finding by the learned Subordinate Judge as to whether the parties were given notice of this Calcutta excursion or not. But this is a first appeal, the evidence is before us, and we can come to our own findings. Having considered the evidence and all the circumstances I am of the opinion that there was no notice given in this case. It is notable that the arbitrator in the award does not say he gave any notice before proceeding to Calcutta. The fact that in the original objection it was not definitely stated that notice had not been given seems to me of little importance because, I think, the assertion that the evidence was taken behind the

parties' backs obviously meant that they were not given notice. As for the evidence, it is oath against oath. But, as appears from the award, the question of the valuation of this Stock Exchange share was the main point in dispute, and it is very difficult to believe that, if the parties had had notice, neither of them would take the trouble to be present. The appellant himself in his evidence merely said that he had been informed either one or two days before the visit. Surely, in the circumstances, the parties would have said, if they had been unable to visit Calcutta at a day's notice, that they should be given some further notice and a different date should be fixed, so as to allow them to proceed there. But that is not suggested.

[4] As I hold that the parties did not get notice, it is unnecessary to consider what the legal position would be if the parties had received due notice and had nevertheless remained absent. I desire to express no opinion on that point. But where an arbitrator takes evidence behind the backs of the parties without notice to them, and bases his award on that evidence, the law is well settled that it amounts to misconduct. It is unnecessary to deal with the cases at length. The position has been admirably summed up in Sircar's Tagore Law Lectures on the Law of Arbitration in British India at p. 174 where the learned author says on the question of the necessity of proceeding in the presence of both parties :

"Arbitrators should rigidly follow this rule because departure from it has often been considered to be a substantial ground for setting aside of the award."

He refers to *In re Plews (?) and Middleton*, (1845) 6 Q. B. 845 : (14 L. J. Q. B. 139) where each of the arbitrators examined the same person separately and came to the same conclusion and made their award, and in setting aside the award it was said by Coleridge J. :

"To uphold this award would be to authorise a proceeding contrary to the first principles of justice. The arbitrators here carried on examinations apart from each other, and from the parties to the reference; whereas it ought to have been conducted by the arbitrators and umpire jointly in the presence of the parties."

He adds :

"How strongly the Courts condemn the practice of examining witnesses or hearing references in the absence of one of the parties is illustrated in *Ramsden and Co.* v. *Jacobs*, (1922) 1 K. B. 640 : (91 L. J. K. B. 432), where the arbitrator heard the evidence of each of the parties in the absence of the other. No objection was made by the parties at the time to the procedure, and it was not shown that any injustice had resulted from this improper procedure, and yet in setting aside the award Bray J. stated : 'It is said on behalf of the sellers that no injustice was done, that the issues were quite plain and depended upon no question of fact on which there would be a conflict of evidence. I feel the force of that, but Mr. Goddard for the buyer has urged that we ought to show our disapproval of the procedure that was followed, and, with some reluctance I yield to that argument and say that we ought to set the award aside."

[5] The learned author also refers to *Dobson* v. *Groves*, (1844) 14 L. J. Q. B. 17 : (6 Q. B. 63) where the arbitrator explained that all that had happened, when he was closeted with a witness and a pleader, was that the witness merely explained the plans and the pleader was present to give him information in connection with the case, but his opinion was not biased by any of those facts. The Court held that there was an opportunity for the mind of the arbitrator being biased and set aside the award.

[6] Reference is also made to the Calcutta case *Toolsimony Dassee* v. *Sudeni Dassee*, 3 C. W. N. 361, where the first meeting of the arbitrators was held behind the back of one of the parties, and it was urged that nothing was done at the meeting. But Maclean C. J. said :

"It is all very well to say nothing was done at that meeting, but how do we know what may or may not have been said by the plaintiffs ? They may, for ought we know, have made *ex parte* statements to the arbitrators about the case; they may have instilled some poison into the arbitrators' minds to the prejudice of the defendants."

[7] In *Ganesh Narain Singh* v. *Malida Koer*, 13 C. L. J. 399 : (10 I. C. 450) the Bench said :

"In arbitration proceedings both sides must be heard and each in the presence of the other. However immaterial the arbitrator may deem a point, he should be very careful not to examine a party or a witness upon it except in the presence of the opponent. If he errs in this respect, he exposes himself to the gravest censure, and the smallest irregularity is often fatal to the award. Where the award recites on the face of it that the arbitrator held, partly on evidence taken before him and partly on private enquiry, that the will executed by a certain person was genuine, it was not competent for him to do so, and the award was vitiated."

[8] Our attention has been drawn to only two Patna cases, both of them single Bench decisions. In *Ganga Bhagat* v. *Sokhi Ram*, 15 P.L.T. 693: (A. I. R. (21) 1934 Pat. 550) Wort J., held that, apart from an agreement to allow the arbitrators to do so, private enquiries behind the backs of the parties is against the ordinary rules of justice. In the other case, *Abdul Halim* v. *Ismail Momin*, 86 I. C. 773 : (A. I. R. (12) 1925 Pat. 465) Foster J., said :

"An arbitrator who makes an enquiry or receives confidential information behind the back of the parties is guilty of misconduct."

[9] All the reasons given by the learned Subordinate Judge for his decision may not be sound, but I am nevertheless of opinion that the decision itself was correct, and I would, therefore, dismiss this appeal with costs.

[10] **Ramaswami J.**—I agree.

D.R.R. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 323 *[C. N. 73.]*

SINHA AND NARAYAN JJ.

Bibi Asghari and another — *Appellants* v. *Muhammad Kasim and others*—*Respondents.*

A. F. A. D. No. 1005 of 1947, D/- 22-2-1950.

(a) Civil P. C. (1908), O. 4, R. 1; O. 6, Rr. 14, 15 — Absence of presentation, signature or verification by some of plaintiffs—Effect.

The absence of presentation of plaint on the part of some of the plaintiffs does not affect the jurisdiction of the Court and suit must be deemed to have been instituted on their behalf as well, if it was filed with their knowledge and authority. There is no rule providing that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. [Para 4]

Anno. C. P. C., O. 4 R. 1 N. 7; O. 6 R. 14 N. 3; R. 15 N. 2, 4.

(b) Civil P. C. (1908), O. 32, R. 3 — Decree against major, treating him as minor.

A decree obtained against a person treating him as a minor while in reality he is a major on the date the decree was passed is not to be regarded as a nullity. [Para 4]

Anno. C. P. C., O. 32 R. 3 N. 8.

(c) Civil P. C. (1908), O. 82, R. 1—Suit by major describing himself as minor.

A suit instituted by a plaintiff describing himself as a minor, though he was a major on the date of the institution of the suit, cannot be regarded as a suit to which he was not a party. [Para 4]

Anno. C. P. C., O. 32 R. 1 N. 5.

(d) Civil P. C. (1908), S. 100—Findings of Courts below that there was no fraud with regard to proceedings — Findings held binding in second appeal. [Para 3]

Anno. C. P. C., Ss. 100 and 101 N. 39.

M. Rahman — for Appellants; S. A. Saghir — for Respondents.

Narayan J.—This is a plaintiffs' appeal arising out of a suit for setting aside a decree and the sale held in execution of that decree and also for confirmation or recovery of possession over the land which had been sold in execution of the decree. The decree in question was passed on 31-1-1928 in Rent Suit No. 2378 of 1927, and the sale in execution of the decree was held on 10 7-1928. The decree-holders themselves purchased the property at the execution sale. The suit out of which this appeal arises was instituted on 9 7-1940 by the two appellants and by two other persons who did not prefer any appeal against the decision of the Court of first instance. The plaintiffs' allegation was that the processes had all been suppressed and that the plaintiffs were not able to know of the fraud perpetrated by the decree-holders until 1-7-1939. Some of the defendants resisted the plaintiffs' claim, firstly, on the ground that there was no suppression of processes and no fraud with regard to the proceedings, and, secondly on the ground that the plaintiffs' claim was barred by limitation.

[2] The Court of first instance negatived the case of fraud set up by the plaintiffs and held that the suit was barred by limitation. There was an appeal preferred against the decision of that Court by these two appellants, but the appeal was dismissed by the First Additional Subordinate Judge of Chapra. Aggrieved by the decision of the learned Subordinate Judge the original plaintiffs 1 and 2, who were the appellants before the learned Subordinate Judge, have preferred this second appeal.

[3] The findings of the Courts below that there was no fraud with regard to the proceedings are binding on us in second appeal, and Mr. Rahman for the appellants had nothing to say before us so far as these findings are concerned. But he strenuously pressed the contention that there was no valid decree against the original plaintiffs 3 and 4, whose interest has now been acquired by plaintiffs 1 and 2, and that the interest of plaintiffs 3 and 4 cannot be deemed to have passed to the decree-holders-auction purchasers by the auction sale. Mr. Rahman has further argued that the lower appellate Court is wrong in holding that the claim of plaintiffs 1 and 2 in so far as it represents the interest originally possessed by plaintiffs 3 and 4 is barred by limitation. In my opinion, the contention of Mr. Rahman is well-founded.

[4] It is common ground that plaintiffs 3 and 4 were minors even at the time when the rent suit was instituted, and that the rent suit was prosecuted against them treating them as majors. These two plaintiffs were minors even up till the time the sale was held, but they were all along treated as majors, and hence the decree as against them and the sale so far as their interest is concerned cannot be regarded as valid in law. But the learned Subordinate Judge was of the opinion that as the "right, title and interest of plaintiffs 3 and 4 came to be the subject-matter of the suit" on 30-6 1943 and as possession to the decree-holders-auction purchasers was delivered in the year 1930, the claim of the plaintiffs 1 and 2 as purchasers of the interest of plaintiffs 3 and 4 would also be deemed to be barred by limitation. It appears that on 30-6-1943 the plaintiffs 1 and 2 had filed a petition before the trial Court praying that their names should be substituted in place of plaintiffs 3 and 4, as they had purchased the interest of these plaintiffs on 22 1-1941 in a court sale held in Exn. Case No. 6 of 1940, and this prayer of plaintiffs 1 and 2 was allowed by the learned Munsif. Plaintiffs 3 and 4 had attained majority before the date of the institution of the suit, that is, before 9-7-1940, but they were described as minors in the plaint of

this suit; and, as pointed out above, it was on 30.6.1943 that plaintiffs 1 and 2 came to be substituted in their place and their names were struck off. The learned Subordinate Judge was of the opinion that because they were described as minors in the plaint though they were, in fact, majors when the suit was instituted, and that as it was on 30 6 1943 that plaintiffs 1 and 2 were substituted in their place, the interest possessed by them cannot be deemed to have been represented in this suit before 30-6-1943. If the learned Subordinate Judge is right in his view that the interest of these plaintiffs 3 and 4 cannot be deemed to have been represented in this suit before 30 6.1943, then certainly the claim of the plaintiffs, even in so far as it represents the interest of plaintiffs 3 and 4, must be held to be barred by limitation. But if the plaintiffs 3 and 4 would be deemed to have been parties to this suit even on the day this plaint was filed, then their interest must be deemed to have been represented in the suit ever since the filing of the plaint, and because the decree passed in the rent suit and the sale held in execution thereof are not binding on them, plaintiffs 1 and 2 would be entitled to a decree in this suit with regard to the interest which they have purchased from plaintiffs 3 and 4. It was held by the Calcutta High Court in *Taqui Jan* v. *Obaidulla*, 21 Cal. 866, that when a suit is instituted by a person alleging himself to be a minor and the suit is brought through a next friend and when it is found that the plaintiff was not actually a minor at the date of the institution of the suit, the Court should not dismiss the suit and that in such a case the proper course for the defendant is to pray that the plaint be taken off the file or be amended. Their Lordships further observed that if the plaint is not amended, the next friend's name should be treated as mere surplusage and the suit should be allowed to proceed. According to the view taken by their Lordships in this case, it cannot be held that because plaintiffs 3 and 4 instituted the suit as minors though they were majors at the time of the institution of the suit, there would be deemed to be no suit on their behalf. The High Court of Madras held in *Shanmuga Chetty* v. *Narayana Ayyar*, 40 Mad. 743 : (A. I. R. (5) 1918 Mad. 916) that the law had been laid down correctly in *Taqui Jan* v. *Obaidulla* (21 Cal. 866). The case of Taqui Jan was also referred to with approval by the Allahadad High Court in *Wali Muhammad Khan* v. *Ishaq Ali Khan*, 54 ALL. 57: (A.I R (18) 1931 ALL. 507 S.B) which was a decision by the Full Bench of that Court. In this Allahabad case the decision of the Madras High Court in *Shanmuga Chetty* v. *C. K. Narayana Ayyar*, (40 Mad. 743 : A. I. R. (5) 1918 Mad. 916) was also referred to with approval. Their Lordships of the Allahabad High Court further referred to a decision of the Judicial Committee reported in *Mohini Mohun Das* v. *Bungsi Buddan Saha Das*, 17 Cal. 580 (P. C.) and I would respectfully adopt the interpretation which has been placed by their Lordships on this Privy Council decision. The Privy Council decision has been referred to in the following terms in this Full Bench case :

"We may also refer to the case of *Mohini Mohun Das* v. *Bungsi Buddan Saha*, 17 Cal. 580 (P. C.), decided by their Lordships of the Privy Council. There three suits had been filed by one of three joint creditors, the others being named as co-plaintiffs with him in the plaints, which he alone had signed and verified. The record did not show that the other plaintiffs, who had omitted to sign the plaints or to verify them, had repudiated the suits. It does not appear from the judgment that they had given any express approval of the suits to the Court before the period of limitation had expired. The question was whether the other two plaintiffs must be considered to have been plaintiffs to the suits from the very beginning or from the date when certain orders intended to cure the defect were passed. Their Lordships of the Privy Council clearly held that the other plaintiffs became parties to the suits from the time when the plaints were filed and that the suits were not barred by lapse of time. This, in our opinion, is a clear authority for the proposition that the absence of signatures or verification or, for the matter of that, the absence of presentation on the part of some of the plaintiffs out of several, does not affect the jurisdiction of the Court, and the suit must be deemed to have been duly instituted on their behalf if it was filed with their knowledge and authority."

I find myself in respectful agreement with their Lordship's view that the Privy Council case is a clear authority for the proposition that the absence of presentation on the part of some of the plaintiffs does not affect the jurisdiction of the Court and suit must be deemed to have been instituted on their behalf as well if it was filed with their knowledge and authority. Their Lordships of the Judicial Committee have said that there is no rule providing that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. A Division Bench of this Court held in *Mt. Sheorani Kuari* v. *Kamakshya Narayan Singh*, 21 P. L. T. 269 dissenting from the view taken by Jwala Prasad J., in *Sekal Singh* v. *Chanderdip Lal*, A. I. R. (6) 1919 Pat. 10 : (49 I. C. 627) that a decree obtained against a person treating him as a minor while in reality he is a major on its date is not a nullity, and their Lordships, Agarwala J., (as he then was), and Rowland, J. relied on a case of the Madras High Court decided by a Division Bench of that Court and reported in *Seshagiri Rao* v. *T. Jagannadham*, 39 Mad. 1031: (A. I. R. (4) 1917 Mad 318). This Madras case also lays down that a decree obtained against a person treating him as a minor while

in reality he is a major on the date the decree was passed is not to be regarded as a nullity. The principle applicable being the same, a suit instituted by a plaintiff describing himself as a minor, though he was a major on the date of the institution of the suit cannot be regarded as a suit to which he was not a party. The several authorities referred to above including the Privy Council case of *Mohini Mohun Das* v. *Bungsi Buddan Saha Das*, (17 Cal. 580 P C.) lead us to hold in disagreement with the view taken by the learned Subordinate Judge that this suit which was instituted on 9 7.1940 would be deemed to be a suit instituted on behalf of plaintiffs 3 and 4 as well whose interest was acquired by the plaintiffs 1 and 2 at the court sale held on 22-1-1941. The learned Subordinate Judge was also of the view that because plaintiffs 3 and 4, though they were majors at the time when the sale in Exn. Case No. 6 of 1940 was held were described as minors, plaintiffs 1 and 2 cannot be deemed to have acquired their interest, inasmuch as they would be deemed to be no parties to the execution case. The case of *K. Seshagiri Rao*, 39 Mad. 1031: (A I. R. (4) 1917 Mad. 318) is a clear authority in support of the proposition that a sale held in execution of such a decree cannot be regarded as a nullity. If this suit can be deemed to be a suit instituted by plaintiffs 3 and 4 as well, then plaintiffs 1 and 2 as purchasers of the interest of plaintiffs 3 and 4, plaintiffs 3 and 4 not questioning their title as purchasers of their interest, would be entitled to a declaration that the sale held in execution of the decree passed in Rent Suit No. 2378 of 1947 does not affect the interest which was possessed by plaintiffs 3 and 4 and which has now been acquired by them. As already pointed out, the Court had allowed the prayer for the substitution of plaintiffs 1 and 2 in place of plaintiffs 3 and 4. The interest of plaintiffs 3 and 4 had been acquired by plaintiffs 1 and 2 during the pendency of the suit, and it is, therefore, that they applied for substitution.

[5] In the result I hold that plaintiffs 1 and 2 are entitled to a declaration, that the decree and the sale do not bind the interest of plaintiffs 3 and 4, which has now been acquired by plaintiffs 1 and 2 and that the claim of plaintiffs 1 and 2 in so far as it represents the interest originally possessed by plaintiffs 3 and 4 is not barred by limitation.

[6] The appeal is allowed in part and the suit is decreed so far as the interest originally possessed by plaintiffs 3 and 4 is concerned, and it is declared that the sale has not affected that interest which has now been acquired by plaintiffs 1 and 2. The parties will bear their own costs throughout.

[7] **Sinha J.**—I agree.

G.M.J. *Appeal allowed.*

A. I. R. (38) 1951 Patna 325 *[C. N. 74.]*

SINHA AND RAI JJ.

Pitambar Chaudhury—*Defendant*—*Appellant* v. *Achoki Chaudhury and others*, *Plaintiffs and others*, *Defendants*—*Respondents.*

A. F. A. D. No. 185 of 1947, D/-6-2-1950.

(a) Limitation Act (1908), Art. 47—Final order—Meaning of.

Where after the Magistrate passes his order in the proceedings under S. 145, Criminal P. C., against the plaintiff the latter makes an application to the Sessions Judge in revision for making a reference to the High Court but the application is dismissed by the Sessions Judge and the High Court is not moved in revision, the order of the Magistrate and not of the Sessions Judge is the 'final order' within the meanining of Art. 47. [Para 3]

Anno. Lim. Act, Art. 47, N. 9.

(b) Civil P. C. (1908), S. 100—Mixed question of fact and law—Criminal P. C. (1898), S. 145.

Whether the other members of the joint Hindu family who were not parties to the proceedings under S. 145, Criminal P. C., are bound by the order of the Magistrate is a mixed question of fact and law and should not be raised at the late stage of second appeal for the first time. [Para 4]

Anno. C. P. C., Ss. 100-101, N. 57; Cr. P. C. S. 145, N. 58.

(c) Criminal P. C. (1898), S. 145—Persons bound by order—Members of joint Hindu family—Hindu law—Joint family manager—Power to represent.

Where the leading member of the family is a party to the proceedings under S. 145, it must be taken that he was representing the entire family and all the members of the family are bound by the order of the Magistrate in the proceedings. [Para 4]

Anno. Cr. P. C., S. 145, N. 58.

L. K. Jha and Satyanand Kumar—*for Appellant*; *B. N. Mitter. R. K. Chaudhury, Govind Chaudhury and Bishambhar Nath Das* — *for Respondents.*

Sinha J. — This is a defendant's second appeal from the concurrent decision of the Courts below decreeing the plaintiff's suit for possession on a declaration that they were the under-raiyats under the defendants, and had acquired occupancy rights in the lands in dispute by virtue of their continuous possession for more than twelve years before they were dispossessed as a result of proceedings under S. 145, Criminal P. C. It appears, as found by the Courts below, that the plaintiffs were inducted on to the lands in dispute as under-raiyats under the defendants second party who transferred their interest to the defendant first party appellant by virtue of a sale-deed of the year 1938. There was a dispute between the plaintiffs and the appellant-defendant which led to proceedings under S. 145, Criminal P. C. Those proceedings ended in

favour of the defendant first party by virtue of the Magistrate's order, dated 2-1-1940. The plaintiffs who had lost before the Magistrate, made an application to the learned Sessions Judge in revision for making a reference to this Court. That application, after hearing the lawyers for both the parties, was dismissed, and the learned Sessions Judge refused to make any reference to this Court. The learned Sessions Judge's order is dated 22-2-1940. The suit leading up to this appeal was filed on 12-2-1943.

[2] In this Court, the only question on which we have been addressed is the question of limitation. It has been argued on behalf of the appellant that the suit is barred by limitation on two grounds, namely, (1) that it is barred by the three years rule of limitation laid down in Art. 47, Limitation Act, calculating the three years period from 2-1-1940, when the proceedings terminated in favour of the appellant in the Magistrate's Court, and (2) that it is barred by the two years limitation under Art. 3, Sch. 3, Bihar Tenancy Act. The Courts below have negatived these pleas of limitation, holding that the three years rule of limitation applied to the case, and that the period of limitation should be calculated from 22-2-1940, when the learned Sessions Judge refused to make a reference to this Court. The Courts below have also taken the view that Art. 3, sch. 3, Bihar Tenancy Act, had no application to the facts and circumstances of the present case, inasmuch as the dispossession was not by the landlord as such but as a result of the adverse findings by the Magistrate, and by the learned Sessions Judge when he refused to make a reference to this Court.

[3] In my opinion, the decision of the Courts below in relation to the application of Art. 47, Limitation Act, is erroneous in law. Article 47 gives three years for institution of a suit by an unsuccessful party to a 145-proceeding from "the date of the final order in the case." The Courts below have taken the view that the date of the final order in the case must be 22-2-1940, when the learned Sessions Judge refused to make a reference to this Court. It should be noted that the plaintiffs, who had been unsuccessful before the Magistrate and in the Court of Session, did not move this Court in revision. The Court of Session is not competent to pass any final orders in a proceeding under S. 145, Criminal P. C., the Sessions Judge can only make a reference to this Court, if he were of the opinion that the orders passed by the learned Magistrate were vitiated by any errors of law. Apparently, there were no errors of law in the orders passed by the learned Magistrate, and that may have been the reason why this Court was not moved in revision. If this Court had been so moved whether the orders passed by this Court, after hearing the parties or otherwise, were against the plaintiffs—they would have had the advantage of the extended period of limitation, in view of the decision of a Division Bench of this Court in the case of *Rampal Singh* v. *Mansukh Rai*, 20 Pat. 735 : (A. I. R. (28) 1941 Pat. 372). In that case, their Lordships took the view that the orders passed by the High Court in its revisional jurisdiction against an order passed in a proceeding under S. 145, Criminal P. C., are the final orders within the meaning of Art. 47, Limitation Act. We are bound by that decision. But, as already indicated, the plaintiff-respondents did not move this Court in its revisional jurisdiction and, therefore, deprived themselves of the benefit of the orders of this Court and of the extended period of limitation in the event of any orders being passed by this Court. There is no decision of this Court which has been brought to our notice which can directly govern this case. The earlier decision of this Court in the case of *Lachman Singh* v. *Diljan Ali*, 43 I. C. 955: (A. I. R. (5) 1918 Pat. 504) to the effect that Art. 47, Limitation Act, contemplates the final order passed by this Court refusing to interfere with that order has no application to the present case, inasmuch as that was a decision given before the amendment of Criminal P. C. in 1922-23. The decision of the Calcutta High Court relied upon in that case is, for the same reasons, not in point. The only decision which has been brought to our notice, and which is the nearest approach to this case, is the decision of the Letters Patent Bench of the Madras High Court in the case of *Nagabushanayya* v. *Kotayya*, I. L. R. (1947) Mad. 179: (A. I. R (33) 1946 Mad. 444). In that case, the learned Chief Justice, delivering the judgment of the Court, laid it down that where a criminal revision application against an order of a Magistrate under S. 145 (6), Criminal P. C., is dismissed *in limine*, and the order of the Magistrate if left untouched, it is the Magistrate's order and not the order passed in revision which is the final order within the meaning of Art. 47, Limitation Act. That case was sought to be distinguished on the ground that the application had been dismissed *in limine*, and not dismissed after hearing both the parties. That, in my opinion, is a distinction without any difference. The Madras decision may, in some respects, be said to be in conflict with the decision of this Court in the case of *Rampal Singh* v. *Mansukh Rai*, 20 Pat. 735 : (A. I. R. (28) 1941 Pat. 372), because this Court has laid it down that, whether the application in revision is allowed or rejected, it makes no difference to the question of limitation. But the case before us stands on a higher

footing than the case before their Lordships of the Madras High Court, inasmuch as no attempt was made by the unsuccessful party in the 145-proceedings to move this Court in revision. An earlier decision of the Calcutta High Court in the case of *Kangali Churn Sha* v. *Zomur-Rudonnissa Khatoon*, 6 Cal. 709 : (8 C. L. R. 154), presents features similar to the case before us. In that case also, there was an attempt to get favourable orders from the Sessions Judge, but the High Court was not moved. Their Lordships of the Calcutta High Court held that the orders of the Magistrate declaring the possession of one of the parties to the proceedings was the final order from which the three years rule of limitation began to operate. It was pressed upon us by Mr. B. N. Mitter, appearing on behalf of the respondents, that the orders of the Sessions Judge were judicial in nature, and were the last orders passed in a proceeding under S. 145, Criminal P. C. That is perfectly true. But Art. 47, Limitation Act, does not speak of the last order in a judicial proceeding but speaks of the final orders, and the final orders which operate in this case were the orders of the learned Magistrate. Hence, in my opinion, the three years rule of limitation must commence from the date of the Magistrate's orders, that is to say, 2-1-1940, and not 22-2-1940. That being so, the suit was barred by limitation. In this view of the matter, it is not necessary to consider the application of Art. 3, Sch. 3, Limitation Act, as laid down in the Bihar Tenancy Act.

[4] Another question arose at the conclusion of the hearing of the appeal whether the orders of the Criminal Court in the proceeding under S. 145, Criminal P. C., bound all the plaintiffs. Mr. Mitter, at first, contended that only Babu Narayan Chaudhury was a party to those proceedings, and that the other members, and particularly Achoki Chaudhury, the eldest member of the family, presumably the karta of the family, was not a party to those proceedings. He, therefore, contended that the persons other than those who were parties to those proceedings are not bound by the result of the decision of the learned Magistrate, and, consequently, Art. 47, Limitation Act, is out of the way of those plaintiffs who were not parties to those proceedings. In the first instance, Mr. Mitter is not right in raising this question at this late stage, because it is a mixed question of fact and law. If this question had been raised in the Courts below, the Courts of fact would have had an opportunity of considering this question and recording a clear finding. There is no finding in the judgment of the Courts below on this question, apparently because it was never raised before them. The only question which was raised before the Courts below bearing on the applicability of Art. 47, Limitation Act, has already been dealt with in the earlier part of this judgment. But the real answer to this question appears to be that the leading member of the family, namely, the first plaintiff, Achoki Chaudhury, was, as a matter of fact, a party to the 145-proceedings. That being so, it must be taken that he was representing the entire family, and claiming possession on their behalf in the Magistrate's Court. Hence, the decision of this Court in the case of *Lachman Singh* v. *Diljan Ali*, 43 I. C. 955 : (A. I. R. (5) 1918 Pat. 504), already referred to, must govern this case also.

[5] There is another effective answer to this contention which has been given in the course of the argument, by my learned brother. That answer is, that, if Art. 47, Limitation Act, does not apply to the case so far as the plaintiffs who were not parties to the 145-proceedings are concerned, then those persons' claim would come within the mischief of Art. 3, Sch. 3, Bihar Tenancy Act, because in that case those persons, on their own plaint, were dispossessed not as a result of the Magistrate's findings in the 145-proceedings but independently of those proceedings. As a matter of fact, both the Courts below have pointed out that the actual dispossession took place some time in April 1940, that is to say, more than two years before the institution of the suit. Hence, in either view of the matter, whether Art. 47, Limitation Act or Art. 3, Sch. 3, Bihar Tenancy Act, applies, the plaintiffs' suit is barred by time. I regret to have come to this decision, but the law of limitation has been enacted to reject claims which have become too stale, and the plaintiffs have to thank themselves if they allowed their landlords, either as a result of the proceedings under S. 145 of the Code or otherwise, to keep them out of possession for more than two or three years, as the case may be. By doing so, they have rendered their claims too stale.

[6] The result of these considerations is that the appeal is allowed, and the suit dismissed with costs throughout.

[7] **Rai J.** — I agree.

D.H. *Appeal allowed.*

A. I. R. (38) 1951 Patna 327 *[C. N. 75.]*

MANOHAR LALL AND RAMASWAMI JJ.

Manik Chand Raut—*Appellant* v. *Baldeo Chaudhary and others*—*Respondents.*

A. F. A. D. No. 914 of 1947, D/- 21-9-1949.

(a) T. P. Act (1882), S. 60 — Clog on equity of redemption — Stipulation in mortgage to sell property to mortgagee — Clause held invalid as clog on redemption.

A stipulation in the mortgage that after the disposal of title suits in which the mortgaged lands were involved, the mortgagor would execute a deed of sale in favour of the mortgagee failing which the mortgagees could get the sale-deed executed through Court is void and illegal as being a clog on equity of redemption. 1902 App. Cas. 24 and (1903) 2 Ch. 1, *Rel. on.*

[Paras 2, 3 and 6]

Anno. T. P. Act, S. 60, N. 28, 30.

(b) T. P. Act (1882), S. 58—Mortgage and agreement to sell—Distinction—Deed held mortgage.

A mortgage is a transfer of an interest in specific immovable property as security for the repayment of a debt. The debt subsists in a mortgage whereas a transaction by which a debt is extinguished is not a mortgage but a sale.

Where a deed clearly recited that the executant with a free will borrowed Rs. 700 cash at interest of Re. 1 per month from the person mentioned therein and that in security for the principal amount with interest he mortgaged his land described therein, certain date was also fixed for payment and the executant had used the words 'mortgage,' 'mortgaged land,' 'mortgagee' repeatedly in the deed :

Held that the deed was a mortgage and not an agreement to sell, even though the executant had not specifically given the right to sell the property, as any words pledging the property as security for debt are sufficient to imply the power to sale. *Case law referred.*

[Paras 4 and 5]

Anno. T. P. Act, S. 58, N. 33.

B. N. Mitter, Kanhaiyaji and B. P. Samayar — for Appellant ; P. R. Das D. N. Varma, C. S. Prasad and K. B. N. Singh—for Respondents.

Ramaswami J. — In the suit out of which this appeal arises the plaintiffs alleged that they had lent a sum of Rs. 700 to defendant 1 who had to file a suit against Raghunandan Mahto and Mt. Marachhia with respect to lands described in Schs. 1 and 2 of the plaint. Defendant 1 executed a bond in favour of the plaintiffs by which he mortgaged a portion of these lands, that is, 6 acres 4 decimals of kasht land in villages Chanki and Rutwan. The defendants further agreed that after the disposal of the title suit against Mt. Marachhia and Raghunandan he would execute a deed of sale in favour of the plaintiffs with respect to the lands which had been mortgaged. In case of his not executing the deed of sale, the mortgagees were given option to get the sale-deed executed through Court. The plaintiffs alleged that defendant 1 obtained a decree in the two suits and secured possession of the properties. As defendant refused to execute the deed of sale the plaintiffs brought the suit for specific performance of the contract. The main ground of defence was that the document was *farzi* and without consideration; that it had been executed merely in order to create evidence of the possession of defendant 1 over the properties in respect of which the suits had been filed. The learned Munsif held that the document was genuine and for consideration and granted the plaintiffs a decree for specific performance of the contract. The decree has been affirmed by the learned Subordinate Judge in appeal.

[2] The main question to be decided in the appeal is whether the stipulation by which defendant 1 bound himself to sell the mortgaged properties was a clog on the equity of redemption and so illegal and void on this account.

[3] Under S. 60, T. P. Act, the right of redemption is a statutory right which as Lord Macnaghten said in *Noakes* v. *Rice*, 1902 A. C. 24 : (71 L. J. Ch. 139) is "of the very nature and essence of a mortgage inherent to the thing itself." The right of redemption cannot, therefore, be controlled by any agreement made as part of the transaction of mortgage. In *Jarrah Timber and Wood Paving Corporation* v. *Samuel*, (1903) 2 Ch. 1 at p. 7 Collins, M. R. approved and adopted the following extract from a judgment in *Browne* v. *Ryan*, (1901) 2 Ir. R. 653 :

"It is the right of a mortgagor on redemption, by reason of the very nature of a mortgage, to get back the subject of the mortgage . . . . to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so, that which he is entitled to on redemption is prevented and to constitute such prevention it is not necessary that the subject of the mortgage should be directly charged with whatever causes the prevention. If he be so prevented in fact, the equity of redemption is affected by what, whether very aptly or not, has been always termed a clog'."

[4] On behalf of the respondents Mr. P. R. Das conceded that if the document was a mortgage the stipulation as to sale of the properties would be a clog on the equity of redemption and could not be enforced. Learned counsel, however, maintained that upon its proper construction the document was not a mortgage but was a mere contract for sale of the properties mentioned therein. In my opinion this argument is not sustainable. A mortgage is a transfer of an interest in specific immovable property as security for the repayment of a debt. The debt subsists in a mortgage whereas a transaction by which a debt is extinguished is not a mortgage but a sale. In the present case the executant clearly recites that he

"with free will borrowed Rs. 700 cash at interest of one rupee per month from Ramkeshar Chaudhury son of Gati Chaudhury of village Habupore" (Is lie ba khus razai wa raghbat apne mubligh sat sau rupia 700/ sikka raejul waqt qarza sudi basharah fisad ek rupia mahwari musammian Ram Keshar Chaudhuri, wald Gati Chaudhury, baiulqaem, sakin mauza Habbupur).

The executant proceeded to state :

"in security for the principal amount with interest I martgage 6 acres 4 decimals kasht kayami nagdi total area cash rental situated in village Chanki and village Intwa pergana Sasaram P. S. Karaghar etc. as given in schedules and in condition detailed below" (Wa baitminan wa diljamai zarqarza, asal mai sud, mawazi chhau (6) acre char (4) decimal· erazi kasht

naqdi qaimi minjumla erazlat kasht naqdi qaimi, mahduda babadud arbea mofassila zail, waqe mauza Chauki wa mauza Itwan, pargana Sasaram, thana Karghar makful kia).

That date was fixed for payment is clear from the following recital

"after the end of the civil suit and after obtaining *dakhaldehani* the principal amount due and adding the interest thereon will form the consideration and for that consideration the mortgaged land will be sold by *kebala* to the mortgagee (Bad infisal moqadma numbari mazkur wa hasul dakhaldehani, asal zarqarza mazkur wa sud mujtama karke aur usko zarsaman qarar dekar us zarsaman men sbai makiula sadar wa mahduda zall ko bazaria tabrir qebala bai lakalam banam dainan mausufan farokht wa bai lakalam kardenge)."

It is of importance to notice that the executant used the words "mortgage" (*makful*), "mortgaged land" (*shai makfula*), "mortgagee (dainan) repeatedly in this document. Mr. P. R. Das argued that the executant has not specifically said that the appellant would have right to cause the property to be sold. But a power of sale is very seldom expressly given in a native mofussil mortgage. Any words pledging the property as security for the debt are sufficient to imply a right of sale: vide *Rangasami* v. *Muttukumarappa*, 10 Mad. 509, *Ponnuranga* v. *Thandavaraya*, 26 I. C. 274: (A. I. R. (2) 1915 Mad. 370); *Motiram* v. *Vital*, 13 Bom. 90 (F. B.) and Full Bench case *Tukaram* v. *Ramchand*, 26 Bom. 252: (3 Bom. L. R. 778). In *Gokuldoss* v. *Kriparam*, 13 Beng. L. R. 205: (3 Sar. 279 P. C.) the Judicial Committee held that the following words sufficed to create a simple mortgage:

"If I fail to pay the money as stipulated, I and my heirs shall without objection cause the settlement of the said village to be made with you."

[5] For these reasons it is manifest that in the present case the document ought to be construed to be a mortgage and not a mere contract for sale of land.

[6] It follows that the agreement for sale contained in this document is void and illegal as being a clog on the equity of redemption to which the mortgagor has a statutory right.

[7] Accordingly I would set aside the decree of the lower appellate Court and order that the plaintiffs should instead be granted a mortgage decree for a sum of Rs. 700 principal plus a sum of Rs. 700 as interest which the defendants should pay within a period of three months from the date of the preparation of the decree. If the defendants do not pay the amount by that date, the plaintiffs will be entitled to realise the amount by executing the decree. They will be entitled to interest at the rate of 6 per cent. on the amount of Rs. 1400 from the expiry of three months after the date of the decree till the date of realisation.

[8] Parties will bear their costs throughout.

[9] **Manohar Lall J.**—I agree. The document can only be construed as a mortgage, all the relevant terms point to that conclusion.

D.R.R. *Appeal allowed.*

A. I. R. (38) 1951 Patna 329 *[C. N. 76.]*

RAMASWAMI AND NARAYAN JJ.

Banwari Lal and others — *Petitioners* v. *Madan Mohan and others*—*Opposite Party.*

Civil Revn. No. 298 of 1949, D/- 23-2-1950.

Court-fees Act (1870), Ss. 7 (iv) (c) and 7 (v) — Suit for possession—Relief of declaring deed of gift void necessary — Suit is governed by S. 7 (iv) (c) and not by S. 7 (v).

Where the plaintiff states that deed of gift of certain property is fraudulent and executed under undue influence and as such is not binding on him and claims the relief of possession of the property, it is necessary for the Court to set aside the deed of gift, which is voidable and not void, before granting the relief of possession and hence the suit is governed by S. 7 (iv) (c) and not S. 7 (v), Court-fees Act: A. I. R. (25) 1938 Pat. 22 (F. B.), *Disting.* [Para 2]

Anno. C. F. Act, S. 7 (iv) (c) N. 3, 5, 9.

K. Dayal — for Petitioners; K. N. Varma and Ramanand Sinha—for Opposite Party.

Ramaswami J. — The question at issue in this case is whether the learned Subordinate Judge was correct to hold that the court-fee on the plaint should be computed under S. 7, cl. (iv) (c), Court-fees Act, and not under S. 7, cl. (v), Court-fees Act.

[2] In support of this rule Mr. Kameshwar Dayal addressed the argument that the suit was not one for a declaration in the true sense but the plaintiffs really had asked for a decree for possession; and if there be a claim in the plaint for a declaration it was an unnecessary one. Reliance was placed upon *Ramkhelawan Sahu* v. *Surendra Sahi*, 16 Pat. 766 : (A. I. R. (25) 1938 Pat. 22 F. B.) in which a Full Bench held that S. 7, cl. (iv) (c) had no reference to the kind of declaration in the sense of a finding of fact as to the plaintiff's title necessary for granting a decree for possession. But the material facts of that case are clearly to be distinguished. In that case the plaint was very verbose and it proceeded to anticipate the defence and stated that the defendants were claiming under an alleged gift in perpetuity in favour of certain idols and that they were the shebaits of the scheduled properties, and submitted that the so-called gift was invalid. The plaint winded up a prayer for a decree for possession, a decree for mesne profits and a request that if the deed of dedication was really valid the plaintiff should be held to be the legal shebait and that a decree for possession be granted in his favour. As the plaintiff averred that the deed was void the Full

Bench held that the defendants obtained nothing under it and it may be ignored and there need be no suit or claim to have it set aside. In support of this conclusion the Full Bench referred to *Petherpermal Chetty* v. *Muniandi Servai*, 35 I. A. 98 : (35 Cal. 551 P. C.). In the present case, however, the plaintiffs have stated that the deed of gift with respect to Sch. 1 property executed by Kashi Prasad, the last male owner, in favour of his daughter-in law Mt. Bhup Kuer was fraudulent and executed under undue influence and so was not binding upon the plaintiffs. With respect to this allegation, it is obvious that the deed of gift upon the allegation in the plaint is voidable and not void and it is necessary for the Court to set aside the deed of gift before granting a decree for possession in favour of the plaintiffs. The ratio of the Full Bench case in *Ramkhelawan Sahu* v. *Surendra Sahi*, 16 Pat. 766 : (A. I. R. (25) 1938 Pat. 22 F. B.) is therefore not applicable and, in my opinion, the learned Subordinate Judge was correct in holding that court-fee on the plaint should be computed in accordance with S. 7, cl. (iv) (c), Court-fees Act.

[3] Mr. Kameshwar Dayal also complained that the court-fee computed is excessive. But the learned Subordinate Judge has considered all the evidence on the quantum of court-fee and his order cannot be impeached for want of jurisdiction.

[4] Accordingly I would discharge the rule. The application is dismissed with costs. Hearing fee one gold mohur.

[5] **Narayan J.**—I agree.

D.R.R. *Rule discharged.*

A. I. R. (38) 1951 Patna 330 *[C. N. 77.]*

REUBEN AND JAMUAR JJ.

Krishnadevanand Ramji — Appellant v. *Kapildeo Das — Respondent.*

A. F. O. O. No. 373 of 1949, D/- 19-1-1950.

Civil P. C. (1908), S. 144, O. 41, Rr. 31, 35—High Court reversing decree under appeal — Formal decree not framed — Application for restitution is maintainable.

Section 144, Civil P. C., does not in terms require a decree by the Appellate Court to give the Court jurisdiction to grant restitution. All that it requires is that a decree is varied or reversed. Where, therefore, the High Court passes a judgment reversing the decree of the subordinate Court, the latter Court can entertain an application for restitution even though a formal decree is not prepared in the appeal. [Para 11]

(Provisions in O. 41, Rr. 31, 32 and 35 explained.)

Case law considered. [Paras 9, 11]

Anno. C. P. C., S. 144 N. 2, 3.

Mahabir Prasad and Khaleel Ahmad —for Appellant ; Lal Narain Sinha — for Respondent.

Reuben J.—We have already passed our order dismissing the appeal. We are giving below our reasons for the order.

[2] This is an appeal by the plaintiff against an order of restitution under S. 144, Civil P. C., passed by the Additional Subordinate Judge 2nd Court, Patna.

[3] The suit out of which the appeal arises relates to the Math of Rajipore and Dhana in the district of Patna. The plaintiff claims to be the Mahanth as being the initiated Sadhu Chela of the late Mahanth Sri Madhawa Nand Ramji. The defendant-respondent denies that the plaintiff is the initiated Chela of the late Mahanth, and claims to have succeeded himself to the late Mahanth as his Gurubhai. The defendant obtained possession of the estate from the District Judge of Patna by an application under Ss. 192 and 195, Succession Act. Hence, the present suit for declaration of title and recovery of possession. The suit was decreed by the Subordinate Judge and, in execution of the decree, the plaintiff was given possession of the estate. The decision of the Subordinate Judge was set aside by this Court on 6-12-1949, in F. A. No. 8 of 1945, and the suit was dismissed. The appeal is directed against an order of the Subordinate Judge allowing the defendant's prayer for restitution under S. 144.

[4] The first point urged is that the application under S. 144 was premature. It is pointed out that such an application is an application in execution, as held by the Full Bench in *Bhaunath Singh* v. *Kedar Nath Singh*, 13 Pat. 411 : (A. I. R. (21) 1934 Pat. 246 F. B.) and it is urged that the Civil Procedure Code provides only for the execution of a decree; a decree not having been prepared as yet, that execution will not lie. The Full Bench was concerned with a point of limitation, as to whether an application under S. 144 is governed by Art. 181 or Art. 182 of the Schedule to Limitation Act. They held that Art. 182 applies, inasmuch as an application for restitution is intended to give effect to the decision by which the decree which was challenged is reversed. This does not mean, however, that such an application is governed by all the rules in the Civil Procedure Code relating to execution in the ordinary course. Courtney-Terrell, C. J. in the course of his judgment, pointed out on the contrary that the procedure for dealing with such applications differs in some respects from the procedure for carrying out other decrees of the Court.

[5] The second objection urged was of a technical nature, namely, that the application as made to the Subordinate Judge did not specify the property of which restitution was sought. It is asked how is it possible for the Court to know

which property to make restitution of, unless the application specifies the property. This is urged as another reason why an application of this kind, made before the preparation of the decree, must be treated as premature. The answer to this objection is that the defendant-applicant was merely asking for restoration of property, possession of which had been given by the Court itself to the plaintiff; therefore, the records necessary for the Court to ascertain the identity of the property must have been available to the Court. Further, for identifying the property, the decree of the appellate Court would be of no use. It is the decree of the original Court which specifies the subject-matter of the suit, and so, the identity of the property could have been established before the Subordinate Judge, if necessary, by the production of the Subordinate Judge's own decree.

[6] The third contention based on the distinction drawn by the Civil Procedure Code between a judgment and a decree at first impressed me as one of substance. A decree is defined as

"the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit,"

and a judgment as "the statement given by the Judge of the grounds of a decree or order"; the judgment, therefore, merely gives the reasons and it is the decree which contains the order, and there being no decree yet in F. A. No. 8 of 1945, there is no operative order and the decree of the Subordinate Judge cannot yet be regarded as having been reversed. This contention is supported at first sight by various subsequent provisions in the Code. Under O. 20, R. 4, the judgment

"shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision,"

whereas, under R. 6, the decree, in addition to certain other particulars, "shall specify clearly the relief granted and other determination of the suit". Again O. 41, R. 31, provides that the judgment of the appellate Court shall state the points for determination, the decision thereon, the reasons for the decision, and where the decree appealed from is reversed or varied, "the relief to which the appellant is *entitled*" (the italics are mine), and, under R. 32, the judgment may be "for confirming, varying or reversing" the decree from which the appeal is preferred, and it is only when there is a compromise between the parties that the appellate Court "may pass a decree or make an order". Contrasted with this is O. 41, R. 35, which requires the decree to contain "a clear specification of the relief *granted* or other adjudication *made*."

[7] On a closer analysis of these provisions, however, and on a consideration of the general scheme of the Code, I do not find it possible to accede to the contention that it is the decree and not the judgment which disposes of the case. It is true that the judgment is defined as a statement of the grounds of the decree or order, but it is required to contain the points for determination and "the decision thereon" (O. 20, R. 4). One of the points for determination in every case is whether the plaintiff or the petitioner, as the case may be, is entitled to relief, and, if he is, what that relief shall be. The word "decision" will cover the finding on this point, and that finding would amount to a decision of the suit or other proceeding before the Court. The word "decision" is clearly used in this sense in O. 20, R. 5, which speaks of "the decision of the suit" and in O. 41, R. 34, which requires a dissenting Judge to state in writing "the decision or order" which he thinks should be passed on the appeal. Coming to the definition of a decree, I would point out that it is stated to be "the formal expression of an adjudication"; it is not the adjudication but is merely indicative of what that adjudication is. In the course of argument before us, it was pointed out that execution is provided for, of the decree and not of the judgment, and that, in the event of a discrepancy between the decree and the judgment, it is not open to the executing Court to proceed on the decree, but it is necessary for the party prejudicially affected thereby to get the decree amended by the Court which passed it. This does not mean, however, that it is the decree which is the real adjudication. If it was, there would be no question of amending it. It is not open to the executing Court to go behind the decree and act upon the judgment because, by its definition, a decree conclusively determines the rights of the parties with regard to the matters in controversy in the suit. The legislature has placed upon the Court which passed the decree the duty of embodying its decision in the form of a decree. Obviously, it is not always possible for the Court when disposing of a case to pass an order complete in all its details so that, when it becomes necessary to act on that decision, it will be clear to the executing Court or other authority acting on the decision what that decision is. One simple item which ordinarily forms part of the decree is the item of costs. This is an item which has to be ascertained by a careful examination of the record. To take another instance, the decision may involve a matter of accounting. It will not always be possible for the Judge to make the necessary calculations himself and to arrive at a definite figure. He may merely indicate the lines on which the accounting should be

made, and the result so arrived at will be incorporated in the decree. Other details required in the decree are the names and particulars of the parties and specifications of the subject-matter of the litigation. Obviously the Court which passed the decree is in the best position to give these particulars and to determine what is the real effect of the decision contained in the judgment. It is, therefore, that, in the case of discrepancy between the judgment and the decree, the executing Court cannot go behind the decree, and the party aggrieved must seek amendment of the decree. As I have remarked, the question of amendment would not arise if the decree was itself the adjudication. It is true that S. 152, Civil P. C., provides for amendments in judgments, but this is confined to clerical or arithmetical mistakes; but, if there is a mistake of substance, the remedy is by "review of judgment". This incompleteness of the judgment and the necessity for a decree giving a formal expression to the adjudication explains why the Code has provided for the execution of decrees and for an appeal against a decree; to give effect to the decision, the executing Court must know exactly what the decision is, and, to deal with the appeal, the appellate Court must know who the parties are and what the subject-matter of the suit is. That the decree is subordinate to the judgment and that it is the judgment and not the decree which disposes of the case is made clear by the fact that the decree is required to be in agreement with the judgment and to bear the date of the day on which the judgment was pronounced although, ordinarily, it is not possible for the decree itself to be drawn up and signed on that very day. The validity and effect of the decision are not affected by a Judge vacating office after pronouncing judgment or by the Court itself ceasing to exist (*Vide* O. 20, R. 8).

[8] That the Code itself regards the decision as operative from the moment of the pronouncement of the judgment appears from sub-r. (1) of R. 11 of O. 21, under which the Court at the time of pronouncing judgment for the payment of money may order immediate execution by the arrest of the judgment-debtor. It is noticeable that the sub-rule provides for this action to be taken by the Court "at the time of the passing of the decree", although it is not likely, nor is it contemplated by the forms of decrees prescribed in App. D of the Code, that a decree will have been drawn by at that time. Therefore, the Court pronouncing judgment may proceed as if there is an operative decree although a formal decree has not been drawn up. In *Golam Gaffar* v. *Goljan Bibi*, 25 Cal. 109. Banerjee J., went so far as to suggest that, in the unlikely event of a decree not having been prepared during the period of three months following the pronouncement of judgment, it would be open to the successful party to save limitation by applying for execution without the decree. Some support for this suggestion may be found in sub-r. (3) of R. 11 of O. 21, which indicates that a Court may entertain a petition for execution without a copy of the decree sought to be executed. For the purposes of the present case, however, it is unnecessary to express an opinion on the correctness of the view expressed by Banerjee J. My view, that the adjudication is made by the judgment and not by the decree, is supported by the fact that limitation for the execution of a decree runs not from the date on which the decree is signed but from the date of the pronouncement of the judgment.

[9] What I have said above regarding the meaning of the word decision, applies also to O. 41, R. 31. Where the appellate Court is not interfering with the decree of the Court below, all that is necessary is that it should be stated in the form of a decision that the appeal be dismissed or that the decree of the Court below be confirmed. In the case of a decree of the subordinate Court being reversed or varied, it becomes necessary that the relief which the appellant is to get should be specified. This is, therefore, provided for in the rule. What the rule contemplates is not merely a specification of what relief the appellant should get but that the judgment, in fact, purports to grant that relief. It is in the light of these observations that O. 41, Rr. 32 and 35 should be read.

[10] The contentions on behalf of the appellant have even less force with reference to a decision of this Court than they would have with reference to a decision of a subordinate Court. This is by reason of O. 49, R. 3, under the provisions of which a chartered High Court is not affected, in the exercise of its ordinary or extraordinary original civil jurisdiction, by Rr. 1 to 8 of O. 20 and, in the exercise of its appellate jurisdiction, by R. 35 of O. 41. The provisions as regards the preparation of decrees in this Court are contained in Chap. VIII of the Rules of the High Court, to the rules in which Chap. I shall refer for what immediately follows. Under R. 5, every judgment delivered and every order passed by the Court shall be recorded by a judgment writer except when the Court delivers a written judgment. The judgment or order so recorded is required to be filed with the paper-book and, at the end of the record so prepared, is to be entered the date of the passing of the order or the delivery of the judgment (R. 6). The

Bench Clerk is then to submit the judgment or order which has been recorded for signature by the Judge or Judges who delivered or passed it,

"unless such Judge or Judges otherwise order or have resigned or proceeded on leave, or are absent on account of illness or any other cause (R. 7)."

There is no provision as to what will happen in these exceptional cases, and it is not necessary for the present case to consider what will happen. Then come the provisions for the preparation of "decrees and orders;" apparently, all decisions of this Court are to be given a formal expression. The responsibility for doing this is placed on the Deputy Registrar. He will give the parties an opportunity of objecting to the decree or order which is drawn up and, in the case of such an objection being made, will obtain the orders of the Bench. The decree or order, when drawn up, will be signed by the Deputy Registrar, and will bear the date of the day when the judgment was delivered (R. 14). The formal decree in this Court, therefore, need not even come before the Bench and will not bear the signature of any Judge. In these circumstances. I do not find it possible to hold that it is the decree and not the judgment which is the adjudication in the case.

[11] Our attention has been drawn to *Gola Ram* v. *Ganga Ram*, A. I. R. (7) 1920 Lah. 395: (1 Lah. 223), in which Scott-Smith and Le Rossignol JJ., following the observations of Piggot J. in *Dulin Golab Koer* v. *Radha Dulari*, 19 Cal. 463 (F.B.), held that a paragraph in a judgment not drawn up in the form of a decree, and not embodied in a separate form, is not a decree within the terms of the Code of Civil Procedure. The question before their Lordships was whether an appeal lies against an order in a judgment not drawn up in the form of a decree. Under the express provisions of the Code of Civil Procedure, it does not, because O. 41, R. 1 expressly requires that

"the memorandum shall be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded."

It is a point for remark that *Dulhin Golab Koer's case*, 19 Cal. 463 (F.B.) was itself a case of this kind and that, in the absence of objection on the point, the Full Bench held that an appeal lay. These decisions, however, do not concern us. We are dealing with a proceeding under S. 144, which section does not in terms require a decree to give the Court jurisdiction to act. All that it requires is that "a decree is varied or reversed." In the view which I have taken of the effect of the pronouncement of judgment, it must be held that the decree of the Subordinate Judge has been reversed. The Subordinate Judge, therefore, had jurisdiction to make restitution under the provisions of this section.

[12] **Jamuar J.**—I agree.

D.R.R. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 333 *[C. N. 78.]*

IMAM AND NARAYAN JJ.

Balmakund—*Appellant* v. *Firm Pirthiraj Ganesh Das*—*Respondent.*

A. F. O. D. No. 266 of 1946, D/- 21-2-1950.

(a) Civil P. C. (1908), O. 21, R. 50 (2) — Order granting leave under sub-rule — Application to revoke order—Dismissal—Effect.

Where a partner of a judgment-debtor firm makes an application for revoking the order granting leave for executing the decree against him and that application is rejected on its merits, it is not open to him to contend that there was no decree against him and that the execution sale has not conveyed any title to the auction-purchaser with regard to the properties in suit. [Para 5]

Anno. C. P. C., O. 21, R. 50, N. 6.

(b) Civil P. C. (1908), Ss. 11 and 47 and O. 21, R. 22 — Objection to execution under S. 47 — No objection as to want of notice under O. 21, R. 22 raised—Property sold in execution—Suit to declare sale null and void—Suit, if barred—Objection as to notice, if can be raised — Sale without notice, if without jurisdiction.

A decree was passed against a firm and it was sought to be executed by the sale of the properties of the plaintiff who was a partner of the firm. The plaintiff contested the decree-holder's claim in the execution proceeding by raising objections under S. 47 and after sale by making an application under O. 21, R. 90. But neither in S. 47-proceeding nor in the proceeding under O. 21, R. 90 did he raise the point that the execution case was not maintainable because no notice under O. 21, R. 22 had been issued. The plaintiff having raised this point in a suit for a declaration that the execution sale of his property was null and void :

Held, (1) that a proceeding under S. 47 can be treated as a suit and a suit can be treated as a proceeding, and because there was a determination under S. 47 of the objection raised by the plaintiff the present suit could be said to be barred ;

(2) that as objection regarding the non-issue of notice under O. 21, R. 22, was not raised in the S. 47-proceeding, it could not be raised in the present suit ;

(3) that even if it was open to the plaintiff to raise the point, it could not be said that the executing Court had no jurisdiction to sell the property, because no notice had issued by it according to the provisions of O. 21, R. 22. [Para 8]

Anno. C. P. C., S. 11, N. 23, Pt. 11; O. 21, R. 22 N. 5, Pt. 18.

(c) Civil P. C. (1908), O. 21, R. 22 (3) (Bihar amendment)—Sub r. (3) if retrospective.

In enacting sub-r. (3) the Legislature contemplated to explain their intention with regard to the provisions contained in O. 21, R. 22, which had been the subject-matter of interpretation in various cases decided by the High Courts and also by the Judicial Committee. The sub-rule is, therefore, retrospective. [Para 9]

(d) Interpretation of statutes—Retrospective operation—Statute dealing with procedure.

The provisions of a statute cannot be applied retrospectively in the absence of express enactment or necessary intendment. But the provisions of a statute

dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them. No person can have a vested right in a course of procedure, and it is an elementary principle that a plaintiff or a defendant has the right of prosecution or defence in the manner prescribed, for the time being, by or for the Court in which he sues, and if there is an act which alters that mode of procedure he has no other right than to proceed according to the altered mode. [Para 9]

Anno. C. P. C., Preamble N. 3, Pts. 7 to 12.

(e) Interpretation of statutes — Retrospective operation—Alteration in procedure.

The general principle is that alteration in a procedure is retrospective unless there be some good reasons against it. Where a statute is passed for the purpose of supplying an omission in a former statute or for explaining a former statute, the subsequent statute relates back to the time when the prior statute was passed. [Para 9]

Anno. C. P. C., Preamble N. 3, Pts. 7 to 12.

S. C. Mazumdar—for Appellant ; N. N. Sen—for Respondent.

Narayan J. — This is a plaintiff's appeal arising out of a suit in which a declaration was sought that the execution sale of the properties which are the subject-matter of the suit was null and void and that the defendant firm had acquired no title to them by virtue of the purchase at the court sale. There was also a prayer for recovery of possession of the properties in question in case the plaintiff was found to be out of possession. The decree in execution of which the properties were sold had been obtained by the firm Pirthiraj Ganesh Das (the respondent in this appeal) against the firm Ganpatrai Balabux in Suit No. 56 of 1926 of the Original Side of the Calcutta High Court, and on leave having been obtained from that Court, according to the provisions of sub.r. (2) of R. 50 of O. 21, Civil P.C., and on the decree having been transferred to the Ranchi Court, it was executed in that Court against the appellant, and the properties in suit were sold on 3-9-1936 and purchased by the respondent firm who were the decree-holders. Thereafter this appellant filed an application under O. 21, R. 90, Civil P. C., for setting aside the sale, but his application was dismissed after contest by the respondent. He then instituted the suit out of which this appeal arises and sought to impugn the sale on various grounds.

[2] The defendant firm resisted the plaintiff's claim and contended that the sale at which they had purchased the properties was a valid sale and that the present suit was barred according to the provisions of O. 21, R. 92 (3), Civil P. C.

[3] The appellant in this Court was constrained to abandon the several contentions which he had pressed with vehemence in the Court below, and his counsel confined his argument only to the following two points : (1) That there was no decree against this appellant at all and his separate properties could not, therefore, be sold in execution of that decree; and (2) that the executing Court had no jurisdiction to sell the properties in question, because no notice had been issued by it according to the provisions of O. 21, R. 22, Civil P. C.

[4] Before I give my finding on the two issues canvassed in this Court, it is necessary to state some more facts. The decree that had been passed by the High Court of Calcutta had been transferred to the Ranchi Court for execution, and the first application for execution had been filed some time in the year 1928. In that execution case, which was Ex. Case No. 80 of 1928, the decree-holders sought to execute the decree against this appellant as a partner of the judgment-debtor firm. The appellant appeared in that execution case and filed an objection which was registered as an objection under S. 47, Civil P. C. That execution case was, however, dismissed on 4-1-1932 and along with the execution case the objection case was also dismissed without adjudication. While these execution and miscellaneous cases were pending in the Ranchi Court, this appellant filed a title suit in the High Court of Calcutta to set aside the *ex parte* decree that had been passed in 1926. It appears that this suit was dismissed according to the provisions of O. 9 R. 8, Civil P. C., and an application for rehearing filed by this appellant according to the provisions of O. 9 R. 9, Civil P. C., was also dismissed Thereafter, an application was filed by the decree-holder firm for leave to execute the decree against this appellant under the provisions of O. 21, R. 50 (2), Civil P. C., and leave was granted. The appellant then moved the Court for revoking the order granting the leave, but his application was dismissed. In September 1934 the execution case in which the properties in suit were sold was filed in the Ranchi Court and in this case the appellant filed a petition of objection under S. 47, Civil P. C. This application was disposed of by the learned Subordinate Judge after a keen contest by the decree-holder, and the judgment of the learned Subordinate Judge is Ex. A in this case. All the contentions raised by this appellant were rejected by the learned Subordinate Judge, and the execution case proceeded with the result that the properties in suit were sold on 3-9 1936. After the sale of the properties the appellant filed an application under O. 21, R. 90, Civil P. C., which was dismissed on 14 6-1938 after contest by the decree-holder-auction-purchaser. The suit out of which this appeal arises was filed on 15-1-1944, and naturally one of the most important pleas taken up by the defendant was that the suit was not maintainable in view of the bar provided by R. 92 of O. 21, Civil P. C.

[5] In my opinion, there is no substance in the contention of this appellant that there was

no decree against him which could be executed in Ex. Case No. 61 of 1934 in which his properties were sold. Order 30, Civil P. C., contains the provisions according to which suits by or against firms can be prosecuted, and R. 3 of O. 30 lays down that where persons are sued as partners in the name of their firm, the summons shall be served either upon any one or more of the partners, or at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there. The provisions for the execution of a decree passed against a firm are contained in R. 50 of O. 21, Civil P. C. According to sub-r. (1) (c) execution may be granted against any person who has been individually served as a partner with a summons and has failed to appear. There are two sub-rules under R. 50 and they are in the following terms:

Sub-rule (2)—"Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-r. (1), cls. (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined."

Sub-rule (3)—"Where the liability of any person has been tried and determined under sub-r. (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

As already pointed out, it is common ground that leave had been granted for executing the decree against this appellant, and after the leave had been granted the appellant made an application to the Court for revoking the order granting the leave. This application was dismissed and the decree was consequently executed against this appellant as a partner of the firm. If the appellant had made an application for revoking the order granting the leave and that application was rejected on its merits, then it is not open to him now to contend that there was no decree against him and that the execution sale has not conveyed any title to the auction-purchaser with regard to the properties in suit. The simple fact that leave as contemplated by sub-r. (2) had been granted and the application of the appellant for revoking the leave had been refused is sufficient to dispose of the first contention raised by the appellant before us. In this connection it is also important to note that in none of the proceedings uptill now this appellant has seriously urged that he is not a partner of the firm against which the decree executed in Ex. Case No. 61 of 1934 had been obtained. It is admitted that though he instituted a suit in the year 1931 for setting aside the decree, even in the plaint of that suit he did not urge that he was not a partner of the firm. It will appear from a perusal of the judgment, Ex. A, which is the judgment passed in the miscellaneous case under S. 47, Civil P. C., that even in the objection which the appellant had filed in the previous execution case, namely, Exn. Case No. 80 of 1928, he did not urge that he was not a partner of the firm Ganpatrai Balabux. The learned Subordinate Judge after a lengthy discussion came to the conclusion that even in Misc. Case No. 1 of 1935 which the judgment-debtor had filed in Exn. Case No. 61 of 1934, he considered himself to be a partner of the firm. The learned Subordinate Judge has observed as follows :

"However the discussions above show that objector still considers he is entitled to share in the judgment-debtor firm and as such, for the purpose of this case at least, he is a partner of that firm."

It is no less important that neither in the plaint of this suit nor in the grounds of this present appeal the appellant has urged that he is not a partner of the firm Ganpatrai Balubux. There is, therefore, no merit in the contention that there was no decree against this appellant which could be executed against him, and in execution of which his properties could be sold.

[6] Admittedly, the appellant had filed an application under O. 21, R. 90, Civil P. C. after the sale of his properties, and his application was considered on its merits and dismissed on 14-6-1938. Sub-rule (3) of O. 21 R. 92, lays down that no suit to set aside an order made under this rule shall be brought by any person against whom such order is made. The present suit is, therefore, not competent unless the appellant is able to show that the executing Court had no jurisdiction to sell the properties and that the sale is a nullity. It is, therefore, that the appellant has raised the contention that the sale is without jurisdiction because no notice under O. 21, R. 22, Civil P. C., was issued by the executing Court. It is, of course, common ground that no notice under O. 21, R. 22, had been issued, though according to sub-r. (1) of R. 22 of O. 21, it was necessary for the Court to issue a notice to the person against whom execution had been applied for requiring him to show cause why the decree should not be executed against him. The question, therefore, arises whether in the absence of the notice the Court had jurisdiction to sell the properties of this appellant. A Full Bench of this Court held in *Ajablal* v. *Haricharan*, 23 Pat. 528 : (A. I. R. (32) 1945 Pat. 1 F. B.) that a sale held in execution of a mortgage decree after the death of the judgment-debtor but after the service of all the necessary processes, including the sale proclamation, without any notice to his

legal representative is void in the sense that it is not valid against the legal representative. Chatterji J., Meredith J. (as he then was), and Sinha J. constituted the Full Bench. Chatterji J. expressed his views in the following terms :

"I must observe that the word 'void' when used with reference to a sale, is not always used in the same sense. A sale may be void in the sense that it is a complete nullity, in which case the purchaser acquires no title at all, even against a trespasser. Again a sale may be void in the sense that it is not valid and operative against some particular person, in which case the purchaser requires no valid title against that particular person, though he may acquire a title quite good and effective against a trespasser. A sale held without issue of notice under O. 21, R. 22 is a void sale of the latter class as will appear from the following observation of Sir George Rankin C. J. in *Chandra Nath* v. *Nabadwip Chandra*, 35 Cal. W. N. 9 : (A. I. R. (18) 1931 Cal. 476), already cited, 'the sale which follows will be without jurisdiction in the sense that even if the sale is to a stranger, the sale will not be binding or valid.' A sale of this class is called a 'void sale' as distinguised from a 'voidable sale' which means that the sale is valid and binding against the particular person concerned, unless and until it is set aside by him in an appropriate proceeding. It will be noticed that in all those cases, cited above, in which the sale was held to be void for want of notice under O. 21, R. 22 the question arose between the auction-purchaser or persons deriving title from him on the one hand and the judgment-debtor or his legal representative on the other. In this connection it will not be out of place to refer to the analogy of a sale in execution of a mortgage decree to which a subsequent transferee is not a party. The sale, though otherwise effective, is not valid and operative against the subsequent transferee. It is not void in the sense that it is a complete nullity. Nor is it merely voidable."

Thus, his Lordship was not of the view that a sale without the issue of a notice under O. 21, R. 22, Civil P. C., is a complete nullity, and he referred with approval to the decision of Rankin C. J., in *Chandra Nath* v. *Nabadwip Chandra Dutt*, 35 Cal. W. N. 9 : (A. I. R. (18) 1931 Cal. 476). Because the decision of Rankin C. J. and C. C. Ghose J., has been referred to with approval not only in the Full Bench case of *Ajablal* v. *Haricharán*, (23 Pat. 528 : A. I. R. (32) 1945 Pat. 1 F. B.), but also in a later Full Bench case *Ramlal Sahu* v. *Mt. Ramia*, A. I. R. (34) 1947 Pat. 454 : (26 Pat. 340 F. B.), I should like to quote a passage from the judgment of his Lordship, Rankin C. J., and especially because the observation of his Lordship if applied to the facts of this case would, to my mind, be conclusive of the point raised before us. Rankin C. J., quoted the following observation of Kulwant Sahay J. in *Fakhrul Islam* v. *Bhubaneshwari Kuer*, 7 Pat. 790 : (A. I. R. (16) 1929 Pat. 79) which case had been decided by a Division Bench of this Court :

"All that O. 21, R. 22 requires is that an opportunity should be given to the judgment-debtors against whom execution is taken out more than a year after the decree to show cause why execution should not proceed."

And then his Lordship proceeded as follows :

"In my judgment, that is the substance and the meaning of the requirement. I do not in any way seek to throw doubt upon the proposition that where such a notice has not issued and the party who is entitled to notice does not in substance get notice and is not given or does not take an opportunity to object to the execution of the decree, the sale which follows will be without jurisdiction in the sense that, even if the sale is to a stranger, the sale will not be binding or valid. The parties in the present case have been litigating actively with each other upon the question whether this execution should proceed and how it should proceed. I have pointed out that, at one stage of the case, the matter was by agreement referred to a gentleman to report as to the amount of the valuation to be inserted in the proclamation of sale. In the appeal which came previously before this Court there was an affirmation that the sale was to take place and the proclamation was to issue. It appears to me to be merely piling unreason upon technicality to hold upon the circumstances of this case that it is open to the judgment-debtors on these grounds to object to the jurisdiction of the Court because they have not got a formal notice to do something, namely, to dispute the execution of the decree when in point of fact they were busy disputing about it in all the Courts for the best part of the last two years. I decline to push the doctrine so far as that and it seems to me that the execution should proceed."

[7] It seems that the Privy Council decision in *Raghunath Das* v. *Sundar Das*, 41 I. A. 251: (A. I. R. (1) 1914 P. C. 129) had been pressed upon their Lordships of the Calcutta High Court, and it is therefore that Rankin C. J., observed that the abstract logic of the case of *Raghunath Das* v. *Sunder Das*, (41 I. A. 251 : A. I. R. (1) 1914 P. C. 129) should not be pushed to a ridiculous extreme. As a matter of fact, the following observation of the Judicial Committee in *Raghunath Das* v. *Sunder Das*, (41 I. A. 251 : A. I. R. (1) 1914 P. C. 129) leaves no room for doubt in my opinion that the principle laid down by their Lordships cannot be applied to a case where a judgment-debtor had not only knowledge of the execution proceeding but had litigated actively and put forward all possible objections for defeating the execution case :

"A notice under that section should have called upon the official assignee to shew cause why the decree should not be executed against him. Had the official assignee been served with such a notice, it is at least probable that he would, as in their Lordships' opinion he certainly could, have shewn good cause why the decree should not be executed, the property having under the Act and vesting order been transferred to him for the benefit of the creditors of the insolvent generally. It is possible that the notice might be upheld as a proper notice preliminary to adding the official assignee as a party under S. 32, if that section were applicable, but in order to bind a party added under that section, he has, after being added, to be served with a summons to appear and answer, and it is not suggested that any such summons was served. Similarly, it is not suggested that any order to carry on proceedings was obtained under S. 372. Having obtained leave in that behalf the respondents proceeded to

serve the notice in question, and their Lordships will assume that the notice was duly served on the official assignee. The official assignee took no notice of it, possibly because he had no objection to being substituted as a party, and expected to be served with notice of any further application against him. There is no evidence that he knew that an order for sale had been already made."

This cannot be regarded as a case in which the appellant did not know that an order for sale had been made. A perusal of the judgment of the learned Subordinate Judge, EX. A, in the miscellaneous case under S. 47, Civil P. C., will show how actively he contested the decree-holder's claim in the execution proceeding and that he raised all possible objections which could be raised for defeating the decree-holder's claim. But neither in the S. 47-proceeding nor in the proceeding under O. 21, R. 90, Civil P. C., did he raise the point that the execution case was not maintainable, because no notice under O. 21, R. 22, had been issued. The Judicial Committee have held in a very recent case, *Shivraj Gopalji* v. *Edappavath Ayisa Bi*, A. I. R. (36) 1949 P. C. 302 : (1949-2 M. L. J. 493) that where in an earlier execution proceeding a decree-holder could have raised a plea that the judgment-debtor had an interest in certain property which could be attached under his decree but that the plea was not raised through his own default and the execution was dismissed, the dismissal operates as *res judicata* in the subsequent execution proceedings and even apart from the provisions of S. 11, Civil P. C., it should be contrary to the principle to allow him in fresh proceedings to renew the same claim, namely, that the properties in question were properties liable to attachment. If the principle of res judicata is applicable in the case of a decree-holder in such circumstances, it will also be applicable in the case of a judgment-debtor in similar circumstances; and we cannot in this case overlook the provisions of sub-s. (1) of S. 47 which runs as follows:

"All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

[8] A proceeding under S. 47 can be treated as a suit and a suit can be treated as a proceeding, and because there was a determination under S. 47, Civil P. C., of the objections raised by this appellant, the present suit can be said to be barred and according to the principle laid down by their Lordships if the objection regarding the non-issue of notice under O. 21, R. 22, Civil P. C., was not raised in S. 47-proceeding, it cannot be raised now. Even if, however, it is open to the appellant to raise this point, the dictum laid down by Rankin C. J. in *Chandra Nath Bagchi's case*, 35 Cal. W. N. 9: (A. I. R. (18) 1931 Cal. 476) referred to with approval in the two Full Bench cases of this Court is a sufficient answer to the contention of the appellant before us that the sale was without jurisdiction, because no notice under O. 21, R. 22, had been issued. Meredith J. in the case of *Ajablal* v. *Haricharan*, 23 Pat. 528: (A. I. R. (32) 1945 Pat. 1 F. B.) went further than Chatterji J. and observed as follows:

"As I read his judgment (judgment of Chatterji J.), he is also of opinion that the sale is not a nullity. He holds it void merely in the sense that it is not binding upon the legal representative of the judgment debtor. He suggests it is something that can be validated by confirmation if the legal representative is substituted before that is done. He does not seem to regard it as something that can be attacked collaterally so that any one can treat the purchaser as a trespasser. He holds indeed that not even the judgment debtor's legal representavive can ignore it and eject the purchaser as a trespasser, because the legal representative can only resist the purchaser's possession, or recover possession if he has lost it, by paying up the redemption money.

Definitions of the words 'void' and 'voidable' may differ, and it seems to me the question whether the sale is to be called void or voidable is consequently not so important. The crucial question is whether it is something that has to be set aside or something that can be ignored. That, to my mind, is equivalent to the question whether it operates or does not operate, unless and until challenged, as a transfer of the title. I have adopted the definition that a 'void sale' is one which can be attacked collaterally as having transferred no title at all to the purchaser, and can be ignored by the judgment-debtor or his legal representative, or whoever was the owner of the property at the time of the sale;

* * * *

My answer to the question referred to the Full Bench is that in none of the circumstances which can arise within the terms of the reference is the sale void in the sense that it can be attacked collaterally or ignored. The sale may, however, be voidable upon a proper application or suit as the case may be."

Sinha J. agreed with Chatterji J. in answering the question referred to the Full Bench and held that the sale contemplated in the question was void as against the party not before the Court in the sense that it was not valid and operative against him. None of the Judges was thus of the opinion that the sale in the absence of a notice under O 21, R. 22, Civil P. C., should be regarded as a complete nullity. In the second Full Bench case in which the provisions of O. 21, R. 22, came to be considered, the judgment of the Court was delivered by Das J., and the following observation of his Lordship appears to me to be important for our present purpose :

"It is, no doubt, the duty of every Court to see that a notice issued by it is served in the manner required by law. This, however, is not a matter of jurisdiction; it is a matter between the Court and its officers. If there is any irregularity of service, the person aggrieved is not without a remedy, and it cannot be said that the object of the rule is frustrated. The person affected by the irregularity may apply for setting aside the sale by taking appropriate proceeding within the time allowed

by law. There may be a case where the party entitled to a notice under O. 21, R. 22, comes to know of the execution and appears to contest it in spite of a defect in the method of service. Can it be said in such a case that the object of the rule is frustrated and that the notice must again be served properly? As Rankin C. J. had observed in *Chandra Nath* v. *Nabadwip Chandra*, 35 C. W. N. 9: (A. I. R. (18) 1931 Cal. 476) to hold so would be 'to push the abstract logic of the case in *Raghunath Das* v. *Sundar Das*, 41 I. A. 251: (A. I R. (1) 1914 P. C. 129) to the ridiculous extreme,' and would be 'piling unreason upon technicality'."

I need not refer to the earlier decisions of this Court or the Calcutta High Court with regard to the provisions contained in R. 22 of O. 21, Civil P. C., when with the help of these latest decisions the point raised before us can easily be determined.

[9] A new sub-rule has now been added to R. 22, and the amendment has been notified in the Bihar Gazette, dated 14-5-1947, under Notifn, No. 89-R/XII-6-47, dated 8-5-1947. The new sub-rule is sub-r. (3) of R. 22, and it lays down as follows:

"Proceedings held in execution of a decree shall not be invalid solely by reason of any omission to issue or failure to serve a notice under sub-r. (1) or to record reasons where such notice is dispensed with under sub-r. (2) unless the judgment-debtor has sustained substantial injury thereby."

It was, however, contended by the appellant's learned counsel—contention which cannot be regarded as absolutely without substance—that this rule can have no retrospective effect. Certainly, the provisions of a statute cannot be applied retrospectively in the absence of express enactment or necessary intendment. But can it be said about this provision that it relates to an existing right? It is either a provision dealing with matters of procedure or it merely interprets the provisions which already existed, and most probably this sub-rule was added to the existing provision with the intention that the Courts of Justice may not hereafter feel any difficulty in interpreting it. As was pointed out by Khaja Mohamad Noor J., in *Sourendra Mohan* v. *Secy. of State*, 14 Pat. 283 : (A. I. R. (21) 1934 Pat. 701) :

"It is a well settled principle of law that the Legislature must be taken to be aware of the interpretation of the statute enacted by them by the Courts; and if they find that the interpretations by Courts of justice are not in conformity with their intention they should amend it to bring it in conformity with their intention."

The sub-rule merely lays down how the Courts of justice should deal with an objection to the effect that proceedings in execution should be regarded as invalid, because a notice under O. 21, R. 22, has not been issued, or where while dispensing with the notice the Court has failed to record reasons for not issuing such a notice. The execution proceeding had terminated long ago, and even the application under O. 21, R. 90, Civil P. C., filed by this appellant was dismissed in June 1938. Because of the bars provided by S. 47 and O. 21, R. 92, Civil P. C., the present suit was not maintainable, and if in the present suit the same questions are raised which could have been raised in the proceeding under S. 47, Civil P. C., or in the proceeding under O. 21, R. 90, I do not think that the new sub-rule which lays down that proceedings shall not be invalid solely by reason of an omission to issue a notice under sub-r. (1) should be ignored while determining the question how far the execution proceeding and the sale held in execution of the decree can be held to be invalid. As laid down by their Lordships of the Judicial Committee in *Delhi Cloth & General Mills Co. Ltd* v. *Income tax Commissioners, Delhi*, A. I. R. (14) 1927 P. C. 242 : (9 Lah. 284) the provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them. No person can have a vested right in a course of procedure, and it is an elementary principle that a plaintiff or a defendant has the right of prosecution or defence *in the manner prescribed for the time being*, by or for the Court in which he sues, and if there is an Act which alters that mode of procedure, he has no other right than to proceed according to the altered mode. If in spite of being unsuccessful in the proceedings under S. 47 and O. 21, R. 90, Civil P. C., this appellant has now chosen to file a suit which is apparently not maintainable. I do not think that he can get over the interpretation which has been placed on the provisions of O. 21, R. 22 by the new sub-rule which, in fact, lays down as to how those provisions have to be interpreted in a case in which an execution is challenged as invalid on account of the non-issue of a notice. The general principle certainly is that alteration in a procedure is retrospective unless there be some good reasons against it. Where a statute is passed for the purpose of supplying an omission in a former statute or for explaining a former statute, the subsequent statute relates back to the time when the prior statute was passed. "Baron Parke", said Lord Hatherley in *Pardo* v. *Bingham*, (1869) 4 Ch. 735 at p. 740 : (20 L. T. 464) "did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was, whether the Legislature had sufficiently expressed that intention. In fact, we must look to the general scope and purview of the statute and at the remedy sought to be applied, and consider what was the former state of the law, and

what it was that the legislature "contemplated." Certainly, in this case the Legislature contemplated to explain their intention with regard to the provisions contained in O. 21, R. 22, which had been the subject-matter of interpretation in various cases decided by the High Courts and also by the Judicial Committee. Even if, however, this new sub-rule cannot be said to have retrospective effect, for reasons already given, I am not prepared to hold in this case that the sale of the judgment-debtor's property is a nullity because no notice under O. 21, R. 22, had been issued in the execution case against him. My conclusion, therefore, in agreement with the learned Subordinate Judge, is that the sale is not without jurisdiction because the notice under O. 21, R. 22 had not been issued.

[10] Though it is not necessary, I should mention that the final decree in the partition suit between the plaintiff and the other members of his family was passed on 12-12-1936, that is, after the impugned sale in Ex. Case No. 61 of 1936 had taken place and, therefore, the decree-holder was not bound to proceed against the properties as allotted to the plaintiff on partition. The appellant's learned counsel did not make any point because of the final decree in the partition suit, and as I have already stated, except the two contentions which have been discussed above, no other contention has been urged before us in the appeal.

[11] In the result, the appeal fails and is dismissed with costs.

[12] **Imam J.** — I agree to the order that the appeal be dismissed. I would not like to express any definite opinion, as yet on the new sub-r. (3) of O. 21, R. 22.

V.R.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 339 *[C. N. 79.]*

MEREDITH AND RAMASWAMI JJ.

Firm Mohar Lal Sahu and another — *Appellants* v. *Har Krishna Bhagat and others* — *Respondents.*

A. F. O. O. No. 169 of 1947, Decided on 14-9-1949.

Limitation Act 1908), Art. 183 — Revivor — What constitutes — Order granting leave under O. 21, R. 50, Civil P. C., to proceed against partners of firm does not constitute revivor.

To constitute revivor of a decree there must be expressly or by implication, a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. [Para 3]

An order by the High Court on an application by the decree-holder for leave under O. 21, R. 50, Civil P. C., to proceed against certain partners of a firm granting such leave does not 'revive' the decree within the meaning of Art. 183, Limitation Act: *Case law reviewed.* [Para 9]

Anno. Lim. Act, Art. 183, N. 10, Pt. 8.

L. K. Jha and Nripendra Nath Roy — for Appellants; S. C. Misra and B. K. N. Singh — for Respondents.

Ramaswami J. — The sole question in this appeal is whether the execution of a decree made by the Calcutta High Court on the original side is barred by Art. 183, Sch. I, Limitation Act.

[2] The decree was granted by the Calcutta High Court on 12-7-1929. The present application for execution was made on 1-3-1946, in the Bhagalpur Court after a lapse of twelve years. But on 3-3-1944, the decree-holder had applied to the Calcutta High Court for leave under O. 21, R. 50, Civil P. C., to proceed against certain partners of the firm. On 3-3-1944, the High Court granted the leave. On behalf of the appellants the argument is addressed that the order of the Calcutta High Court "revived" the decree within the meaning of Art. 183, Limitation Act.

[2a] The question, therefore, must be determined on the words of Art. 183, as a matter of statutory construction.

[3] There is no definition of the term "revivor" in the Limitation Act, but the historical review contained in the judgments in the cases of *Ashootosh Dutt* v. *Doorga Churn*, 6 Cal. 504: (8 C. L. R. 23), *Futteh Narain* v. *Chundrabati Chaudhrain*, 20 Cal. 551 and *Jogendra Chandra Roy* v. *Shyam Das*, 36 Cal. 543 : (1 I. C. 168) shows beyond doubt that the procedure for revivor of judgment on the original side of the Calcutta High Court was substantially analogous to the writ of *scire facias* under the common law. That procedure was subsequently embodied in Ss. 248 and 249, Civil P. C., 1882, and was reproduced as O 21, Rr. 22 and 23 of the Code of 1908. Under these provisions, where an application for execution is made, a notice is required to be issued to the person against whom execution is applied for, if more than one year has elapsed from the date of the decree. The notice calls upon him to show cause why the decree should not be executed against him. If he does not appear or does not show cause to the satisfaction of the Court, the Court orders the decree to be executed. The order for execution thus made operates as a revivor, but the mere issue of the notice does not by itself produce that consequence *Monohar Dass* v. *Futtah Chand*, 30 Cal. 979: (7 C. W. N. 793). The true rule has been enunciated in *Kamini Debi* v. *Agore Nath*, 11 C. L. J. 91: (4 I. C. 402), namely, that to constitute revivor of a decree there must be, expressly or by implication, a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it.

[4] In *Chutterput Singh* v. *Sait Sumari Mall*, 43 Cal. 903: (A. I. R. (3) 1916 Cal. 488 F. B.) a Full Bench of the Calcutta High Court decided that an order for transmission of a decree was not an order on an application for execution; it was a proceeding taken with a view to further action by way of execution elsewhere on which action, unless previously determined, the question of the right to execute the decree is decided. Consequently the Full Bench decided that the order made upon the application did not operate as a revivor within the meaning of Art. 183, Limitation Act.

[5] This case was expressly approved by the Judicial Committee in *Banku Behari Chatterji* v. *Naraindas Dutt*, 55 Cal. 500, in which the High Court had ordered a decree to be transmitted for execution to a district Court. Before the order was passed, the judgment-debtor appeared in the High Court and upon his petition, the decree had been varied with his consent. Even so, the Judicial Committee held that the order of the High Court did not operate to revive the decree so as to extend the time within which, under the Limitation Act, 1908, an application to enforce it must be made.

[6] Reference should be made to *Muthiar Chettiar* v *Chidambaran Chetti*, 55 Cal. 578 : (A. I. R. (15) 1928 Cal. 686) in which there was an adjudication in the execution stage of the question whether one of the judgment-debtors was a partner in the defendant firm and, as such, whether the decree was validly passed. An application for execution was made by the appellant as assignee of the decree. The application was served on Subramania who obtained a rule on motion calling upon the appellant to show cause why the decree should not be set aside and execution stayed. On 17-8-1923, it was ordered that an issue be tried as to whether Subramania was a partner in the defendant firm and that all "further proceedings in the execution should be stayed until the trial of the said issue." Apparently the validity of the decree depended upon this issue which was determined against him by an order of Thornhill J. on 20-5-1924, which declared that Subramania was a partner of the said firm and his application to set aside decree was dismissed. Rankin, C. J. and Mitter J. held that even so the adjudication by the High Court could in no sense be regarded as a determination by implication that the decree was capable of execution or that the decree-holder had a right to execute the decree, and that such an order could not revive the decree within the meaning of Art. 183, Limitation Act, 1908

[7] In support of appellant the learned Advocate-General relied upon *Bhagwan Manaji* v. *Hiraji Premaji*, A. I. R. (19) 1932 Bom. 516: (140 I. C. 519) in which an application under O. 21, R. 50, was held to be an application for execution of the decree obtained against the partnership. But the case must be distinguished, for the learned Judges were construing not Art. 183 but Art. 182 Limitation Act.

[8] On the contrary, in *Harnarain* v. *Dayabhai Hira Chand*, 19 Pat. 909: (A.I.R, (27) 1940 Pat. 596) a Division Bench of this Court held that the proceedings for obtaining leave to execute the decree against a partner of the firm under O. 21, R. 50 (2) did not operate as a revivor within the meaning of Art. 183. Limitation Act. In 1924 the decree-holder obtained decree against the judgment-debtor firm in the Bombay High Court. In 1938, the decree was transferred to the Court of the Subordinate Judge at Motihari and leave was obtained under O. 21, R. 50 (2), Civil P C., 1908, to execute the decree against Har Narain a partner of the judgment-debtor firm. But the execution case was dismissed for default. In 1937 another application for execution was filed against Harnarain, but the Division Bench held that the proceedings for obtaining leave to execute the decree would not operate as revivor and the execution was time-barred.

[9] Upon this review of these authorities, it is manifest that in the present case there has been no revivor of the decree within the meaning of Art. 183, Limitation Act.

[10] In my opinion, the order of the Subordinate Judge is correct and this appeal must be dismissed with costs.

[11] **Meredith J.**—I agree.

D.R.R. *Appeal dismissed.*

A. I. R. 38) 1951 Patna 340 *[C. N. 80.]*

SINHA AND NARAYAN JJ.

Khub Narain Missir and others —*Appellants* v. *Ramchandra Narain Dass*—*Respondent.*

A. F. O. D. Nos. 274 and 275 of 1945, D/- 25-1-1950.

(a) Civil P. C. (1908), S. 92—Charitable and Religious Trusts Act (1920)—Applicability — Trust for public purposes is essential—Burden of proof —Gifts to Mohant of an asthal—Dedication for public purposes — Use of expression 'Shriprit' or 'Vishnuprit'—Inference.

For applying Act XIV [14] of 1920 or S. 92, Civil P. C. it must be established that the trust was substantially for public purposes of a charitable or religious nature. It is not sufficient if one or some of the purposes of the trust are public. [Para 7]

To constitute a trust created or existing for a public purpose of a charitable or religious nature within the meaning of Act XIV [14] of 1920, the author or authors of the trust must be ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover, the pur-

pose of the trust, the trust property, and the beneficiaries must be indicated so as to enable the Court to administer the trust if required. [Para 7]

Where an asthal is founded by a bairagi Sadhu and there is nothing to show that the founder dedicated the temple attached to it for public use, the mere fact that during festivals and on ceremonial occasions a large number of people used to come to the temple to make offerings and to receive *prasad* cannot establish that the temple was a public institution So also the feeding of Sadhus and the distribution of alms and the entertainment of guests are inevitable in a temple and these are merely incidental to the worship of the deities. Where properties have been gifted to the Mohant of the asthal without any indication that they were dedicated for public use, the mere use of the expression 'Vishnuprit' 'Sheoprit' or Sriprit' in the deed of gift does not indicate that the gift was made for public purposes. The incidents attaching to the properties depend in each case upon the conditions on which the properties were dedicated or upon the conditions which can be gathered from the way they have been dealt with or which may be inferred from the usage and the custom of the institution.

[Paras 3, 4, 7]

Anno. C. P. C., S. 92, N. 5.

(b) Evidence Act (1872), S. 43 — Statement of facts in previous judgment cannot be used as evidence in subsequent case to decide points which are in issue in that case. [Para 6]

Anno. Evi. Act S. 43, N. 3.

B.C. De, Prem Lall and A.C. Ray — for Appellants; L. K Jha, P. Jha and Satyananda Kumar — for Respondent.

Narayan J.—Appeal No. 274 arises out of Title Suit No. 10 of 1943 and App. No. 275 arises out of Title Suit No 3 of 1943. In Suit No. 10 of 1943, which was instituted in the Court of the Subordinate Judge of Darbhanga on 8-2 1913, the plaintiff was Mahanth Ramchandra Narain Dass and the defendants were Khub Narain Missir, Ramkishun Thakur, Shubhnarain Pande and Ramsunder Pande, and in suit No. 3 of 1943, which was instituted in the Court of the District Judge of Darbhanga, the plaintiffs were one Rambihari Thakur and Khub Narain Missir, defendant 1 of Suit No. 10 of 1943. The defendants of suit No. 10 had filed an application under S. 3 of Act XIV [14] of 1920 before the District Judge of Darbhanga for directing the Mahanth to furnish accounts for being examined and audited, and the then District Judge directed the Mahanth to produce the accounts for the years 1345, 1346 and 1347. The Mahanth moved this Court in civil revision against this order, but his application was dismissed. The Mahanth then filed Title Suit No. 10 of 1943 for a declaration that the

"properties and temple appertaining to the asthal were private trust to which Act XIV [14] of 1920 was inapplicable, and that as such the order of the District Judge dated 5-7-1941 and the order of the High Court dated 18-3-1942 were illegal, *ultra vires* and void."

In the meantime Khub Narain Missir and one Rambihari Thakur had moved the Advocate-General of Bihar for giving his consent for the institution of a suit under S. 92, Civil P. C. against the Mahanth. The consent of the Advocate-General was obtained on 13-4-1943, and thereupon Khub Narain and Rambihari instituted Title suit No. 3 of 1943. While the contention of the Mahanth in the suit instituted by him was that the properties appertaining to the asthal had not been dedicated for public purpose of a charitable or religious nature, and no trust either express or constructive had been created, the case which Rambihari and Khub Narain made out in their own plaint was that the temple was a public temple and that the properties attached to it were *debottar* and trust properties. The allegations substantially were that in the said asthal there is a public temple in which the idols of Sri Ramji, Jankiji and Lachhmanji were installed, and that the said asthal owned and possessed considerable properties the income of which was spent in maintaining the asthal and acquiring other properties for religious and charitable purposes. It was further alleged that the defendant since his accession to the office of Mahanth had wasted the asthal properties and had been leading an immoral life. The plaintiffs instituted this suit as members of the Hindu public, and their alleged cause of action was that the defendant had committed breaches of the trust. The prayer was that the Mahanth be removed from the office and another suitable person be appointed in his place. It was further prayed that the Mahanth be ordered to render accounts of the funds of the asthal which had come into his hands, and if it be found that he had misappropriated any money belonging to the asthal, a decree for the recovery of the same may be passed against him personally.

[2] Both the suits were heard together by the learned District Judge, who, by his judgment dated 7-8-1945, decreed Title Suit No. 10 of 1943 which had been instituted by the Mahanth declaring that the properties detailed in the schedules attached to the plaint of the Mahanth were properties to which Act XIV [14] of 1920 was not applicable. The learned Judge dismissed Title Suit No. 3 of 1943 on the finding that it had not been established that there was a truet for public purposes of a charitable or religious nature, and that consequently S. 92, Civil P. C., was inapplicable. Rambihari Thakur and Khub Narain Missir, the plaintiffs of Suit No. 3 of 1943, have preferred F.A. No. 275 of 1945 against the decision of that suit, and the four defendants of Suit No. 10 of 1943 have preferred F. A. No. 275 of 1945 against the decision of that suit, and the principal matters of controversy in these two appeals are whether the properties mentioned in the plaint of Suit No. 10

were debottar properties and were held on trust for purposes of religious and charitable nature, and whether the Mahanth has rendered himself liable to removal from his office on account of his alleged misfeasance and malversation. One of the arguments advanced on behalf of the appellants before us was that the Court below should have in this case held that the asthal was a public institution and that the properties appertaining to it were held on trust for public purposes of a religious and charitable nature when it negatived the contention of the Mahanth that the asthal properties were his private properties. In other words, the contention of Mr. De for the appellants was that the Court below by coming to the finding that the properties were held on private trust had made out a third case. But, I think, the learned Judge has been quite careful in his statements and findings, and he has concluded his discussion on this point with the following observation:

"On a consideration of all the facts and circumstances of this case and keeping in view of the rulings referred to above, I am unable to hold that the disputed properties were held in trust for a public purpose of a charitable or religious nature. It is unnecessary for me to consider whether the properties are held in private trust or whether they are private properties of the Mahanth."

But it can, however, be legitimately contended by the appellants that the amendments which have been made in the plaint of Suit NO. 10 of 1943 go to show that the Mahanth was at first not clear regarding the stand which he should take and whether he should claim the properties as private trust properties or as his own private properties. His ultimate decision, however, was that he should claim the properties as his personal properties, and, therefore, certain important amendments were made in the plaint. For the words "religious institution" the word "temple" was substituted, and for the words "private trust properties" the words "private property" were substituted. The plaint, as it stands now, no doubt, shows that the Mahanth is claiming these properties as his private properties. But it would not be a sound contention that if the contention that the properties are his private properties is negatived, the Court must hold that these properties are held for public purposes of a charitable and religious nature. The only relief sought by the Mahanth in his own suit is that it be declared that the properties attached to the asthal and the temple are properties to which Act XIV [14] of 1920 has got no application, and this relief the Mahanth would be entitled to whether he claims the properties as his own or as private trust properties. It does not, therefore, matter much if in the beginning he claimed these properties as private trust properties and is now claiming them as his personal properties. So far as the plaintiffs of Suit NO. 3 are concerned, their action cannot succeed unless it is held that the asthal is a public institution and that the properties appertaining to it are held for public purposes of a charitable or religious nature, and the Mahanth is certainly entitled to the declaration which he seeks if the trust is not held to be a trust for purposes of a chartitable or religious nature. The difference in the wordings of the original plaint and the wordings of the amended plaint cannot, therefore, be of any assistance to the appellants in establishing the case which they have made out. I cannot agree with Mr. De that the use of the word "institution" in the original plaint indicates that there was a trust for public purposes of a charitable or religious nature. The temple would be called an institution even if there are properties appertaining to it which can be regarded as private trust properties. The whole question in this case, therefore, is whether the asthal is a public institution and the properties appertaining to it have been held for public purposes of a charitable or religious nature, and the onus is on the appellants to show that the properties have been held under a trust for public purposes. In order to determine this point we have to investigate what was the origin of this institution and how it has been developed and what has been its *raison d'etre*. As has been repeatedly pointed out, a "trust" in the sense in which this expression has been used in English law is unknown to the Hindu system. As was pointed out by their Lordships of the Judicial Committee in the well-known case of *Vidya Varuthi Thirtha* v. *Balusami Ayyar*, 44 Mad. 831 : (A. I. R. (9) 1922 P. C. 123),

"Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system: to *Brahman, Goswamis, sanyasis* etc."

Their Lordships quoted with approval the following observation of the officiating Chief Justice of the Madras High Court in the case of *Kailasam Pillai* v. *Nataraja Thambiran*, 33 Mad. 265 : (5 I. C. 4):

"I think, then, that it cannot be predicated of the head of a mutt, as such, that he holds the properties constituting its endowments as a life tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long-continued and well-established usage and custom of the institution in respect thereto."

[3] There can be no doubt that the incidents attaching to properties depend in each case upon the conditions on which the properties were dedicated or upon the conditions which can be

gathered from the way the properties have been dealt with or which may be inferred from the usage and the custom of the institution. In *Ram Parkash Das* v. *Anand Das*, 43 I. A. 73 : (A. I. R. (3) 1916 P. C. 256) their Lordships of the Judicial Committee observed that an asthal is an institution of a monastic nature, and that it is established for the service of a particular cult, the instruction in its tenets, and the observance of its rites, and that the question as to who has the right and office of Mahant is one, which must depend upon the custom and usage of the particular math or asthal. Such questions in India, their Lordships said, are not settled by an appeal to the general Customary law; the usage of the particular math stands as the law, therefor. In *Chhotabhai* v. *Jnan Chandra Basak*, 62 I. A. 146: (A. I. R. (22) 1935 P. C. 97) their Lordships pointed out that it is necessary to consider who was the author or who were the authors of the trust which is alleged to have been a trust for a public purpose of a charitable or religious nature. Their Lordships further pointed out that the intention to create a trust must be indicated by words or acts with reasonable certainty and that the purpose of the trust, property, and the beneficiaries must be indicated in such a way that the trust could be administered by the Court if occasion arose. It was, therefore, incumbent on these appellants to place on the record certain very essential materials in absence of which it cannot be held that there is an express or constructive trust created or existing for a public purpose of a charitable or religious nature to which Act XIV [14] of 1920 applies. The question is what materials are there on the record which can go to establish that a trust had been created for a public purpose of a charitable or religious nature. I have no hesitation in agreeing with the learned Advocate General, who appeared on behalf of the respondent before us, that there is no evidence in this case to show that a trust for a public purpose of a charitable or religious nature had been created. I am further inclined to hold that the way in which the asthal properties have been dealt with ever since its inception leaves no room for doubt that this asthal is a private institution. The observance of religious festivals, the feeding of *sadhus* and giving hospitality to *atithis* or guests are inevitable where there is a temple in which idols are being worshipped and which is under the control of a *bairagi Sadhu*. It is common ground that this asthal was founded by Mahanth Damodar Dass, who, it appears, was a saint whose piety had attracted the attention of not only the local people but also of a big person like the Maharaja Bahadur of Darbhanga. The plaintiffs of Suit No. 3 of 1943 have stated in para. 1 of the plaint that in village Bihat Tola Adalpur there is an asthal from a very long time of Bairagi Ramanandi Laskari sect, which is commonly known as the Adalpur asthal, and that in the said asthal from its very inception there is a "temple in which the *murties* of Sri Ramji, Jankiji and Lachhmanji besides other deities are consecrated and installed." In the depositions the witnesses for these appellants have been described as plaintiff's witnesses, and the witnesses for the Mahant have been described as defendant's witnesses, and we get it from the evidence of the plaintiffs' witnesses that Mahant Damodar Dass was the founder of the Adalpur asthal, and that idols of the temple were installed in his time. In the written statement of Suit No. 3 the Mahant has stated that in the year 1759 the temple was established by Mahant Damodar Dass who,

> 'by reason of his great piety and devotion of the deities was able to attract the attention and loyalty of the people round about who made gifts of property to him so that he might better be able to perform the daily religious practices he had established."

There is absolutely nothing to show that when this temple was constructed or when the deities were installed Mahant Damodar Dass dedicated the temple for public use, and the mere fact that during festivals and on ceremonial occasions a large number of people used to come to the temple to make offerings and to receive *prasad* cannot establish that the temple was a public institution. Such things happen even in private temples, and a *bairagi* can maintain a private temple even though he depends, for the up keep of the temple, on public charity. Something more substantial is required for establishing the alleged public nature of the institution than mere evidence to show that pepople used to assemble and make offerings at the temple on ceremonial occasions. Mr. De placed great reliance on the sanads granted by that Mabaraja of Darbhanga, and, in his opinion, the recitals in these sanads go to establish that the temple was a public institution, and that the properties dedicated to it are of the nature of a public trust. There are five sanads and two *parwanas*, by which properties appear to have been gifted to Mahant Damodar Dass. Out of the five sanads, four appear to have been granted by the then Maharaj of Darbhanga and one by some other person whose identity is not established. We have looked into the original sanads, and we find that the translator while translating some of these sanads has wrongly substituted the word "Vishunprit" for "Sriprit." In the sanads (Exs. A, A(1), A(2), A(3) and A (4)) Mahant Damodar Dass is mentioned as the donee, and in all of them, except Ex. A (3), the Maharaja is mentioned as

the donor. Exhibit A (3) is a Fakirana Patra by one Shri Thakurji to Shri Damodar Dass. The recital in EX. A is as follows:

"Fakirana Prit land excluded from rent has been granted in the said mauza since 1172 Fasli excepting the previous barmottar and inami lands within the boundary of the mauza. You shall cultivate at your convenience and enjoy the produce thereof disciples after disciples. This shall be treated as prit land and no obstruction shall be caused thereto."

The expression "Shishyopashisyhya mili" has been translated as disciples after disciples, and this expression indicates that along with his disciples he will enjoy the usufruct of the land. The expression 'Fakirana prit land" is interpreted to mean that the dedication was a dedication for public use. In EX.A as well, the statement is that the produce will be enjoyed by the donee, that he will not have to pay any rent for it and the land will be treated as *priti* land. In EX. A (2) the recital is similar to the recital in EX. A and the lands described as *sriprit* land. In EXS. A (3) and A (4) also the lands have been described as *sriprit* land, and the expression "Shishyopashishya-mili" is to be found in EX. A (4) as well. In EX A (5) the name of one Shri Vidyapati Jha is mentioned as the donee, and this document cannot be regarded as a relevant document when it does not appear that any of the Mahanths of this math or asthal was given the property mentioned in this document as *brahmottar* land. The whole question, so far as these sanads are concerned, is whether the expression "Vishunu prit" or "Sriprit" and the expression "Shishyopshishya-mili" can lead us to hold that the dedication was for public use. The word "Vishunu prit" has been interpreted in some of the decisions of this Court, and in *Naurangi Lal* v *Ram Charan Das*, 11 P. L. T. 403 : (A. I. R. (17) 1930 Pat. 455) Fazl Ali. J. as he then was, pointed out that in a number of cases the words "Vishnu prit." "Sheoprit" and "Sheottai" have been held to indicate strongly that the property with reference to which one or other of these terms was used was not the private property of a Mahant or Shebait. His Lordship further observed that the terms "Khairat" and 'Vishunuprit" although they strongly indicate that there was an endowment for certain religious or charitable purposes are, strictly speaking, not conclusive for the purpose of establishing that the endowment was for public use. With the greatest respect for his Lordship's views, I may point out that the literal meaning of the word "Vishunuprit" is "for the love of Vishnu", and, according to the Hindu Shastras not only every dedication for public use but every act of charity is to be regarded as an act done for the love of Vishnu, even when alms are given to beggars, that is an act done for the love of Vishnu, and the Hindu Shashtras are so strict in this respect that they enjoin upon all Hindus not to take credit for any pious act done, but to lay the effects of the pious acts at the feet of the Lord Vishnu without claiming any benefit for the same. At the time when these grants were made the Hindu Society had not advanced in the modern sense of the term, and people had much greater faith in the injunctions of the Hindu Shastras, and, therefore, the expression "Vishnuprit" or "Sriprit" does not to my mind lead to the inference that the donor intended that the properties would be gifts not to the Mahant, whose piety, it appears, had a great impression upon him, but that the properties would be used by the public and would be treated as a public trust. In a much later case *Ramsaran Das* v. *Jai Ram Das*, 21 Pat. 815 : (A. I. R. (30) 1943 Pat. 135), Harries C. J. and Manohar Lall J. had to consider the meaning of the word "Vishnuprit" and the observations of Fazl Ali J. in the case of *Naurangi Lal* v. *Ram Charan Das*, 11 P. L. T. 403 : (A. I. R. (17) 1930 Pat. 455), and the learned Chief Justice, with whom Manohar Lall J. agreed, made the following observation:

"This case in which Fazl Ali. J., made the observation, which I have quoted, was subsequently reversed by their Lordships of the Privy Council but only on a point of limitation, whether their Lordships approved of this observation of the learned Judge, it is impossible to say, but it is an observation of weight. But as the learned Subordinate Judge himself points out, the use of the word 'Bishunprit' is not conclusive. In any event, there is nothing in the word 'Bishunprit' to indicate that the property was gifted to the idol for public purposes."

[4] I respectfully agree with his Lordship's views, and I have no hesitation in holding that the expression "Vishnuprit", "Sheoprit" or "Sriprit", does not indicate that the gift was made for public purposes. The gift in this case was made to a *bairagi* sadhu, who, it appears, had come to be regarded as a very pious man and whose piety had attracted the attention of all the local people including a big zamindar like the Maharaja of Darbhanga. The sanads show that the gift was made to Mahanth Sri Damodar Das and not to the idol, but even if it was a gift to the idol, that does not lead to the inference that it was a gift for public use when the temple cannot be held to be a public temple, and when it is obvious that the idol had been installed by Mahanth Damodar Das himself, who was the founder of the temple and the asthal. In the Parwanas (EXS. B and B (1)) as well the lands have been described as Vishnuprit land, and Mahanth Damodar Das is mentioned as the donee. It appears from the recitals in all these sanads and parwanas that the donor was very anxious to indicate that these grants should

be treated as rent-free grants, and that no obstruction should be caused to the sadhus or his disciples in the possession or the cultivation of the lands. The words "Fakirana" has been used, and it has been explained as excluded from rent. It is important to note that in the survey record which was finally published in 1902 the lands have been mentioned as "Fakirana Vishunuprit." It would appear from the Guide and Glossary to Survey and Settlement Operations that the word "Fakirana" means rent-free grant to Muhammadan ascetics. Of course, this word must have come into use during the Muhammadan rule, but certainly when the survey authorities used the word „Fakirana Vishunuprit" they meant that the land would be treated as rent-free. In Col. 11 of the survey khewat where the nature, conditions and incidents of the tenure are to be mentioned the entry is "Fakirana Vishunuprit," and evidently what the survey authorities meant by this entry was that the grant was a rent-free grant. It is also noteworthy that the name of Mahanth Balmakund Dass alone was recorded as tenure-holder in the khewat, and this entry, which carries a presumption of correctness, goes to show that the Mahanth was treated as the sole owner of these dedicated lands. There is no mention even of the idol in Col. No. 2 of survey khewat where the name of the tenure-holder has to be mentioned, and it is remarkable that no member of the public cared to have these lands recorded in the survey as lands dedicated for public use, or as lands in respect of which the Mahant was a trustee and in which he was not personally interested. The entry in the survey record, therefore, militates against the case which Rambihari Thakur and others have made out, and if the survey record is considered along with the sanads and the parwanas referred to above, there would be little doubt left that the properties, which Rambihari Thakur and others claim as properties dedicated for public use, are really the personal properties of the Mahanth.

[5] Mr. De next relied on a judgment of the Calcutta High Court in a case which had been instituted by one Ganga Das to recover possession of the asthal in question from Bishun Das, who was the fourth Mahanth after Mahanth Damodar Das. Mahanth Bishun Das died during the pendency of the above suit, and the suit proceeded against Ralmukund Das, the *Chela* of Mahanth Bishun Das, in whose favour Mahanth Bishun Das had executed a will dated 13-11-1888. In this judgment there are certain passages on the basis of which Mr. De argued that this temple should be regarded as a public institution. In the very first sentence of this judgment the asthal has been called a Hindu convent, and there is another passage in the judgment which runs as follows :

"This suit relates to the asthal of Adalpur admittedly belonging to the Luskari brotherhood. . . . . The brotherhood to which the asthal of Adalpur belongs is a branch of the Ramanandi sect."

The mere fact that their Lordships used the expression "Hindu Convent" while referring to this asthal cannot indicate that their Lordships treated this institution as a public institution, just as the observation of their Lordships of the Judicial Committee in *Ram Parkash Das* v. *Anand Das*, 43 I. A. 73 : (A. I. R. (3) 1916 P. C. 256) that an asthal, commonly known in Northern India as a math, is an institution of a monastic nature, would not lead us to hold that every asthal is a monastery. What their Lordships of the Judicial Committee meant was that an asthal bears resemblance to a monastery and can be taken to be an institution of that nature. By this statement their Lordships never meant to say that every asthal is a public institution just as a monastery is. Similarly, when their Lordships of the Calcutta High Court used the expression "Hindu Convent" they merely meant that the asthal bears some resemblance to a Christian convent, and even though their Lordships of the Calcutta High Court said that Adalpur asthal belongs to the Laskari brotherhood, they never meant that it is an institution belonging to the entire sect, known as the Ramanandi Laskari sect. In the case of *Vidya Varuthi Thirtha* v. *Balusami Ayyar*, 44 Mad. 831 : (A. I. R. (9) 1922 P. C. 123), their Lordships condemned the idea of judging these Hindu institutions in the light of legal conceptions borrowed from abroad, and the following passage of their Lordships' judgment is an answer to the contention of Mr. De, who relied on the expression "monastic nature" and the expression "Hindu convent" in the judgments referred to above :

"It would, in their Lordships' opinion, be a serious inroad into their rights if the rules of the Hindu and Muhammadan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, in *pari materia*. The vice of this method of construction by analogy is well illustrated in the case of *Vidyapurna Thirtha Swami* v. *Vidyanidhi Tirtha Swami*, 27 Mad. 435 : (14 M. L. J. 105) where a Mahant's position was attempted to be explained by comparing it with that of a bishop and of a beneficed clergyman in England under the ecclesiastical law. It was criticised, and rightly, in their Lordships opinion, in the subsequent case, which arose also in the Madras High Court, of *Kailasam Pillai* v. *Nataraja Thambiran*, 33 Mad. 265 : (5 I. C. 4)."

[6] When their Lordships of the Calcutta High Court said that the asthal belongs to the Laskari brotherhood they meant nothing more than this that the Mahanths of this asthal belonged to the Laskari brotherhood. And it is not necessary for

me to point out that statements of facts in a previous judgment cannot be admissible in a subsequent case. There does not appear to be anything in the Evidence Act to warrant the view that the statements of facts in a previous judgment can be used as evidence in a subsequent case to decide the points which are in issue in that case. As such the appellants can gain very little by relying on the statements in the judgment of the Calcutta High Court (Ex. 5 (b), in which case there were two rival claimants for the Mahanthship.

[7] Mr. De next relied on certain recitals in the will which Mahanth Bishun Das had executed in favour of Balmukund Das. It appears that when this will was executed Balmukund Das was a minor, aged only ten years, and Mahanth Bishun Das had to make arrangement for the management of the asthal during his minority. Paragraph 4 of this will says that Bansi Ram Das, the *adhikari* of the asthal, who has been the

"manager of the village and Court affairs from the time of the previous Mahanths, shall be the guardian of Balmakund Das till he attains majority and shall maintain and bring him up and educate him and shall realise rent, manage and settle the village affairs and shall appoint and dismiss servants, shall pay Government revenue and cess and other demands and other items that are obligatory and generally done, shall bear the expenses of Puja Pat, utsab, festivals concerning Sri Thakurji and *bhandara*, shall entertain the casual visitors, and seek the pleasure of the poor, and the destitute, shall repair and construct houses, shall pay the salaries of the servants, shall take care of the boundary limits, shall look after (all) the cases, the estate relating to moveable and immoveable properties, take care of the cattle, viz. he cows and she cows, horses and elephant etc. which are at present in the asthal and that which may be acquired in future."

In Para. 5 of the will it is stated that the

"income from the village and the produce of the zirat lands as well as the income from the sewaks, devotees and the pujas of Sri Thakurji comes to more than ten thousand rupees and that after meeting the above-mentioned expenses he should keep the balance in his custody, and if he deems possible and proper out of the balance he shall purchase milkiat lands and other lands etc. in the name of the said disciple for his betterment and improvement."

Paragraph 7 of the will says that :

"After the period of minority when the said minor attains majority he shall manage the affairs of the dharam asthal as is being done from time immemorial, he shall not utilise the income from the village and the produce of the zirat lands on useless and immoral purposes save and except on legal necessities so that the properties and the reputation of the asthal may not be ruined and may not bring disgrace to the fair name of me, the executant."

In Para. 9 of the will there is a statement which runs as follows :

"The said disciple shall have no right to borrow money. If the said disciple requires some money for meeting the expenses of the *bhandara* or for purchasing properties, he shall in consultation with the adhikaris, shall take loan and perform the necessary work and shall (illegible). He shall have no right to cause loss to the milkiat (properties) and properties appertaining to the asthal."

The question is whether these recitals in the will can at all lead to the inference that the institution was treated as a public institution. I have already said that even a private institution like this is expected to look after the poor and the destitute, and every *bairagi* Mahanth would be careful enough to leave a direction that the income of the asthal should not be used for immoral purposes. This asthal has a large income, and the executant of the will rightly thought that his successor will have no necessity to borrow money, but still he made a provision for taking loans in case his successor thought that money was required for *bhandara* expenses or for purchasing properties. The clauses referred to above do not go to establish that the institution was a public institution, and that the *asthaldhari* was liable to render account to the public with regard to the income and expenditure of the math. On the other hand, the statement in para 5 to the effect that the guardian would be at liberty to purchase properties in the name of the succeeding Mahanth "for his betterment and improvement" goes to show that the Mahanth was the sole owner of the math, and that the properties appertaining to the asthal were his private properties. This document, therefore, instead of helping the appellants seems to destroy the case which they have set up. On the materials, therefore, which are forthcoming in this case I am unable to take a view contrary to the one which has been taken by the learned District Judge, and I fully agree with the learned Judge's view that the onus which lay on these appellants has not been discharged by them, and that it has not been established that the asthal is a public institution and that the properties appertaining to it are held for public purpose of a charitable and religious nature. It was held by the Calcutta High Court in the case of *Prosad Das* v. *Jaganath Pal*, 37 C. W. N. 181 : (A. I. R. (20) 1933 Cal. 519) that even where a deed of endowment provides for *devasheva* and for feeding of the poor and of students if the income increases, that does not make the endowment anything but a private trust, and in another case reported in *Sm. Charusila Dassi, In the matter of*, 50 C. W. N. 521 : (A. I. R. (34) 1947 Cal. 148) the same High Court held that the performance of *Prosad Utsarga* does not necessarily render a temple a public one, and that a trust for a Hindu idol and temple *simpliciter* is not necessarily one for public purpose. And it need not be pointed out that the mere fact that a property has descended from guru to chela does

not warrant a presumption that it is a religious property. Mr. De relied on the decision of the Madras High Court reported in *Sammantha Pandara* v. *Sellappa Chetti*, 2 Mad. 175, and a decision of this Court reported in *Susil Chandra* v. *Gobind Chandra*, A. I. R. (21) 1934 Pat. 431 : (150 I. C. 61). There are several cases of the Madras High Court on the point which were decided subsequent to the decision reported in *Sammantha's case*, 2 Mad. 175, and in my opinion, the decision of the Madras High Court in *Sammantha's case*, 2 Mad. 175, is of very little use to the appellants in this case. That was a case where a math had been sued on the basis of a bond, and the defence was that the debt had not been contracted for the purposes of the math, and that the Mahanth who had borrowed the loan had no authority to do so. There an observation in the judgment that the property is attached to the office and passes by inheritance to no one who does not fill the office and that it is in a certain sense a trust property. There is a further observation that the superior has large dominion over the property, and is not accountable for its management or for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. The question whether that particular institution was a public institution or a private institution was not directly in issue in that case and from the facts given in the judgment it appears that the institution was taken to be a private institution. In the case of *Susil Chandra* v. *Gobind Chandra*, A. I. R. (21) 1934 Pat 431 : (150 I. C. 61), Dhavle J., observed that there are some differences between *debutter* property and property dedicated to a math, and that whether or not the property is dedicated to the idol the property, if it appertains to the math, would not be the personal property of the Mahanth. Nobody says that the property appertaining to a private asthal is to be regarded as the personal property of the Mahanth in the sense in which we generally use the expression "personal property." There can be priavate trust, and there has always been a distinction between a private trust and a public trust. The question before us in this case is whether this is a trust to which S. 92, Civil P. C., or Act XIV [14] of 1920 can be applicable. If it is found that in this case there is no express or constructive trust created for public purposes of a chartitable or religious nature, that would conclude the matter, and really it is not within the scope of this case to investigate whether the properties of the asthal should be regarded as private trust properties or as the personal properties of the Mahanth. In the case of *Ramsaran Das* v. *Jairam Das*, 21 Pat. 815 : (A. I. R. (30) 1943 Pat. 135), Harries C. J. quoted a passage from the judgment of the Judicial Committee in the case of *Parma Nand* v. *Nihal Chand*, 65 I. A. 252 : (A. I. R. (26) 1938 P. C. 195) and, I think, the observation of his Lordship Sir Shadi Lal in the Privy Council case is fully applicable to this case. The observation runs as follows :

"Their Lordships do not think that any user or treatment of the property has been proved, such as would justify the conclusion that it was a public, and not a private trust. It cannot be disputed that the plaintiff can be defeated only if the defendants establish affirmatively that a trust of a public character was imposed upon the property. To constitute a trust 'created or existing for a public purpose of a charitable or religious nature' within the meaning of Act XIV [14] of 1920, the author or authors of the trust must be ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover, the purposes of the trust, the trust property, and the beneficiaries must be indicated so as to enable the Court to administer the trust if required; *Chotabhai* v. *Jnan Chandra*, 62 I. A. 146 : (A. I. R. (22) 1935 P. C. 97). These conditions have not been fulfilled."

For applying Act XIV [14] of 1920, it must be established that the trust was substantially for public purposes, and as already pointed out it is not sufficient if one or some of the purposes of the trust are public. The feeding of sadhus and the distribution of alms and the entertainment of the guests are inevitable in a temple, and these are merely incidental to the worship of the deities. In fact, no Mahanth worth the name can refuse to entertain sadhus and guests if he has the means for it. His Lordship, the Chief Justice, while construing the *arpannama* in the case of *Ramsaran Das*, 21 Pat. 815 : (A. I. R. (30) 1943 Pat. 135) observed that though the *arpannama* had made it clear that thereafter the properties were *debottar* properties, there was nothing in the terms of the *arpannama* to indicate that the properties were dedicated to the public, and, therefore, his Lordship held that the trust was a private one. In this case also it would appear from the sanads and the parwanas that properties were gifted only to the Mahanth, there being nothing in these documents to indicate that they were dedicated for public use. It is true that in the case of *Ramsaran Das*, 21 Pat. 815 : (A. I. R. (30) 1943 Pat. 135) the grant in favour of the Mahanth was described as *Gurudakshina*, but that makes no difference whatsoever. By whatever name the gift is called it is a gift to the Mahanth of the asthal, and after the gift the property either retains its secular character or a private trust is created with regard to it. These suits were, therefore, correctly decided by the learned Judge, and his decision must be confirmed.

[8] Mr. De did not challenge the findings of the learned Judge that it had not been established that the Mahanth was leading an immoral life, but he pointed out to us that the learned Judge had held that the Mahanth had, without any necessity, settled some *bakast* lands and had executed two *ladavi* deeds, the execution of which documents constituted a breach of trust. These things will be material only if the trust is held to be a public trust. On the findings of the learned Judge it must be held that the Mahanth has not been acting like a prudent manager, but the public or any section of the public cannot complain against it when the trust is not a public trust. These appeals, therefore, fail and are dismissed with costs, one set of hearing fee.

[9] **Sinha J.**—I agree.

K.S. *Appeals dismissed.*

A. I. R. (38) 1951 Patna 348 *[C. N. 81.]*

MEREDITH AND RAMASWAMI JJ.

Jagat Kishore Pd. Narain Singh—*Appellant* v. *Parmeshwar Singh and others*—*Respondents.*

A. F. A. D. No. 451 of 1946, D/- 23-9-1949.

(a) Limitation Act (1908), Arts. 115 and 97 — Applicability—Suit to recover money in respect of realisation by decree-holder of decretal dues twice over—Starting point.

A suit for recovery of money in respect of realisation by the decree-holder of the decretal dues twice over is a suit for damages for breach of an implied contract by the decree-holder to get the payments certified and not to execute the decree and the article applicable is Art. 115, or possibly Art. 97. The breach takes place and the consideration fails as soon as the decree-holder does something inconsistent with the carrying out of the contract—something negativing its performance by him. That would be the date when he files an application for execution for the full decretal amount ignoring the payment which has been made. The subsequent second payment does not give a fresh cause of action. A. I. R. (26) 1939 Pat. 156 and A. I. R. (6) 1919 Mad. 773, *Dissent.* [Para 5]

Anno: Lim Act, Art. 97, N. 2; Art. 115, N. 6, Pts. 1 and 2.

(b) Limitation Act (1908), S. 24—Applicability—Suit to recover money in respect of realisation by decree-holder of decretal dues twice over—Contract Act (1872), S. 73.

Section 24 is applicable in the case of actions *ex contractu* in proper cases. [Para 7]

But the section has no application to a suit for recovery of money in respect of realisation by the decree-holder of the dues twice over ignoring previous payment made under a promise of certification. The breach of contract *per se* gives rise to a cause of action, and time begins to run from that date; A. I. R. (23) 1936 Rang. 510, *Rel. on*; A. I. R. (13) 1926 All. 605, *Dissent.* [Para 8]

Anno: Lim. Act, S. 24, N. 2

(c) Contract Act (1872), S. 73 — Measure of damages.

Where the judgment-debtor paid the decretal amount out of Court in 1936 under a promise of certification, but the payment was never certified and the decretal amount was recovered again in 1940 in execution, in a suit by the judgment-debtor to recover the money so recovered :

Held (Per *Meredith J.*; *Ramaswami J. dubitante*) that the act of the decree-holder deprived the plaintiff not only of the money, but the interest which he could earn and that should be taken into account in fixing the measure of damages and, therefore, the plaintiff should be allowed something by way of interest, though, strictly speaking, it should be described as damages and not interest, and it should not be interest from the date of the second payment in 1940, but interest from 1936 on the amount paid then: A. I. R. (20) 1933 Pat. 196 and A. I. R. (25) 1938 P. C. 67, *Disting.* [Paras 20 and 24]

Anno: Contract Act, S. 73, N. 4.

Prem Lall—for Appellant; Lakshmi Narain Sinha—for Respondents.

Meredith J.—This is a defendant's second appeal in a suit for recovery of Rs. 300 and interest, by way of damages, in respect of realisation by the defendant of the decretal dues twice over in two rent suits. These rent suits were decreed in 1935. According to the plaintiff's case and the findings of the Courts below, the sum of Rs. 300 was paid out of Court in the year 1936 under a promise of certification, but in fact the payment was never certified, and execution for the full amount of the decrees was taken out in the year 1937. On 5-4 1937, the plaintiff made an application under O. 21, R. 2, Civil P. C., for certification of the payment, but this application was dismissed as barred by limitation under Art. 174, Limitation Act, and also as it was held that payment had not been proved. There was an appeal, but the appeal also was dismissed. Subsequently in the execution proceedings the judgment-debtor had to pay over again, paying by instalments from 16-1-1940. onwards. The plaintiff waited for full three years before doing anything about it, and on 19-1-1943, filed the present suit. There were, however, a few days' holidays prior to the 19th of January, and it is conceded that the suit was within time if limitation runs from 16-1-1940. The suit has been decreed for Rs. 300 and interest, not at the rate claimed, but at 6 per cent. per annum from 16-1-1940.

[2] Three points have been raised in appeal, first, that the suit was barred by *res judicata* owing to the dismissal of the application under O. 21. R. 2, second, that the suit was barred by limitation, and third, that interest should not have been allowed as there was no contract for payment of interest or damages.

[3] I shall take these points in turn. With regard to the first, reliance is placed on a number of cases of which it will suffice to cite *Peary*

Mohan Mukherjee v. *Ambica Churn Bandopadhya*, 24 Cal. 900, wherein it was held that, though the previous suit failed for lack of notice, there was *res judicata* because the question of the merits, whether necessary or not, had also been decided and the matter was directly and substantially in issue in the previous litigation.

[4] Similarly it is argued that the application under O. 21, R. 2, was dismissed not only on the score of limitation, but also on the merits. Therefore, the matter of payment had been finally decided. It is not necessary to discuss the legal point involved because there is a short answer. It was for the defendant to establish the plea of *res judicata* set up by him. The final decision in the application under O. 21, R. 2, was that of the appellate Court, and the defendant has not filed the judgment of the appellate Court, and we do not know whether the appellate Court decided on the merits or only on the score of limitation. The first contention, therefore, fails.

[5] The second, that of limitation, is one of some difficulties. It is well settled that a suit like the present is a suit for damages for breach of an implied contract by the decree-holder to get the payments certified and not to execute the decree. Indeed it is only in this light that such a suit has been held to be maintainable despite the provisions of S. 47, Civil P. C. This being so, the article of limitation must be Art. 115, or possibly Art. 97, Limitation Act. In the first case limitation is three years from the date of the breach, in the second three years from the failure of the consideration. My personal view is that Art. 115 is applicable rather than Art. 97. But it makes no difference. Limitation is three years, and the question is, what is the *terminus a quo*? When did the breach take place or when did the consideration fail? Put like this, I think there can be only one answer. The breach took place and the consideration failed as soon as the decree-holder did something inconsistent with the carrying out of the contract—something negativing its performance by him. That would be the date when he filed an application for execution for the full decretal amount ignoring the payment which had been made. In this view the cause of action arose when the application for execution was filed in 1937, and consequently a suit brought in 1943 will be long out of time.

[6] There are, I apprehend, only two possible avenues of escape from this conclusion. First, that S. 24, Limitation Act, would be applicable, and, second, that the actual payment of the money twice over by the judgment-debtor gives a fresh cause of action.

[7] Section 24, Limitation Act, runs:

"In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results."

In *Kedar Nath* v. *Har Govind*, 24 A. L. J. 550: (A. I. R. (13) 1926 ALL. 605), Ashworth J. took the view that under S. 73, Contract Act, a suit can only be brought for an injury or loss already caused, and not for prospective loss Consequently there is no cause of action until actual loss has been incurred, and S. 24, Limitation Act, will be applicable as it is not confined to suits based on tort. For the latter view he has been severely criticised by Ba U J. in *V. M. Gany* v. *Leong Chye*, 166 I. C. 48: (A. I. R. (23) 1936 Rang. 510) who holds that in a suit for compensation for a breach of contract, the breach of contract *per se* gives rise to a cause of action, and time begins to run from the date of the breach, and not from the date of actual loss or damage. Section 24, Limitation Act, has no application because it applies only to suits based upon torts, and not to those based on breach of contract. With respect I think the better view is that S. 24 is applicable in the case of actions *ex contractu* in proper cases. It was so held by a Bench of this Court in *Jagannath Marwari* v. *Kalidas*, 8 Pat. 776: (A. I. R (16) 1929 Pat. 215), though in that particular case the *terminus a quo* was held to be the date of injury and not the breach of the covenant, because it only became apparent that the removal of pillars of coal amounted to a breach when the plaintiff's tank subsequently subsided.

[8] Agreeing, however, that in proper cases S. 24 is applicable to actions on contract, I am clear that it has no application to a case like the present. I do not think Ashworth J. was quite correct in his view of S. 73, Contract Act, and would prefer the view of Ba U J. that the breach of contract *per se* gives rise to a cause of action, and time begins to run from that date. In many such actions there has been no actual money loss, for example, in an action brought for failure to supply goods on a certain date the plaintiff will be entitled to recover the difference between the price of the goods according to the contract and the market price thereof at the date of failure to supply, even though the plaintiff has not actually subsequently purchased the goods at the higher price.

[9] In Halsbury's Laws of England, vol. 19, p. 42, S. 64 we find,

"in an action for a breach of contract the cause of action is the breach. Accordingly such an action must be brought within six years of the breach; after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff

within six years of action brought. In such an action it is not necessary to prove actual damage, and special damage is merely alleged as a measure of the damages to be recovered. The time is not extended by the fact that the breach has not been discovered or that damage has not resulted until after the expiration of six years."

Similarly in Rustomji's work on the Law of Limitation, 1938 Edn., Vol II, p. 988, speaking about Art. 115, the learned author says:

"Time runs from the breach (i.e. when the contract is broken), after expiration of three years from the breach, the suit will be barred, although damage may have accrued to the plaintiff within three years of action brought, i. e. an action for breach of contract accrues as soon as the contract is broken, though no injury results until afterwards . . . . . The time is not extended by the fact that the breach has not been discovered or that damage has not resulted until after expiration of three years."

[10] In an action like the present, however, the position seems to me even clearer because here there is definitely damage as soon as the contract was broken by filing an application for execution. This results from the fact, which has, I think, been lost sight of in some of the decisions, that the money has been actually previously paid out by the plaintiff, and as soon as the defendant has converted it to his own independent use instead of setting it off against the decree, that money is lost to the plaintiff, since it can never be applied towards the satisfaction of the decree, as under O. 21, R. 2, the execution Court is debarred from taking any notice of the uncertified payment. The entire liability under the decree remains untouched, and the money paid previously becomes a complete loss, though of course compensation for that loss may be recovered in a suit like the present. Therefore, I think, limitation must run from the actual breach, and S. 24 has no application.

[11] As for the argument that the subsequent second payment gives a fresh cause of action, I am unable to appreciate that contention. It is payment of an amount lawfully due under the decree. The decree-holder is entitled to realise it, and the judgment-debtor must pay it. The breach of the contract has already taken place, and is over and done with. There is no fresh breach by the decree-holder, and indeed the levying of the money follows directly from the application for execution. It is made by the Court, not the decree-holder. In any event a suit for recovery of the money paid on the second occasion in the execution proceedings would be barred under S. 47, Civil P. C.

[12] Authority is somewhat scanty. There are two single Bench decisions of this High Court. The first is *Ramautar Singh* v. *Thakur Prasad Singh*, A. I. R. (22) 1935 Pat. 65. Fazl Ali J. in that case appears to have held that limitation ran from the date of the original payment, but I think the decision is based on the particular manner in which the plaint was framed since the cause of action was specified to be the receipt by the decree holder to his use. In the other case, *Ram Das Sahu* v. *Sukhdeo Ram*, A. I. R. (26) 1939 Pat. 156: (178 I. C. 196) Manohar Lall J. held that the cause of action arose on the date of realisation of the money for the second time in execution, and it was on that date that the plaintiff obtained the right to bring a suit for damages. With respect to the learned Judge, I think he was wrong for the reasons I have already given.

[13] There are several Madras cases. The first is *Viraraghava Reddi* v. *Subhakka*, 5 Mad. 397 (F.B.), a Full Bench case, in which it was held that a suit like the present is maintainable as a suit to recover damages for the breach of the implied promise to certify the payment to the Court and thereby make it effectual in execution. But the question of limitation was not considered.

[14] In *T. M. Sriramulu* v. *R. Dalayya*, 16 M. L. J. 54, where, as soon as the notice of the application for execution was served on the judgment-debtor, but before any steps were actually taken to execute the decree, the judgment-debtor instituted the suit, it was held that the suit was not maintainable. But in this case there is absolutely no discussion of the question. The judgment consists of a single sentence, and it has been subsequently dissented from in the Madras High Court itself. Having regard to the nature of the judgment, it is, in my opinion, no authority.

[15] In *In the matter of Medai Kaliani Anni*, 30 Mad. 545 : (3 M. L. T. 15) a learned Judge laid down that the law casts on the decree-holder receiving payment out of Court, the duty of certifying such payment in satisfaction of the decree under S. 258, Civil P. C. The judgment-debtor has a cause of action against the decree-holder when the latter having received the decree amount not only does not certify, but actually takes out execution. It is not necessary that money should have been actually recovered in execution.

[16] *Krishna Aiyar* v. *Savurimuthu Pillai*, 42 Mad. 338 : (A. I R. (6) 1919 Mad. 424) is a case in which, after receiving certain payments, the decree-holder assigned the decree, and the assignee executed it. The Full Bench held that the judgment-debtor has a cause of action for damages only as against the decree-holder, but none against the assignee. That is clearly correct having regard to the fact that there is no contractual relationship between the judgment-

debtor and the assignee, and the decree is a good decree and capable of execution so long as the payment is not certified. In such a case it may well be that the application for execution will give no rise to a cause of action. It cannot do so against the assignee, and it is not the act of the decree holder. Hence in such a case the cause of action will arise against the decree-holder as soon as the judgment-debtor has to pay twice over, but that is in no way inconsistent with the view I have taken.

[17] In *Gopalasami Naick* v. *Nammalwar Naick*, 36 M. L. J. 175 : (A. I. R. (6) 1919 Mad. 773), a Bench held that a cause of action arises as soon as the application for execution is filed, being a breach of the implied contract, the breach in itself giving rise to the cause of action. Though money may not have been realised, yet successive applications for execution will give rise to successive breaches and fresh cause of action, and, if money is subsequently realised, that will give a fresh cause of action as a further breach of the covenant. With regard to the second proposition, I am unable to agree with those learned Judges. They are apparently thinking of the fact that under Art. 115 limitation runs from the time when the contract is broken or, where there are successive breaches, when the breach, in respect of which the suit is instituted, occurred. But the provision with regard to successive breaches relates to a different type of contract altogether. A contract of which there may be successive breaches is a contract by which a party to it agrees to do or forbear doing two or more different things. Successive breaches occur in those cases only in which there is promise to perform periodically, as for example, payment of rent or maintenance. A contract such as we are concerned with in the present case, however, is a contract only for a single act, and when that act is rendered impossible of performance or negatived, the breach is complete, and it is over and done with, and there is no question of any further breach. Having wholly repudiated the contract in the first instance, what the decree-holder may do subsequently is merely in consequence of that breach, and is not a fresh breach of the contract to which he had previously put an end.

[18] There is one single Bench decision from Peshawar, *Azim Khan* v. *Mt. Sahib Jan*, 205 I. C. 20 : (A. I. R (30) 1943 Pesh. 13). In that case the learned Judge held that the filing of an execution application by a decree-holder against a judgment-debtor, who alleges that he has paid off the decree-holder privately, in itself gives the judgment-debtor a cause of action to bring a suit for relief, and for doing so the judgment-debtor need not wait until he is made to pay twice over or suffers some damages. I agree with that decision.

[19] In my opinion limitation in the present case ran from 1937, and the suit was barred by limitation.

[20] In this view there is no need to examine the third contention, but, as it has been argued, I may perhaps state my view briefly. Reliance is placed on *J. H. Pattinson* v. *Sm. Bindhya Debi*, 12 Pat. 216 : (A. I. R. (20) 1933 Pat. 196) and *Bengal Nagpur Railway Company Ltd.* v. *Ruttanji Ramji*, 65 I. A. 66 : (A. I. R. (25) 1938 P. O. 67) but what those cases laid down was merely that in a suit for recovery of money due under a contract interest cannot be awarded unless provided for in the contract, and interest cannot be recovered in such a case as damages under S. 73, Contract Act. The reason is given that S. 73 is merely declaratory of the Common Law as to damages, and under the Common Law interest could not be allowed by way of damages for wrongful detention of debt. These cases deal, only with suits for recovery of money due, but the present suit is not for recovery of money due. It is for damages for breach of a contract, and not for recovery of the money paid. The considerations laid down in those cases, in my opinion, have no application to a suit like the present. Under S. 73, Contract Act, the party who suffers by the breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such a breach or which the parties knew, when they made the contract, to be likely to result from the breach of it. Now what damage would naturally arise from the breach in a case such as the present? The payment was made in 1936. Had the decree-holder carried out his implied promise, the decree would have been satisfied in 1936. Owing to his breach the decree was executed in 1940. The execution would no doubt take place for the decretal dues with interest up to 1940, and, therefore, the judgment-debtor would have to pay not only the amount due in 1936, but interest on that amount as well up to 1940, and certainly I know of no principle on which it could be asserted that that loss could not be taken into account in fixing the measure of damages. Alternatively, the judgment-debtor paid Rs. 300 in 1936. Had that money remained with him up to 1940, he could in the usual course of things have earned interest upon it. Therefore, the act of the decree-holder deprived him not only of the money, but the interest which he could earn, and again I see no reason why that should not be taken into account. In my view, therefore, the Courts below were not wrong in allowing

something by way of interest, though strictly speaking, it should not have been described as interest, but damages, and it should not be interest from the date of the second payment in 1940 up to the date of the suit but interest from 1936 on the amount paid then.

[21] As in my view the suit was barred by limitation, I would allow this appeal and dismiss the suit with costs throughout. I see no reason why the defendant should not get costs since there appears no good reason why the plaintiff waited from 1940 until 1943 to bring the suit.

[22] **Ramaswami J.**— There is a considerable divergence of judicial opinion on the question whether interest can or cannot be recovered as damages under S. 73, Contract Act, where it is not recoverable under the Interest Act. In the Madras case *Kamalammal* v. *Pearu Meera Levvai Rowthen*, 20 Mad. 481 : (7 M. L. J. 263), the question arose whether interest could be recovered by way of damages under S. 73, where it was not recoverable under the Interest Act, and it was held that it could not be so recovered. The effect of the judgment in that case is that wherever interest could be claimed by way of damages, it would not be awarded unless either the requirements of the Interest Act are complied with, or interest is recoverable at Common Law. But according to the Calcutta High Court *Khetra Mohan* v. *Aswini Kumar*, 22 C. W. N. 488 : (A. I. R. (5) 1918 Cal. 448) interest may be awarded as damages for wrongful detention of money under S. 73, though there may be no agreement to pay interest and though the case may not be covered by the Interest Act. On the contrary in *J. H. Pattinson* v. *Smt. Bindhya Debi*, 12 Pat. 216 : (A. I. R. (20) 1933 Pat 196), a Division Bench of this Court after full review of all the authorities held that S. 73 was merely declaratory of the Common Law as to damages and under the Common Law interest could not be allowed by way of damages for wrongful detention of debt.

[23] In this context reference should be made to *B. N. Rly. Co., Ltd.* v. *Ruttanji Ramji*, 65 I. A. 66: (A. I. R. (25) 1938 P. C. 67) in which the respondents instituted a claim on 29-11-1927, against the appellant railway company for a sum on account of work done by their predecessor in interest under three contracts in connection with the construction of a branch line. It was found that the original contract rates at which payment was to be made for various items of work done had been abandoned during the progress of the work with the consent of both parties, and that the price of the work done, determined on the basis of fair and reasonable rates, was Rs. 66,980-10-6 which the railway company were liable to pay to the respondents on 26-7-1925, after the completion of the work. Upon these facts the Judicial Committee held that in the absence of any usage or contract, express or implied, or of any provision of law to justify the award of interest on the decretal amount for the period before the institution of the suit, interest for that period could not be allowed by way of damages caused to the respondents for the wrongful detention of their money by the railway company. At p. 72, Sir Shadi Lal states,

"now S. 73, Contract Act, gives statutory recognition to the general rule that, in the event of a breach of a contract, the party who suffers by such breach is entitled to recover from the party breaking the contract compensation for any loss or damage thereby caused to him. On behalf of the plaintiffs, reliance is placed upon illustration (n) to that section. The illustration, however, does not deal with the right of a creditor to recover interest from his debtor on a loan advanced to the latter by the former. It only shows that if any person breaks his contract to pay to another person a sum of money on a specific date, and in consequence of that breach the latter is unable to pay his debts and is ruined, the former is not liable to make good to the latter anything except the principal sum which he promised to pay, together with interest up to the date of payment. He is not liable to pay damages of a remote character. The illustration does not confer upon a creditor a right to recover interest upon a debt which is due to him, when he is not entitled to such interest under any provision of the law. Nor can an illustration have the effect of modifying the language of the section which alone forms the enactment."

[24] Upon the facts proved in the present case I, therefore, doubt whether the plaintiffs would be entitled to claim interest upon the amount.

[25] It is, however, unnecessary to decide this point for I agree with my learned brother that the suit is barred by limitation and that the appeal should be allowed and the suit should be dismissed with costs throughout.

V.R.B. *Appeal allowed.*

A. I. R. (38) 1951 Patna 352 *[C. N. 82.]*

RAMASWAMI AND NARAYAN JJ.

Ramautar Singh and others—*Petitioners* v. *Ramsewak Lal and others*—*Opposite Party.*

Civil Revn. No. 370 of 1949, D/- 27-2-1950.

(a) Civil P. C. (1908), O. 34, R. 1—Mortgage redemption suit—Parties—Person claiming paramount title is not necessary party. [Para 3]

Anno. C. P. C. O., 34, R. 1, N. 5.

(b) Civil P. C. (1908), S. 115, O. 2 R. 3—Decision that suit is not bad for misjoinder of parties—Revision.

A decision on an issue in a suit to the effect that the suit is not bad for misjoinder of parties and causes of action is subject to the revisional jurisdiction of the High Court under S. 115. [Para 4]

Anno. C. P. C., S. 115, N. 13; O. 2 R. 3 N. 17.

Lalnarayan Sinha and Lakshmi Narain Sinha—*for Petitioners*; *Madan Mohan Pd*—*for Opposite Party.*

Ramaswami J.—The question which arises for decision in this case is whether defendants 2 to 4 are necessary parties in the suit brought by the plaintiffs for redemption of the land in dispute.

[2] For the plaintiffs it was alleged that his ancestor had on 15-3-17 executed a rehan deed in favour of the father of defendant 1, for a sum of Rs. 50 with respect to 15 bighas 4 kathas 11 dhurs of land. A few months later defendant 1 executed a Bazidawa in favour of defendant party 2 treating the land as bakasht. The plaintiffs deposited the rehan money under S. 83, T. P. Act. After due service of notice on defendant party 1, they instituted a suit for redemption of the land. Defendant party 2 was impleaded on the ground that he interfered with the possession of the plaintiffs. The learned Munsif overruled the objection of the defendant party 2 and held that they were necessary parties for the decision of the suit.

[3] In support of the rule Mr. Lalnarain Sinha referred to the principle that in a suit for redemption, paramount title ought not to be normally drawn into controversy without the consent of the parties. It was pointed out that in the present case paramount title was in conflict with the title of the mortgagor as well as the mortgagee. For the opposite party reference was made to *Zakirraza* v. *Madhusudan Dass*, A. I. R. (5) 1918 Pat. 356 : (45 I. C. 691) and *Khub Lal* v. *Jhapsi Kundu*, A. I. R. (11) 1924 Pat. 613 : (3 Pat. 244). But these cases must be distinguished for they proceeded upon the ground that the defendants who had set up paramount title appeared and contested the allegation set out in the plaint, that issues had been framed with their concurrence and so they could not afterwards object that the issues ought not to have been litigated, since they have already acquiesced in that course. In the present case, however, it is of importance to observe that the applicants as soon as they appeared in Court objected that the issue as to paramount title ought not to be tried and they should be struck off from the action. In the present case, therefore, I am of opinion that the learned Munsif was wrong to hold that the applicants were necessary parties but ought to have struck their names from the suit. This view is supported by *Loknath Singh* v. *Santokhi Missir*, 7 P. L. T. 737 : (A. I. R. (14) 1927 Pat. 45 : 27 Cr. L. J. 1240) in which the High Court interfered in a second appeal and dismissed the suit against the defendants who set up a paramount title but whose objection was not entertained by the lower Courts. The principle is laid down in *Jaggeswar Dutt* v. *Bhuban Mohan*, 33 Cal. 425 : (3 C. L. J. 205) in which Ashutosh Mookerjee J. restated the ordinary rule that a plaintiff mortgagee cannot be allowed to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee. It was observed that the rule was not one of convenience merely and the fact of the question of such title being determined by the Court of first instance in breach of the rule did not preclude a Court of appeal from reversing the decree.

> "The interpretation which we put upon S. 85, leads necessarily to the conclusion that the proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and those claiming under him ; the only proper parties to such a suit are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage. It is not competent for the mortgagee to make as party defendant, one who claims adversely to the title of the mortgagor and mortgagee. He is a stranger to the mortgagee, has no connection with the mortgage, and as his adverse claim of title cannot in any way be affected by the mortgage suit in which he has no interest, he cannot be made a party for the purpose of litigating such claim of title."

Reference should also be made to *Rameshwar Rai* v. *Harakh Lal*, 20 Pat. 841 : (A. I. R. (29) 1942 Pat. 226) in which the learned Judges after examining a number of authorities deduced the general rule that in a mortgage suit paramount title ought not ordinarily be drawn into controversy without the assent of the parties.

[4] For the opposite party it was, however, objected that the question of misjoinder of parties or of causes of action is not a question of jurisdiction with which the High Court ought to interfere. This argument is not in my opinion untenable. It is true that High Court will not be justified in interfering on the sole ground that the trial Court has made a mistake in law. But here I think that it has done more than that. For it has entirely misunderstood the nature of the judicial discretion which it is called upon to exercise. In *Velappa Nadar* v. *Chidambara Nadar*, 43 M. L. J. 277 : (A. I. R. (9) 1922 Mad. 174) Venkatasubba Rao J. held that a decision on an issue in a suit to the effect that the suit is not bad for misjoinder of parties and causes of action is subject to the revisional jurisdiction of the High Court under S. 115, Civil P. C. The learned Judge reached the conclusion after examining a number of authorities.

[5] In my opinion this rule must be made absolute and defendants 2 to 4 should be struck off from the suit as not being necessary parties thereto. The application is allowed. There will be no order as to costs.

[6] **Narayan J.**—I agree.

V.B.B. *Rule made absolute.*

A. I. R. (38) 1951 Patna 354 *[C. N. 83.]*

SHEARER AND JAMUAR JJ.

Gopalji Sharma — Petitioner v. *The State through Raghunandan Prasad — Opposite Party.*

Criminal Revn. No. 746 of 1950, D/- 15-11-1950.

Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), S. 20 (2)—Tenant directed to vacate — Non-compliance, if punishable.

There is nothing in the Act to indicate that a non-compliance of the order which is executable under S. 17 of the Act cannot be subject-matter of prosecution under sub-s. (2) of S. 20. The order passed under S. 11 (2) by a Controller or by a Commissioner on appeal against a tenant to vacate a house within a certain time is clearly a direction for the non-compliance of which the tenant is liable to be punished under sub-s. (2) of S. 20. Under the provisions of the Act there is no bar for the landlord to apply to the civil Court for execution of that order or direction under S. 17 of the Act, and yet he may apply for the prosecution of the tenant for the non-compliance of the direction under sub-s. (2) of S. 20 of the Act. [Para 2]

Syed Akbar Hussain— for Petitioner; Shereshwar Prasad — for Opposite Party.

Jamuar J.—The petitioner is a tenant of a house under one Raghunandan Prasad which is situated in Terhi Ghat, police station Khajekalan, Patna City. On 21-1-1948, Raghunandan Prasad filed an application before the House Controller for the eviction of the petitioner from that house in the circumstances stated in the petition. The House Controller rejected the petition on 21-7-1948, and the landlord Raghunandan Prasad filed an appeal before the Commissioner against the order of the House Controller. In the meantime the landlord had also filed a money suit on 20-6-1948, for realisation of arrears of rent and obtained a decree. The appeal filed before the Commissioner, came to be heard by the Additional Commissioner who by his order dated 15-2-1949, allowed the appeal; and further made a direction against the petitioner to vacate the house by 25-5-1949. This direction has been disobeyed by the petitioner and he has not yet vacated the house as ordered by the Additional Commissioner. On 31-5-1949, that is, about a week after the expiry of the period allowed to the petitioner for vacating the house, the landlord filed a petition by way of a complaint before the Sub-divisional Officer, Patna City, for the prosecution of the petitioner under S. 20, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947. Ultimately, the petitioner was put on trial for an offence under that section and was convicted by a Magistrate and sentenced to six months' rigorous imprisonment as also to pay a fine of Rs. 25, and, in default, to suffer further rigorous imprisonment for two weeks. As against that judgment and order of conviction, the petitioner filed an appeal before the Sessions Judge of Patna, who, while upholding the conviction under S. 20 (2), Bihar Buildings Control Act, 1947, reduced the sentence of imprisonment to two months and maintained the fine. The petitioner has now come up to this Court in its revisional jurisdiction.

[2] Mr. Akbar Hussain for the petitioner has contended that the conviction of the petitioner is entirely illegal for the reason that in the circumstances of the case no prosecution could lie under S. 20, Bihar Buildings Control Act, at all. His contention was that sub-s. (2) of S. 20 of the Act makes the non-compliance of a direction made or deemed to have been made under the Act punishable, and the order of the Additional Commissioner made against the petitioner to vacate the house by a certain date did not amount to a direction within the meaning of sub-s. (2) of S. 20 of the Act. He argued that under S. 17 of the Act every order made by the House Controller or by the Commissioner on appeal under S. 18 of the Act has been made executable by the Court having jurisdiction to entertain a suit for the recovery of arrears of rent in respect of the building in relation to which the order to be executed is passed, as if such order were a decree passed by such Court, so that the order passed by the Additional Commissioner to vacate the house was an order which could be executed by the civil Court under S. 17 of the Act, therefore the non-compliance of that order which amounts to a decree would not be punishable under sub-s. (2) of S. 20 of the Act. I am unable to accede to this contention. There is nothing in the Act to indicate that a non-compliance of the order which is executable under S. 17 of Act cannot be a subject-matter of prosecution under sub-s. (2) of S. 20. Section 11 (2) of the Act provides that a landlord who seeks to evict his tenant under sub-s. (1), shall apply to the Controller for a direction in that behalf, and if the Controller is satisfied that the tenant is liable to be evicted under the provisions of sub-s. (1), he shall make an order directing the tenant to put the landlord in possession of the building, and if the Controller is not so satisfied, he shall make an order rejecting the application. In my opinion, the order passed by a Controller or by a Commissioner on appeal against a tenant to vacate a house within a certain time is clearly a direction for the non-compliance of which the tenant is liable to be punished under sub-s. (2) of S. 20. Under the provisions of the Act there is no bar, in my opinion, for the landlord to apply to the civil Court for execution of that order or direction under S. 17 of the Act, and yet he may apply for the prosecution of the

tenant for the non-compliance of the direction under sub-s. (2) of S. 20 of the Act. In these circumstances it is impossible to interfere with the conviction of the petitioner. I think, however, that there is room for interference with the sentence which has been imposed upon him. In the particular circumstances of this case I do not think that there is any necessity for sending the petitioner to jail. I would therefore, set aside the sentence of imprisonment imposed upon the petitioner, but I would enhance the amount of fine to Rs. 100, and in default to suffer two weeks' rigorous imprisonment.

[3] With these modifications in the sentence imposed upon the petitioner, the application is dismissed.

[4] **Shearer J.**—I agree.

M.K. *Application dismissed.*

A. I. R. (38) 1951 Patna 355 *[C. N. 84.]*

RAMASWAMI AND NARAYAN JJ.

Atta Karim—Appellant v. *Mt. Bibi Habiba Soghra — Respondent.*

A. F. O. O. No. 236 of 1948, D/- 28-2-1950.

Civil P. C. (1908), S. 51—Money decree—Execution by arrest of judgment-debtor—Onus of proof —Order when can be made.

According to S. 51, Civil P. C., as it stands after the amendment by Act XXI [21] of 1936, the onus of proof is on the decree-holder to establish that the judgment-debtor had sufficient means to pay the decree within the meaning of sub-cl. (b) of the proviso to S. 51. Though by the amendment of the section some restrictions have been placed on the right of the decree-holder to obtain an order of arrest, such an order can be made when it is found that the judgment-debtor, though perfectly capable of paying the decree money, has neglected to pay it. [Para 2]

Thus, where a judgment-debtor, who was a Sub-Registrar owning some property, was found to have delayed or obstructed the payment of the dower debt for which a decree was obtained by his divorced wife, an order of execution of the decree by arrest of the judgment-debtor was passed: A.I.R. (26) 1939 Pat. 380 and A.I.R. (13) 1926 Lah. 110, *Rel. on.* [Para 2]

Anno. C. P. C., S. 51, N. 5a.

K. C. Sanyal, Shamshul Hoda and A. H. Quadri — for Appellant; R. S. Sinha — for Respondent.

Narayan J. — This appeal arises out of an execution proceeding. The respondent obtained a decree for Rs. 5000 against the appellant on 11-1-1943, this amount having been claimed by the respondent as her dower. On appeal to this Court the decree was varied and Rs. 10,000 was allowed as dower to this respondent. The decree was put under execution and the judgment-debtor appeared in the execution case on 2-11-1943 and made a prayer to the effect that execution be stayed till the disposal of the appeal which he had preferred to the High Court. He was allowed time till 12-1-1944 and meanwhile an order was received from the High Court according to which the judgment-debtor was allowed to deposit the decretal amount in four equal instalments. This Court permitted the judgment-debtor to pay the decree money in instalments of Rs. 1250 each. There was, however, default by the judgment-debtor and because of the default the decree-holder applied for issue of notice under O. 21, R. 37, Civil P. C. against him. The judgment-debtor then objected but his objection was overruled and order for issue of warrant of arrest was passed. On 7-9-1944, the judgment-debtor prayed for recalling the order for the issue of warrant of arrest and after this petition had been heard the judgment-debtor was held to be in possession of properties yielding an income of about Rs. 400 per year. There was again an order by the Court permitting the judgment-debtor to pay the decree money in instalments and the judgment-debtor went on making payments till 19-1-1946. In the meantime his appeal before this Court was dismissed. Again for the third time by an order dated 2-7-1946 the judgment-debtor was allowed to pay the decree money in instalments and he made some payments but ultimately the order dated 2-7-1946 was set aside by the High Court. The decree-holder therefore again proceeded with the execution and the judgment-debtor filed an objection contending that he was not liable to be arrested. The judgment-debtor relied on S. 51, Civil P. C., as it stands after the amendment made in 1936. There is a proviso added to this section which says that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree is likely to abscond or leave the local limits of the jurisdiction of the Court, or has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property or committed any other act of bad faith in relation to his property; or (b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or (c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account. The objection of the judgment-debtor was heard and the learned

Subordinate Judge was of the opinion that sub-cl. (b) of the proviso is applicable to this case inasmuch as the judgment-debtor, though he had the means to pay the decree, has neglected to pay it. The learned Subordinate Judge has pointed out that the execution has been pending for the last five years and that though there was a decree for Rs. 10,000 as dower and for Rs. 1400 as costs against this judgment-debtor he has up till now paid a sum of Rs. 3600 only towards the decree. Mr. Sanyal on behalf of the appellant has stressed the fact that the judgment-debtor has made payments from time to time and he argues that this is a circumstance which indicates that he has not refused or neglected to pay the decree money.

[2] The main question therefore is whether the judgment-debtor has had since the date of the decree the means to pay the amount of the decree or a substantial part thereof. We have got two depositions of this judgment-debtor on the record and from a perusal of these depositions I am satisfied that the judgment-debtor has had the means to pay the decree money. He stated on 1-7-1944 that in December 1937, he had executed a sale-deed in favour of the children of his first wife with regard to the properties yielding an income of Rs. 600 or Rs. 700 per year and that the income from the properties still in his hands was Rs. 400 per year. It is clear from his deposition that besides owning zamindary property yielding an income of Rs. 400 a year he is in possession of certain khudkasht or bakasht lands. His statement is that he has got khudkasht lands in Hundrahi and Bhatta, but unfortunately he has avoided stating the exact area of the bakasht lands. Certainly it is very difficult to believe his statement that he does not remember the exact area of his bakasht lands and is not able to give any idea of those lands. This statement of the judgment-debtor shows that it is not only a few bighas of bakasht lands which are in his possession. If he would have really only possessed a few bighas of bakasht lands it was very easy for him to say that the area of the bakasht land, in his possession is quite negligible. In another deposition which the judgment-debtor gave on 6-7-1948 he stated that he had got about 50 bighas of bhaoli lands. If he has 50 bighas of bhaoli lands that would be equivalent to about 25 bighas of bakasht lands and even this property must be regarded as a valuable property specially in these days when prices of lands are very high. I therefore see no reason to disagree with the learned Subordinate Judge that the judgment-debtor, though he had the means to pay the amount of the decree or a very substantial part thereof, has neglected to pay it. Mr. Sanyal was perfectly right when he said that according to S. 51 of the Code as it stands after the amendment by Act XXI [21] of 1936 the onus of proof is on the decree-holder to establish that the judgment-debtor had sufficient means to pay the decree within the meaning of sub-cl. (b) of the proviso to S. 51. But as was pointed out by a Division Bench of this Court in *Kamaldhari Lal* v. *Kamleshwari Sahay*, 1939 P. W. N. 604 : (A.I.R. (26) 1939 Pat. 380) though by the amendment of S. 51 of the Code some restrictions have been placed on the right of the decree-holder to obtain an order of arrest, such an order of arrest can be made when it is found that the judgment-debtor though perfectly capable of paying the decree money has neglected to pay it. Rowland J. who delivered the judgment of the Division Bench expressed his agreement with the decision in *Hargobind* v. *Hakim Singh*, 6 Lah. 548 : (A. I. R. (13) 1926 Lah. 110) and in this Lahore case Sir Shadi Lal C. J. had quoted the observation of the Judicial Committee that "the difficulties of a litigant in India begin when he has obtained a decree. The learned Chief Justice further observed that it was a matter of common knowledge that far too many obstacles were placed in the way of a decree-holder who sought to execute his decree against the property of the judgment-debtor, and therefore a decree-holder at times finds it easier to apply for the arrest of his judgment-debtor. The judgment-debtor in this case happens to be a Sub-Registrar but if he has neglected to pay the decree money I should not hesitate to uphold the order that has been passed against him. In my opinion it is an abnormal thing for a man of his position to avoid, delay or obstruct the payment of the dower debt which he was liable to pay to his wife who has now been divorced.

[3] I see no merit in this appeal and the appeal is dismissed with costs.

[4] **Ramaswami J.** — I agree to the order proposed.

D.R.R. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 356 *[C. N. 85.]*

SINHA AND RAMASWAMI JJ.

Sitaji and others—*Appellants* v. *Bijendra Narain Choudhary and others*—*Respondents.*

A. F. O. D. No. 74 of 1945, D/- 13-4-1949.

(a) Evidence Act (1872), S. 32 (5) — Pedigree table.

A *panji* (family pedigree) maintained according to recognised system prevailing in Mithila is admissible in evidence as to relationship of various members of family even if it is not proved by whom it was written. [Para 7]

Anno. Evi. Act, S. 32, N. 25.

(b) Civil P. C. (1908), S. 107 — Appreciation of evidence by appellate Court — Interference on question of fact.

The functions of a Court of appeal in dealing with a question of fact are limited in their character and scope. Where the decision mainly rests on oral evidence, the Court of appeal must have regard to the exceptional value of the opinion of the Judge of first instance. In a case which turns on the conflicting testimony of witnesses and the belief to be reposed on them, the appellate Court can never recapture the initial advantage of the Judge who saw and believed. The Court of appeal must, in order to reverse the decision of the trial Judge, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong. [Para 9]

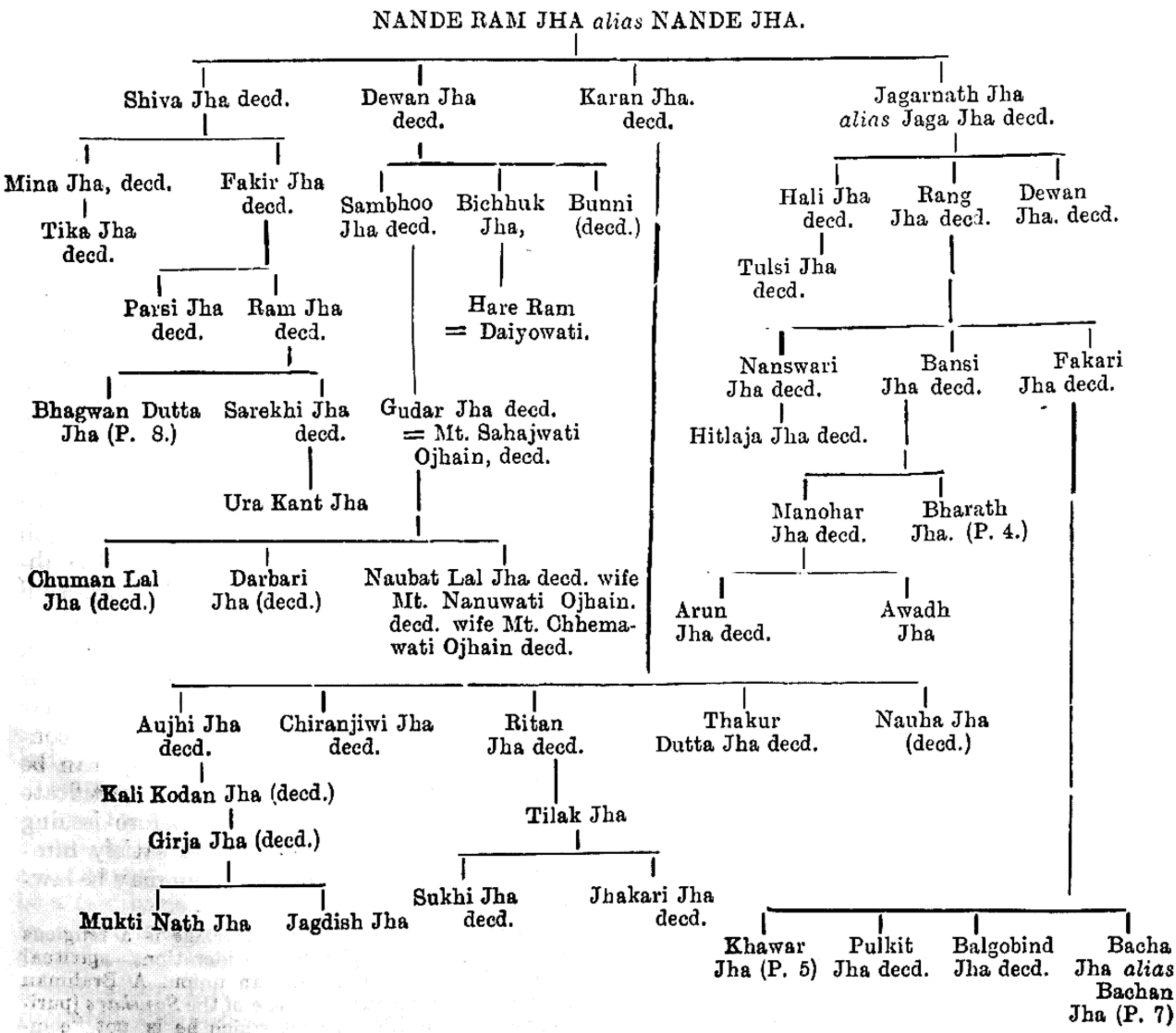
Anno. Civil P. C., S. 107, N. 14.

(c) Hindu Law — Widow — Accretion — Nature of — Burden of proof — Evidence Act (1872), Ss. 101 to 103.

The question whether properties acquired by a widow out of savings from income from her husband's estate form an accretion to her widow's estate or constitute her stridhan property must be determined according to the intention of the widow in dealing with those properties. A person who alleges accretion must show that the property was acquired by the widow with that intention : A. I. R. (5) 1918 P. C. 156, *Rel. on* ; A. I. R. (26) 1939 Pat. 364, *Dissent.* [Para 11]

B. C. De, Ramakant Verma and K. D. De — for Appellants ; L. K. Jha, B. N. Mitter, Prem Lall, A. K. Mitter and Srinath Singh—for Respondents.

Ramaswami J. — This appeal is by the defendants first and second parties from a decree of the Additional Subordinate Judge of Darbhanga. The plaintiffs brought the suit claiming that they were the nearest reversioners of one Naubat Lal Jha, who died in 1879, leaving two widows, Mt. Nanuwati and Mt. Chemawati and his mother Mt. Sahajwati Ojhain. The following pedigree will elucidate the relationship of the parties :



After death of Naubat Lal both the widows obtained possession of the estate but Mt. Sahajwati was granted only maintenance. Sahajwati died in 1909 ; and Nanuwati in 1911 when the whole estate devolved on Mt. Chemawati. On 5-11-1915 Mt. Chemawati dedicated all the properties to certain deities by a registered deed of Samarpannama. She constituted herself as *shebait* for her life time but she provided that after her death Mahant Ramsarup Das would

succeed as *shebait*. Mahant Ramsarup Das, however, died in the life time of Mt. Chemawati. In 1931 she, therefore, executed a deed of *shebaitnama* appointing Mahant Gopal Das as *shebait* of the said deities. In 1933 the plaintiffs instituted a suit against the defendants for a declaration that the deed of endowment executed by Mt. Chemawati was void and not binding upon their reversioners. In that suit the defendants contended that the plaintiffs were not the nearest reversioners of Naubat Lal Jha. But the plaintiffs obtained a decree. On appeal the High Court dismissed the suit on the ground that it was barred by time; but the other issues raised were expressly left open. After Mt. Chemawati died on 5-8-40, the plaintiffs brought the present suit. They sought a declaration that the deed of endowment and *shebaitnama* executed by Mt. Chemawati were void and fraudulent and they were entitled to possession of the properties on the death of Mt. Chemawati. It is necessary to state that plaintiffs second party have conveyed 10 annas share of the properties to plaintiffs first party who in consideration thereof have agreed to meet the costs of litigation.

[2] Defendants 1st party contested the suit on the ground that plaintiffs 2nd party were not the nearest agnates of Naubat Lal Jha. As regards the disputed properties the defendants 1st party claimed that Naubt Lal was not the owner thereof; that the properties had from long before appertained to the deities and Naubat Lal Jha had acted merely as a *shebait*. In the alternative, defendants 1st party claimed that at any rate the properties mentioned in Sch. 3, of the deed of endorsement were the stridhan of Mt. Chemawati and she could make a valid endowment in favour of the deities.

[3] The learned Subordinate Judge found that the plaintiffs were the nearest reversioners of Naubat Lal Jha, that the properties in dispute belonged to Naubat Lal Jha and not to the Thakurbari. As regards Sch. 3 of the deed of endowment the Subordinate Judge held that there was no evidence to show that these properties constituted the stridhan of Mt. Chemawati and she had power to alienate. Upon these findings the Subordinate Judge pronounced a decree in favour of the plaintiffs.

[4] Two main questions were discussed in hearing of the appeal, viz., (1) whether the plaintiffs were the nearest heirs of Naubat Lal Jha and so were competent to bring the suit; (2) whether the learned Subordinate Judge was correct in holding that the properties mentioned in Sch. 3 of the deed of endowment did not constitute the stridhan of Mt. Chemawati.

[5] On the important question of pedigree the parties have produced evidence of a very contradictory nature. The plaintiffs alleged that their ancestor Shiva Jha and Jaya Jha were the brothers of Dewan Jha, who was the great grand-father of Naubat. They stated that Shiva Jha, Jaya Jha and Dewan Jha were all sons of Nande Jha, who belonged to Jajuare Pachahi Mul. The defendants did not dispute that the plaintiffs are descendants of Shiva Jha and Jaya Jha or that Naubat Lal was descendant of Nande Jha and belonged to Jajuare Pachahi Mul. The defendants, however, denied that Shiva Jha and Jaya Jha were brothers of Dewan. They asserted on the contrary that Shiva Jha, Jaya Jha and Karan Jha were sons of one Guni Jha and that they all belonged to Jajuare Bhargao Mul. The question at issue, therefore, is whether Shiva Jha, Jaya Jha, Dewan Jha and Karan Jha were full brothers, as claimed by the plaintiffs. (After discussion of the oral evidence the judgment proceeds :)

[6] At this stage it is necessary to state that both parties exhibited *panjis* to corroborate the oral evidence of pedigree. *Panjis* are palm-leaf manuscripts of pedigree systematically maintained by *Panjiaras* (or genealogists) in the community of Maithil Brahmins. It is the agreed case of the parties that such a system is scrupulously maintained in order to prevent marriages being contracted within forbidden degree. There is a reference to this custom in Crooke's Tribes and Castes vol. 3 p. 411, 1896; O'Malley-Gazetteer of Darbhanga District p. 39; Journal of Bihar and Orissa Research Society, vol. 3, p. 515. *Panjikars* are selected after they pass a regular test prescribed by the Maharajah of Darbhanga, who is the head of Maithil Brahmins, and who issues certificates to successful candidates. The primary duty of the *panjikars* is to maintain regular records of pedigree of the Maithil Brahmins. In order to keep their records up-to-date, the *Panjikars* go on regular tours and make enquiries. The *panjis* are considered so important that no marriage can be celebrated unless *panjikars* issues a certificate of sanction called *Siddhanta*. Before issuing the certificate the *panjikar* must satisfy himself that the bride and bride-groom may be lawfully married :

"With a Maithil Brahman, marriage is a religious rite; it is based upon spiritual considerations—spiritual benefits derivable from such an union. A Brahman ought to marry because it is one of the *Sanskars* (purifications) of his life without which he is not "complete", nor competent to do any of the duties of *Girhastha* (householder). He ought to marry because a son born of such marriage will save the parents from the hell named '*Pun*'. A son (Putra) means he who saves one from the hell '*Pun*'. Consequently the marriage must be in conformity with Shastric injunc-

tions. A bride must be more than fifth in descent on the mother's side and more than sixth on the father's from the last common ancestor of her and the bridegroom. One cannot marry the daughter of his stepmother's brother, nor can he marry a girl who is an offspring of his grandfather, and so forth. *Any infringement of these rules not only invalidates the marriage but is a grievous sin.* And as a safeguard against such an invalid marriage, entries of the relationship with names of members of all the different Maithil families are kept from an ancient time by the *Panjikars* or Panjiars (genealogists) of Mithila (Journal of Bihar and Research Society, Vol. 3, p. 515).

[7] For the plaintiffs *panjis* (EXS. 4 series) were exhibited in order to support the oral evidence of pedigree. If these *panjis* be authentic, they would completely establish the plaintiffs' case that Dewan Jha, Shiva Jha, Karan Jha and Jaya Jha were the sons of Nande Jha. P. W. 29 Nirsu *alias* Biswanath and P. W. 31 Lachmi Narain Jha proved the *panjis* (EXS. 4 to 4-G). Kumar Lal Jha had proved EX. 4-D in the previous title suit. His evidence is EX. 25-A. On behalf of the appellants it was pointed out that in the previous suit, EXS. 4 to 4-C and 4-E were not filed. But it is undisputed that EXS. 4-D, 4-F and 4-G were filed in that suit. For the appellants comment was made that Khantar Jha admitted in his evidence that he had dictated genealogy to Kumar Lal Jha. Kumar Lal Jha, however, stated that EX. 4-D was written partly by his father, that he was unable to identify the hand-writing of the other part. There is to my mind no real contradiction between the evidence of Khantar and of Kumar Lal Jha. It was then objected for the appellants that unless the hand-writing of the whole of EX. 4-D was proved, the document was not admissible in evidence. But this argument is untenable. In my opinion, it is not necessary for the plaintiffs to prove by whom the *panji* was written, if we recognise the admitted system of maintaining *panjis* in Mithila. In the present case Kumar Lal Jha has stated that EX. 1 is partly written by his father and partly by his ancestor whose writing he could not identify. The Subordinate Judge has rightly accepted his evidence as true. If so, the *panji* (EX. 4-D) is admissible in evidence. In a similar case *Jahangir* v. *Sheoraj Singh*, 37 ALL. 600 : (A. I. R. (2) 1915 ALL. 334), a document ancient and genuine purporting to be a family pedigree was produced in evidence in a mutation case by one Jiraj. Jiraj stated that he had received the pedigree from his grand-father. But it was not proved who had prepared the pedigree. The High Court held that it was not necessary to show who has made the statements mentioned in the pedigree and that it was admissible in evidence under s. 32, cl. (6), Evidence Act. In *Mt. Anandi* v. *Nand Lal*, 46 ALL. 665: (A. I. R. (11) 1924 ALL. 575), it was pointed out that a family pedigree may be a pedigree kept by a member of the family or by another person on its behalf. In that case a book maintained by the members of a family of hereditary bards and containing entries of domestic events occurring from time to time in the family to which they rendered services as bards, was held admissible as evidence concerning the relationship of the various members of the family, whose history was entered therein. (After discussion of the defence evidence the judgment proceeds).

[8] In my opinion, the Subordinate Judge rightly held that the *panjis* (EXS. 4 series) are genuine. They completely support the oral evidence adduced by the plaintiffs that they are the nearest agnates of Naubat Lal Jha.

[9] In this context it is of great importance to remember that the functions of a Court of appeal in dealing with a question of fact are limited in their character and scope. Where the decision mainly rests on oral evidence, the Court of appeal must have regard to the exceptional value of the opinion of the Judge of first instance. He has had the opportunity of watching the demeanour of witnesses, he has observed the drift and conduct of the case, he has impressed upon him by hearing every word, the scope and nature of the evidence in a way that is denied to any Court of appeal. In a case which turns on the conflicting testimony of witnesses and the belief to be reposed on them, the appellate Court can never recapture the initial advantage of the Judge who saw and believed. In *Powell* v. *Strentham Maner Nursing Home*, (1935) A. C. 243 : (104 L. J. K. B. 304), Lord Wright observed :

"Two principles are beyond controversy. First, it is clear that, in an appeal of this character, that is from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of appeal must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong."

In *Watt or Thomas* v. *Thomas*, (1947) A. C. 484 : (1947-1 All E. R. 582), Lord Thankerton re-stated the principle :

"Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion."

In *Prem Singh* v. *Deb Singh*, 1947 A. L. J. 613 : (A. I R. (35) 1948 P. C. 20) the Judicial Committee quoted this statement of principle, reversed the High Court decree and restored that of the Subordinate Judge, holding that the

finding of the trial Judge on the oral evidence should have been accepted by the High Court.

[10] In the present case the learned Subordinate Judge has expressly accepted the testimony of P. W. 6, Khantar Jha, and P. Ws. 26, 30 and 38 on the question of pedigree. He rejected the evidence of the defendants' witnesses on this point. He expressly held that D. W.-22, Awadh Behari Das, being a *Bairagi* could not have performed the *sradha* of Mt. Chemawati; and that his evidence that he did perform the *sradh* was manifestly false. As regards the *panjis*, the Subordinate Judge held that the *panjikars* (P. Ws.-29 and 31) have given credible evidence and the *panjis*, they produced were genuine and absolutely reliable. On the contrary he disbelieved the evidence of D. W.-35, Nirsu Jha, and the *panjis* (Exs. 10 Series) produced for defendant. On behalf of the appellants Mr. B. C. De addressed elaborate arguments to show that the plaintiffs' evidence was unreliable. But we cannot take the responsibility of reversing the conclusion of the trial Judge, for we are not satisfied that his decision is wrong, or that the evidence on which he relied is so improbable as to be unbelievable, or otherwise unworthy of acceptance. It was next contended on behalf of the appellants that even if the plaintiffs were the nearest reversioners of Naubat Lal, they could not succeed with respect to the properties mentioned in Sch. 3 of the deed of endowment. In para. 9 of the plaint the plaintiffs alleged that the properties in Sch. 3 had been wrongly described as self-acquired properties of Mt. Chemawati. In para. 20 of the written statement the defendants specifically asserted that the properties were stridhan of Mt. Chemawati. It is the agreed case that these properties were purchased after the death of Naubat Lal Jha out of the income of the estate. But neither party has adduced evidence to prove whether Mt. Chemawati intended the properties purchased to be her stridhan or to be accretions to her husband's estate. For the respondents reliance was placed on *Sheo Lochan Singh* v. *Saheb Singh*, 14 I. A. 63: (14 Cal. 387 P. C.) in which the purchased properties were dealt with by the widows as accretions to their husband's estate, and the original properties and such accretions were treated by the widows precisely alike in the deed of gift which they executed in favour of the alleged adopted son. The Judicial Committees held upon the evidence that the properties were accretions, and proceeded to observe:

"Where a widow comes into possession of the property of the husband, and receives the income, and does not spend it, but invests it in the purchase of other property, their Lordships think that, *prima facie*, it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would, *prima facie*, be intended to be accretions to that estate."

But this is only a dictum which must be understood with reference to the facts and circumstances of that case. It cannot be read as a statement of law for it is expressed merely in terms of an inference of fact. The *obiter dictum* is more than counter-balanced by the actual decision of the Judicial Committee in a much later case *Saudamini Dasi* v. *Administrator-General of Bengal*, 20 I. A. 12: (20 Cal. 433 P. C.) where the income which accrued from the husband's estate after his death for about eight years subsequent to his death and which was not disposed of by his will came to his widow as heir-at-law, and she invested the same in Government securities worth two lakhs of rupees; and after the lapse of about twenty years she disposed of the same as her own. It was held that the money so invested by her belonged to her as income derived from her widow's estate and was subject to her disposition. The Judicial Committee observed:

"It was said she had placed it in investments of a permanent nature. Had she done so, it does not appear to their Lordships that this circumstance alone would have added the fund to the estate devolving on her husband's heir."

In *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao*, 52 I. A. 214: (A. I. R. (12) 1925 P. C. 105) the widow never obtained actual possession of the income to which she was entitled and the question arose as to whether she was entitled to dispose of it by will. Their Lordships observed:

"That income or any part of it, she could, while she remained entitled to it, have added as an accretion to the Medur estate if she had wished to do so. There is no evidence to suggest that she had ever added any part of that income as an accretion to the Medur estate. She was consequently entitled to dispose of it by will or otherwise."

In *Navaneetha Krishna* v. *Collector of Tinnevelly*, 69 M. L. J. 632: (A. I. R. (22) 1935 Mad. 1017) the Madras High Court held, as well established that the income of a woman's estate remained at her disposal in the absence of any thing done by her to show that she treated the accumulation as part of the last male holder's estate. In *Balasubrahmanya* v. *Subbayya*, 65 I. A. 93: (A. I. R. (25) 1938 P. C. 34) the Judicial Committee affirmed that decision holding that both the savings which were in the hands of the Court of Wards and the money which was in the widow's own possession were the personal property of the Rani and would pass under her will.

[11] The true position is stated by Lord Phillimore in *Raja of Ramnad* v. *Sundara Pandiyasari*, 46 I. A. 64: (A. I. R. (5) 1918 P. C. 156):

"A widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say (25 Mad. 351). But at the out side it is a presumption and *it is a question of fact to be determined*, if there is any dispute, whether a widow has or has not so dealt with her property."

On behalf of the respondents reference was made to *Ramran Bijoy Pd. Singh* v. *Krishna Madho Singh*, A. I. R. (26) 1939 Pat. 364 : (182 I. C. 982) where a Division Bench held that where a widow invests the income of the husband's estate in the purchase of other property the intention of the widow must be *prima facie* deemed to make purchased property an accretion to the husband's estate. But (with the greatest respect) this decision appears incorrect for it is opposed to the Privy Council authorities and is inconsistent with *Prasad Kuer* v. *Baijnath Prasad*, 14 Pat. 518 : (A. I. R. (23) 1936 Pat. 200) and *Jamuna Prasad* v. *Ram Padarath*, 18 P. L. T. 765: (A. I. R. (24) 1937 Pat. 619) in which the learned Judges held that the onus was upon the party who alleged accretion, to show that the property which was purchased by the widow from her own savings was not her own but was intended to be an accretion to the estate. In the present case the plaintiffs have alleged that the properties of Sch. 3 of the deed of endowment were accretion to the widow's estate. The onus of proof was upon them, but they have not produced any evidence to show that the widow's intention was such. On the contrary in the deed of endowment Mt. Chemawati herself has clearly recited that the Sch. 3 properties were self-acquired. This important recital together with the circumstance that the widow separately enumerated the properties in the deed of endowment clearly suggest that the widow never intended to merge the properties with her husband's estate. As regards these properties, it is manifest that Mt. Chemawati could validly execute a deed of endowment, and the plaintiffs are not entitled to a decree.

[12] Upon these grounds I hold that the deed of endowment and *shebaitnama* are valid with respect to the properties mentioned in Schs. 1 and 2, the plaintiffs being found to be the nearest reversioners of Naubat Lal Jha, are entitled to a declaration of their title and recovery of possession and to mesne profits from the date of death of Mt. Chemawati till possession is delivered.

[13] Accordingly I would alter the decree of the learned Subordinate Judge and allow the appeal to this extent with proportionate costs.

[14] **Sinha J.**—I agree.

K. S. *Decree modified.*

A. I. R. (38) 1951 Patna 361 *[C. N. 86.]*

SINHA AND RAI JJ.

Mt. Rukmini Devi and others—*Appellants* v. *Rambilas Singh and others*—*Respondents.*

A. F. A. D. No. 1020 of 1947, D/- 24-2-1950.

(a) Tenancy Laws — Bihar Tenancy Act (VIII [8] of 1885), S. 112-A—All Landlords not impleaded —Effect - Civil P. C. (1908), O. 1, R. 3.

Where, in proceedings under S. 112A before the Revenue Court, all the landlords are not impleaded, the order of the Revenue Court reducing the rent of the holding is without jurisdiction. [Para 6]

(b) Civil P. C. (1908), S. 11—Competency to try subsequent suit.

A suit for a declaration that the order of the Revenue Court reducing the rent of the holding is without jurisdiction as all the landlords were not impleaded in the proceedings under S. 112A, Bihar Tenancy Act, could not have been tried by the Revenue Court and as such is not barred by *res judicata* either constructively or directly. [Para 8]

Anno. C. P. C., S. 11 N. 73, 75.

Lakshmansaran Sinha — for Appellants; B. C. De and R. K. Sinha — for Respondents.

Rai J.—This appeal is by the heirs of one Parmanand Singh, who along with others, had filed a title suit in the Court of the Subordinate Judge, Gaya, for a declaration that the order dated 14-9-1939, as finally confirmed by the appellate order dated 10-9-1940, reducing the rentals of the holdings in suit is *ultra vires*, illegal and without jurisdiction and not binding upon the plaintiffs.

[2] The plaintiffs claimed the relief on various grounds including the one that all the landlords had not been impleaded in the proceedings under S. 112A, Bihar Tenancy Act, before the Revenue Courts, and, as such, the orders passed in those proceedings were *ultra vires* and without jurisdiction.

[3] The defence put forward by the tenants-defendants was, that those of the landlords who had been impleaded in the proceedings would be deemed to have represented all the landlords, and, as such, the orders passed by Revenue Courts cannot be attacked in the present suit as being one without jurisdiction.

[4] The trial Court decreed the suit. But, on appeal by the tenants-defendants, the judgment and decree passed by the trial Court was modified. The appellate Court has held that the order of the Revenue Courts reducing the rent of the holdings would not bind Mt. Jit Kuer, or her heirs and legal representatives, but it was binding upon the present appellants who are the heirs of Parmanand Singh, deceased, the original plaintiff. Being aggrieved by the said judgment and decree of the lower appellate Court, the appellants have come up in second appeal before this Court.

[5] Mr. Lakshmansaran Sinha, the learned counsel for the appellants, has contended that as all the landlords had not been impleaded in the proceedings taken under S. 112A, Bihar Tenancy Act, the Revenue Court had no jurisdiction to reduce the rent of the holdings. The petition filed by the tenants for reducing of rent has been exhibited in this case, and is Ex. 3 on the record. In that petition under the heading "Name and residence of landlord" the following persons were named: "Sheorachcha Singh ogairah, Babu Rajendra Prasad Singh and Kishundeba Singh." The column recites the various addresses of the landlords named therein. Now, both the Courts have proceeded on the assumption that Jit Kuer, one of the landlords, and Parmanand Singh, another co-sharer landlord, had not been impleaded in the petition that was filed under S. 112A, Bihar Tenancy Act. It was contended on behalf of the respondents by Mr. De that Sheorachcha Singh would be deemed to have represented the interest of Mt. Jit Kuer and that Bishundeva Singh would be deemed to have represented the interest of Parmanand Singh. The lower appellate Court, while dealing with this point, has come to the conclusion that Bishundeva Singh being the elder brother and karta of the family will be deemed to have represented the interest of Parmanand Singh also in the proceedings, and, hence, Parmanand Singh would be bound by the orders passed by the Revenue Court. As regards Mt. Jit Kuer, the lower appellate Court has taken the view that she was not represented in the proceedings, and she or her heirs and legal representatives would not be bound by the orders passed in the rent reduction proceedings.

[6] Mr. Lakshmansaran Sinha next contended that the jurisdiction of the Revenue Court to decide the question of reduction of rent had been conferred by statute, and that jurisdiction can be exercised only if the case comes within the four corners of the powers that had been conferred on the Revenue Courts by the said statute. He contended that the right of the entire body of landlords to realise rent at a particular rate cannot be interfered with unless a proceeding is taken under S. 112A after impleading all of them as parties to those proceedings and after serving them with notice as enjoined by the rules framed under the Bihar Tenancy Act concerning the rent reduction proceedings. In support of his proposition he relied upon two Division Bench decisions of this Court, namely, *Raja Surajpal* v. *Ramgati*, 26 Pat. 353 : (A. I. R. (35) 1948 Pat. 239) and *Basdeonarain* v. *Karumahton*, 26 Pat. 592 : (A. I. R. (35) 1948 Pat. 153). In the former case, Imam J. held :

"As to the second point, it is clear that in the rent reduction proceedings under S. 112A, Bihar Tenancy Act, only defendant 1 was made a party and the other landlords of the holding were not made parties. No notices were issued to them. The decision was given in their absence. It is quite clear that in these circumstances the order reducing the rent was without jurisdiction."

His Lordship thereafter dealt with various rules framed under the Bihar Tenancy Act enjoining a particular procedure to be followed regarding service of the notice. In the other case of *Basdeonarain* v. *Karumahton*, 26 Pat. 592 : (A. I. R. (35) 1948 Pat. 153) the same view was taken by a Division Bench of this Court. A similar question arose for consideration before their Lordships of the Judicial Committee in the case of *Jagdishwar Dayal Singh* v. *Dwarka Singh*, 12 Pat. 626 : (A. I. R. (20) 1933 P. C. 122). There, the question in controversy was whether a sale held under S. 208, Chota-Nagpur Tenancy Act, was within the jurisdiction of the Deputy Commissioner. In that case what had happened was that one of the tenure-holders had not been impleaded either in the rent suit or in the execution proceedings before the Deputy Commissioner, and in his absence the tenure was sold under S. 208, Chota-Nagpur Tenancy Act. Section 208, Chota-Nagpur Tenancy Act, ran as follows :

"When a decree passed by the Deputy Commissioner under this Act is for an arrear of rent due in respect of a tenure or holding, the decree-holder may apply for the sale of such tenure or holding, and the tenure or holding may thereupon be brought to sale, in execution of the decree, according to the provisions for the sale of under-tenures contained in the Bengal Rent Recovery Act, 1865; and all the provisions of that Act, except Ss. 12, 13, 14 and 15 thereof, shall, as far as may be, apply to such sale."

Now, dealing with the jurisdiction of the Revenue Court, their Lordships of the Judicial Committee were of opinion that when a statutory jurisdiction is conferred on a Revenue Court, the jurisdiction must be exercised within the statutory powers conferred. This pronouncement of their Lordships of the Judicial Committee can be relied upon to decide the controversy in the present action also. The Revenue Court had been conferred statutory jurisdiction to decide the question of reduction of rent within particular limits. Section 112A and the other relevant sections of the Bihar Tenancy Act read with the rules framed under that Act governing such cases make it mandatory that the orders can be passed in the presence of all the parties interested in the holdings; and when it is found that all the landlords had not been impleaded in the proceedings, the order passed

by the Revenue Court would become without jurisdiction.

[7] Mr. De, appearing on behalf of the respondents, on the other hand, contended that it had not been established that Jit Kuer was recorded in Register D. But from the pleadings as well as from the admitted case of the parties before the two Courts below, it was clear that Mt. Jit Kuer was one of the landlords who had not been impleaded in the proceedings under S. 112A. It is now too late to suggest that it may be that Mt. Jit Kuer was not recorded in Register D. Besides, the lower appellate Court also has held that Mt. Jit Kuer, her heirs and legal representatives would not be bound by the orders passed by the Revenue Courts as she was not represented in the proceedings. This part of the judgment of the lower appellate Court has not been challenged before us either by way of cross-objection or by way of appeal. It is, therefore, now settled for the purposes of this second appeal that Mt. Jit Kuer was one of the landlords who had not been impleaded in the proceedings under S. 112A, Bihar Tenancy Act.

[8] Mr. De further contended that this objection of non-joinder of all the co-sharer landlords interested in the holdings had not been taken before the Revenue Courts and the present plaintiff was debarred from taking the same by virtue of constructive *res judicata* as contemplated by Expln. IV to S. 11, Civil P. C. He relied on the Full Bench decision in the case of *Ram Ran Bijoy Prasad Singh* v. *Ramagya Kuer*, A. I. R. (33) 1946 Pat. 354 : (226 I. C. 363 F. B.). But there the facts were different. In that case what had happened was that on 8-11-1939, on the application of the tenants under S. 112A, Bihar Tenancy Act, the Rent Reduction Officer had reduced the rent of khata No. 415/1 to Rs. 14 and that of khata No. 416 to Rs. 17-11-0. On a further application of those very tenants the Rent Reduction Officer reduced the rent of khata No. 415/1 to Rs. 7-10-0 and that of khata No. 416 to Rs. 9-11-0 by order dated 29-11-1939. It was held in that case that the second order was passed on a petition for rehearing the matter as the first order had been passed *ex parte*. In the Full Bench case, however, their Lordships further considered the legality of the second order of the Rent Reduction Officer on the basis that the landlord should have raised objection at the time of the second order that a few days before there had already been a reduction and a second reduction was not permissible. He having not raised such objection at the time of the second order could not be permitted to say that the second order was wrong. The present suit as framed could not have been tried by the Revenue Court, and, as such, the present suit is not barred by *res judicata* either constructively or directly.

[9] Mr. De further referred to the case of *Dwarka Nath* v. *Dhanoo Gope*, 26 P. L. T. 297: (A. I. R. (32) 1945 Pat. 320), but there the facts were different. All the landlords interested in the holding had been impleaded as parties to the proceeding under S. 112A, Bihar Tenancy Act. There was some irregularity regarding service of notice and the point that was urged there was that the person on whom notices were served, had no written authority to accept notice on behalf of the landlord, and, as such, it was contended in that case that the order of the Revenue Court was without jurisdiction. But in the present case all the landlords had not even been impleaded in the proceeding, and, as such, that case has no application to the facts and circumstances in the present case.

[10] Mr. Lakshmansaran Sinha further raised the point that during the pendency of the appeal before the lower appellate Court, Parmanand Singh died and in his place the appellants before the lower appellate Court, substituted the widow and the two minor sons of Parmanand Singh as party-respondents to the appeal. The guardian's name in the substitution petition did not appear, but in spite of his non-appearance no other guardian was appointed by the Court to look after the interest of the minors, and, as such, the minors will not be deemed to be parties to the appeal. Mr. De in reply contended that the mother of the minors had also been made a party-respondent and she would be deemed to have protected the interest of the minors. But it appears that the mother also had not entered appearance, and it cannot be said that the mother will be deemed to have protected the interest of the minors in the appeal without even entering appearance in the appeal. But it is not necessary to proceed with this matter further because on merits, in my judgment, the appeal should be allowed.

[11] Under the circumstances, the appeal is allowed, the judgment and decree passed by the lower appellate Court are set aside and those of the trial Court restored. The plaintiffs-appellants are entitled to their costs in all the Courts.

[12] **Sinha J.**—I agree.

D.H. *Appeal allowed.*

A. I. R. (38) 1951 Patna 364 *[C. N. 87.]*

REUBEN AND JAMUAR JJ.

Sri Ram Krishna Das — Appellant v. *Bindeshwari Prasad and others—Respondents.*

Civil Revn. Petn. No. 122 and A. F. O. O. No. 46 of 1948, D/- 11-1-1950.

(a) Civil P. C. (1908), Ss. 104, 115 and O. 1, R. 3 —Order by Subordinate Judge holding suit bad for misjoinder of defendants —Appeal—Revision.

Where the Subordinate Judge holds that the suit is bad for misjoinder of defendants and directs the plaintiff to elect to proceed against some only, no appeal but revision lies against the order. [Paras 2, 3]

Anno. C. P. C., O. 1, R. 3 N. 14.

(b) Civil P. C. (1908), O. 1, R. 3—Different causes of action—Relief, if can be said not to arise out of same act or transaction.

A mere finding that there were different causes of action as against the different sets of defendants is not sufficient to conclude that the condition under O. 1, R. 3 as to common act or transaction was not satisfied.

The question as to joinder depends not on a common cause of action but on common basis of acts or series of acts. [Para 5]

Anno. C. P. C., O. 1 R. 3, N. 6, 9.

(c) Civil P. C. (1908), S. 115—Interference in revision.

The High Court will not interfere in exercise of Court's power of revision in order to assist the plaintiff to raise in Patna, questions relating to the passing of a decree and the execution thereof in the Brindaban (U. P.) Courts so long ago as 1928 and 1929, and raising questions quite unconnected with the suit as against the defendants and the property belonging to Patna. [Para 6]

Anno. Civil P. C., S. 115 N. 16.

(d) Civil P. C. (1908), S. 115, O. 1, R. 10 and O. 6, R. 16—Failure to exercise jurisdiction—Suit relating to property situated in two districts—Misjoinder of parties—Procedure.

Where the Court feels itself embarrassed by the presence of parties against whom it has no power to entertain the suit or by the inclusion in the plaint of pleadings relating to property over which it has no jurisdiction, it has the power under O. 1, R. 10, sub-r. (2), to strike out the defendants, and under O. 6, R. 16, to strike out the unnecessary pleadings. [Para 7]

Where, instead of following this procedure, the Court held that the suit was bad for multifariousness and directed the plaintiff to elect some of the defendants only, within a given period, failing which the plaint was to stand rejected :

Held that the Court had gone wrong by refusing to exercise its jurisdiction in respect of property over which it had jurisdiction. [Para 7]

Anno. C. P. C., S. 115 N. 12 ; O. 1, R. 10 N. 43.

S. C. Sinha—for Appellant ; R. K. Prasad and B. D. Narain and S. Narain—for Respondents.

Reuben J.—This civil revision petition and miscellaneous appeal, both by the plaintiff, are directed against an order of the Subordinate Judge, 3rd Court, Patna, in Title Suit No. 122 of 1947.

[2] In this suit, the plaintiff, as *sebait* of Sri Thakur Brindaban Behari having its temple at Mahalla Kazibagh, police station Alamgunj, and Sri Thakur Radha Rasik Mukutmani *alias* Sri Thakur Brindaban Rasik Mukutmani having its temple in Mahalla Gyangudri Darwaza, police station Brindaban, in the district of Mathura, United Provinces, sues on behalf of the Deities to recover certain property in Brindaban and in Patna. The property in Brindaban, according to him, forms portion of the temple there. It was sold on 14-11-1929, in execution of a decree dated 25-7-1928, in Suit No. 273 of 1928 in the Court of the Munsif of Mathura on the basis of a bond for Rs. 140, executed by Muneshwar Tewari, one of the then *sebaits* of the Deity. It is alleged that Muneshwar Tewari had no authority without the concurrence of the other *sebaits* to incur any liability on behalf of the Deity, and that the liability was incurred without any legal necessity and was not for the use or benefit of the Deity, and that both the decree and the sale in execution were collusive and the purchaser at the auction-sale was a friend of Muneshwar Tewari. Recovery of possession over this property is sought as against defendants 3 to 5, to whom the property has passed from the auction-purchaser by a series of private transfers. Two other transactions are impugned. One is a deed of *rehan* dated 4-2-1936 for Rs. 1,000 in favour of defendant 2, in respect of three pies share in Mauza Rasulpur Kateswar Tauzi No. 627C, executed by Ram Kewal Tewari, one of the then *sebaits* of the Deities. The other transaction is also a *rehan*, executed on 10-7-1937, by the aforementioned Muneshwar Tewari in respect of fifteen dams share in Mauza Rasulpur Kateswar Tauzi No. 627C, also in favour of defendant 2. These transactions are impugned on the same grounds, namely, that the *sebaits* could not, by their individual acts, bind the Deities, and that the transactions were not for legal necessity or for the use or benefit of the Deities. According to the plaintiff, in both these transactions, defendant was the *farzidar* of Munshi Kanhaiya-Lall deceased, father of defendant 1, and relief is sought as against defendants 1 and 2 in respect of these properties. Plaintiff is alleged to have become the *sebait* of the Deities in 1939. Only defendants 3 to 5 appeared and contested the suit and, at their instance, the Subordinate Judge considered first the issue regarding the jurisdiction of the Court to entertain the suit against the contesting defendants in respect of the property in Brindaban. Under O. 1, R. 3, Civil P. C., all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, where, if

separate suits were brought, any common question of law or fact would arise. The learned Subordinate Judge held that there were two distinct causes of action as against the two sets of defendants, and that the two conditions of O. 1, R. 3, were not satisfied and, therefore, the plaintiff, by joining the two causes of action in one suit, could not confer jurisdiction on the Patna Court in respect of the property in Brindaban. On this finding, he came to the conclusion that the suit as framed was bad for multifariousness and directed the plaintiff to elect against which defendant or set of defendants he proposed to go on with the suit, the discretion to be exercised by 17-2-1948. failing which the plaint would stand rejected. The appeal and the petition in civil revision are both directed against this order.

[3] It is clear that no appeal lies against the order of the learned Subordinate Judge. The petition in civil revision will, therefore, be dealt with below.

[4] Order 1, R. 3, requires two conditions to be satisfied : (1) that the right to relief should be related to the same act or transaction or series of acts or transactions, and (2) that, as against the different defendants or sets of defendants, some common question of law or fact will arise.

[5] The first condition is concerned with a common act or transaction or series of acts or transactions. A mere finding that there were different causes of action as against the different sets of defendants is, therefore, not sufficient. The Code itself recognises that, in the case of joinder of several defendants, every defendant may not be interested as to all the relief claimed (O. 1, R. 5), and that questions may arise in which one set or other of the parties may not be interested (O. 2, R. 6). The question as to joinder depends not on a common cause of action but, as I have said, on common basis of acts or series of acts. That the matter is not as simple as the learned Subordinate Judge appears to have thought, is clear from the series of decisions commencing with *Vasudeva Shanbhaga* v. *Kuleadi Narnapai*, 7 M. H. C. R. 290, where the Full Bench, dealing with suits impugning several alienations of joint family property by deceased coparceners, repelled the objection of multifariousness and commented on the desirability of deciding the validity of the alienations in one proceeding in order to secure the soundness of the decision, and to avoid discordant decisions in different cases on facts nearly the same. The decision was followed in *Mahomed* v. *Krishnan*, 11 Mad. 106, in a suit by junior members of a Nayar family challenging as many as 48 alienations by the *karnavan* in respect of 213 items of the family property. The same course was followed in *Abdul* v. *Ayaga*, 12 Mad. 234 and *Byathamma* v. *Avulla*, 15 Mad. 19. The underlying principle was explained in *Nundoo Kumar* v. *Banomali Gayan*, 29 Cal. 871, which was a suit in ejectment. The maintainability of the suit was challenged for multifariousness on the ground that the different sets of defendants second party held by separate leases under the defendant first party, from whom the plaintiff claimed as a lessee. Their Lordships pointed out that the cause of action of the plaintiff suing in ejectment cannot be affected by the title under which the defendants profess to hold possession; what concerns the plaintiff is that another is wrongfully in possession of what belongs to him; it is that fact that gives him the cause of action, and it is a matter of indifference to him on what grounds the different persons in possession may seek to justify the wrong detention of what is his. They agreed with the same view expressed by another Bench of the same Court in *Ishan Chunder* v. *Rameswar Mondo*, 24 Cal. 831. These two decisions were followed in *Parbati Kuar* v. *Mahmud Fatima*, 29 ALL. 237: (4 A. L. J. 121), where the plaintiff sued as heir of his father to recover various portions of his father's estate from the hands of different alienees and in *Kubra Jan* v. *Ram Bali*, 30 ALL. 560 : (5 A. L. J. 647), where the plaintiff as heiress of her father sued to recover from her brother and certain transferees from him her share of the property of her deceased father. The latter decision is of special interest as the suit related to property partly in Bareily district and partly in the district of Bara Banki in the Province of Oudh. During the course of the suit, a compromise was arrived at regarding the Bareily property. Nevertheless, their Lordships held that the Court at Bareily was not divested of its jurisdiction to hear and decide the suit in respect of the property situate in Oudh. For other decisions relevant to the point of joinder, reference may be made to *Govindaraja Mudaliar* v. *Alagappa Thambiran*, 49 Mad. 836 : (A. I. R. (13) 1926 Mad. 911 F. B.); *Ramanathan Chettiar* v. *Annamalai Chettiar*, 57 Mad. 1031 : (A. I. R. (21) 1934 Mad. 367) *Ranganatham Chettiar* v. *Mariappa Mudaliar*, A. I. R. (29) 1942 Mad. 334 : (208 I. C. 81) and *Ramautar Singh* v. *Brij Kishore*, A. I. R. (20) 1933 Pat. 653 : (149 I. C. 931) all of which emphasise the necessity that the first condition of O. 1, R. 3, must be satisfied.

[6] In the present case, I do not think it is necessary for me to go into this matter at greater length, because I do not think that we should interfere in exercise of this Court's

power of revision in order to assist the plaintiff to raise in Patna, questions relating to the passing of a decree and the execution thereof in the Brindaban Courts so long ago as 1928 and 1929 and raising questions quite unconnected with the suit as against the defendants and the property belonging to Patna.

[7] Taking the finding of the Subordinate Judge as it stands it seems to me that the Subordinate Judge has clearly gone wrong by refusing to exercise his jurisdiction in respect of the Patna property. The proper procedure might ordinarily be, as suggested in the cases of *Ramanathan Chettiar* v. *Annamalai Chettiar*, (57 Mad. 1031 : A. I. R. (21) 1934 Mad. 367) and *Ramautar Singh* v. *Brij Kishore*, (A. I. R. (20) 1933 Pat. 653 : 149 I. C. 931) to give the plaintiff an opportunity of amending his plaint and electing as to which of the defendants he will proceed against. This is because there are more than one set of defendants against whom the Court is empowered to grant relief, and it is proper that the plaintiff should decide as to whom he will pursue his remedy against. The problem does not arise, where the Court finds, as it has found in this case, that there are two sets of defendants against one of whom it has no power to grant any remedy. Order 1, R. 3 provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties, and that the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Under O. 1, R. 4, judgment may be given without any amendment against such one or more of the defendants as may be found to be liable, according to their respective liabilities. If the Court feels itself embarrassed by the presence of parties against whom it has no power to entertain the suit or by the inclusion in the plaint of pleadings relating to property over which it has no jurisdiction, it has the power under O. 1, R. 10, sub-r. (2), to strike out the defendants, and, under O. 6, R. 16, to strike out the unnecessary pleadings. A case in point is *Nisar Ali* v. *Mohammad Ali*, 59 I. A. 268 : (A. I. R. (19) 1932 P. C. 172) where the inclusion in the suit of property in the Punjab which the plaintiff claimed as *mutwalli* of Muhammadan *wakf*, was not held to affect the maintainability of his suit in the Oudh Court in respect of an estate comprising properties in Oudh and the Punjab, claimed by him under a testamentary disposition made by his father.

[8] On the above grounds, I would allow the petition in revision, set aside the order of the Subordinate Judge so far as it relates to the election to be made by the plaintiff and direct that the suit be proceeded with according to law. The petition having failed against defendants 3 to 5, they are entitled to and will get their costs. I would assess the hearing fee at one gold *mohar*. Defendants 1 and 2 not having opposed the petition, and the necessity for the petition in this Court having arisen by reason of the plaintiff not having elected as directed, there will be no order for costs against defendants 1 and 2. I would dismiss the appeal, there will be no order as to costs.

[9] **Jamuar J.** — I agree.

V.B.B. *Revision allowed; Appeal dismissed.*

A. I. R. (38) 1951 Patna 366 *[C. N. 88.]*

AGARWALA C. J. AND MEREDITH J.

Bhagwan Das — *Petitioner* v. *Province of Bihar* — *Opposite Party.*

Misc. Judicial Case No. 260 of 1947, Decided on 19th August 1949.

(a) Sales Tax — Bihar Sales Tax Act (XIX [19] of 1947), S. 25 (6)—Proceeding under Act — Costs against dealer can be awarded only by High Court.

In a proceeding under the Act costs cannot be awarded against a dealer except by the High Court under cl. (6) of S. 25 which is equivalent to S. 21 (6), Sales Tax Act of 1944 : Misc. Judicial Case No. 127 of 1947, D/- 28-9-1948 (Pat.), *Foll.* [Paras 1 and 3]

(b) Sales Tax — Bihar Sales Tax Act (XIX [19] of 1947), S. 24 (4) — Commissioner may dismiss application for revision without hearing applicant.

An order refusing to revise is not an order which can be said adversely to affect either party to the proceedings. The revisional jurisdiction both of the Commissioner and the Board of Revenue is entirely discretionary and when a discretionary jurisdiction is conferred on a Tribunal, it is impossible to hold that anybody has a vested right to be heard before an order refusing to exercise the discretionary jurisdiction of revision is passed. The Commissioner may legally dismiss an application for revision under S. 24 (4) without giving the applicant a reasonable opportunity of being heard in support of his application.

[Paras 1 and 3]

Ramanugrah Prasad — for Petitioner ; *Government Pleader—for Province of Bihar.*

Agarwala C. J. — Under S. 21 (3), Bihar Sales Tax Act, 1944, the Board of Revenue was called upon by this Court to state a case on the following questions :

"(1) Whether in a proceeding under the Act costs may be awarded against a dealer except by the High Court under cl. (6) of S. 25 ; and

(2) Whether the Commissioner may legally dismiss an application for revision under S. 24 (4) without giving the applicant a reasonable opportunity of being heard in support of his application."

[2] The reference to the sections in the questions framed was to those of the Act of 1947 which replaced the Act of 1944, but which are *in pari materia* with the provisions of the former Act.

[3] So far as the first question is concerned, that has been decided in *The Province of Bihar*

v. *Messrs. Jokhi Ram Ram Prasad*, (Misc. Judicial Case No. 127 of 1947) on 28-9-1948 by this Bench, which held that there was no power to grant costs under the Bihar Sales Tax Act except the power vested in the High Court by S. 25 (6) of the Act of 1947 which is equivalent to S. 21 (6) of the Act of 1944. The revisional powers of the Commissioner under the Act of 1944 are derived from S. 20, sub-s. (3) of which provides :

"Subject to such rules as may be prescribed and for reasons to be recorded in writing, the Commissioner may, upon application or of his own motion, revise any order passed under this Act or the rules thereunder by a person appointed under S. 3 to assist him, and subject, as aforesaid, the Board of Revenue may, in like manner, revise any order passed by the Commissioner :

Provided that before rejecting any application for revision of any such order the Commissioner or the Board of Revenue, as the case may be, shall consider it and shall record reasons for such rejection."

Sub-section (5) provides :

"Before any order is passed under this section which is likely to affect any person adversely, such person shall be given a reasonable opportunity of being heard."

It is contended that the effect of sub-s. (5) is to confer upon a dealer who has been assessed a right to be heard by the Commissioner before his application to revise an order is rejected. That contention, in my opinion, is entirely untenable. The proviso to S. 3 merely requires the Commissioner or the Board of Revenue, as the case may be, to consider an application before rejecting it, and does not require the aggrieved party to be heard. Sub-section (5) merely requires the revising authority to hear the party before an order adverse to him is made. An order refusing to revise is not an order which can be said adversely to affect either party to the proceedings. If it had been intended that an application in revision should not be rejected without hearing the party making it, that would have been made clear in the proviso to sub-s. (3). It is to be noted that the revisional jurisdiction both of the Commissioner and the Board of Revenue is entirely discretionary and when a discretionary jurisdiction is conferred on a Tribunal, it is impossible to hold that anybody has a vested right to be heard before an order refusing to exercise the discretionary jurisdiction of revision is passed. I would, therefore, answer the first question referred to us in the negative, and the second question in the affirmative. As the petitioner succeeds on the first point and fails on the second, there will be no order for costs. Half the fee of Rs. 100 deposited by the applicant under S. 21(1), will be refunded to him.

[4] **Meredith J.** — I agree.

V.R.B. *Reference answered.*

A. I. R. (38) 1951 Patna 367 *[C. N. 89.]*

MANOHAR LALL AND MEREDITH JJ.

Kokil Ram and others — *Petitioners* v. *Province of Bihar* — *Opposite Party.*

Misc. Judicial Case No. 3 of 1947, D/- 26-1-1949.

Sales Tax—Bihar Sales Tax Act (VI [6] of 1944), S. 6—Betel leaves, if taxable.

Green betel leaves called *pan* are taxable articles within the meaning of S. 6 read with Govt. Notfn. No. 7567-F, D/- 8-7-1944. The word "vegetables" in the notification is used in the more limited sense as plants cultivated for food and does not include betel leaves which are certainly not a food stuff. [Paras 3 & 5]

Rai Parasnath—for Petitioners; Advocate-General and R. Prasad — for Opposite Party.

Meredith J. — This is a case stated by the Board of Revenue under S. 21 (3), Bihar Sales Tax Act, 1944. The question referred is :

"Whether green betel leaves called *pan* are taxable articles within the meaning of S. 6, Bihar Sales Tax Act, 1944, read with Notfn. No. 7567-F, dated 8-7-1944 issued by the Government of Bihar in the Finance Department."

[2] The assessees are 13 dealers in betel leaves used in making up *pan*. It was found that they had been importing betel leaves from outside the Province of Bihar, and had been carrying on this business for a long time, with an annual gross turnover exceeding Rs. 5000 in the case of each of them during the financial year 1943-44, but they had failed to apply for registration under S. 7 of the Act. Accordingly, the Sales Tax Officer issued notices upon them on 14-3-1945, under S. 10 (5) of the Act calling upon them to file necessary returns for the quarter ending 31-12-1944. Instead of filing returns, the assessees filed objection petition on the ground that betel leaves come within the category of green vegetables and as such were exempted from the levy of sales tax by Notfn. No. 7567 dated 8-7-1944, issued by the Government under S. 6 of the Act. Subsequently they filed before the Commissioner of Sales Tax, Chota Nagpur Division, a joint petition for determination of the question whether any tax was payable in respect of the sale of betel leaves. The Commissioner took the view that the notification in question was not intended to exclude betel leaves from taxation, and that the word "vegetables" in the notification was used in the ordinary popular sense of "a plant cultivated for food". He accordingly dismissed the petition. The assessees then moved the Board of Revenue in revision, but the Board took the same view. The assessees then filed an application under S. 21 (1) of the Act which has resulted in the present reference.

[3] The notification referred to direct that no tax shall be payable on the sale of a number of classes of goods specified. Item 6 is "vegetables, green or dried other than medi-

cinal preparations". Hence the question for decision is whether the word "vegetables" must be taken to include betel leaves. The word "vegetable" is used in two different senses: first, in a wide sense, as for example, when we speak of "the vegetable kingdom". According to this usage, it would include all plants. The second sense, and the more common usage, is as connoting only "herbaceous plants cultivated for food" (*see* Webster's Dictionary). It is perfectly clear from the notification that Government used the word in the more limited sense in accordance with the common usage. The notification includes 25 items, many of which are not food-stuffs, but all the items up to 8 are food-stuffs, and item 6, which we are considering, thus comes in the midst of the list of food-stuffs. Secondly, it is impossible to suppose that Government meant to exclude the entire vegetable kingdom. Lastly,—and this is most convincing—item 1 is

"cereals and pulses including all forms of rice, gram, peas, *moong*, *arhar*, *masur*, *khesari*, *millet*, *bajra*, *and jowar*, wheat, oats, barley, maize, powdered or broken pulses, sago, *besan* and *sattu*, sold loose or in unsealed cardboard or paper containers."

Item 3 is "flour including *atta*, *maida*, *suji* and bran". Item 8 is "*gur*, sugar and molasses". If the word "vegetables" had been used in a comprehensive sense to include all plants and their products, then items 1 and 8 would not have been separately specified. There can, therefore, in my opinion, be no doubt that Government by "vegetables" meant plants cultivated for food.

[4] In this limited sense, will *pan* be included? *Pan* is certainly not a food-stuff. It is a masticatory (*see* the article on "betel" in the Encyclopaedia Britannica). Some hold that it is also a digestive. But, even so, it is not a food. It is not eaten for its food value, but at the highest as an aid to digestion. It is not served as a part of a meal, but as a supplement to it. As a digestive agent, it might perhaps be considered a medicinal preparation, but the notification is careful to provide that in exempting vegetables, green or dried, medicinal preparations are not included.

[5] For these reasons I am satisfied that the view taken by the Board of Revenue is the correct one, and I would, therefore, answer the question in the affirmative. Betel leaves are taxable, and have not been exempted under the notification. The assessees must pay the costs of the reference. Hearing fee Rs. 100.

[6] **Manohar Lall J.** — I agree.

K.S.B. *Answer in the affirmative.*

A. I. R. (38) 1951 Patna 368 *[C. N. 90.]*

MANOHAR LALL AND MEREDITH JJ.

Dahu and another—Appellants v. *Jamadar Rai and others—Respondents.*

Letters Patent Appeal No. 3 of 1948, D/- 1-2-1949.

Transfer of Property Act (1882), S. 3—'Attested' — Signature by one attesting witness for himself and for other attesting witness—Validity.

When one of the two attesting witnesses to a mortgage signs for himself and also on behalf of the other at his instance and in his presence the signature would be a good signature, though no mark is affixed by the other witness. The mortgage, therefore, is valid as duly attested. [Para 8]

Anno: T. P. Act, S. 3, N. 11 to 13.

K. D. Chatterji — for Appellants; Barhamdeva Narain, U. S. Sharma and S. A. Ahmad — for Respondents.

Meredith J. — This is an appeal under the Letters Patent from a decision of Shearer J. sitting singly. The appeal is by defendants 1st party. The suit was brought upon a mortgage created in 1927 by the appellants in favour of one Chilu Rai. Defendant 4 was Chilu's widow, and defendant 3, the widow of his son. The plaintiff is an assignee from defendant 3. The suit was decreed by the learned Munsif and the learned Subordinate Judge dismissed the first appeal.

[2] It is necessary for our present purposes only to consider two of the defences taken. The defendants first party claimed that the mortgage had been redeemed by payment of the full amount to defendant 4. The learned Subordinate Judge held that this payment had in fact been made, but it could not operate as a discharge as the right to realise the debt had passed from Chilu to his son, and thence to defendant 3, and thereafter to the plaintiff. Therefore, the payment could not be recognised by the Court.

[3] The second point to be noticed is that it was alleged that the mortgage was not valid because the document had not been duly attested. There were two attesting witnesses, Mathura Rai and Damar Rai. Mathura Rai (deceased) had signed for himself and had also signed on behalf of Damar, the latter not having even affixed his mark. The learned Subordinate Judge held that the signature of Damar made on his behalf, at his instance, and in his presence by Mathura was good signature, and the mortgage was, therefore, valid. This is the sole point which was raised before Shearer J. in second appeal. That learned Judge had dealt with the matter elaborately, and, as I am in complete agreement with his views, it is unnecessary to add much to what he has said. The definition of the word "attested" was inserted in S. 3, T. P. Act, by the Transfer of

Property (Amendment) Act (XXVII [27] of 1926), and was further amended by the insertion of the words "and shall be deemed always to have meant" by the Repealing and Amending Act, 1927, to show that the definition had retrospective effect. The definition was made in the same words as had been used in S. 63, Succession Act (originally S. 50). In *Fernandez* v. *Alive*, 3 Bom. 382, it had been held in regard to S. 50, Succession Act, that it was necessary for the validity of a will that the actual signature, as distinguished from a mere mark, of at least two witnesses should appear on the face of the will. This decision was followed by the Calcutta High Court in *Nitye Gopal* v. *Nagendra Nath*, 11 Cal. 429. But obviously other considerations arise with regard to the Transfer of Property Act. One is this. Before the definition of "attested" in the Transfer of Property Act, it had been held, and was recognised as good law, that a signature might be validly made by the pen of someone else provided it was done at the instance of the attesting witness, and in his presence. On this point reference may be made to *Sasi Bhusan Pal* v. *Chandra Peshkar*, 33 Cal. 861 : (4 C. L. J. 41) where the question was fully examined. Now, if the intention of the Legislature in 1926 was to alter the position, it is highly unlikely that the definition would have been made retrospective, as thereby large numbers of existing titles would have been upset, and large numbers of deeds validly attested in accordance with the previous view would become invalid. This suggests that there was no intention to alter the law in this respect, but rather to define and clarify it. The question in regard to the words "signed by the mortgagor" in S. 59, T. P. Act, was exhaustively considered by a Full Bench of five Judges in the Allahabad High Court in *Deo Narain Rai* v. *Kukur Bind*, 24 ALL. 319: (1902 A.W.N. 127 F.B.). Stanley C. J. considered the whole position including that under the English law and held that the word "signed" did not mean "personally autographed" unless there was some clear provision in the statute under consideration so providing. There was no such provision in the Transfer of Property Act. In S. 59, the word "signed" was used without more. The same remarks apply to the definition of "attested" in S. 3. Here also the wording is, "each of whom has signed the instrument in the presence of the executant." I cannot usefully add to the reasoning of Stanley C. J., which may be referred to.

[4] It is argued for the appellants that a distinction should be drawn between the executant and the attesting witnesses. But I cannot find any warrant for that distinction in the Act when the same wording is used. A judgment which is material is the Division Bench decision of the Madras High Court in *Nagamma* v. *Venkatramayya*, 58 Mad. 220 : (A. I. R. (22) 1935 Mad. 178). The question under consideration there was whether the word "sign" used in S. 3, T. P. Act, with reference to an attesting witness was to be taken to be governed by the definition of that word in S. 3 (52), General Clauses Act, 1897, and to include, with reference to a person who is unable to write, his mark. This question was answered in the affirmative. Though this case is not directly in point, a passage in the judgment of Beasly C. J. is very material. At p. 226 he says :

"But in our view the act of execution by the executant is so important and the physical acts to which the attestors may have to testify are so important that the Legislature deemed it necessary to set out all the four alternatives in precise language. On the other hand, no such importance appears to us to be attached to the act of the attestors provided only it is done in the presence of the executant. Whether they sign the document themselves or affix their mark to it, the mere presence of their names on the document will be sufficient *prima facie* evidence to show who the attestors are. *The really essential part of the definition is that the attestors should be present and be assured by what they themselves see or by what the executant acknowledges before them that the executant has actually executed the document.*"

[5] I am of opinion that the mortgage was validly attested, and this appeal must, therefore, be dismissed. The case seems to me, however, in some respects a hard one, since the appellants having already paid off the mortgage to a close relative of defendant 3 now have to pay up again. I would accordingly make no order for costs.

[6] **Manohar Lall J.**—I entirely agree and wish to make a few observations out of respect to the able argument addressed to us by Mr. K. D. Chatterji. His chief contention was that the Legislature by amending S. 3, T. P. Act, has laid down that the instrument will be considered to be attested only *inter alia* if the attesting witness makes his own signature and that even if such a person is illiterate and he makes a mark, that would not be a sufficient compliance with law. I am unable to agree with this argument for the reason that the language of the definition of the word 'attested' does not warrant the adoption of such a narrow construction which would lead to great inconvenience and injustice. In this country a very large number of persons are still illiterate, and if the argument is accepted as correct it would be putting an impossible burden upon the parties to secure only literate attesting witnesses.

[7] It will be observed that in the definition the words "signature" or "mark" are inserted to show that the executant must either sign

the document or affix his mark; but the Legislature has been careful to omit these words "or mark" when providing for the manner in which the witness should sign. This omission indicates, to my mind, that in case of an illiterate witness he is not required even to put a mark. As I pointed out in the course of the argument, the essential requirement from an attesting witness is that he should actually be present at the time of the execution of the document and either he should have seen the executant sign or affix his mark to the instrument or he may be assured by the executant himself that he himself has signed and put the mark on the document. It was argued that unless there is a signature of the witness there will be ample room for fraud. I do not agree with this argument. In order to safeguard any fraud, the contesting party is able to know from the document itself as to who the attesting witnesses are, and he can easily satisfy the Court that such persons, though shown to be attesting witnesses, are really not so. In my opinion, Shearer J. in his elaborate judgment came to the correct conclusion, and I would entirely agree with the view expressed by the Madras High Court in *Nagamma* v. *Venkatramayya*, 58 Mad. 220 : (A. I. R. (22) 1935 Mad. 178) and with the view of the Full Bench of the Allahabad High Court in *Deo Narain Rai* v. *Kukur Bind*, 24 ALL. 319 : (1902 A.W.N. 127 F.B.). I would also approve of *Sasi Bhusan Pal* v. *Chandra Peshkar*, 33 Cal. 861 : (4 C.L.J. 41), which has taken the same view. I, therefore, agree that the appeal must be dismissed.

K.S.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 370 *[C. N. 91.]*

MANOHAR LALL AND MAHABIR PRASAD JJ.

Julum Rai and others — *Appellants* v. *Jainarain Rai and others* — *Respondents.*

A. F. A. D. No. 1109 of 1945, D/- 6-4-1949.

(a) Oaths Act (1873), Ss. 8 and 11—Proceedings under S. 145, Criminal P. C.—Decision on special oath — Regular civil suit not barred — Civil P. C. (1908), S. 11.

Where in a proceeding under S. 145, Criminal P. C., a special oath is administered by an agreement of parties and the Court orders delivery of possession to one of the parties in accordance with such oath, the unsuccessful party is not precluded thereby from suing for declaration of his title to and recovery of possession of the disputed lands. The reason is that the effect of special oath is merely to treat that as conclusive evidence in those proceedings and it is the order upon such conclusive evidence which is *res judicata* between the parties and not the evidence. [Paras 6 & 8]

Anno. Oaths Act, S. 11 N. 1.

(b) Oaths Act (1873), Ss. 10 and 11 — Applicability to criminal proceedings.

Sections 10 and 11, Oaths Act, are applicable to proceedings under Ss. 144 and 145, Criminal P. C., but obviously they are not applicable to criminal proceedings which are between the Crown or Government and the accused unless these may be criminal proceedings between the complainant and the accused in certain circumstances. [Para 8]

Anno. Oaths Act, S. 10 N. 1; S. 11 N. 1.

Harinandan Singh — for Appellants ; Prem Lall, Sreenath Singh and G. P. Shahi—for Respondents.

Manohar Lall J.—This is an appeal by the defendants who are aggrieved by the concurrent decisions of the Courts below by which they have decreed the plaintiffs' suit for a declaration of title to and recovery of possession of certain lands. One of the questions for consideration is the effect of certain sections of the Oaths Act, 1873.

[2] The facts are these: The plaintiffs claim title to 8 kathas 14 dhurs of plot 539 and to 15 kathas out of plot 549 on the basis of certain transfers in their favour from the true owners. The cause of action for the suit was the dispossession of the plaintiffs and the defendants fourth-party as a result of an adverse order passed under S. 145, Criminal P. C.

[3] The defence to the action was that the plaintiffs and defendants fourth-party had no title to the land in suit, and that on the material dates although the plaintiffs had title at one time to plot 539, but as a result of an exchange plot 539 came into possession with title of the defendants, the plaintiffs title to plot 549 was wholly denied. It was further urged that in the 145-proceedings the defendants fourth-party gave a special oath to the defendants, and as a result of that special oath, the 145-proceedings were decided in favour of the defendants, and, therefore, the plaintiffs and the defendants fourth-party are bound by that oath and cannot re-agitate their title in the civil suit.

[4] The Courts below have concurrently found title and possession with the plaintiffs and defendants fourth-party, and have also held that in law the special oath has no force in the proceedings in the civil suit. Hence, the second appeal to this Court.

[5] Mr. Harinandan Singh, learned counsel for the appellants, took us through the entire judgments of the Courts below and wanted to submit that the findings on the question of title and possession are not in accordance with law; but having perused the judgments of the Courts below I am satisfied that they have come to the conclusions on the question of fact which are binding in second appeal. No error of law has been pointed out although it was sought to be argued that the findings on the question of fact were erroneous here and there. With

regard to plot 539, the Courts below did not believe the story of exchange, and, therefore, the plaintiffs had established their subsisting title to plot 539 all along. With regard to plot 549, the Courts below have proceeded to assess the evidence. The defendants' own case was that the portion of plot 549 in dispute had been amalgamated with plot 539; this was also the case of the plaintiffs. Now, if the title of plot 539 is found to be with the plaintiffs, the amalgamation could have only been made by the plaintiffs. The Courts below have considered this as an important circumstance to defeat the defendants' case that they had any title to this portion of plot 549. Having considered the matter, I am of the opinion that the Courts below have taken a view which was open to them as Courts of facts, and this Court cannot be asked to interfere in second appeal.

[6] An interesting argument was raised as to the effect of the oath taken by the defendants fourth-party in the 145-proceedings. It was argued that the result was that some sort of agreement had been arrived at between the defendants fourth-party and the defendants that the defendants fourth-party had no longer any claim to plot 539 and to the portion of plot 549, that is to say, by some sort of conclusive admission, title to these plots passed to the defendants some sort of estoppel was sought to be established. I do not agree with this contention, because upon a plain reading of the various sections of the Oaths Act, it is clear to me that the effect of the special oath is to treat that as a conclusive piece of evidence in those proceedings, when the oath was administered by an agreement between the parties. See S. 8 and S. 11. Section 11 distinctly states that the evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated. It is obvious that this is conclusive proof of the matter in those proceedings and the Court in charge of the proceedings is bound to decide the proceedings in accordance with the evidence specially given on oath. It is also clear that it is the adjudication upon such conclusive evidence which is *res judicata* between the parties and not the evidence, as was sought to be made out by Mr. Harinandan Singh.

[7] The case of *Mithu Lal* v. *Sri Lal*, 45 ALL. 724 : (A.I.R. (11) 1924 ALL. 126) was relied upon by Mr. Harinandan Singh; but what that case decided was that where one party has entered into a valid agreement with the other that the case may be decided according to the special oath and the other party has taken a special oath, then the Court is not competent to ignore the statement and enter into further evidence to decide that litigation. This is in accordance with what I have observed above and does not help the appellants.

[8] The next case relied upon was the case of *Sanyasi Baritya* v. *Artaswaro*, 36 Mad. 287 : (18 I. C. 835). In that case it was held that an adjudication by a Court on an oath made by one of the parties to the suit would make the matter or issue covered by the adjudication *res judicata* in a subsequent litigation between the same parties where the subject-matter of the suit is different. It would be noticed that the adjudication is *res judicata* and not the evidence. This case is of no assistance in the present case because the only adjudication in the 145-proceedings was not that the title was with the defendants, but that the possession should be given to the defendants and was given to the defendants. The effect of the adjudication was not that the aggrieved party was debarred from bringing the regular civil suit, but that the proceedings then before the Court must be decided in accordance with the special oath. Moreover, on reading p. 294, it appears that the learned Judges came to the same conclusion as was pointed out by us in the course of the argument. I am reading from the top of p. 294. Referring to the case of *Badiaddin Ahmed* v. *Nizamuddin Haider*, 33 Cal. 386 : (10 C. W. N. 501) the learned Judges observed :

> "In that case proceedings taken under S. 144, Criminal P. C., were settled by an oath taken by one of the parties. The result of an order in such a proceeding does not prevent a suit in a Civil Court by the unsuccessful party to establish his right to any property concerned in the proceeding. * * * * The doctrine of *res judicata* would not apply to a prior decision in a criminal proceeding between the parties in a Court which would have no jurisdiction to try the later proceedings in the civil litigation. It need hardly be observed that the scope of the doctrine cannot be extended by the fact that the decision of any matter proceeded on evidence furnished by an oath."

I think Mr. Harinandan Singh cannot have been unaware of these observations of the learned Judges at p. 294, and that he cited this case really to meet the view of the Courts below that Ss. 10 and 11, Oaths Act, are not applicable to criminal proceedings. In my opinion, these sections are applicable to S. 144 or S. 145-proceedings; but obviously they are not applicable to criminal proceedings which are between the Crown or Government and the accused unless these may be criminal proceedings between the complainant and the accused in certain circumstances.

[9] A later Madras case of *Ranganatha Aiyar* v. *Jayavelu Mudaliar*, A. I. R. (27) 1940 Mad. 627 : (193 I. C. 591) also supports the view which I have taken. In that case the proceeding under O. 21, R. 100, Civil P. C., was decided in favour

of a party as a result of a special oath in a suit instituted under O. 21, R. 103, Civil P. C., and a suit was brought to set aside this order. It was argued that the special oath which was taken in the course of the proceedings under R. 100 was a bar to the trial of the same matter between the parties. The argument was overruled by the learned Judges holding (1) that the primary meaning of S. 11 is that the evidence given in any proceeding in which a challenge has been made and an oath has been taken shall be in that proceeding conclusive proof of the matter stated; (2) that in a subsequent proceeding unless that statement has been brought on the record, it cannot even be considered; (3) in that regular suit any evidence which has been given under the special provisions of the Oaths Act in the earlier proceeding under R. 100, Civil P. C., cannot be conclusive, but will merely be treated as an evidence. With respect, I agree with these observations.

[10] Having regard to the views expressed above, I come to the conclusion that the Courts below were right in overruling the second contention also.

[11] I would, therefore, dismiss the appeal with costs.

[12] **Mahabir Prasad J.** — I agree.

K.S. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 372 *[C. N. 92.]*

REUBEN AND DAS JJ.

Dasrathi Rai Chaudhury — Appellant v. *Kali Charan Ghosh—Respondent.*

A. F. A. O. No. 218 of 1949, D/- 1-2-1950.

(a) Houses and Rents—Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), S. 1 (3)—Operation of Act—Delegation of legislative power to Provincial Government — Effect — Operation of Act, whether validly extended.

The amendment of the Act by the Bihar Ordinance No. VI [6] of 1949, substituting a new sub-s. (3) for the original sub-section in S. 1, has validly made the Act an Act whose period of operation is five years from its commencement. The Act is, therefore, validly in existence for five years : A. I. R. (37) 1950 Pat. 50 (F.B.), *Rel. on.*

In view of the above Full Bench decision, it is not now open to argue that the original sub-s. (3) of S. 1 having contained delegation of legislative power to the Provincial Government was invalid and that the Act could not, therefore, be extended beyond the initial period for which it was first brought into force.

[Paras 7, 8]

(b) Houses and Rents—Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), S. 17—Order of eviction by Controller—Execution —Munsif, first Court, with Small Cause powers — Jurisdiction to entertain application for execution.

The Courts of Small Causes in Bihar are not Courts established under S. 5, Provincial Small Cause Courts Act; they are the ordinary civil Courts empowered under S. 25, Bengal, Agra and Assam Civil Courts Act, 1887, to exercise the jurisdiction of a Judge of a Court of Small Causes. A civil Court which is invested with Small Cause Court powers under S. 25 does not thereby become a different Court. It is only for the purposes of the Small Cause Courts Act and of the Code of Civil Procedure that it will be treated as being a different Court in each of its two capacities (*vide* S. 33, Small Cause Courts Act). It follows that, for the purposes of S. 17 of Bihar Act III [3] of 1947 the Munsif, first Court, who is invested with Small Cause powers should be regarded as the same Court whether exercising his ordinary jurisdiction or his Small Cause Court powers. Where, therefore, such Munsif's Court is the Court of lowest jurisdiction competent to try the rent suit in respect of the building, an application for execution of an order of eviction by the Controller can rightly be presented in his Court.

[Paras 14, 16]

(c) Houses and Rents—Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), Ss. 11, 17 — Order of eviction by Controller giving three months' time to tenant—Appeal to Commissioner — No further extension by Commissioner—Application for execution of order of eviction within three months of Commissioner's order is not premature. [Para 17]

(d) Houses and Rents—Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), Ss. 11, 17 — Application for execution of order of eviction — Subsequent filing of suit for arrears of rent—Effect — Whether tenant is entitled to protection under S. 11.

It is obvious that the protection under S. 11 cannot avail the tenant against an order of eviction passed under the Act itself.

The conception of a tenant as conceived by this Act is entirely novel and not in keeping with the ordinary ideas as to what a tenant is. The mere fact, therefore, that an order was passed against the tenant under S. 11 to vacate the building does not necessarily terminate his tenancy and a subsequent suit to recover rent does not bring a new tenancy into being. The legal position of the tenant after the Controller has passed an order under S. 11 is uncertain. He may or may not continue as a tenant. In these circumstances, if the landlord, in his suit, describes as rent the sum which he claims to recover from him on account of his occupation of the building subsequent to the order of eviction by the Controller, it cannot be said that he shows thereby an intention to continue the tenancy and to waive his rights under the order of the Controller.

[Paras 20, 21, 22]

B. C. Ghosh and S. C. Ghosh — for Appellant; R. S. Chatterji—for Respondent.

Reuben J.—This appeal is directed against an order of the District Judge of Patna, dated 19-7-1949, modifying a decision of the Munsif, first Court, Patna, dated 24-5-1949. It arises in the following circumstances.

[2] The respondent as the owner of a house situated in Holding 189, Circle 18, Ward 10, in the Patna City Municipality, obtained on 18-9-1948, an order from the Controller under S. 11, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act III [3] of 1947), which I shall refer to for convenience as Act III [3], directing the appellant as the tenant to vacate the house in favour of the respondent within three months from the date of

the order. An appeal against this order was dismissed by the Commissioner on 26-2-1949. The appellant not having vacated the house as directed, the respondent, on 21-3-1949, applied to the Munsif, first Court, Patna, under S. 17 of the Act III [3] for the execution of the order. On 24-5-1949, the appellant filed an application under S. 47, Civil P. C., challenging the executability of the order against him. This was summarily dismissed by the Munsif. In appeal, the District Judge has made a slight modification in the Munsiff's order. Among other grounds of objection, the appellant objected that he is not the tenant of the respondent in respect of Holding 189, and that it is being sought by mentioning boundaries not included in the order of the Controller to execute the order against Holding 175 which is in his occupation. The District Judge has directed :

"That the respondent will get delivery of possession over the house situated in Holding 189 and not over any house situated in Holding 175 unless he gets the Commissioner to amend his order."

[3] Six points have been urged before us: (1) that owing to a delegation of legislative power to the Provincial Government under sub-s. (3) of S. 1, Act III [3] never came into operation ; (2) that under S. 17 of the Act the Small Cause Court and not the Munsif, first Court, in his ordinary civil jurisdiction, can entertain an application for execution of the order ; (3) that the application for execution having been filed within three months of the Commissioner's order it is premature, (4) that the execution cannot proceed against Holding 175 which is in the occupation of the appellant, (5) that the objection under S. 47 should not have been summarily dismissed, and (6) that the respondent by filing a suit for the recovery of arrears of rent in respect of this holding for a period subsequent to the orders of the Controller and the Commissioner has created a new tenancy, which is entitled to protection under S. 11 of Act III [3], and, therefore, the order of eviction is no longer executable.

[4] For his first contention, the learned counsel relies on the decision of the Federal Court reported in *Jatindra Nath* v. *Province of Bihar*, A.I.R. (36) 1949 F. C. 175 : (50 Cr.L.J. 897) in which their Lordships considered the provisions of S. 1 (3), Bihar Maintenance of Public Order Act, 1947. The duration of that Act was by the statute fixed for one year, but there was a proviso that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that the Act shall remain in force for a further period of one year with such modification, if any, as may be directed in the notification. The power given to the Provincial Government under the Proviso was held to be legislative power and the delegation of it to the Provincial Government to be *ultra vires* of the Legislature. The impugned portion of Act III [3] is sub-s. (3) of S. 1, the relevant portion of which is as follows :

"It shall remain in force for such period as the Provincial Government may, by notification, fix;

Provided that the Provincial Government may, from time to time, by notification, extend such period."

[5] There is, thus a two-fold power given to the Provincial Government. Firstly, it can determine at the initial stage the duration of the Act. Secondly, it may, from time to time, extend that period. According to the learned counsel, the delegation is in both respects delegation of legislative power and, therefore, *ultra vires* of the Legislature. This view, according to him, follows from the decision of the Federal Court as was held by Meredith J., in the recent Full Bench decision in *Kishori Lal* v. *Debi Prasad*, S. A. No. 201 of 1948 : (A.I.R. (37) 1950 Pat. 50 FB). He contends that the further deduction of Meredith J., that sub-s. (3) of S. 1 was separable from the Act and that, in the absence of this provision, the Act would operate as a permanent Act commencing from the publication on 15-3-1947, in the Bihar Gazette of the Governor-General's assent, is incorrect. It is not open, according to the learned counsel, to the Court, by interpretation, to give an Act an effect contrary to its clear intention. He points out that the second proviso contained in sub-s. (3) contemplates an Act which is not permanent, and argues that this sub-section cannot be ignored so as to make the Act a permanent Act.

[6] It is not necessary for me, nor will it be proper to consider whether this contention of the learned counsel has any substance, for the learned counsel concedes that the effect of the decision of the Full Bench is that it is no longer open to this Bench to consider whether the delegation to the Provincial Government of the power to fix the initial duration of the Act is *ultra vires* or not. My Lord the Chief Justice and Ramaswami J., who were the other members of the Full Bench took a different view from Meredith J. They distinguished the case of *Jatindra Nath* v. *Province of Bihar*, A. I. R. (36) 1949 F. C. 175 : (50 Cr.L.J. 897) (*ante*) and held that the delegation made in sub-s. (3) of S. 1 is *intra vires* of the Legislature. This is a decision which is binding so far as we are concerned. Therefore, while not conceding the correctness of this decision, the learned counsel has argued the case on the basis that, to the

extent of the delegation of authority to determine the initial duration, sub-s. (3) was *intra vires*. According to him, this is all that the decision of the Full Bench is an authority for; the question as to whether the delegation contained in the first proviso to sub-s. (3) is *ultra vires* of the Legislature is still open.

[7] To understand the argument of the learned counsel, it is necessary to give a few further facts relating to Act III [3]. By Notfn. No. 6208, dated 15-3-1947, the Provincial Government fixed the initial period of duration as one year. This period was extended for another period of one year by Notfn. No. 5641 dated 1-3-1948, and for a further period of one year by Notfn. No. 7804 dated 7-3-1949. The subsection was then repealed by the Bihar Buildings (Lease, Rent and Eviction) (Amending and Validating) Ordinance, 1949, and, in its place, was substituted the following: "(3) It shall remain in force for five years." According to the learned counsel, the first notification was effective, so that the Act remained in force for one year; the other two notifications were of no effect because the delegation was *ultra vires*. The Act, therefore, expired at the end of the first year, and, since the Ordinance purports to amend an existing Act, it did not have the effect of revising the Act. In consequence there was no such Act in existence after 15-3-1948, and the orders of the Controller and the Commissioner were without jurisdiction.

[8] The point raised by the learned counsel is of interest, but, in my opinion, it is not open to this Bench to investigate it as it is concluded by the decision of the Full Bench. That decision was given on a reference made in a first appeal arising out of an ejectment suit. The plaintiff in that suit, following an unsuccessful attempt to evict the defendants under the provisions of the House Rent Control Order, 1942, filed a suit in ejectment treating the defendants as trespassers. By that time, Act III [3] had replaced Ordinance II [2] of 1946, which had itself replaced the House Rent Control Order, 1942. The defence set up was that the defendants were tenants within the very wide definition of this term contained in cl. (h) of S. 2 of the Act, and, under the provisions of S. 11 the civil Court has no jurisdiction to evict them. The defendants' case succeeded and the suit was dismissed on 8-4-1948, that is to say, in the period following the initial period of one year of the duration of Act III [3]. Obviously, the defence was of no avail, unless the Act was in existence. The point for consideration before the Full Bench, therefore, was whether this was so or not. The learned counsel stresses that the decision of the majority of the Full Bench is to the effect that sub-s. (3) of S. 1 is *intra vires* of the Provincial Legislature, and he has argued that this decision confines itself to the main provision of the section, that is to say, the delegation of the power to fix the initial period. On a perusal of the judgments it is clear that there is no substance in this argument. Both their Lordships set out the provisions of sub-s. (3) including the first proviso. They mentioned the successive notifications by which the duration was first fixed for one year and then extended from time to time. Then, having referred to the Ordinance of 1949, they came to the definite conclusion that the Act is now an Act whose period is five years from its commencement, that is to say, that it is an Act which is in existence now, so that its protection was available to the defendants in that case. This also was the effect of the decision of Meredith J. according to whose view the Act first took effect as a permanent Act and now, as a result of the Ordinance of 1949, is an Act for five years.

[9] It has been suggested that, even if this is the effect of the decision of the Full Bench, the decision is *obiter* that it is not covered by either of the two points that were referred to the Full Bench. The relevant point was thus stated by the referring Bench: "Whether the annual extension of the Act aforesaid by the Provincial Government is *ultra vires* of the Legislature."

[10] This was a clear reference as regards the first proviso to sub-s. (3) of S. 1. It is unthinkable that the Full Bench would not decide the very point which was referred to them. But, the argument is, there was no reference so far as the Ordinance of 1949 was concerned. This Ordinance was only promulgated on 12-10-1949, probably after the reference had been made to the Full Bench. This may explain why it is not mentioned in the order of the referring Bench. Whether it was mentioned in that order or not, a consideration of its effect was obviously necessary. The entire point of the reference was to ascertain whether Act III [3] was still in force and its provisions were available to protect the defendants. In giving its reply, it was surely open to the Full Bench to determine what was the real question referred and not to consider itself bound by the exact words used in the reference.

[11] This brings me to the second point. Section 17 is as follows:

"Every order of the Controller passed under this Act and every order of the Commissioner passed on appeal under S. 18, shall be executed by the Court having jurisdiction to entertain a suit for the recovery of arrears of rent in respect of the building in relation

to which the order to be executed is passed, as if such order were a decree passed by such Court."

[12] It is pointed out that the tenancy in question was a monthly tenancy, the rental being Rs. 16 per month. It is urged that, under the provisions of Ss. 15 and 16, Provincial Small Cause Courts Act, read with Art. 8 of the Schedule to the Act, a suit for the recovery of arrears of rent in respect of the building was entertainable by the Small Cause Court and not by the Munsif in his ordinary civil jurisdiction. It is conceded that the Munsif in question is vested with the powers of a Court of Small Causes, and that, in that capacity, he can entertain a rent suit in respect of this building. But it is contended that the execution petition was filed before him in his ordinary jurisdiction and, therefore, is not entertainable.

[13] There has been an argument at some length as to the identity of the Court authorised under S. 17 to execute an order under the Act. The particular Court in which a suit for arrears of rent will lie will depend upon the valuation of the suit. Up to Rs. 500 the suit would lie before the Small Cause Court, beyond that it would go to the Munsif, and, if it exceeds the pecuniary jurisdiction of the Munsif, it will have to be filed before the Subordinate Judge. In fact, in the rent suit to which a reference has been made in stating the sixth point, the arrears claimed exceeded Rs. 500 and the suit has been instituted before the Munsif in his ordinary civil jurisdiction. The section does not say how the valuation of the notional suit contemplated by it is to be determined. Are we to take the arrears of rent, actual or as claimed by the landlord, at any particular time, say at the time of the application to the Controller, or at the time of the order which is under execution, or at the time when the application for execution is made? And what is to happen if there are no arrears? Are we to take a notional sum, say the rent for one month or one year, as being the arrears recoverable? Another possibility is that the section gives the person in whose favour the order stands (for convenience, I will describe him as the decree-holder), a power of election between the two or the three Courts coming within the description in S. 17, a supposition which seems unlikely in view of the words "the Court" used in the section.

[14] The difficulty as between the Small Cause Court and the civil Court in its ordinary jurisdiction is, to my mind, only an apparent one. The solution lies in the manner in which the Small Cause Court's jurisdiction has been created in this Province. Our Courts of Small Causes are not Courts established under S. 5, Provincial Small Cause Courts Act; they are the ordinary civil Courts empowered under S. 25, Bengal, Agra and Assam Civil Courts Act, 1887, to exercise the jurisdiction of a Judge of a Court of Small Causes. There is a difference between a Court of Small Causes, a term defined in S. 4, Provincial Small Cause Courts Act, and a civil Court empowered under S. 25, Civil Courts Act. The two are spoken of separately in sub-s. (2) of S. 35, Provincial Small Cause Courts Act, and S. 32 of that Act provides that certain portions of that Act applicable to Courts of Small Causes shall apply to Courts invested with the jurisdiction of such Courts. A civil Court, therefore, which is invested with Small Cause Court powers under S. 25, Civil Courts, Act, does not thereby become a different Court. It is only for the purposes of the Small Cause Courts Act and of the Code of Civil Procedure that it will be treated as being a different Court in each of its two capacities (*vide* S. 33, Small Cause Courts Act). It follows that, for the purposes of S. 17 of Act III [3] the Munsif, first Court, should be regarded as the same Court whether exercising his ordinary jurisdiction or his Small Cause Court powers. It is in this sense that the Court is spoken of in S. 17, and this explains the further difficulty in the way of the decree-holder which was suggested to us in the course of the argument, namely, that the only Court competent to execute the order is the Small Cause Court and that Court cannot execute the decree because it is a decree for ejectment. If it was necessary, I was prepared to hold that, when the Legislature in S. 17 indicated to Small Cause Court as the proper Court to execute the order, it thereby empowered that Court to execute that order, although in its ordinary jurisdiction as such Court it is not authorised to execute such an order. It is not necessary, however, to go so far. It is unlikely that, with Civil Courts exercising such jurisdiction available for the purpose, the Legislature would delegate to Small Cause Courts the duty of executing orders of eviction under S. 11 or enforcing the restoration of amenities under S. 10. This consideration is, on the contrary, a further reason for holding that the Court indicated in S. 17 is the civil Court exercising its ordinary jurisdiction.

[15] The difficulty as regards the choice between the Court of the Munsif and that of the Subordinate Judge, within whose local jurisdiction the building in question lies, is not likely to arise where the rent of the building is so small that the accumulated arrears for the whole period of limitation for the filing of such a suit will not exceed the jurisdiction of the Munsif. The solution of the difficulty in cases

where such a difficulty does arise seems to me to lie in the application of the principle which has found statutory sanction in S. 15, Civil P. C., namely, that the superior Court should be protected from overcrowding: *Mohini Mohan* v. *Kunjabehari*, A. I. R. (30) 1943 Cal. 450 : (209 I. C. 225). All that S. 17 speaks of is "the Court having jurisdiction to entertain *a suit* for the recovery of arrears of rent in respect of the building." However high the rent may be, it is always possible that only a small portion of that rent is in arrear. Therefore, the Court of the Munsif will always come within this description. The section does not indicate that the notional rent suit is to have any particular valuation. There is no reason, therefore, why the Court before which execution is sought to be taken out should be required to enter upon an investigation as to existing arrears at any particular moment of time or to assume that the section requires it to proceed on a notional valuation. All it has to ask is whether it has jurisdiction to entertain "a suit" for the recovery of arrears of rent in respect of the building, and, if it has, whether it is the Court of the lower jurisdiction which can do so. If it is, then it is a Court which has jurisdiction to execute the order.

[16] The Munsif, first Court, was in the present case the Court of the lower jurisdiction in which a suit for arrears of rent of the building would lie. Hence, the execution petition was rightly presented in this Court.

[17] There is no force in the third contention. The Controller gave the appellant three months within which to vacate the premises. It was open to the Commissioner, if he thought it proper, to extend this period. He has not done so and has allowed the order of the Controller to stand as it is. I see no reason to hold, in the circumstances, that the appellant is entitled to a further period of three months from the date of the Commissioner's order before he can be evicted. The petition in execution is not, therefore, premature.

[18] The fourth and the fifth points are interconnected. There is no authority for the proposition that an application under S. 47 should not be summarily dismissed. It is always open to a Court to which a petition is presented to consider it on its merits at the time of the presentation. If it is clear that the contentions raised in the petition have no merits, it is not right that public time and money should be wasted and the opposite party harassed and put to additional expense by deferring the passing of orders until both parties have been heard at length. It is necessary, however, that the party filing the application should have a full hearing on the points raised and, where necessary, should be given an opportunity of establishing them. So far as an objection concerns a pure matter of law, it is possible that the matter may be so clear that the Court will have no difficulty in coming to a decision on the point at once. Where considerations of fact arise, this will not generally be possible. In the present case, there was such a consideration, namely, that, according to the appellant, the order relates to Holding 189 and the respondent is trying to execute it in respect of Holding 175. The orders of the Controller and the Commissioner, which are on the record, mention merely the number of the holding and give no boundaries. The execution petition gives certain boundaries which, according to the appellant, are the boundaries of Holding 175. Without some sort of investigation, it is not possible to deal with the objection of the respondent. It is necessary that the executing Court should proceed only against the building in respect of which the order under execution was passed. Had the Munsif investigated the matter, the difficulty would have been cleared up at once. As it is, in the absence of any evidence, the District Judge gave the only directions which were open to him, namely that the order be executed strictly in accordance with its terms. During the hearing we were informed that the decree-holder has since got the order amended. In the circumstances, it is not necessary for us to interfere with the order passed by the Courts below.

[19] This brings me to the point about the filing of the suit for recovery of rent. The application for execution was made on 21-3-1949. In May of the same year, the respondent filed Money Suit No. 435 of 1949 in the Court of the same Munsif in respect of Holding 189, seeking recovery from the appellant of arrears of rent from May 1946 to April 1949 amounting to Rs. 576. It is contended that this suit constitutes the appellant a statutory tenant under Act III [3] and, therefore, he is entitled to claim protection from eviction under the Act. The relevant provision is in S. 11 and is as follows:

"Notwithstanding anything contained in any agreement or law to the contrary .... where a tenant is in possession of any building, he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise."

[20] It is obvious that this protection cannot avail the tenant against an order of eviction passed under the Act itself. The contention of the learned counsel, however, is that, by filing the rent suit, a new tenancy has come into being and, therefore, the tenant can claim protection. The conception of a tenant as con-

ceived by this Act is entirely novel and not in keeping with the ordinary ideas as to what a tenant is. I reproduce the definition below :

" 'Tenant' means any person by whom or on whose account, rent is payable for a building and includes a person continuing in possession after the termination of the tenancy in his favour."

[21] According to our ordinary conception of a tenant, he ceases to be a tenant when the tenancy terminates. If he continues to occupy the tenancy after the termination, he does so as a trespasser and continues to be a trespasser, however long he remains in possession after this period, unless the landlord, by accepting rent or by otherwise indicating his recognition of the relationship of landlord and tenant between them, brings a tenancy into being between them. Under Act III [3], however, no such thing is necessary; even after the tenancy has terminated, the lessee is still a tenant provided he remains in possession. This is so even after the passing of an order under S. 11 for vacating the building in favour of the landlord. The order of eviction given by the Controller is also different in nature from an order of eviction passed by a civil Court. It is based on grounds which do not necessarily terminate the tenancy, for instance, for non-payment of rent or because the landlord requires the building for his own occupation whereas the civil Court ejects a lessee as a trespasser after the tenancy between him and the lessor has been terminated. In the present case, therefore, the mere fact that an order was passed against the appellant to evict the building would not necessarily terminate his tenancy and the suit to recover rent would not bring a new tenancy into being.

[22] The principle underlying the waiver of forfeiture of a tenancy is that the lessor by some act has indicated an intention to treat the lease as still subsisting. It is illustrated by S. 112, T. P. Act, which provides that a forfeiture under cl. (g) of S. 111 of the Act is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting. There is a relevant exception to this section, namely, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture. Apparently, once the lessor has made his intention of terminating the relationship clear by instituting a suit for ejectment, his acceptance of rent is not to be interpreted in the manner indicated in the section. This exception is not extended by S. 113, T. P. Act, to waiver of a notice to quit, but the view has been expressed by a Judge of this Court that the inclusion in a suit for ejectment of a claim to such rent would not have the effect of waiver: *Shah Wali Ahmad* v. *Hussaini Begam*, 2 Pat. L. J. 595 : (A. I. R. (4) 1917 Pat. 469). These sections are concerned with waiver before the landlord has obtained a decree for ejectment. Here, we are concerned with a case where the landlord has actually got an order for ejectment and has filed a petition for execution in order to give effect to it. Act III [3] does not contain any special provisions to enable the landlord to recover his arrears of rent. He has for this purpose to go to the civil Courts and he has done so in the present case. I have indicated above that the legal position of the tenant after the Controller has passed an order under S. 11, directing him to vacate the building is uncertain. He may or may not continue as a tenant. In these circumstances, if the landlord, in his suit, describes as rent the sum which he claims to recover from him on account of his occupation of the building subsequent to the order of the Controller, it cannot be said that he shows thereby an intention to continue the tenancy and to waive his rights under the order of the Controller. A copy of the plaint in the suit was produced before us, and it certainly does not indicate any such intention.

[22A] On the above grounds, the appeal fails and must be dismissed with costs.

[23] **Das J.**—I agree with my learned brother that this appeal must be dismissed with costs.

[24] As to the first point of delegated legislation, I am clearly of the opinion that the Full Bench decision, *Kishori Lal* v. *Debi Prasad*, (A.I.R. (37) 1950 Pat. 50 F.B.) referred to by my learned brother covers the point now raised by learned counsel for the appellant. It would, I think, serve no useful purpose to repeat what my learned brother has said with regard to it.

[25] I should like to say a few words about the second point which relates to the interpretation of S. 17, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, hereinafter to be referred to as Bihar Act III [3] of 1947. The particular words used in the section which have given rise to difficulties are

"shall be executed by the Court having jurisdiction to entertain a suit for the recovery of arrears of rent in respect of the building in relation to which the order to be executed is passed, as if such order were a decree passed by such Court."

The difficulties are these. It appears that there are three kinds of orders which may be passed by the Controller or the Commissioner on appeal, where the question of execution of the order may arise. Under S. 9, the Controller may direct, on application by the tenant, that certain repairs be made by the tenant and the

cost thereof may be deducted from rent which is payable by him. Under S. 10, the Controller may make an order directing the landlord to restore amenities which the landlord has without just or sufficient cause cut or withheld. Under S. 11, the Controller may pass an order of eviction directing the tenant to put the landlord in possession of the building. With regard to, at least, two of the aforesaid orders, namely, the order directing the landlord to restore amenities and the order directing the tenant to put the landlord in possession, the question of execution of the order will undoubtedly arise. The only section in Bihar Act III [3] of 1947 relating to execution is S. 17. That section seeks to indicate the Court which shall execute every order of the Controller passed under the Act and the order of the Commissioner passed on appeal under S. 18. In terms, the section states that the order shall be executed by the Court having jurisdiction to entertain a suit for the recovery of arrears of rent in respect of the building in relation to which the order to be executed is passed, as if such order were a decree passed by such Court. The first difficulty that arises is that there may be cases where in fact there are no arrears of rent. The second difficulty is even when there are arrears of rent, which amount should be taken for the purpose of determining the Court of execution, the amount of arrears at the date of the order of the Controller or the amount of arrears at the date of the order of the Commissioner on appeal, or the amount of arrears at some earlier date, say the arrears outstanding at the date when the application for the order was made. The jurisdiction of a Court is of various kinds, personal, territorial and pecuniary. There will be no difficulty in determining the territorial jurisdiction; but there may be difficulty in determining the pecuniary jurisdiction, and the Court will be different according as one view or other of the views mentioned above is taken. I have been at some pains to find out one solution which would meet all difficulties; but S. 17 is so worded that it is difficult to get one solution for all the difficulties which may arise.

[26] Personally, I think that as between the Court of Munsif and that of a Subordinate Judge the determination will depend on the amount of arrears, and that amount must be the amount outstanding at the date of the order which is under execution. If the amount is beyond the pecuniary jurisdiction of a Munsif, the order must be executed by the Subordinate Judge; if the amount is within the pecuniary jurisdiction of a Munsif, the order will be executed by the Munsif. The question may be asked — what about cases where there are no outstanding arrears of rent? In such cases, I think, a notional arrear has to be resorted to in order to give effect to the words used in S. 17. The arrears then would be notionally at least, one month's rent if a monthly tenancy or one year's rent, if an annual tenancy, or periodical rent if the tenancy is created for a particular period. Without any such notional arrear it will be impossible to determine to which Court to go for execution of the order.

[27] Where, however, the amount of arrears, either actual or notional, is within the pecuniary jurisdiction of a Munsif, I do not think any difficulty is created. I agree with my learned brother that S. 33, Provincial Small Cause Courts Act, solves the difficulty. That section states that a Court invested with the jurisdiction of a Court of Small Causes with respect to the exercise of the jurisdiction, and the same Court with respect to the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, shall, for the purposes of the Small Cause Courts Act and the Code of Civil Procedure, be deemed to be different Courts. It is worthy of note that they will be different Courts only for the purpose of the two Acts—the Provincial Small Cause Courts Act and the Code of Civil Procedure. I do not think that S. 17, Bihar Act III [3] of 1947, contemplates that a Munsif who is vested with the powers of a Small Cause Court under S. 25, Bengal, Agra and Assam Civil Courts Act, 1887, and the same Munsif who exercises jurisdiction in suits of a civil nature not cognizable by a Court of Small Causes, shall for the purposes of Bihar Act, III [3] of 1947, be deemed to be different Courts. The Legislature must have been aware of the provisions of S. 33, Provincial Small Cause Courts Act. It is to be observed that the words used in S. 33 are "be deemed to be different Courts" which mean not that they are different Courts, but that they shall be deemed to be different Courts for a limited purpose only. If the intention was to treat them as different Courts for S. 17, Bihar Act III [3] of 1947, the Legislature would have said so in clear terms. There is, therefore, no antithesis between a Munsif exercising the powers of a Small Cause Court and a Munsif exercising ordinary jurisdiction in suits of a civil nature not cognizable by a Court of Small Causes, so far as the provisions of S. 17, Bihar Act III [3] of 1947, are concerned.

[28] Therefore, in either view of the matter the order in the present case was properly executed in the Court of the first Munsif,

Patna, who had both territorial and pecuniary jurisdiction. I have examined the order of the Controller dated 18-9-1948, as also the order of the Commissioner on appeal dated 26-2-1949. I think it is the order of the Commissioner which is in execution, and on the date of that order the arrears amounted to more than Rs. 500. Under S. 15 (2), Provincial Small Cause Courts Act, the Small Cause Court had no jurisdiction as the value exceeded Rs. 500. This would be the result if the view is taken that there is a distinction between the Munsif exercising Small Cause Court powers and the Munsif not exercising such powers. I do not, however, think there is any such distinction, and if there be no such distinction, then clearly enough the proper Court of execution of the order of eviction was the Court of the first Munsif, Patna.

[29] I agree with my learned brother with regard to points 3, 5 and 6, and have nothing useful to add. With regard to point 4, I do not think there is any difficulty. It was stated at the Bar that the order in question had been amended so as to relate to Holding 175. If such an amendment has been made, then there is no question of making any further enquiry as to whether Holding No. 189 was the old number of the holding which is now 175 as is stated by learned counsel for the respondent. If no amendment has been made, then the order of the learned District Judge makes it quite clear that the execution will be in respect of the holding mentioned in the order. The respondent has not made any grievance of the order of the learned District Judge, and I fail to see how the appellant can make a grievance of it.

D.R.R. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 379 *[C. N. 93.]*

SHEARER AND SARJOO PRASAD JJ.

Province of Bihar—Petitioner v. *Prithvi Chand Lal Chowdhury—Opposite Party.*

Misc. Judicial Case No. 96 of 1948, D/- 12-10-1950.

Bihar Agricultural Income-tax Act (VII [7] of 1938), Ss. 2, 6 (c) and 6 (k)—Agricultural income — Usufructuary mortgage of patni mahal — Rent and cess realised by mortgagee — Whether 'income' of mortgagor assessee for purposes of deduction under Ss. 6 (c) and (k).

Where certain patni mahal is usufructuarily mortgaged and a *mukhatyarnama* is also executed in favour of the mortgagee by the assessee mortgagor, the realisation of rent and cess from the patnidars of the mortgaged property made by the mortgagee under the power-of-attorney from the mortgagor is the income of the mortgagee and not that of the mortgagor, and the assessee is not entitled to get any deductions under S. 6 (c) and (k), Bihar Agricultural Income-tax Act, in respect of the said income; nor is he entitled to deductions for the collection and payment of interest in respect of the mortgage : A. I. R. (15) 1928 All. 81 (F. B.) and A. I. R. (15) 1928 Mad. 543 (F. B.), *Ref.* [Para 3]

Lalnarayan Sinha — for Government Advocate and R. Prasad — for Petitioner; Baldeo Sahai and S. K. Mazumdar—for Opposite Party.

Sarjoo Prasad J.—This is a reference made by the Bihar Board of Agricultural Income-tax under S. 25 (2), Bihar Agricultural Income-tax Act (VII [7] of 1938). There are the following two questions of law which have been referred to us :

"Whether the realisation of rent and cess from the patnidars of the mortgaged property made by the mortgagee under a power-of-attorney from the mortgagor is the income of the mortgagor or mortgagee within the meaning of Ss. 6 (c) and 6 (k), Agricultural Income-tax Act, and whether the assessee is entitled to get deduction under those sections in respect of the same income ?

Whether under the circumstances of the case the assessee is entitled to get appropriate deductions under S. 6 (c) for collection charges and also under S. 6 (k) for payment of interest made on the mortgage?"

The answer to the two questions formulated above will affect the assessment in respect of various years, namely, 1943-44, 1944-45 and 1945-46.

[2] The relevant facts are that a portion of the assessee's property has been given in usufructuary mortgage to one Babu Raghubar Narayan Singh of Monghyr under a registered mortgage bond dated 10-8-1935 for a sum of rupees 4 lakhs. Under the terms of the bond the mortgagee was entitled to remain in possession of the mortgaged property and to utilise the usufruct of the same, and until the payment of the mortgage debt the mortgagor or his successors were not entitled to dispossess him of the mortgaged property. The mortgagees were entitled to realise rents from the patnidars and had also the right to enforce payment thereof in case of default by institution of rent suits. Contemporaneous with the mortgage, the executant of the bond also executed a *mukhtarnama* in favour of the mortgagee. It appears that by virtue of the mortgage in question the mortgagee had been appropriating a sum of Rs. 34,270 out of the usufruct by way of interest for the loan advanced and also paying Government revenue and cesses amounting to Rs. 1,11,797. The assessee claims that these two amounts were really a part of his agricultural income, and, therefore, he is entitled to deduction on account of those payments. The assessee contends that those appropriations are really in the discharge of his obligations in favour of Government, on the one hand, and the creditor, on the other; and, therefore, they should be included within his income and the deductions allowed as claimed by him. The Revenue authorities did not

agree with this contention of the assessee. They held that, in accordance with the terms of the mortgage deed, the mortgagee was in possession of the *patni mahal*, and the assessee had no right to collect rents from the patnidars, and, as such, the income from the *patni mahal* was not the income of the assessee, and, consequently, he was not entitled to any deductions under S. 6 (c) or under S. 6 (k) of the Act.

[3] In my opinion, the view of the Revenue authorities on the point is absolutely correct. The term "agricultural income" as defined in S. 2 of the Act means any rent or income derived from land which is used for agricultural purposes, etc. On the plain terms of the mortgage bond it is perfectly clear that since *sewan*, 1342 Fs., that is, long before the periods of assessment the mortgagee has been in possession of the mortgaged property, and the assessee is neither in possession, nor is he entitled to collect any rent, nor has he derived any agricultural income from the said property during the years of assessment. Therefore, in no sense can it be said that he had any agricultural income in respect of the mortgaged property. A mortgage is a transfer of interest in an immovable property, and where the mortgagee comes into possession of the property and is entitled to appropriate the usufruct thereof, he gets the income of the land in question. He gets the income of the land in question subject to the payment, as the terms may be, of the Government demands in respect of the property. The payment of the Government demands, according to the terms of the mortgage bond, is in no sense the agricultural income of the mortgagor assessee although it goes to satisfy some of the public demands for which the mortgagor may be found personally liable. Similar considerations apply to the payment of the interest out of the usufruct of the property. The mortgagee, in such a case, is not acting as the agent of the mortgagor. In the bond under consideration there is no rate of interest fixed and, on the terms of the bond there is nothing to show that any particular portion of the usufruct is to be specifically appropriated towards the interest of the loan. But even if there were such a term, as I have already pointed out, that would not make any difference so long as whole usufruct of the property is appropriated and realised by the mortgagee under the terms of the document, and no part of the income of the property goes to the mortgagor. The possession would have been different if it had been a case of a simple mortgage where, of course, the income derived from the property goes to the hands of the mortgagor, or where for instance, the usufructuary mortgagee had given a lease back to the mortgagor on certain terms and conditions ensuring the payment of a certain amount towards the satisfaction of the principal or interest in respect of the mortgage dues: *vide In the matter of M. Makund Sarup*, 50 ALL. 495 at p. 497: (A. I. R. (15) 1928 ALL. 811 F. B.) and *Ibrahimsa Rowther* v. *Commissioner of Income-tax, Madras*, 51 Mad. 455: (A. I. R. (15) 1928 Mad. 543 F. B.). As it has been rightly found that no part of the income derived from the mortgaged property under the terms of the bond did not go to the hands of the mortgagor, the claim of the mortgagor in respect of the deductions in question is quite unfounded. The answer, therefore, to both the questions must be in the negative; in other words, the answer to the first question is that the realisation of rent and cess from the patnidars of the mortgaged property made by the mortgagee under a power-of-attorney from the mortgagor is the income of the mortgagee and not that of the mortgagor, and the assessee is not entitled to get any deductions under Ss. 6 (c) and 6 (k), Bihar Agricultural Income-tax Act, in respect of the said income; and the answer to the second question is that in the circumstances of the case, the assessee is not entitled to get deductions under S. 6 (c) or under S. 6 (k) of the Act for collection and payment of interest in respect of the mortgage in question.

[4] The reference is answered accordingly. The department is entitled to the sum of Rs. 100 by way of costs of this reference which has been already deposited by the assessee.

[5] **Shearer J.**—I agree.

D.R.R. *Reference answered.*

A. I. R. (38) 1951 Patna 380 *[C. N. 94.]*

AGARWALA C. J.

Mansid Oraon and another — *Petitioners* v. *The King.*

Criminal Revn. No. 1189 of 1949, D/- 7-10-1949.

(a) Forest Act (1927), Ss. 20 (1), 26 (1) (f) and (h) —Prosecution for offence under Cls. (f) and (h) of S. 26 (1) — Notification under S. 20 (1) not proved — Effect.

For the purpose of proving the guilt of the accused it is necessary to show not only that they did the acts mentioned in cls. (f) and (h) of S. 26 (1) but also that they were not entitled to do those acts because there had been a notification issued under S. 20 (1) specifying the limits of the forest and that the land in question fell within those limits. Such a notification is essential for the purpose of declaring a forest as a reserved forest. The production of notification under S. 4 or oral evidence as to limits of the forest is not sufficient. [Para 1]

Anno. Forest Act, S. 26 N. 3, 6.

(b) Criminal trial — Evidence — Duty of Court and Public Prosecutors.

The Public Prosecutors or the magistracy should take care to bring on to the record those notifications and orders which are essential for proving that the accused has acted in contravention of the law. Until they do so, it is a waste of public time and money to prosecute at all because whenever convictions are challenged in the High Court, they have to be set aside when there are omissions of this nature.

[Para 2]

L. K. Chowdhury — for Petitioners; Harinandan Singh — for the Crown.

Agarwala C. J.—The petitioners have been convicted of offences under cls. (f) and (h) of S. 26 (1), Forest Act, 1927. The prosecution case is that they cultivated land which falls within a reserved forest and have cut down trees standing on that land. The defence was that the land which has been cleared does not fall within the reserved forest, and that it has been the *raiyati* land of the petitioners for many years. The prosecution produced and relied on a notification issued under S. 4 of the Act, and also led evidence that the land in question falls within the boundary pillars fixed by the forest department, for proving that the land in question falls within the reserved forest. Now, the notification under S. 4 of the Act is merely a notification declaring the intention of Government to constitute certain land as a reserved forest and specifying as nearly as possible the situation and limits of such land. The following sections of the Act provide for the determination of rights in the land which it is sought to constitute as a reserved forest and similar matters. Then comes S. 20 which is the section under which the forest is eventually constituted. That section provides that when certain events have occurred, which need not be specified here, the Provincial Government,

"shall publish a notification in the Official Gazette specifying definitely, according to boundary marks erected or otherwise, the limits of the forest which is to be reserved, and declare the same to be reserved from a date fixed by the notification."

Sub-section (2) of this section says that

"from the date so fixed shall be deemed to be a reserved forest."

The prosecution has not produced the notification, if any, issued under S. 20, specifying definitely the limits of the forest. It is clear from a perusal of the section that a notification under this section is essential for the purpose of declaring a forest a reserved forest, and that such notification must specify precisely the limits of the forest and the date from which the forest is constituted. The prosecution has, by oral evidence, endeavoured to prove that the land in question falls within certain boundary pillars. Presumably it was intended to imply that these were the boundary marks referred to in sub-s. (1) of S. 20. It may be that they are so; but for the purpose of proving the guilt of the petitioners it is necessary to shew not only that they did the acts mentioned in cls. (f) and (h) of S. 26 (1), but also that they were not entitled to do those acts because there had been a notification issued under S. 20 (1) specifying the limits of the forest and that the land in question fell within those limits.

[2] This is merely one of the many instances to which this Court has continually invited Government's attention to the utter carelessness with which prosecutions in this province are conducted. Neither the Public Prosecutors nor the magistracy seem to take the slightest care to bring on to the record those notifications and orders which are essential for proving that the accused has acted in contravention of the law. Until they do so, it seems to be a waste of public time and money to prosecute at all, because whenever convictions are challenged in this Court they have to be set aside when there are omissions of this nature.

[3] The convictions and sentences are set aside. The fines, if paid, will be refunded.

[4] A copy of this judgment will be sent to the Provincial Government.

D.R.R. *Conviction set aside.*

A. I. R. (38) 1951 Patna 381 *[C. N. 95.]*

REUBEN J.

Ramautar Ahir — Petitioner v. *The State.*

Criminal Revn. No. 1021 of 1950, D/- 14-11-1950.

Criminal P. C., (1898), S. 250 — Order for compensation — Findings necessary before passing—Omission—Effect.

Before an order for payment of compensation is passed, S. 250 necessarily implies a finding by the Magistrate on two heads : firstly, whether the accusation was false, and, secondly, whether it was either frivolous or vexatious. Where in acquitting the accused persons of the offences charged, the Magistrate expresses the opinion that the accusation was false and malicious it is at most a compliance with the provisions of sub-s. (1) of S. 250 which says that the complainant or informant, as the case may be, is to be called on to show cause, only if the Magistrate is of the opinion that the accusation was false and either frivolous or vexatious. The expression of opinion contained in the judgment of acquittal does not exempt the Magistrate from considering the point after the cause is shown. The absence, however, of the necessary finding under the other head does not affect the jurisdiction of the Magistrate to pass the order for compensation *ab initio* as it is not a defect which goes to the root of jurisdiction. [Paras 2, 3]

Anno. Cr. P. C. S. 250 N. 10.

S. Safdar Imam — for Petitioners; Janeshwar Singh — for the State.

Reuben J. — The petitioner filed a first information report under Ss. 447 and 380, Penal Code, against Banti Ahir and four other persons, alleging that they had committed house-

breaking and theft in his house. The accused persons were acquitted by the First Class Magistrate, Motihari, and, in a proceeding under S. 250, Criminal P. C., the petitioner was directed by the Magistrate to pay Rs. 100 as compensation to each of the accused persons. The order has been upheld by the Sessions Judge with the modification that the amount payable to each of the accused persons has been reduced to Rs. 50.

[2] The order passed by the Magistrate is on the face of it defective as not complying with S. 250. This section provides that, after cause has been shown by the complainant or informant, as the case may be, if the Magistrate is satisfied that the accusation was false and either frivolous or vexatious, he may direct payment of compensation. This necessarily implies a finding by the Magistrate on two heads : firstly, whether the accusation was false, and, secondly, whether it was either frivolous or vexatious. In acquitting the accused persons of the offences charged, the Magistrate expressed the opinion that the accusation was false and malicious. This is at most a compliance with the provisions of sub-s. (1) of S. 250, which says that the complainant or informant, as the case may be, is to be called on to show cause, only if the Magistrate is of the opinion that the accusation was false and either frivolous or vexatious. The expression of opinion contained in the judgment of acquittal does not exempt the Magistrate from considering the point after the cause is shown. The learned Magistrate lost sight of this provision altogether and recorded only one finding, namely, that the accusation was false.

[3] It has been urged that the absence of the necessary finding under the other head affects the jurisdiction of the Magistrate to pass the order and, therefore, the order is bad *ab initio*. It appears to me that this is not a defect which goes to the root of jurisdiction. At the most, there is an irregularity and, since the appellate Court can exercise the same powers as the original Court, the defect might have been supplied by the Sessions Judge in appeal. I, therefore, turn to the order of the Sessions Judge.

[4] The finding of the learned Sessions Judge is that there was probably a house-breaking and theft as alleged, but that the accusation as against these particular persons is without any reasonable and probable ground and was made out of enmity between the parties. He did not refer to the particular terms of S. 250 and went on to decide whether the condition as to frivolousness or vexatiousness was satisfied. In the circumstances of this case, it is not necessary to enter into a consideration of the difficult question as to whether a finding of this sort is a sufficient finding for the purposes of S. 250. Some guidance on the point is afforded by *In re Dinshahji Hirjibhai*, A. I. R. (19) 1932 Bom. 177 : (33 Cr. L. J. 392). But that was a case where the falseness of the accusation against the accused person was definitely established. On a consideration of the order of the Sessions Judge, I do not find this to be so here. According to the Sessions Judge, there probably was a house-breaking and theft. The witnesses, however, seem to be interested and have deposed before for the prosecution. There is previous enmity between the first informant on one side and the accused persons on the other and there are discrepancies in the evidence and improbabilities in the evidence relating to the occurrence. These are the reasons given by the learned Sessions Judge. They are, at the most, reasons for disbelieving the witnesses, in other words, for holding that the offences alleged against these accused persons have not been proved. Before an order under S. 250 can be passed, however, it must be definitely established that the accusation is false.

[5] For the reasons given above, I would allow this petition and set aside the order for the payment of compensation. The money, if paid, must be refunded.

D.R.R. *Petition allowed.*

A. I. R. (38) 1951 Patna 382 *[C. N. 96.]*

MANOHAR LALL AND RAMASWAMI JJ.

Governor-General in Council — *Appellant*
v. *Gouri Shankar Mills Ltd.* — *Respondent.*

A. F. O. D. No. 220 of 1946, D/- 5-5-1949.

(a) Railways Act (1890), S. 72—'Risk Note A' — Non-delivery—Liability of railway.

Risk Note A confers exemption from liability only in respect of the condition of goods at the time of delivery at destination. It does not confer immunity in a case of total non-delivery of the goods. [Para 5]

Anno : Railways Act, S. 72, N. 5.

(b) Railways Act (1890), S. 72 — Consignment under Risk Note A—Loss of goods due to looting at destination—Non-delivery—Liability of Railway —Burden of proof.

Under S. 72, Railways Act, the responsibility of Railway Administration is that of a bailee under Ss. 151 and 152, Contract Act. The railway must take such care of the goods as a man of ordinary prudence would take of his own goods of the same quality and value under similar circumstances. The loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence and the burden of proof, therefore, to disprove negligence lies on the bailee and this burden lies also on the Railway Administration in the absence of special circumstances to the contrary. [Para 6]

Where a consignment of goods under Risk Note A was looted at the destination by an unruly mob under

circumstances over which the Railway Administration had no control and there was no proof of negligence on the part of the railway, it was held that the railway could not be held liable in damages for non-delivery of the goods. [Para 8]

Anno : Railways Act, S. 72, N. 3, 5, 24.

(c) Limitation Act (1908), S. 14 — Suit for damages against Railway for non-delivery of goods — Plaintiff withdrawing suit with leave of Court to sue afresh on ground that it was filed within two months of service of notice under S. 80, Civil P. C. — Plaintiff is entitled to exclude period of pendency of suit in computing limitation for fresh suit. [Para 9]

Anno : Lim. Act, S. 14, N. 8.

N. C. Ghosh and P. K. Bose — for Appellant ; Nandlal Unatwalia and Shreenath Singh — for Respondent.

Ramaswami J.—This is an appeal by the defendant from a decree of the Additional Subordinate Judge, Monghyr. The plaintiff brought the suit on the allegation that the defendant Railway Administration had on account of their negligence failed to deliver three consignments of certain goods which had been booked for being delivered to the plaintiff at Lakhisarai. Shree Krishna Company had booked one consignment of goods at Bhagalpur on 11-8-1942. A second consignment was booked by Ramdeo Gajanand at Barhee on 13-8-1942; a third consignment by Durga Prasad Nandlal at Sultanganj on 11-8-1942. The plaintiff claimed as damages a sum of Rs. 5233-2-9 and odd together with interest. The main ground of defence was that the consignment booked at Bhagalpur and Sultanganj were duly conveyed to Lakhisarai where they were looted by a violent mob on 15-8-1942. It was stated that the third consignment was looted by a violent mob on 14-8-1942 at Barhee station. The Railway Administration pleaded that there was no negligence on their part ; that the loss of the consignments was due to circumstances beyond their control. The learned Subordinate Judge held that the Bhagalpur and Sultanganj consignments were looted by a violent mob at Lakhisarai as alleged by the defendant. But he held that the Railway Administration was negligent and the loss would not have taken place if the railway servants had taken proper care. As regards the third consignment the learned Subordinate Judge found that there was no reliable evidence that Barhee railway station was subjected to mob violence on 14-8-1942 or that the consignment was looted. He accordingly granted a decree to the plaintiff for a sum of Rs. 5233-2-9 but disallowed interest.

[2] Three main questions were argued in this appeal : (1) whether the learned Subordinate Judge was right to hold that the Sultanganj and Bhagalpur consignments were looted at Lakhisarai owing to the negligence of the Railway Administration; (2) whether there was proof that the Barhee consignment was lost on account of mob violence at Barhee ; and (3) whether the entire claim of the plaintiff was not barred under Art. 31, Limitation Act.

[3] On behalf of the respondent learned advocate addressed the argument that the Bhagalpur and Sultanganj consignments never reached Lakhisarai, that they were not looted from the Lakhisarai goods shed on the alleged date. But this argument is untenable in face of the admission of the plaintiff's witnesses that the consignments were actually looted from the goods shed at Lakhisarai. The Subordinate Judge has found also upon the evidence that the Bhagalpur and Sultanganj consignments duly reached Lakhisarai on 13-8-42 during the night, that the consignments were unloaded and kept in the Lakhisarai goods shed on the next date. (After discussion of the evidence the judgment proceeds :)

[4] On behalf of the respondent it was argued that there was no proof that the particular consignments were looted from the goods shed at Lakhisarai on the alleged date. It was maintained that the railway officers ought to have prepared a list of the consignments which were looted. But D. W. 11 stated when cross-examined, that no list was prepared as nothing was left after the loot. Learned advocate referred to *Governor-General in Council* v. *Kabirram*, 27 Pat. 151 : (A. I. R. (35) 1948 Pat. 345) in which we had held that the onus was really on the company to prove that the particular goods were looted. But that case must be distinguished from the facts proved in the present case. In that case part of the contents of the wagon were looted by the mob and part remained of which a list had been prepared by Mr. Banerji. This list was disbelieved as Mr. Banerji had not been examined. In the present case, however, it was proved that the entire contents of the wagon had been looted and according to the evidence of D. W. 11 no list was prepared as nothing was left after the loot. On the contrary the defence evidence coupled with the admission of the plaintiff's witnesses fully supports the conclusion of the learned Subordinate Judge that the Bhagalpur and Sultanganj consignments were looted by a violent mob from the goods shed at Lakhisarai on 15-8-42.

[5] In the present case the consignments were booked under Risk Note Form A duly signed by the consignor. Under this Risk Note the consignor undertakes to hold the Railway Administration

"harmless and free from all responsibility for the condition in which the aforesaid goods consigned may

be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants."

This clause confers exemption from liability, only in respect of the "condition" of goods at the time of delivery at destination. It does not confer immunity in a case of total non-delivery of the goods. The onus will still be on the Railway Administration to prove that they took as much care of the consignments bailed to them as a man of ordinary prudence of his own goods of the same quality and value under similar circumstances.

[6] Under S. 72, Railways Act, the responsibility of railway administration is that of a bailee under Ss. 151 and 152, Contract Act. The Railway must take such care of the goods as a man of ordinary prudence would take of his own goods of the same quality and value under similar circumstances. There are authorities to the effect that the loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence and the burden of proof, therefore, to disprove negligence lies on the bailee and this burden lies also on the Railway Administration in the absence of special circumstances to the contrary. In *Surendra Lal* v. *Secretary of State*, 25 C. L. J. 37 : (A. I. R. (5) 1918 Cal. 892) the plaintiff had made over to railway 250 bundles of tobacco for delivery to Calcutta. In course of transmission the goods were destroyed by a severe cyclone while being carried on a flat in river Padma. Sir Ausutosh Mookerjee observed that when goods were not delivered to the consignee at the place of destination, the plaintiff need not prove how the loss occurred. The burden lay upon the bailee to prove the existence of circumstances which exonerated him from liability for the loss. Sir Asutosh Mookeriee relied upon two cases : *Trustees of the Madras Harbour* v. *Best & Co.* 22 Mad. 524 and *Sesham Patter* v. *Moss*,(17 Mad. 445). In *River Steam Navigation Co.* v. *Choutmull*, 26 I. A. 1 : (26 Cal. 398 P. C.) the Judicial Committee had previously adopted the view. In that case jute properly put on board on one of the appellants' vessels took fire and was consumed. The respondents claimed damage for non-delivery of 432 drums of jute. The judicial Committee held that under the Carriers Act the appellants would have been exempt from liability if they had proved (the onus being on them) that there was no negligence on their part, but that on the evidence they had failed to exonerate themselves. In *Flannery* v. *Waterford and Limerick Railway Co.*, Ir. R. 11 C. L. 30, the plaintiff sustained injuries in consequence of a portion of the train in which she was travelling, having left the rails, and the railway, the engine and the carriages were under the defendants' management. The Court held that the fact of the accident was sufficient evidence to cast upon the defendants the burthen of showing that there was no negligence on their part; and that as they declined to afford any explanation of the course of the accident, there was a case for the plaintiff proper to be submitted to the jury. In *Scott* v. *London Docks Co.*, (1865) 3 H. & C. 598 at p. 601 : (34 L. J. Ex. 220) Erle C. J., has well stated the principle :

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

[7] In the present case the Subordinate Judge has found that the consignments were looted on account of the negligence of the Railway Administration. But the reasoning is extravagant and the conclusion cannot be sustained. The Subordinate Judge states that the bazar at Lakhisarai was close to the railway station. He considers that on 14-8-42 the railway authorities should have ascertained who were the consignees of the goods lying in the goods shed and should have issued a general notice of beat of drum to the traders in the bazar. He states: "the station-master if he had so liked could have saved the properties with the help of his staff and the traders in the bazar."

But there is sufficient evidence on the record to indicate that the loot of the consignments could not have been prevented by any reasonable precaution on the part of the railway authorities. [After discussion of evidence the judgment proceeds.]

[8] In the present case it is manifest that the consignments were looted in the circumstances over which the Railway Administration had no control. There is no proof of negligence on the part of the Railway Administration. On the contrary there is evidence that the Railway Officers had taken as much care for the consignments as a man of ordinary prudence would have taken of his own goods under similar circumstances. As regards the Bhagalpur and Sultanganj consignments it must, therefore, be held that the plaintiff is not entitled to any decree against the Railway Administration.

[9] As regards the Barhee consignment the case is, however, different. For the defendant it was alleged that the consignment was looted by a riotous mob on 14-8-42 from a wagon in Barhee station. The Stationmaster and Assistant Station-master (P. Ws.-1 and 5) gave oral

evidence of the alleged loot. Exhibit A is the report of the Station-master but the learned Subordinate Judge rightly refused to place any reliance upon it because the original diary was not produced and no explanation was given for its non-production. Three witnesses on behalf of the plaintiff (P. Ws. 6, 9 and 10) denied that any loot took place at Barhee. Upon the evidence the learned Subordinate Judge rightly held that the Railway Administration has not proved the loss of the consignment. As already stated the non-delivery of the consignment would be *prima facie* evidence of negligence. No proof has been offered by the railway company to rebut this presumption. With reference to the Barhee consignment the plaintiff is, in my opinion, entitled to a decree against the defendant.

[10] On behalf of the appellant learned advocate addressed the argument that the whole suit was barred by Art. 31, Limitation Act. There is admitted evidence that till December 1942 the Chief Commercial Manager had stated that special enquiry was being made and that he would send a definite reply shortly. The plaintiff originally brought the suit on 16-9-43 with respect to all the consignments. On 15-11-44 the plaintiff withdrew the suit with the leave of the Court to sue afresh on the same cause of action. The reason was that the suit had been filed within two months of the service of notice under S. 80, Civil P. C. The plaintiff instituted the present suit on 16-11-1944. Upon these facts it is patent that under S. 14, Limitation Act, the plaintiff is entitled to exclude the period during which the previous suit was pending in Court. In this context reference may be made to *Hem Chander* v. *Kali Prosunno*, 30 I. A. 177: (30 Cal. 1033 P. C.). In that case the facts were, that in 1890 a suit was brought against certain talukdars claiming to enhance the rent and to recover rent at an enhanced rate for a particular year. The first prayer was allowed but the second claim was rejected upon the ground that it was premature. Five years thereafter the plaintiff brought a suit to recover, *inter alia*, rent at the enhanced rate for the same year. The Subordinate Judge held that this claim was barred by *res judicata*. In appeal, the High Court did not accept this view but held that it was barred by limitation. The Judicial Committee held that there was no bar of limitation. They observed:

"In the opinion of their Lordships the proceedings in the earlier suit stayed the operation of the law of limitation; and as the appellant claimed the arrears of 1298 in that suit, but his claim was then disallowed as premature, he is now entitled to the benefit of the decree of enhancement and to recover the arrears at the enhanced rate."

Reference may also be made to the recent case *Lal Bihari Lal* v. *Beni Madhab Khetri*, F. A. No. 389 of 1946 : (A. I. R. (36) 1949 Pat. 293 F. B.) in which upon similar facts the Full Bench held that the plaintiffs were entitled to invoke the exception under S. 14, Limitation Act. The objection of the appellant that the suit is barred must be overruled.

[11] For the reasons already stated I hold that the plaintiff is not entitled to a decree as regards the Bhagalpur and Sultanganj consignments but he is entitled to a decree with respect to the Barhee consignment, viz., a sum of Rs. 2,104-1-0 with proportionate costs and interest *pendente lite* at 6 per cent. per annum.

[12] To this extent I would alter the decree of the trial Judge and allow this appeal with proportionate costs.

[13] **Manohar Lall J.** — I agree. I only wish to observe that the plaintiff cannot be non-suited on limitation because he has come too soon and not too late. See *Mt. Phulbas Kunwar* v. *Jogeshur*, 3 I. A. 7 at p. 25 : (1 Cal. 226 P. C.) and *Hem Chander* v. *Kali Prosunno*, 30 I. A. 177 : (30 Cal. 1033 P. C.). I would allow relief to the plaintiff under S. 14, Limitation Act in the circumstances of the case.

K.S. *Decree modified.*

A. I. R. (38) 1951 Patna 385 *[C. N. 97.]*

MANOHAR LALL AND RAMASWAMI JJ.

Nanda Majhi—Appellant v. *Gokul Kamini and others — Respondents.*

A. F. A. D. No. 529 of 1947, D/- 3-8-1949.

(a) Landlord and Tenant — Self-growing palas trees on land in possession of raiyat—Right of tenant to grow lac.

The right to the *palas* trees self-growing on the land in the possession of the raiyat would go along with the land in possession of the raiyat unless the patnidar establishes that he at the time of the original settlement with the raiyat had reserved the right to go upon the land in possession of the raiyat and put lac on the trees that may come into existence later on or unless he establishes the custom that the tenant in the particular village had no right on the self-growing *palas* trees standing on his holding. It is for the patnidar to prove that there was a stipulation in the original settlement to the effect that if the raiyat cultivates lac on the trees he must pay a tax or rent therefor. Even in such a case the landlord has no right to go on the land to cultivate lac. But the right to cultivate lac is with the raiyat : A.I.R. (16) 1929 Pat. 328 and A.I.R. (4) 1917 Cal. 226, *Rel. on;* A. I. R. (3) 1916 Pat. 69, *Disting.* [Paras 10, 13]

(b) Tenancy Laws — Chota Nagpur Tenancy Act (VI [6] of 1908), S. 21A (a) (iv)—Retrospective operation—S. 21A (a) (iv) is retrospective. [Para 7]

S. C. Mazumdar and S. K. Mazumdar — for Appellant; R. S. Chatterji — for Respondents.

Manohar Lall J.—This is an appeal by the defendants who are aggrieved by the concurrent decisions of the Courts below by which they have decreed the plaintiff's suit. The question for decision is whether the appellants as raiyats have a right to grow lac on the trees standing on their holding.

[2] The facts alleged are that the plaintiff is the patnidar of village Damda from before the time of the survey settlement operations which took place about the year 1922. No *palas* trees fit for lac rearing were found on the lands belonging to the plaintiff which were recorded as khewat No. 2 under the Gorabadi khatian No. 117; but subsequently some *palas* trees grew up on those lands. On 9-6-1924, the plaintiff settled all the trees standing in village Damda by a registered kabuliat with certain lessees who relinquished the settlement on 6-10-1933 and surrendered all the trees with the lac thereon in favour of the plaintiff.

[3] The appellants held in that period some lands in this village as ordinary tenants, but owing to a dispute between the appellants and the landlord, Mukunda Majhi, the predecessor of the appellants, claimed some khas lands of the plaintiff as within the ambit of his jote, and thereupon Title Suit No. 493/503 of 1928 was instituted by the appellants in the Court of the Munsif of Purulia, but that suit was compromised on 6-3-1929, and a compromise decree was drawn up on the terms that the lands in suit were recognised to be tenancy of the appellants at Rs. 5 a year. This compromise decree having been found to be unregistered has not been relied upon by the Courts below, or before us.

[4] The cause of action for the present suit instituted on 8-4-1944, was that in the year 1934 the appellants forcibly cut away the lac standing on the *palas* trees on their holding and the plaintiff was unsuccessful in the criminal Court in a case which he had instituted against the appellants for theft. The plaintiff states that since 1935 he has been dispossessed from the trees.

[5] The defence to the action was that the plaintiff was never in possession of the trees in suit, that the story of the settlement of those trees with a third person is not true and the defendants had all along been in possession of those trees and their possession was affirmed by the compromise decree.

[6] It should be stated that the plaintiff's case that there was a custom in the village by which the tenants had no right whatsoever on the self-grown *palas* trees standing on his holding has not been established on the evidence. The only question for decision, therefore, is whether in the circumstances of the present case the right to rear lac on the trees and the title to the trees are with the defendants or with the plaintiff.

[7] If S. 21A, introduced in the Chota Nagpur Tenancy Act, 1908, by Bihar Act XXV [25] of 1947, is held to be retrospective, then the plaintiff has no case whatsoever, because by sub-cl. (a)(iv) of that section the raiyat is expressly given right to rear lac and cocoons on the trees standing on his land and appropriate the same provided that there is no specific entry in the record of rights to the contrary. In the present case there is no specific entry in the record of rights to the contrary, and the allegation of custom has been already found to be non-existing. The terms of this new sub-clause appear to be retrospective, otherwise no reference would have been made to the entry in the record of rights.

[8] But it is unnecessary to have recourse to the retrospectivity of this new section, because on the facts found the plaintiff has no title or subsisting title to the trees in suit.

[9] It is admitted that the trees are on the lands in possession of the defendants, and therefore, *prima facie* in their possession. The solitary act of possession which the plaintiff alleges is that he reared lac on the trees which was removed by the defendants in 1934. The finding of the appellate Court is not clear or satisfactory. All he says at p. 14 is:

"The plaintiff has adduced evidence that in 1341 B. S. he reared lac on the trees standing on the disputed lands but the defendants cut and removed the same in Kartik 1341 B. S. . . . I have no reason to disbelieve this evidence of the plaintiff as he would never have allowed the defendant to set lac on the trees which were never settled with them along with the lands. The defendants have failed to prove that they have any right in the trees."

This finding of possession by a solitary act in 1341 B. S. is based materially upon the finding that the title was with the plaintiff and not with the defendants. I have perused the evidence adduced in this case, and I am of the opinion that the Courts below should not have accepted the plaintiff's evidence of possession. But as there is a finding of fact, however unsatisfactory it may appear to be, I must assume that the possession was somehow with the plaintiff in 1934.

[10] But has the plaintiff established that he has any title to the trees in question? The trees were self-growing on the land in possession of the defendants. The plaintiff did not claim the right to such trees in the record of rights, nor can he rely upon the statements made in the compromise decree, because that decree is inadmissible in evidence. The right to

the trees would, therefore, go along with the land in possession of the defendants unless the plaintiff establishes that he at the time of the original settlement with the defendants had reserved the right to go upon the land in possession of the defendants and put lac on the trees that may come into existence later on. As I have said above, the plaintiff cannot rely upon the terms of the compromise decree, and in the absence of any evidence whatsoever as to the terms upon which the original settlement of the land was made with the defendants, the plaintiff could only succeed on the question of custom which he had set up in the plaint. The custom having been found non-existent on the evidence, the plaintiff, in my opinion, has failed to prove that he has any title to the trees which admittedly stand on the lands rightly in the possession of the defendants.

[11] I now proceed to consider some of the cases which have been placed before us.

[12] The leading case is *Rai Charan Mahanti* v. *Kanai Kumar*, 24 C. L. J. 21 : (A. I. R. (4) 1917 Cal. 226). In that case the learned Judges were construing a kabuliat by which the lessor had reserved property in the trees growing on the leasehold land and the lessee was prohibited from taking them away although they were given enjoyment of the fruits and flowers of the trees only at the permission of the lessor. Nevertheless, it was held that this ownership in the trees did not carry with it a right to go on the land of the lessee to cultivate shellac on the trees reserved. In my opinion, this case exactly fits in the circumstances of this case. Moreover I cannot see any justification for the plaintiff to insist on going on the land of the defendants to cultivate lac on the trees. If this is allowed to be done it would mean unjustifiable interference with the right of the defendants to enjoy every portion of their land, and in view of the unhappy relations between the parties this would also lead to constant breaches of the peace.

[13] This case was referred to with approval in *Upendra Singh* v. *Surjan Singh*, 8 Pat. 266: (A. I. R. (16) 1929 Pat. 328), the facts of this case, however, are distinguishable because it was found that the lease was both of the land and of the trees. The head-note states that in the district of Ranchi where a raiyat clearing land for cultivation conserves a tree, he is not liable by custom or otherwise to pay rent or a tax in respect of the tree if he cultivates lac on it, unless on a stipulation in the original settlement to that effect. This head-note correctly states the decision and supports me in the view that it is for the plaintiff to prove that there was a stipulation in the original settlement to the effect that if the raiyat cultivates lac on the trees, he must pay a tax or rent therefor. It will be observed that even in such a case the landlord has no right to go on the land to cultivate lac upon it, but the right to cultivate lac is with the raiyat.

[14] Mr. Chatterji cited before us some cases including *Nawagarh Coal Co. Ltd.* v. *Behari Lal*, 1 Pat. L. J. 275 : (A. I. R. (3) 1916 Pat. 69), to support his argument that there is an implied reservation of incidental rights in the landlord. But those cases are cases of mining leases and have no bearing upon the facts of the present case.

[15] For these reasons, I would reverse the decision of the Courts below and dismiss the plaintiff's suit. The plaintiff should pay half the costs to the defendants in all the Courts.

[16] **Ramaswami J.** — I agree.

D.H. *Appeal allowed.*

A. I. R. (38) 1951 Patna 387 *[C. N. 98.]*

REUBEN AND NARAYAN JJ.

Asghar Ali—Appellant v. *Mt. Jasoda Kuer and others—Respondents.*

A. F. A. D. No. 2550 of 1947, Decided on 30-8-1949.

(a) Bihar and Orissa Public Demands Recovery Act (IV [4] of 1914), S. 45 — Section has no application to suit to declare certificate-sale as void ab initio as it relates to suits to set aside certificate sales. [Para 2]

(b) Bihar and Orissa Public Demands Recovery Act (IV [4] of 1914), S. 11 — Certificates against co-sharer tenants - Payment of their proportionate dues by some of them — Their shares temporarily exempted and execution proceeded against others —Fresh notice under S. 7 if necessary.

Where a landlord files a certificate against all the tenure-holders for the rent of the entire tenure but during the course of the proceeding some of the co-sharer-tenants pay up their proportional dues and their shares are temporarily exempted from sale at the request of the landlord with the result that the Certificate Officer directs the execution to proceed against the remaining co-sharer-tenants for the value of the amount due, there is no amendment of the certificate within the meaning of S. 11 so as to necessitate a fresh issue of notice under S. 7. [Para 5]

(c) Bihar and Orissa Public Demands Recovery Act (IV [4] of 1914), S. 26 and Sch. II, R. 24 — Certificate filed on requisition of private landlord — Certificate officer's power to execute it by sale of portion of property — Tenancy laws — Bihar Tenancy Act (VIII [8] of 1885), S. 158 A (7).

Where a certificate is filed on the requisition of a private landlord, the provisions of the Public Demands Recovery Act become applicable to such a sale by virtue of S. 158A (7), Tenancy Act. Therefore by virtue of S. 26 read with Sch. II, R. 24 of that Act the certificate officer has power to execute the certificate only against a portion of the property liable for the certificate debt, such a sale operating as a money sale: A. I. R. (35) 1948 Pat. 223 and A. I. R. (36) 1949 Pat. 89, *Disting.* [Para 6]

(d) Bihar and Orissa Public Demands Recovery Act (IV [4] of 1914), Ss. 29 and 45 — Certificate sale—Irregularities in—Jurisdiction of Civil Court.

Sections 29 and 45 show that the Legislature was not anxious that the Civil Court should interfere with the proceedings of the Certificate Officer on the ground of irregularities. By Ss. 29 and 31 it has kept such matters for the consideration of the Certificate Officer himself, and even where that important notice, the notice under S. 7, is alleged not to have been served it has refused relief to the certificate debtor under S. 45, if he appears in the certificate proceedings.

[Para 9]

L. K. Jha, S. Anwar Ahmad and Balbhadra Prasad Sinha—for Appellant; Rajkishore Prasad, S. P. Shrivastava and Shivanugraha Prasad — for Respondents.

Reuben J.— This is an appeal by the plaintiff against a decision of the District Judge of Gaya, reversing in appeal, a decision of the Subordinate Judge of Gaya.

[2] The suit was instituted to obtain a declaration that a certificate sale of certain mokarrari property was void *ab initio*. In dismissing the suit, the District Judge, besides other grounds, relied on the ground that the suit is barred under the provisions of S. 45, Public Demands Recovery Act, 1914. Obviously this section has no application, as it relates to suits for the *setting aside* of certificate sales.

[3] The suit property is a share of 4 annas and odd in a mokarrari tenure in village Murhera, tauzi No. 1755. The certificate was filed at the instance of the Maharaja of Darbhanga, the mortgagee of the proprietary interest in the village, for the recovery of arrears of rent of the entire mokarrari interest for the years 1344 to 1345 Fasli at the rate of Rs. 1363 per year. During the course of the execution of the certificate, one of the cosharers-mokarraridars, defendant 1, whose share is 7 annas and odd filed an application for accepting from him a fraction of the certificate dues proportional to his share and for exempting his share from being proceeded against. A similar petition was filed by another set of co-sharer Mokarraridars, defendants 3 to 7, who hold a share of 8 pies and odd. These two applications were agreed to by the certificate-holder and were allowed by the Certificate Officer by an order dated 29-5-1939. The execution of the certificate proceeded against the other certificate-debtors for the balance of the certificate dues and 7 annas and odd of the mokarrari tenure was sold on 31-7-1939, delivery of possession being taken by the purchaser defendant 1 on 24-1-1940. An application under S. 29, Public Demands Recovery Act for setting aside the sale was filed by the plaintiff on 28-9-1939. It was allowed conditionally by the Certificate Officer, but was dismissed by the Collector in appeal.

[4] The learned Advocate-General, for the appellant, has challenged the validity of the sale on two grounds, firstly that, by his order of 29-5-1939, the Certificate Officer amended the certificate and, therefore, under S. 11, Public Demands Recovery Act, 1914, should have issued a fresh notice under S. 7. In the absence of such a notice, he argues, the Certificate Officer had no jurisdiction to sell the property. Secondly, he argues, on the basis of S. 158A, Tenancy Act (*vide* Sch. 3 to the Public Demands Recovery Act) which section was then in force but has since been repealed, and sub-s. (3) of S. 26, Public Demands Recovery Act, that the Certificate Officer could only proceed in respect of the rent against the entire tenure, and, therefore, has acted without jurisdiction in proceeding against only some of the Mokarraridars in respect of a fraction of the tenure.

[5] The first point is readily answered by a perusal of the Certificate Officer's order of 29-5-1939 which is as follows :

"R. O. Reports that the share of the C. Ds. 1 and 2 to 6 may be *temporarily* exempted as they have paid their full quota. The share of C. Ds. 1 to 6 is therefore *temporarily* exempted. Issue fresh S. N. fixing 31-7-1939 on payment of cost by 1-6-1939. Put up on 30-6-39."

I have stressed the word "temporarily" because it indicates what was the essence of the order of the Certificate Officer. He had before him a certificate filed by the landlord against all the tenure-holders for the rent of the entire tenure. During the course of the proceeding, some of the co-sharer-tenants paid up what he took to be their quota, and at the request of the landlord he directed execution to proceed against the remaining co-sharer-tenants for the balance of the amount due. This, however, was a "temporary" step. If the sale of the shares of the remaining co-sharers failed to realise the balance still due, the Certificate Officer intended to proceed against the shares which had been "temporarily" exempted. The effect, therefore, was that these certificate-debtors though for the time being they were not being proceeded against, remained as certificate debtors. It follows that it is not correct that there was any amendment in the certificate.

[6] Coming to the second point, S. 158-A, Tenancy Act empowers the Provincial Government to extend the procedure prescribed by the Public Demands Recovery Act to the recovery of rent by private landlord. When a certificate is filed on the requisition of such a landlord, the provisions of the Public Demands Recovery Act apply *mutatis mutandis* for the purpose of the execution and of proceedings arising out of the execution of the certificate (*vide* sub-s. (7) of S. 158A). In the present case, there is no sugges-

tion that the requisition made by the landlord and the certificate filed thereupon are not in accordance with the law. The learned Advocate-General stresses merely sub-s. (3) of S. 26, which provides that the sale in certificate proceedings of a tenure or holding for arrears of the rent thereof shall in certain circumstances have the effect of a rent sale. This provision must be read with sub-s. (1) of S. 26 of the Act, and R. 24 of the rules in Sch. 2 to the Act, which rules have a statutory effect (*vide* S. 47 of the Act). Rule 24 empowers the Certificate Officer when executing a certificate to sell the whole or a portion of the property liable to sale. Under sub-s. (1) of S. 26 where property is sold in execution of a certificate, there vests in the purchaser "merely the right, title and interest of the certificate-debtor at the time of the sale, even though the property itself be specified."

The two provisions clearly empower the Certificate Officer to execute the certificate only against a portion of the property liable for the certificate-debt, such a sale operating as a money sale. This is all that has happened in the case before us.

[7] Our attention has been drawn to *Ambika* v. *Laxmi Ahir*, 26 Pat. 66 : (A.I.R. (35) 1948 Pat. 223) and *Parmeshwar Singh* v. *Jajo Singh*, 29 Pat. L. T. 9 : (A.I.R. (36) 1949 Pat. 89). These are authorities for the proposition that no suit can be entertained for the recovery of rent for a non-existent tenancy. They have no application to the present case. Here, we are past to stage of a suit to recover arrears of rent. The certificate which was duly filed is a decree for rent, and has been held to be for the correct rent of the whole tenure. We are now at the stage of execution.

[8] The learned Advocate-General has spoken of certain irregularities, for example, he complains that the order of 29-5-1939, was passed without notice to the applicant and that there is no provision under which the Certificate Officer could proceed only against some of the certificate-debtors. At the best, these are irregularities. Apart from S. 45, the only provision for challenging a sale on the ground of an irregularity is S. 29. This provision is analogous to that in O. 21, R. 90, Civil P. C., but goes much further, for it extends to material irregularities "in the certificate proceedings" and not merely "in publishing and conducting the sale". Further, the Certificate Officer is empowered to entertain an objection even after the expiry of sixty days after the sale (*vide* sub-s. (2) of the section). The plaintiff is barred from relief under S. 45 as he has been found to have appeared in the proceedings (*vide* cl. (b) of the proviso to S. 45) and the sale having been confirmed after the dismissal of his objection under S. 29 has become absolute (*vide* S. 31).

[9] The learned Advocate-General has also cited *Baijnath Sahai* v. *Ramgut Singh*, 23 I. A. 45 : (23 Cal. 775 P. C.) and *Sudhir Chandra* v. *Sudhanshu Kumar*, 44 C. W. N. 1097 : (A. I. R. (27) 1940 Cal. 556) and has stressed the observation of Lord Davey, about the necessity for the Certificate Officer to comply precisely with the forms prescribed by the Public Demands Recovery Act. These were both cases where the Court found that there was no certificate. Now, the certificate is the basis of the Certificate Officer's power to proceed in execution. The defect was one which went to the root of jurisdiction and entirely invalidated the proceedings of the Certificate Officer. But here we are concerned only with irregularities. The provisions of the Public Demands Recovery Act to which I have referred show that the Legislature was not anxious that the civil Court should interfere with the proceedings of the Certificate Officer on the ground of irregularities. By Ss. 29 and 31 it has kept such matters for the consideration of the Certificate Officer himself, and even where that important notice, the notice under S. 7, is alleged not to have been served it has refused relief to the certificate-debtor under S. 45 if he appears in the certificate proceedings.

[10] On the above grounds, I think that the appeal has no merits and must be dismissed with costs.

[11] **Narayan J.**—I agree.

K.S. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 389 *[C. N. 99.]*

DAS AND SINHA JJ.

Chandra Sheikhar Prasad Singh — Petitioner v. *The State of Bihar.*

Criminal Misc. No. 126 of 1950, D/- 24-8-1950.

(a) Public Safety — Preventive Detention Act (1950), S. 3 (1) — Detention order — Necessity to mention period of detention.

The detaining authority is not required, under the Act, to mention the period for which the detaining authority intends the detenu to be detained. If there is no provision for mentioning the period, the detaining authority is not bound or obliged to mention the period : A. I. R. (38) 1951 All. 357, *Dissent*. [Para 3]

Hence, a detention order under S. 3 is not invalid by reason of a failure to mention therein the period of detention. [Para 26]

(Distinction between preventive and punitive detentions pointed out.)

(b) Public Safety — Preventive Detention Act (1950), S. 3 (1)—Public order—Meaning — Words and Phrases.

'Public order' must be taken in a comprehensive sense so as to include public safety in its relation to the maintenance of public order and that maintenance of public order undoubtedly involves consideration of public safety. [Para 4]

(c) Public Safety — Preventive Detention Act (1950), S. 12—Previous detention under other law —If can be considered for one year, under S. 12.

The expression 'from the date of his detention' in S. 12 must refer to the detention under the Act under which the person is to be detained, that is to say, the Preventive Detention Act (IV [4] of 1950). If Parliament has enacted that a person should be detained without his case having been referred to an Advisory Board for a period not exceeding one year from the date of his detention, it must have reference to the detention under the Preventive Detention Act and it would be ridiculous to hold that this maximum period of one year could be made up by taking into consideration under some previous enactment. [Para 7]

(d) Public Safety — Preventive Detention Act (1950), S. 7—Detention grounds—Communication of—Delay in—Delay of 18 days between the date of the order of detention and the actual service of the grounds of detention is not an unreasonable delay —Constitution of India, Art. 22 (5). [Para 8]

(e) Public Safety — Preventive Detention Act (1950), S. 7 Detention grounds—Necessity to disclose all grounds — Constitution of India, Art. 22 (5) and (6).

The grounds on which the order of detention has been made must be communicated to the person detained and the right to get the grounds on which the order of detention has been made is one of the fundamental rights. The Preventive Detention Act (IV [4] of 1950) has quite properly given due consideration to that fundamental right embodied in Art. 22 (5) of the Constitution and the detaining authority, under S. 7, Preventive Detention Act, is bound to furnish the grounds on which the order of detention has been made. He is not at liberty to disclose some and withhold other grounds on which the order is made. If some of the grounds on which the order has been made are not communicated to the detenu, then he is not in a position to make an effective representation which he has the right to do under Art. 22 (5) of the Constitution. [Paras 10, 12]

There may be a number of grounds in support of the order, but the authority making the order must be held entitled to base the order of detention only upon some out of the many grounds in his possession. It is only those grounds on which the order has been made that have to be communicated to the detenu. [Para 12]

The safeguard provided by cl. (5) of Art. 22 of the Constitution of India is a safeguard in favour of the detenu, and the detenu is entitled, as a matter of right, to know the grounds on which the order of detention has been made against him. No question of waiver can arise in such circumstances. [Para 36]

B. C. Ghose, U. C. Sinha and Rewati Raman Singh — for Petitioner ; Government Advocate — for the State.

Sinha J. — This application was made by the petitioner on 27-2-1950, under S. 491, Criminal P. C. and Art. 226 of the Constitution of India. At that time the petitioner was being detained under the Bihar Ordinance II [2] of 1950, the detention order under that Ordinance having been served on him on 17-2-1950. It appears, however, that after the Preventive Detention Act, 1950 (IV [4] of 1950) came into force, an order of detention was passed against the petitioner on 27-2-1950. This order was served upon him on 28-2-1950 and the grounds of detention were communicated to him on 17-3-1950. As this application was made before the present Act IV [4] of 1950 came into force, no specific grounds relating to this Act were mentioned in the petition. Mr. B. C. Ghose, the learned counsel for the petitioner, has, however, made submissions as if the application was made after the order of detention against the petitioner was passed under the Preventive Detention Act of 1950, and no objection having been raised by the State, the Court has heard Mr. Ghose's arguments as if objection was taken to the detention of the petitioner under the present Act. Mr. Ghose has submitted that the petitioner has been in detention since 1-8-1949, under one or other of the Bihar Acts or Ordinances.

[2] The following points have been taken in support of the application: (1) that the order of detention is illegal, because it does not prescribe the period of detention; (2) that the grounds of detention communicated to the petitioner do not relate to public order; (3) that the date of detention must be counted from the date of detention under previous orders; (4) that the grounds of detention were not communicated to the petitioner as soon as possible; and (5) that all the grounds on which the order of detention has been made have not been communicated to him. I would like to consider the points in the order in which they have been mentioned. To understand the argument, it is necessary to mention some of the relevant provisions of the Preventive Detention Act (Act IV [4] of 1950):

"*Section 3 (1)* — The Central Government or the State Government may:

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial . . . . .

(ii) the security of the State or the maintenance of public order . . . . it is necessary so to do, make an order directing that such person be detained.

Section 7 (1)—When a person is detained in pursuance of a detention order, the authority making the order *shall, as soon as may be*, communicate to him the *grounds on which the order has been made*, and shall afford him the earliest opportunity of making a representation against the order . . . .

(2) Nothing in sub-s. (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.

Section 12 (1) — Any person detained in any of the following classes of cases or under any of the following circumstances may be detained without obtaining the opinion of an Advisory Board for a period longer than three months, but *not exceeding one year from the date of his detention*, namely, where such person has been detained with a view to preventing him from acting in any manner prejudicial to . . . . . (b) the security of a State or the maintenance of public order. (2) The case of every person detained under a detention order, to which the provisions of sub-s. (1) apply, shall, within a period of six months from the date of his detention, be reviewed where the order was made

by the Central Government or a State Government, by such Government, and where the order was made by any officer specified in sub-s. (2) of S. 3, by the State Government to which such officer is subordinate, in consultation with a person who is, or has been, or is qualified to be appointed as a Judge of a High Court nominated in that behalf of the Central Government or the State Government, as the case may be."

The words which I considered important have been underlined (here italicised) by me.

[3] Now I take up the arguments of Mr. Ghose. He says that the order of detention is bad because no period of detention has been mentioned in the order. From the provisions of the sections which I have mentioned above—and there is no other section in the Act bearing on the point—it is apparent that the detaining authority is not required, under the Act, to mention the period for which the detaining authority intends the detenu to be detained. If there is no provision for mentioning the period, the detaining authority is not bound or obliged to mention the period. The learned counsel, has, however, relied upon an unreported judgment of the Allahabad High Court in *M. M. Bashir* v. *State*, Cri. Misc. No. 1127 and 1128 of 1950 : (A. I. R. (38) 1951 ALL. 357 : 52 Cr. L. J. 115) delivered by Bhargava J. in support of his contention. I have perused the judgment with care and attention and with great respect to the learned Judge, I do not subscribe to his view or to the reason he has given for holding that the order of detention must contain the period of detention. One reason which appears to have appealed to his Lordship is that, because in punitive detentions, that is to say, in punishments for some offences under the Criminal law, a period is prescribed for the imprisonment of the accused, so also, he says, in a case of preventive detention the period must be mentioned. I think, the analogy is not correct. In the first place, in the case of punitive detentions, the Court which passes a sentence of imprisonment has to determine, with reference to the gravity of the offence proved, as to for how long a period the man should be put in prison. The facts are before it and it is in a position to know exactly what the offence is and, having regard to the nature of the offence, it has to decide as to how long the accused should be imprisoned. This is not the case in regard to preventive detentions. By the very nature of it, the detaining authority has to proceed, more or less upon suspicion based upon confidential reports against the person to be detained. He is not in a position to judge at the time he passes the order as to the exact nature of the act or acts which the person to be detained was going to commit or for how long it will be necessary to detain him. This will depend upon circumstances which may be obtaining in future. He only knows at the time that upon the reports which he has received if the man is allowed to remain at large, his so remaining at large will be prejudicial to public safety or public order. It is not, therefore, possible for the detaining authority, at the time of his making the order, to exactly know the nature of the act the detenu was going to commit or the circumstances prevailing in future and, therefore, in my opinion, he is not in a position to fix any definite period for which the person has to be detained. Mr. Ghose, by way of analogy, has placed before us S. 107 and other sections occurring in Chap. VIII, Part V, Criminal P. C. headed 'Prevention of Offences' and has argued that as under S. 112 so also under the Preventive Detention Act (IV [4] of 1950) the period for which the order is to remain in force has to be mentioned. The analogy does not hold good. It is sufficient to dispose of this part of the argument to say that the Court under S. 112, Criminal P. C. is required under law to mention the period and, therefore, it is a statutory obligation whereas there is no such obligation under the provisions of the Preventive Detention Act. In my view, therefore, no period of detention need be mentioned and the order of detention cannot be held to be illegal because it mentions no period of detention.

[4] The next point is that the grounds of detention in this case have no relation to the maintenance of public order and, therefore, the order of detention is bad. The learned counsel for the petitioner has taken us to the various provisions of Art. 19, Constitution of India and has tried to show that the expressions 'security of State', 'public order', 'public order or morality', and 'interest of the general public' have distinct and different connotations. He has placed before us the grounds of detention passed against the petitioner to show that those grounds do not relate to the maintenance of public order, but that they relate to both 'public safety' and 'public order'. In my view, this point is no longer at large because in the case of *Nek Mohammad* v. *Province of Bihar*, A. I. R. (36) 1949 Pat. 1 : (50 Cr. L. J. 44 F. B.) it has been held that 'public order' must be taken in a comprehensive sense so as to include 'public safety' in its relation to the maintenance of public order and that 'maintenance of public order' undoubtedly involves consideration of 'public safety'. His Lordship Das J., who delivered the judgment of the Full Bench case, made the following observation :

"In the context in which the expression 'public safety' occurs in the preamble and in S. 2 (1) of the Act, it is either synonymous with public order or is

comprehended by the more general term 'public order'."

It may be noted that his Lordship was considering the validity of the Bihar Maintenance of Public Order Act (v [5] of 1947), but that makes no difference to the meaning of the expression 'public order' as used in the present Act under consideration. I do not like to dilate upon this point any further and I hold that the word 'public order' has been used in a comprehensive sense.

[5] After the hearing of this case was concluded my attention was drawn to two more cases of the Supreme Court. In the case of *Romesh Thappar* v. *State of Madras*, A. I. R. (37) 1950 S.C. 124 : (51 Cr.L.J. 1514) the majority judgment has been given by Patanjali Sastri J. This case involved the consideration of the validity of the Madras Maintenance of Public Order Act, 1949 (XXIII [23] of 1949). His Lordship has made the following observation which is relevant to the point I have been considering:

"Now 'public order' is an expression of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted. Although S. 9 (1A) (of the Madras Maintenance of Public Order Act, 1949) refers to 'securing the public safety' and the 'maintenance of public order' as distinct purposes, it must be taken that public safety is used as a part of the wider concept of public order."

In the other case of *Brij Bhushan* v. *State of Delhi*, A. I. R. (37) 1950 S. C. 129 : (51 Cr. L. J. 1525) the majority judgment was given by Patanjali Sastri J. His Lordship relied mainly upon his judgment given in the other case, referred to above, but his Lordship Fazl Ali J. gave a dissenting judgment. But so far as the expressions 'public order' and 'public safety' are concerned, his Lordship made the following observation, after having held that 'public order' and 'public safety' are allied matters :

"In my opinion, the word 'or' (between 'public safety' and 'maintenance of public order') is used here not so much to separate two wholly different concepts as to show that they are closely allied concepts and can be used almost interchangeably in the context."

These two decisions also, in my opinion, support the view which I have taken in regard to this point.

[6] Now, looking to the grounds in the present case, I find that they relate to public order and in support of my view I need only quote an extract from the grounds of detention served upon the petitioner :

"The police recovered during his arrest a cyclostyled Hindi leaflet entitled 'RAILWAY HARTAL AUR KISAN MORCHA KE SATHION KA KARTABYA' dated 5-3-1949, containing incitement to railway men, Kisans and field labourers to hold demonstrations, to attack zamindars, Mahajans, profiteers, rich kisans etc. to face the police and military paying them back in the same coin, uproot rails etc."

In my view the extract quoted above is closely connected with the maintenance of public order. Besides the above quotation, there are a number of other grounds given which, in my opinion have reference to the maintenance of public order. I am satisfied, therefore, that the grounds served upon the petitioner relate to the maintenance of public order and as such the order is good and valid.

[7] The third ground taken is that the period of previous detention under any other provision of law should be counted for the purpose of S. 12 of the Act which prescribes the maximum period of one year. The learned counsel contends that if the detenu has been in detention for more than a year before his detention under the present Act, his present detention would be illegal. In my view, the interpretation put upon S. 12 by the learned counsel for the petitioner is not borne out by the section itself. The section says that if a person has been detained with a view to preventing him from acting in any manner prejudicial to the security of a State or the maintenance of public order (I am omitting the other portions of the section), the man can be detained without obtaining the opinion of an Advisory Board for a period longer than three months but not exceeding one year from the date of his detention. The expression 'from the date of his detention' must refer to the detention under the Act under which the person is to be detained, that is to say, the Preventive Detention Act (IV [4] of 1950). If Parliament has enacted that if a person should be detained without his case having been referred to an Advisory Board for a period not exceeding one year from the date of his detention, it must have reference to the detention under the Preventive Detention Act and it would be ridiculous to hold that this maximum period of one year could be made up by taking into consideration the previous detention under some previous enactments. If the argument is good, the result would be absolutely absurd; for example, if a man who has been detained for one year, say 20 years ago, he cannot again be detained under the Preventive Detention Act, 1950, although there may be good reasons for his detention. That could never have been the intention of the Parliament and I must hold that the maximum period of one year mentioned in S. 12 means one year from the date of detention of the person under the Preventive Detention Act, 1950.

[8] Now I come to the fourth contention of Mr. Ghose. He says that the grounds of detention in this case have not been communicated to the petitioner in time, as required by S. 7,

Preventive Detention Act, 1950, or Art. 22 (5) of the Constitution. In this case the order of detention under the Preventive Detention Act, as I have already said, was passed on 27-2-1950; it was served on the petitioner on 28-2-1950; and the grounds were communicated to him on 17-3-1950. Thus there has been a delay of only 18 days from the date of the order of detention. I consider that a delay of 18 days between the date of the order of detention and the actual service of the grounds of detention is not an unreasonable delay. In the case of *Murat Patwa* v. *Province of Bihar*, A. I. R. (35) 1948 Pat. 135 : (49 Cr. L.J. 132 F.B.) their Lordships had to consider the same expression "as soon as may be", as we find in the present Preventive Detention Act, and they held that it meant a reasonable time, although on the facts of that particular case, their Lordships did hold that the delay between the date of order of detention and the service of the grounds was not reasonable, because, as the facts of that case showed, the order of detention was passed on 16-4-1947; the man was arrested on 9-5-1947; and the grounds were served upon him on 24-7-1947. Thus in that case there was delay of two months and a half and their Lordships held that the authorities did not comply with the mandatory provision of the Bihar Act (V [5] of 1947), which their Lordships were considering in that particular case. In the present case, however, I find that the delay was not unreasonable and that the petitioner was given the earliest opportunity, in the circumstances of this case, to make a representation against the order. In that view of the matter, I hold that there is no merit in this contention.

[9] Having disposed of the first four points, I now come to the most important contention of the petitioner. The submission is that all the grounds on which the order of detention is made have not been communicated to the petitioner. Reliance is placed by the learned counsel, in support of his submission, on the grounds themselves. Paragraph 4 of the grounds, which is a long para. has the second sentence as follows:

> "The Provincial Government is of opinion that it would be against the public interest to disclose all the grounds of the order of detention passed against Sri Chandra Shekhar Prasad Singh."

It is said that on their own admission the detaining authority have not given all the grounds of detention, as required by Art. 22 (5) of the Constitution of India and S. 7, Preventive Detention Act, 1950 (IV [4] of 1950). Article 22 (5) of the Constitution of India which occurs in Part III—"Fundamental Rights"—enjoins upon the authority making an order to communicate to the detained person the grounds on which the order has been made. Section 7, Preventive Detention Act (IV [4] of 1950) borrows exactly the language mentioned in Art. 22 (5) of the Constitution. This right to receive the grounds on which the order of detention has been made is one of the fundamental rights which has been guaranteed to the detained person under the constitution and, therefore, it is not open to the executive authority to whittle down the said fundamental right. Article 22 (6), however gives liberty to the detaining authority not to disclose the facts which such authority considers to be against the public interest to disclose. Therefore, a clear distinction has been made between the grounds on which the order of detention has been made and the facts upon which the grounds may have been founded. It is not open to the executive authority to keep back some out of the grounds on which the order has been made. In the case of *Lalit Kumar* v. *The State*, Cri. Misc. No. 124 of 1950 : (29 Pat. 502 F.B.) a Full Bench of this Court which considered the validity of the Preventive Detention Act (IV [4] of 1950), Das J. who was one of the Judges constituting the Full Bench and with whom Meredith C. J. concurred considered cls. (5) and (6) of Art. 22 of the Constitution, and while considering these two clauses, his Lordship said :

> "A distinction is drawn between 'grounds' and 'facts'. Clause (6) entitles the authority making the order to withhold disclosure of facts, but it does not authorise withholding disclosure of grounds on which the order has been made."

[10] The Supreme Court also, while considering the validity of the Preventive Detention Act (IV [4] of 1950), in the case of *A. K. Gopalan* v. *The State of Madras*, 1950-13 S. C. J. 174 : (A.I.R. (37) 1950 S. C. 27 : 51 Cr.L.J. 1383) has also expressed the view similar to the view expressed by Das J. in the Patna Full Bench case. Their Lordships of the Supreme Court have, by majority judgment, held that the Preventive Detention Act (IV [4] of 1950), excepting S. 14 of the Act, is a good and valid Act and within the competence of Parliament to enact. Their Lordships have given separate judgments, but so far as Arts. 22 (5) and 22 (6) of the Constitution are concerned, there is no difference of opinion and they have held that the grounds on which the order of detention has been made cannot be withheld from the detained person and they must be communicated to him and that so far as the facts are concerned, if the authority passing the order of detention was of the opinion that the disclosure of such facts would be against the

public interest, then, the authority could very well withhold such facts. I would, therefore, content myself by giving a quotation from the judgment of Kania C. J. Dealing with Arts. 22 (5) and 22 (6) his Lordship says:

"Article 22 (5) prescribes that when any person under a preventive detention law is detained, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. This clause is of general operation in respect of every detention order made under any law permitting detention. Article 22 (6) permits the authority making the order to withhold disclosure of facts which such authority considers against the public interest to disclose. It may be noticed that this cause only permits the non-disclosure of facts, and reading Cls. (5) and (6) together a distinction is drawn between facts and grounds of detention."

It is, therefore, quite clear that the authority passing the order of detention cannot withhold any of the grounds on which the order of detention has been made. *In the case of Nek Mohammad*, A.I.R. (36) 1949 Pat. 1 : (50 Cr.L.J. 44 F.B.), the Full Bench, while considering the validity of the Bihar Maintenance of Public Order Act (V [5] of 1947) on the construction of S. 4 of the Act, observed as follows:

"It is clear that under the section the authority passing the order of detention shall communicate the grounds and I emphasise the word 'shall'; but it need not disclose facts which it considers it would be against the public interest to disclose. A question has been raised before us if 'facts' and 'grounds' mean the same thing. There are some decisions in which it has been held that 'grounds' mean the conclusions or reasons based on 'facts.' Whether such a distinction can be made or not, it seems to me that under S. 4, Bihar Act the facts may be so intertwined with the grounds that the Provincial Government may be in a position to say that the grounds cannot be disclosed without disclosing the facts."

[11] The learned counsel has cited before us the case of *Inder Prakash* v. *Emperor*, A.I.R. (36) 1949 ALL. 37 : (50 Cr. L. J. 34) in support of the contention that all the grounds must be disclosed. It appears that some of the Allahabad cases were also placed before Full Bench in *Nek Mohammad* v. *The Province of Bihar*, A.I.R. (36) 1949 Pat. 1 : (50 Cr. L. J. 44 F.B.) and the Full Bench in regard to the Allahabad cases had observed as follows:

"In some of the Allahabad decisions it has been held that all the grounds must be disclosed. I do not think one can go to that extent under the Bihar Act."

Some of the unreported Nagpur decisions which have been placed before us were also placed before the Full Bench in *Nek Mohammad's case*, (A.I.R. (36) 1949 Pat. 1 : 50 Cr. L. J. 44 F.B.). The Nagpur judgments were in *Madhav Bapat* v. *Provincial Government of C. P. & Berar*, Misc. Case No. 253 of 1948, and *Govind Laxman* v. *Provincial Government of C. P. & Berar*, Misc. Cri. Case No. 154 of 1948 and these are the cases which have been placed before this Court also. Das J., delivering the judgment of the Full Bench case, has observed in regard to these Nagpur cases as follows:

"It was there (in Nagpur cases) stated that the Provincial Government was bound to state all the grounds and particulars. As I have said above, under S. 4, Bihar Act, one cannot go so far as to say that all the grounds must be disclosed."

[12] The learned counsel for the petitioner has also cited before us the case of *Shoilen Dey In re*, A.I.R. (36) 1949 Bom. 75 : (50 Cr.L.J. 173). In my view, however, this case is not of much help in the present case. What happened in that case was that the detenu was detained for inciting a section of labourers of Tata Air India, Bombay, to use violence against the officers of the Tata Air India and that he was also inciting this section of workers to acts of sabotage. It was found, however, that there was no such company in existence as Tata Air India. Chagla C. J. made the observation:

"The detaining authority, as we have had occasion to point out several times, has such wide powers given to it under the statute that where the Court is left with any discretion at all to investigate the grounds given by the Commissioner of Police, the Court must do so vigilantly in order to find out whether that degree of care and caution has been exercised by the detaining authority which the law requires. The Commissioner of Police need give no particulars, need state no facts. He can take refuge behind public interest and behind the language of Ss. 2 and 3 (of Bombay (Act VI [6] of 1947). But when he does give grounds—and those grounds have to be given by him as a statutory obligation—he must take meticulous care to see that whatever he stated in those grounds is stated with absolute accuracy."

Their Lordships of the Bombay High Court ordered the release of the detenu because the grounds communicated to the detenu had in fact no existence inasmuch as there was no such company as Tata Air India, Bombay, and it was, therefore, held that the detenu was not afforded the opportunity of making a representation. As I have said above, this case does not give us any assistance. In my view, and upon the authorities mentioned above, it is quite clear that the grounds on which the order of detention has been made must be communicated to the person detained and the right to get the grounds on which the order of detention has been made is one of the fundamental rights. The Preventive Detention Act (IV [4] of 1950) has quite properly, if I can say so with respect, given due consideration to that fundamental right embodied in Art. 22 (5) of the Constitution and the detaining authority, under S. 7, Preventive Detention Act, is bound to furnish the grounds on which the order of detention has been made. He is not at liberty to disclose some and withhold other grounds on which the order is made. If some of the

grounds on which the order has been made are not communicated to the detenu, then he is not in a position to make an effective representation which he has the right to do under Art. 22 (5) of the Constitution. That being the settled position in law, let us consider if the detaining authority in this case has complied with the mandatory provision of Art. 22 (5) of the Constitution of India or of S. 7, Preventive Detention Act. There may be a number of grounds in support of the order, but the authority making the order must be held entitled to base the order of detention only upon some out of the many grounds in his possession. It is only those grounds on which the order has been made that have to be communicated to the detenu. When in Para. 4 of the grounds it is said that :

"The Provincial Government is of opinion that it would be against the public interest to disclose all the grounds of the order of detention passed against Sri Chandra Sekhar Prasad Singh,"

does it mean that any of the grounds on which the order of detention has been made or is being founded is being suppressed from the detenu ? The answer depends on the meaning of the two expressions " . . . the grounds on which the order has been made . . . ." which finds place both in Art. 22 (5) of the Constitution and in S. 7, Preventive Detention Act, 1950 and "the grounds of the order of detention passed . . . " which occurs in Para. 4 of the grounds of detention communicated to the petitioner in this case. If there is no difference in the meaning of the two expressions, then it must be held that the detaining authority has failed to comply with the constitutional safeguards and the statutory provision. I have given my anxious consideration to the meaning of these two expressions and I have come to the conclusion that there is no difference at all. The expression 'grounds of the order of detention' must mean the same thing as 'the grounds on which the order of detention has been made'. It has, therefore, to be held that all the grounds of detention have not been communicated to the petitioner which was one of the fundamental rights guaranteed under the Constitution and which under the Act under consideration he was entitled to get.

[13] Now let us consider if upon the interpretation of the language implied in Para. 4 of the grounds it is possible to give any other meaning to the word 'grounds' occurring in that paragraph. At one time I was inclined to think that the word 'grounds' has been used rather loosely and perhaps the authority wanted to use the word 'facts' instead of 'grounds'. As that raised a doubt in my mind, I enquired of the learned Government Advocate whether the State would be able to swear an affidavit as to whether or not there were some other grounds of detention which have not been disclosed. The learned Government Advocate took time to consider the matter and then, after a few days, he said that for some reason it was not possible to file an affidavit. This attitude on the part of the State, therefore, settled the matter beyond doubt that the word 'grounds' has not been loosely used.

[14] It is, therefore, clear that the word 'grounds' in the above-mentioned sentence in Para. 4 of the grounds does not mean 'facts' and, in that view of the matter, I am bound to hold that the grounds of detention on which the order has been made have not been communicated in full to the petitioner.

[15] In the circumstances mentioned above, the petition must succeed and it is, therefore, allowed and the petitioner must be released from detention.

[16] **Das J.**—I take up one by one the points urged by learned counsel for the petitioner in support of his contention that the detention of the petitioner is illegal.

[17] The first point is that the order of detention passed under S. 3 (i), Preventive Detention Act, 1950 (hereinafter to be referred to as the Detention Act) is invalid, because it does not state the period for which the petitioner is to be detained. In an unreported decision of the Allahabad High Court *M. M. Bashir* v. *State*, in Cri. Misc. Case Nos. 1127 and 1128 of 1950 : (A. I. R. (38) 1951 ALL. 357 : 52 Cr. L. J. 115) Bhargava J. expressed himself as follows :

"It is true that S. 3, Preventive Detention Act, 1950 (IV [4] of 1950) did not itself lay down that the period of detention must be prescribed in the order but whether a period is prescribed in the order or elsewhere, it is obviously essential that it must be definitely laid down by the detaining authority. On behalf of the State it was argued that under S. 12, Preventive Detention Act, 1950 (IV [4] of 1950) any person, detained under the provisions of this Act, could be detained for a maximum period of one year and, therefore, the detention of the applicant should be considered to be valid until the expiry of the period of one year from the date from which his detention began. This argument is not acceptable to me. Section 12 of the Act merely lays down the maximum period for which a person can be detained but it does not lay down that in case the detaining authority prescribes no period, the detention will continue for the whole of this maximum period. Most of the provisions of the Penal Code also lay down the maximum period of imprisonment that can be awarded for the commission of offences dealt within it. It has, however, always been considered necessary that a Court passing a sentence for an offence under the Penal Code must itself lay down the period for which the sentence is to run and if no such period is laid down, it cannot be

held that the Court must be deemed to have passed the sentence for the maximum period permissible for that offence under the Code.

Similarly, in this case it was essential that the District Magistrate of Aligarh, who passed the order of detention, should have exercised his own mind and arrived at a finding about the period for which the detention of the applicant was necessary for purposes mentioned in S. 3, Preventive Detention Act, 1950 (IV [4] of 1950). If the District Magistrate did not do so, it cannot be said that the maximum period permissible under S. 12 of the Act is the period for which the District Magistrate desired the applicant to be detained. In these circumstances, it would appear that the detention of the applicant is not in accordance with the procedure prescribed by law and he is, therefore, entitled to be released."

[18] I have had occasion to consider several petitions under S. 491, Criminal P. C. against orders of detention passed under the Detention Act or under previous Acts or Ordinances dealing with the preventive detention. So far as I am aware, the period of detention was never mentioned in the initial order of detention, and the point that the detention order is invalid unless it mentions the period of detention was never taken in any previous case. The fact that a point was never taken previously is no ground for holding that it is a bad point, and in view of the decision of Bhargava J. quoted above, which is undoubtedly entitled to great respect, it is necessary that the point should be very carefully considered. Bhargava J. has mainly relied on an analogy from punitive detention. There is, however, a very marked distinction between 'preventive detention' and 'punitive detention'—a distinction which has been often referred to in many judicial decisions, English and Indian. Preventive detention is a purely precautionary measure which "must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof" (per Lord Atkinson in *Rex* v. *Halliday*, 1917 A. C. 260 at p. 275 : (86 L.J.K.B. 1119). This is also made clear in the words used in cl. (a) of sub-s. (1) of S. 3, Detention Act : the words used are

"if satisfied with respect to any person that *with a view to preventing him from acting* in any manner prejudicial to, etc."

I have underlined (here italicised) the words which bring out the main purpose of preventive detention. In cases of punitive detention, the sentence awarded is moulded, so far as humanly possible, to the crime committed. Various circumstances are taken into consideration in awarding the sentence, e. g., age, motive for the crime, mitigating circumstances (if any), provocation, aggravation of the crime, etc. But all these factors are known factors proved in the case. The position is different with regard to preventive detention.

[19] In a criminal trial or enquiry, under the ordinary procedure of the Code of Criminal Procedure, the judgment or final order comes at the conclusion of the trial, after both parties have been heard. The scheme or procedure envisaged in the Detention Act is and must necessarily be different; because the object or purpose of preventive detention is different from that punitive detention. Let us examine the scheme of the Detention Act, 1950. The order of detention is made under S. 3 of the Act. The order is made when the detaining authority is satisfied with respect to any person that with a view to preventing him from acting in a prejudicial manner (I am leaving out clauses which are not relevant for the argument), it is necessary to make an order directing that such person be detained. The section does not require, in express terms, that the period of detention should be mentioned. What is of greater importance, however, is that the order is made on *ex parte* materials, and before the detenu has had an opportunity of making a representation, in other words, before the detenu has been heard. This must necessarily be so, as the executive on whom rests the responsibility for the maintenance of law and order, must act quickly in order to prevent prejudicial acts. Therefore, it is obvious that there is no real analogy between a detention order passed under S. 3, Detention Act and a judgment of conviction in which a sentence is awarded. The person against whom a detention order is made may be absconding at the time, and action contemplated by S. 6, Detention Act may have to be taken. If the detention order mentions the period of detention from the date of the order and not from the date of arrest, the order may spend its force by the time the man is arrested. Under S. 7, Detention Act, the authority making the order shall, as soon as may be, communicate to the detenu the grounds on which the order has been made, and shall afford the detenu the earliest opportunity of making a representation against the order. This opportunity is meaningless, unless the intention is that the detaining authority shall consider the representation, and in appropriate cases, if satisfied with the representation, order the release of the detenu. If that be the meaning and purpose of S. 7, Detention Act, how can the period of detention be fixed before the detenu has been heard? Section 8, Detention Act deals with the constitution of Advisory Boards, and S. 9 states in which cases a reference to the Advisory Board is necessary. Section 10 deals with the procedure of Advisory Boards. Section 11 is, I think, very important. It states :

"In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of the persons concerned, the Central Government or the State Government, as the case may be, *may confirm the detention order* and continue the detention of the person concerned for *such period as it thinks fit.*"

[20] I have underlined (here italicised) the words which, in my opinion, are important for our present purpose. It is clear from S. 11 that, at least, in those cases where a reference to the Advisory Board is necessary, the order of detention made at the initial stage need not mention the period of detention; otherwise, the section would not have said "confirm the detention order and continue the detention of the person concerned for such period as it thinks fit." It is true that S. 11 has no application to those cases in which there is no reference to an Advisory Board—a point which has been emphasised by Mr. Ghosh for the petitioner; but the words used in S. 11 give an insight into the scheme of the Detention Act, and indicate, in my opinion clearly enough that the detention order passed under S. 3 of the Act need not mention the period of detention. Section 12, Detention Act, is the section which applies in the present case. I accept the argument that the period of one year mentioned in sub-s. (1) is the maximum period prescribed by Parliament under sub-cl. (b) of cl. (7) of Art. 22, Constitution of India, for a particular class or classes of cases. The period of one year is the maximum period, and it is not necessary that every person detained must be detained for the maximum period. But there is nothing in sub-cl. (1) of S. 12 which requires the detaining authority to state the period of detention in detention order. Sub-section (2) of S. 12 requires the case of every person detained under a detention order to which the provisions of sub-s. (1) apply, to be reviewed by the appropriate authority in consultation with a person who is, or has been or, is qualified to be appointed as a Judge of a High Court. This review further shows that the circumstances in which a person detained may be released and the detention order revoked or cancelled against him, are circumstances which may change and may not be known at the time when the detention order is passed on *ex parte* materials. Section 13 deals with revocation of detention order, and sub-s. (2) of S. 13 states that the revocation of a detention order shall not bar the making of a fresh detention order under S. 3 against the same person. This, again, shows that the scheme of the Detention Act is different, as it must necessarily be, from the procedure of an ordinary criminal trial or enquiry where the punishment comes at the conclusion of the trial and not at the beginning. In my view, it would be wrong and misleading to draw an analogy, and base a decision thereon, between the procedure of an ordinary criminal trial or enquiry and the procedure with regard to preventive detention, as envisaged in the Detention Act.

[21] Our attention has been drawn to the preventive sections of the Code of Criminal Procedure. It is pointed out that under S. 112, Criminal P. C., when a Magistrate acting under S. 107, S. 108, S. 109 or S. 110 deems it necessary to require any person to show cause under such section he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, etc. Learned counsel has emphasized the words "the term for which it is to be in force." After the conclusion of the enquiry, when the Magistrate makes a final order under S. 118, Criminal P. C., he cannot ask a person to give security for a period longer than what was specified in the order made under S. 112. Learned counsel has also referred to S. 117 (3), Criminal P. C., under which the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may direct the person in respect of whom the order under S. 112 has been made to execute a bond, with or without sureties, for keeping the peace, etc. until the conclusion of the enquiry, and may detain him in custody until such bond is executed or, in default of execution, until the enquiry is concluded. If there is any analogy between the procedure laid down in the aforesaid sections of the Code of Criminal Procedure and the procedure of the Detention Act, the object or purpose for which a detention order is passed has, perhaps, some resemblance to that of sub-s. (3) of S. 117, Criminal P. C., at least as regards the immediacy of action for preventive purposes. The detention under sub-s. (3) of S. 117 is not for a definite period but "until the enquiry is concluded." The obvious reason for this is that until the enquiry is concluded, it would not be known finally whether it is necessary to ask the person to execute a bond; yet even before the conclusion of the enquiry, the person is asked to execute a bond or, in default of execution, is detained until the enquiry is concluded.

[22] Then, there is another aspect of the matter. There are decisions to the effect that the failure to comply with the provisions of S. 112, Criminal P. C., does not necessarily make the order null and void, unless the accused person has been prejudiced by the omis-

sion. Therefore, even if the analogy of the procedure of the preventive sections of the Code of Criminal Procedure is pressed fully into service, it would not result in any such axiomatic statement that a detention order is invalid because it does not mention the period of detention at the initial stage.

[23] The Detention Act came under examination of the Supreme Court in the recent decision of *A. K. Gopalan* v. *The State of Madras*, 1950 S. C. J. 174: (A.I.R. (37) 1950 S. C. 27: 51 Cr. L. J. 1383). There are observations in the judgments delivered by their Lordships which seem to me to indicate that the view contended for on behalf of the petitioner is not correct. Dealing with the argument that S. 3, Detention Act, prescribes no limit of time for detention, and therefore, the legislation is *ultra vires* his Lordship Kania C. J. observed as follows :

"It was also contended that S. 3 prescribes no limit of time for detention and therefore the legislation is *ultra vires*. The answer is found in Art. 22 (7) (b). A perusal of the provisions of the impugned Act, moreover, shows that in S. 12 provision is made for detention for a period longer than three months but not exceeding one year in respect of cls. (a) and (b) of that section. It appears, therefore, that in respect of the rest of the clauses mentioned in S. 3 (1) (a) the detention is not contemplated to be for a period longer than three months, and in such cases a reference to the Advisory Board under S. 9 is contemplated."

[24] Dealing with S. 11, Detention Act, his Lordship made the following observations:

"It was argued that S. 11 of the impugned Act was invalid as it permitted the continuance of the detention for such period as the Central Government or the State Government thought fit. This may mean an indefinite period. In my opinion this argument has no substance because the Act has to be read as a whole. The whole life of the Act is for a year and therefore, the argument that the detention may be for an indefinite period is unsound. Again, by virtue of Art. 22 (7) (b), the Parliament is not obliged to fix the maximum term of such detention. It has not so fixed it, except under S. 12, and therefore, it cannot be stated that S. 11 is in contravention of Art. 22 (7)."

[25] Similar observations will be found in the other judgments. Though the point was not specifically taken in the Supreme Court in the form in which it has been taken before us and there is no decision on the point, it seems to me, and if I may say so with respect, that the observations quoted above explain the true meaning and import of Ss. 3, 11 and 12, Detention Act.

[26] For these reasons, I hold that the detention order under S. 3, Detention Act is not invalid by reason of a failure to mention therein the period of detention.

[27] I now proceed to a consideration of the second point. I agree generally with what my learned brother has said on this point. There is, however, one point urged by Mr. Basanta Chandra Ghosh which, I think, requires a more detailed consideration. The Detention Act, in S. 3, refers to several matters, e. g., the defence of India, the relations of India with foreign powers, the security of India, the security of the State or the maintenance of public order, the maintenance of supplies and services essential to the community, etc. Section 12 of the Act refers to some of these subjects only in cls. (a) and (b). The order of detention passed in the present case states that it was necessary to detain the petitioner with a view to preventing him from acting in a manner prejudicial to the maintenance of public order; in other words, the detention in the present case comes under cl. (b) of S. 12, Detention Act. It is contended before us that the grounds of detention relate either to the security of the State or the maintenance of supplies and services essential to the community. It is contended that if the grounds of detention do not relate to the maintenance of public order but relate to the maintenance of supplies and services essential to the community, then the detention of the petitioner does not come under S. 12 but will attract S. 9, and a reference to the Advisory Board should have been made. Having examined the grounds, I am satisfied that they relate to the maintenance of public order, though indirectly they may affect other matters. The decision in *Rex* v. *Basudeva*, A.I.R. (37) 1950 F. C. 67: (51 Cr. L. J. 1011), on which Mr. Ghosh placed reliance, has been explained in the later decision in *Machindar Sivaji* v. *King*, A. I. R. (37) 1950 F. C. 129: (51 Cr. L. J. 1480). Even applying the test laid down in *Basudeva's case*, (A.I.R. (37) 1950 F. C. 67 : 51 Cr. L. J. 1011), I am satisfied that the activities referred in the grounds of detention against the petitioner are such as have a close and direct relation to the maintenance of public order.

[28] Learned counsel for the petitioner further drew our attention to the decision of the Supreme Court in *Romesh Thapper* v. *The State of Madras*, (A. I. R. (37) 1950 S. C. 124: 51 Cr. L. J. 1514). He particularly relied on the following observations of Patanjali Sastri J. :

"Similarly, the Constitution, in formulating the varying criteria for permissible legislation imposing restrictions on the fundamental rights enumerated in Art. 19 (1) has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it, and made their prevention the sole justification for legislative abridgment of freedom of speech and expression, that is to say, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the rights to freedom of speech and expression, while the right of peaceable assembly (sub-cl. (b)) and the right of association (sub-cl. (c)) may be restricted under cls. (3) and (4) of Art. 19.

in the interests of 'public order' which in those clauses includes the security of the State. This differentiation is also noticeable in Entry No. 3 of List III (Concurrent List) of Sch. 7 which refers to the 'Security of a State' and 'Maintenance of Public Order' as distinct subject of legislation. The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, more or less roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance treating for this purpose differences in degree as if they were differences in kind."

[29] It is to be observed, however, that the distinction which his Lordship was drawing, was with reference to Art. 19 of the Constitution of India, cls. (2) to (5). In cl. (2) amongst other things, the expression that occurs is "the security of the State." In cls. (3) and (4), however, the expression which occurs is "the interests of public order." His Lordship made a distinction between these two expressions, and further referred to a similar distinction made in Entry No. 3 of List III of Sch. 7 of the Constitution of India. I am unable to agree that the distinction made has any application to the facts of the present case, or that the detention order in the present case is bad, because the grounds do not relate to the maintenance of public order. In my opinion, they relate primarily to the maintenance of public order, though indirectly they may affect other matters.

[30] As to the third point that the date of detention must be counted from the date of detention under previous orders, I agree entirely with my learned brother. Mr. Ghosh has emphasised before us that S. 12, Detention Act states "not exceeding one year from the date of his detention." He has contended that the expression is not "detention order" which expression is defined in S. 2, Detention Act. He has further pointed out that in some other sections, the expression used is "detention order." I think that the argument is sufficiently answered by stating that the reference to detention under S. 12 (1) of the Act can mean only detention under the Act of which S. 12 is a part. This is made more clear by sub-s. (2). It states: "The case of every person detained under a detention order to which the provisions of sub-s. (1) apply shall, etc." The expression "detention order" is used in this sub-section, and means an order made under S. 3. If the detention referred in sub-s. (1) of S. 12 meant detention under any other law, nothing could have been easier for the Legislature than to say so. If sub-s. (1) refers to previous detention under any other law, then the question of the legality of that detention would also have to be considered for the purpose of calculating the period of one year. In the course of the arguments I put to Mr. Ghosh whether he contended that previous illegal detention, if any, would also go into the computation of one year. Mr. Ghosh reserved his opinion on the matter. Other absurdities are likely to result if the period of one year mentioned in S. 12 (1) is computed in the way desired by Mr. Ghosh. The word "detention" in the ordinary sense will include preventive detention as well as punitive detention. If the word "detention" in sub-s. (1) of S. 12 has no reference to a detention order under the Detention Act, then a person who had been previously imprisoned for any offence for more than a year, cannot be detained under S. 12 (1). Similarly a person who had been detained (under any Ordinance or Act for preventive detention) some time in the past for more than a year, cannot be detained again. I do not think any such result was intended by Parliament; nor do the plain words of the section convey any such result. For these reasons, I am unable to read sub-s. (1) of S. 12 in the way desired by Mr. Ghosh.

[31] As to the fourth point, I have nothing further to add to what my learned brother has said. What is reasonable time, within the meaning of the expression "as soon as may be" in S. 7, Detention Act, which is a reproduction of cl. (5) of Art. 22 of the Constitution of India, will depend on the facts and circumstances of each case. No hard and fast rule can be laid down.

[32] I now come to the last and the most important point of all. Clause (5) of Art. 22 of the Constitution of India is in the following terms:

> "When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

Section 7, Detention Act, reproduces the exact words of cl. (5). In the grounds communicated to the detenu in this case the following sentence occurs in para. 4 of the grounds:

> "The Provincial Government is of opinion that it would be against the public interest to disclose all the grounds of the order of detention passed against Sri Chandra Shekhar Prasad Singh."

[33] This sentence occurring in the grounds communicated to the petitioner has caused all the trouble in this case. It is contended by Mr. Basanta Chandra Ghosh that it is not open to the State Government to withhold some of the grounds on which the order of detention has been made, and such withholding amounts to a violation of cl. (5) of Art. 22 of the Constitution of India. It is necessary here to refer to

the clause which immediately follows cl. (5), namely, cl. (6), which is in these terms :

"Nothing in cl. (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose."

[34] If cls. (5) and (6) are read together, it is clear that a distinction is drawn between the grounds on which the order of detention has been made and the facts relating to those grounds. The detaining authority need not disclose facts which such authority considers to be against the public interest to disclose, but no such power or saving is given with regard to the grounds on which the order of detention has been made. If the intention were that the grounds could also be withheld in the public interest, nothing would have been easier than to say so in the Constitution. It must be remembered that the constitution making body must be taken to have been aware of the existing law on the subject. In the Bihar Maintenance of Public Order Act, 1949, which came into force on 4-1-1950, the relevant section was S. 5, sub-s. (1). A proviso to that sub-section said that a

"detention order shall not be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication made to the detenu."

Therefore, under the law as it stood in Bihar, before the Constitution of India came into force on 26-1-1950, it was open to the State Government to withhold some grounds, and any defect in the communication made to the detenu would not, in the very express terms in the Bihar Maintenance of Public Order Act, 1949, render the order of detention invalid. That position, however, changed when the Constitution of India came into force. Though the word "all" does not occur in cl. (5) of Art. 22, it seems clear to me that no exception is made in respect of the grounds on which the order of detention has been made, and no power has been given to withhold any of the grounds on which the order of detention has been made. In my view this result inevitably follows from reading together cls. (5) and (6) of Art. 22 of the Constitution in the background of the existing law on the subject on the date on which the Constitution of India came into force.

[35] One point must, however, be made quite clear. The detaining authority need only communicate *such* grounds on which the order of detention has been made or is founded. The position may be made clear by the following example. The State Government gets a report against 'A' alleging several grounds, founded on a series of facts, for his detention. The State Government, or whoever be the detaining authority, considers the report and accepts only some of the grounds and not others. In that case, the order of detention is made or based only on those grounds which the detaining authority accepts, and the detaining authority need communicate to the detenu only those grounds on which the order of detention has been made. This, I think, is the true meaning of cl. (5), because the word "grounds" is followed by the adjectival clause "on which the order has been made." But the detaining authority has no power to make a further distinction in the grounds on which the order of detention has been made, and say to the detenu : "I have detained you on several grounds, but I shall disclose to you only some and not all the grounds of the order of detention." This, in my opinion, will be a denial of the right guaranteed to a person under cl. (5) of Art. 22 of the Constitution. I emphasise here the words in cl. (5) "shall afford him the earliest opportunity of making a representation against the order." The detenu can make a representation only with reference to the grounds which have been communicated to him. It is obvious that he can say nothing about grounds of which he has no information. Suppose, for example, that the detenu is in a position to clear the apprehension or suspicion against him with regard to the grounds which have been communicated to him. If the detaining authority is satisfied with the representation, it ought to release the detenu. If, however, the detaining authority keeps some of the grounds up its sleeves, then how does the detenu get an opportunity of making a representation against the order of detention? The opportunity then ceases to be a real or effective opportunity. Let us take another example. Suppose there is only one ground for the detention of a person, and the detaining authority considers that that ground should not be disclosed in the public interest. Then, the person detained can have no opportunity of making a representation against the order of detention, if he is denied information of that one ground.

[36] The learned Government Advocate has urged two points in support of his contention that a failure to disclose all the grounds need not necessarily invalidate the order of detention; firstly, he has urged that the only effect of not disclosing some of the grounds is that the detaining authority shall be deemed to have waived those grounds; secondly, if the grounds disclosed are good grounds, then the failure to disclose other grounds should not invalidate the order of detention. I am unable to accept these contentions of the learned Government Advocate. If the detaining authority

is entitled to withhold some of the grounds on which the order of detention has been made, then logically the detaining authority will be entitled to withhold the ground of detention even in a case where there is only one ground of detention; that would make cl. (5) of Art. 22 of the Constitution meaningless. The principle of waiver which the learned Government Advocate has invoked does not, in my opinion, apply. This Court does not sit in appeal or review over the detaining authority, so far as the grounds of detention are concerned. Whether the grounds are adequate or not is a matter for the detaining authority only. The safeguard provided by cl. (5) of Art. 22 of the Constitution of India is a safeguard in favour of the detenu, and the detenu is entitled, as a matter of right, to show the grounds on which the order of detention has been made against him. No question of waiver can arise in such circumstances.

[37] The second contention of the learned Government Advocate is apparently based on the decision *In re Rajdhar Kalu Patil*, A.I.R. (35) 1948 Bom. 334: (49 Cr. L. J. 465 F. B.). That was a case under the Bombay Public Security Measures Act, 1947. Some of the grounds given for the detention were vague and indefinite, though not outside the scope and ambit of the Act. It was held that if some of the grounds given were not outside the scope and ambit of the Act but were merely vague and indefinite, it could not be said that some extraneous consideration had weighed with the detaining authority in making the order it had made; therefore the Court must draw a sharp distinction between a ground which is outside the purview of the statute and a ground which is bad because it lacks precision and accuracy. It was further observed that if after eliminating the grounds which were no grounds at all, there still remained a ground or grounds which were precise and accurate and which could justify the order, then there was no reason why the order made by the detaining authority should not stand. The principle laid down in the aforesaid decision does not apply, in my opinion, to the present case. The distinction between the two cases is obvious: in the Bombay case, all the grounds were disclosed, though some were vague and indefinite; whereas in the case before us, the detaining authority has itself stated that it would be against the public interest to disclose all the grounds of the order of detention passed against Sri Chandra Shekhar Prasad Singh. In a case where all the grounds are disclosed, though some are vague and indefinite, it cannot be said that the detenu was kept in the dark and had no opportunity of making an effective representation. He could make a representation with regard to those grounds which were not indefinite or vague, and if the detaining authority were not satisfied with the representation with regard to those grounds which were clear and precise, it had power to keep the detenu in detention. The position is, I think, different where some of the grounds on which the order of detention has been made, are not disclosed at all. Thus, there is no real analogy between the Bombay case and the case before us. Moreover, the position has now to be considered with reference to cls. (5) and (6) of Art. 22 of the Constitution of India, and those clauses, in my opinion, lend no support to the contention of the learned Government Advocate.

[38] There are observations in *Gopalan's case*, 1950 S. C. J. 174: (A.I.R. (37) 1950 S. C. 27: 51 Cr. L. J. 1383) referred to above, which support the view I have expressed. Referring to cl. (5) of Art. 22, his Lordship Kania C. J., stated:

"This clause is of general operation in respect of every detention order made under any law permitting detention. Article 22 (6) permits the authority making the order to withhold disclosure of facts which such authority considers against the public interest to disclose. It may be noticed that this clause only permits the non-disclosure of facts, and reading cls. (5) and (6) together a distinction is drawn between facts and grounds of detention."

In another part of his judgment, his Lordship stated:

"The Parliament by the Act has expressly given a right to the person detained under a preventive detention order to receive the grounds for detention and also has given him a right to make a representation."

Therefore, the right given under cl. (5) of Art. 22 is a guaranteed right, and cannot be whittled away by cutting out some of the content of that clause in the manner suggested by the argument of the learned Government Advocate.

[39] I must concede that the grounds, so far as they have been disclosed by the detaining authority, are precise and undoubtedly relate to the maintenance of public order. If the sentence to which I have made a reference in the earlier part of this judgment, relating to the non-disclosure of some grounds of the order of detention passed against the petitioner, were not there, I would have had no hesitation in saying that there was no reason for interference by us. We found it rather difficult to understand why it was necessary to state, in the midst of the grounds detailed in para. 4, that

"it would be against the public interest to disclose all the grounds of the order of detention passed against Sri Chandra Shekhar Prasad Singh."

We thought at one time that, perhaps, a mistake had been made, and the word "grounds" was loosely used for "facts"; it might even be that really there were no other grounds on which the order of detention was passed, and the old formula in vogue under the Bihar Maintenance of Public Order Act, 1949, was being blindly copied. Accordingly, we suggested to the learned Government Advocate to consider the advisability of filing an affidavit on behalf of the State of Bihar to clear up the mistake, if any. The learned Government Advocate took time and then stated that, for some reason or other, it was not possible to file an affidavit. In the absence of any affidavit, I fail to see how the sentence in para. 4 can be taken in any sense other than what the words used therein ordinarily mean. It is difficult to hold that the detaining authority was referring to grounds other than those on which the order of detention had been made. The words used are "to disclose all the grounds *of the order of detention passed against Sri Chandra Shekhar Prasad Singh.*" I have underlined (here italicised) the words which, I think, are important. Those words clearly qualify the word "grounds," and can have only one meaning, that is, the detaining authority considered it against the public interest to disclose all the grounds on which the order of detention was passed against Sri Chandra Shekhar Prasad Singh.

[40] This, in my opinion, is a clear violation of cl. (5) of Art. 22 of the Constitution of India.

[41] I would, accordingly, hold that the present order of detention is bad. The application is allowed, and the petitioner must be released from detention.

V.B.B. *Application allowed.*

A. I. R. (38) 1951 Patna 402 *[C. N. 100.]*

SHEARER AND SARJOO PROSAD JJ.

Jani Kuer—Petitioner v. *State of Bihar—Opposite Party.*

Misc. Judicial Case No. 220 of 1948, D/-12-10-1950.

Bihar Agricultural Income-tax Act (XXXII [32] of 1948), Ss. 6 (b), 7 (3) (b) — Estate under Court of Wards—Collection of general rate and audit rate by Government — Deduction as to, whether allowed.

An assessee whose estate is under the Court of Wards and is guided by the provisions of the Act in making payments of all demands is not entitled to deduction under Ss. 6 (b) and 7 (3) (b), Bihar Agricultural Income-tax Act, of the general rate and audit rate paid to and collected by the Provincial Government under Bihar Court of Wards Act or the Public Demands Recovery Act in pursuance of rules having the force of law framed by the Government under the Government Management of Private Estates Act, 1892, as these payments cannot be deemed to be collections under S. 48, Bihar Court of Wards Act. [Paras 3, 4]

Baldeo Sahay and Jadubans Sahay—for Petitioner: Lalnarayan Sinha for Government Advocate and R. Prasad — for Opposite Party.

Sarjoo Prosad J. — This is a reference under S. 28 (3), Bihar Agricultural Income-tax Act, made by the Board of Agricultural Income-tax. This reference was called for by the Court at the instance of the petitioner, the Maharani of Bettiah, whose estate is under the Court of Wards, and it refers to an assessment during the agricultural year 1352 Fasli corresponding to 1944-45. The only point under reference is:

"Whether the assessee whose estate is under the Court of Wards and is guided by the provisions of the said Act in making payments of all demands, is entitled to deduction of the general rate and audit rate under S. 6 (b) and S. 7 (3) (b), Agricultural Income-tax Act paid to and collected by the Provincial Government under Bihar Court of Wards Act or the Public Demands Recovery Act in pursuance of rules having the force of law framed by the Government of Bihar under Act X [10] of 1892 (Government Management of Private Estates Act)?"

[2] The reference has been necessitated because the petitioner assessee claimed deductions on account of certain payments made by her manager under the Court of Wards on account of the costs of audit and general rates levied under Act X [10] of 1892. The amounts under the above claim on account of the said deductions are a sum of Rs. 30,691 of the management charges paid to the Government of Bihar and Rs. 17,378 on account of the audit rate. The revenue authorities refused to allow these deductions on the ground that the retes were not levied in respect of the lands from which agricultural income was derived, and, therefore, the claim for the deductions was not sustainable under S. 6, Bihar Agricultural Income-tax Act.

[3] On behalf of the assessee it is contended that the said deductions claimed by the assessee would come within the meaning of Ss. 6 (b) and 7 (3) (b) of the Act, and, therefore, it should have been held to be admissible by the revenue authorities. Now, S. 6 (b) of the Act refers to sums paid in respect of the land from which agricultural income is derived by way of local cess or rate collected under any Bengal Act or under any Bihar and Orissa Act or under any Bihar Act. Here the general rate and the audit rate in wards estates are levied under S. 3, Government Management of Private Estates Act, 1892, which is neither a Bengal Act, nor a Bihar and Orissa Act, nor a Bihar Act as contemplated by cl. (b) of S. 6. In regard to audit rate, there is no specific provision for deduction under S. 6 at all. Now S. 7 (3) provides rules prescribing the manner of determining the net amounts of agricultural income for the purpose of cl. (b) of sub-s. (1) of the section which

is to be on the net amount of such income after making the permissible deductions, namely, the sum actually paid in the previous year in respect of each land as any local cess or rate collected under any Bengal Act or under any Bihar and Orissa Act or under any Bihar Act. Here again the same difficulty arises and S. 7 (3) (b) also has no application to the case. Mr. Baldeo Sahay for the petitioner, however, contends that the Government Management of Private Estates Act only provides for the levy of the management and audit charges and the rules framed thereunder prescribe the rates for such charges, but there is no machinery in the Act for realisation of these charges. These charges, therefore, on his submission become payable and are collected from the estate by virtue of S. 48, Court of Wards Act under which the manager of the Court of Wards is bound to make certain payments of public demands and other charges. It is, therefore, contended that the payment having been made by the operation of S. 48, Court of Wards Act, it should be deemed that the payment was collected under a Bihar Act, and, as such, would fall under S. 6 (b) or under S. 7 (3) (b), Agricultural Income-tax Act. This argument, in my opinion, is too far-fetched to be accepted. It is true that the Government Management of Private Estates Act does not provide for the realisation of the charges leviable under S. 3 of the Act but the power to collect the charges must be implied in the power to levy the charges in question, and in any case there is a provision under S. 7 of the Act enabling Government to frame rules for the purpose of giving effect to the provisions of the Act. Even though Government may not have framed rules for that purpose, they can always do so, and, in any event, the charges leviable under S. 3 can be recovered by suit. Under S. 48, Court of Wards Act, although the manager of the Court of Wards is under the law bound to make the payments as required by the Act, still it cannot be said that the various payments made by the manager are collected under that section. The manager may have to pay public demands, may have to pay Government revenue, may have to pay income-tax and various other charges; and, the payments so made are not collected under S. 48 of the Act but they are actually collected under various other Acts under which the liability of the estate arises to make those payments. It is contended that the manager in making these payments is really fulfilling a double function; on the one hand, he is making payments as the manager of the estate, and, on the other he should be deemed to have collected these payments on behalf of Government. The underlying fallacy to this argument is that it is not the manager who is collecting but the collections are made by the Government treasury in respect of these charges. Therefore, it cannot be contended with success that the aforesaid payments should be deemed to be collections under S. 48, Court of Wards Act, and, as such, are deductions permissible under Ss. 6 (b) and 7 (3) (b), Agricultural Income-tax Act. At first sight it may appear a little hard on the assessee not to be allowed these deductions although the payments have been made in respect of Government demands but the Agricultural Board of Revenue points out that there is no hardship involved inasmuch as a general deduction of 12½ per cent. on account of collection charges is permissible under the law as provided in S. 6 (c), Agricultural Income-tax Act. It is stated by the Board that private estates are also audited but no separate deductions are allowed to them in respect of audit charges, and in its opinion these costs incurred by the estate are in the nature of costs of supervision and management all included in collection charges. There may be some strength in this observation of the Board though it is unnecessary for us to decide the matter in answering the present reference. I have held above that the deductions claimed do not come within the language of S. 6 (b) or S. 7 (3) (b), Agricultural Income-tax Act, and, as such, the assessee is not entitled to the deductions.

[4] The answer to the question submitted to us is, therefore, in the negative, and the reference may be answered accordingly. The Department will also be entitled to the costs of this reference, hearing fee Rs. 100.

[5] **Shearer J.** — I agree.

D.R.R. *Reference answered.*

A. I. R. (38) 1951 Patna 403 *[C. N. 101.]*

REUBEN AND NARAYAN JJ.

Abdul Rahman and others — *Petitioners* v. *Budhu* — *Opposite Party.*

Civil Revn. No. 157 of 1948, D/- 4-4-1949.

Court-fees Act (1870), S. 7 (xi) (e) — Applicability — Suit by tenant for possession against purchaser of landlord's interest.

A suit by a tenant for recovery of possession of the land from which he had been wrongfully dispossessed by the defendant who was a purchaser of the landlord's interest in part of the demised land is governed by S. 7 (xi) (e). The Court has jurisdiction to investigate in such a case whether the relationship of landlord and tenant exists between the parties even though the investigation of such question may involve an investigation of a question of title involving a third party : A. I. R. (13) 1926 Pat. 251, *Dissent.*

[Paras 4, 5]

Anno. Court-fees Act, S. 7 (xi) N. 4.

Rahman — for Petitioners; Ugrah Singh — for Opposite Party.

Reuben J.—This petition has been filed by the defendants first party, in a suit for recovery of immovable property.

[2] The plaintiff's story is that a *raiyati* settlement of 1.78 acres of land was made with him by the original landlord, that, out of this land, the landlord's right in respect of 1.07 acres, which comprises the subject-matter of this suit, was purchased by the defendants first party, and that, since the purchase, the defendants first party have wrongly dispossessed the plaintiff. He, therefore, seeks recovery of possession, and has paid court-fee under S. 7, cl. (xi) sub-cl. (e), Court-fees Act. The objection of the defendants first party is that the suit raises a question of title and should be valued for purposes of court-fee and jurisdiction under S. 7, cl. (iv) and, on this valuation is beyond the pecuniary jurisdiction of the Munsif.

[3] The case came before me sitting singly, and I referred it to a Division Bench in view of a decision of Ross J. in *Krishna Chandra* v. *Raja Mahakur*, 5 Pat. 208 : (A. I. R. (13) 1926 Pat. 251) with which I found myself unable to agree.

[4] It has been laid down that, for purposes of court-fee and jurisdiction, valuation should be made on the plaint as it stands (*Narayan Jha* v. *Jogni Prasad Jha*, 13 Pat. 329 : (A. I. R. (21) 1934 Pat. 184 S. B.).) Reading the plaint in this suit, I have no doubt that it is covered by S. 7 cl. (xi), sub-cl. (e), Court- fees Act.

[5] The case before Ross J. arose out of a suit for declaration of title as an occupancy *raiyat* and for recovery of possession on the allegation that the plaintiff having settled the land with the appellant and having further agreed to make a perpetual settlement of it with him, wrongfully dispossessed him from the land. His Lordship, relying upon *Balasidhantam* v. *Perumal Chetti*, 27 M. L. J. 475 : (A. I. R. (2) 1915 Mad. 654) and *Pramatha Nath* v. *Amiraddy*, 24 C. W. N. 151 : (A. I. R. (7) 1920 Cal. 205) held that the suit involved an investigation of a question of title and, therefore, fell within the provisions of S. 7 (v), Court-fees Act. With all respect, it seems to me that neither of these decisions is an authority for the conclusion arrived at by his Lordship. The Madras case was a suit under S. 7, cl. (xi), sub-cl. (cc), for the recovery of immovable property from a tenant after expiry of the tenancy. The defendant raised a question of title, namely, that the plaintiff was not the landlord but merely a mortgagee whose right to possession had terminated by the deposit of the mortgage dues. The High Court, being satisfied as to the plaintiff's right to possession, refused to investigate the nature of his title and upheld the decision of the Courts below decreeing the suit. All that the High Court refused to investigate was, as I say, the nature of the interest of the plaintiff in the suit, but it did investigate the question as to whether there was a relationship of landlord and tenant between the plaintiff and the defendant to form the basis of a suit of this kind. In the *Calcutta case*, the suit was for the recovery of immovable property from two sets of defendants, again, on the allegation that the tenancy under which they held had terminated. The first set of defendants admitted the tenancy. The second set denied the relationship of landlord and tenant and set up the title of a third party as landlord. The Court of first appeal refused to investigate the title as between the rival landlords, but investigated the existence of the alleged relationship of landlord and tenant between the plaintiff and the second set of defendants and answered it in the negative. On this finding, the High Court held that the suit under S. 7, cl. (xi), sub-cl. (cc), could not proceed against the defendants second party. This was a case where their Lordships refused to investigate the title as between the plaintiff and the third party set up by the second set of defendants, but the existence of the relationship of landlord and tenant between the plaintiff and the contesting set of defendants was investigated and, being answered in the negative, it was held that the suit under S. 7, cl. (xi), sub-cl. (cc), could not proceed. In this view of the matter, it cannot be said that, merely because a question of title arises, the suit will not lie under S. 7, cl. (xi). For this clause to apply, the existence of the relationship of landlord and tenant is necessary, and an investigation into its existence is within the jurisdiction of the Court. Further, it is possible to imagine cases where the investigation of this question may involve an investigation into what may appear, at first sight, to be a question of title involving a third party. I may cite as an instance *Shanmuga Nadar* v. *Kandasami Nadar*, A. I. R. (24) 1937 Mad. 91 : (168 I. C. 462) another suit under S. 7, cl. (xi), sub-cl. (cc), in which the plaintiff claimed as a transferee from the landlord who had created the tenancy in question. The jurisdiction of the Munsif to try the suit was challenged on the ground that the suit was governed by S. 7, cl. (v), Court-fees Act, and was beyond his pecuniary jurisdiction. In dismissing the petition, Cornish J. made it clear that it was open to the Munsif to go into the question of the validity of the assignment under which the plaintiff claimed his title—a question necessary to be

decided in order to determine whether there was a relationship of landlord and tenant between the parties.

[6] That a suit of this sort is covered by S. 7, cl. (xi), Court-fees Act, is clear from *Gobinda Kumar Sur* v. *Mohinimohan Sen*, 57 Cal. 349: (A. I. R. (17) 1930 Cal. 42), a case under sub-cl. (cc), in which their Lordships held that the Court was entitled to find if there was a relationship of landlord and tenant between the plaintiff and the defendant, and whether the defendant's tenancy had been validly terminated. They ruled that, if any question of title is raised in the suit, it can only be gone into for the purpose of determining the main question about the existence of this relationship between the plaintiff and the defendant. There is a further proposition about a possible conversion of a suit into a suit of another nature—a proposition with which we are not concerned here and which I have discussed elsewhere. This decision, so far as it is relevant to the present case, was approved by a Special Bench of this Court in *Narayan Jha* v. *Jogni Prasad*, 13 Pat. 329 : (A. I. R. (21) 1934 Pat. 184 S. B.).

[7] Mr. Rahman, on behalf of the petitioners, has referred to *Furzand Ali* v. *Mahanth Lal Puri*, 32 Cal. 268, *Mt. Bhagobai Devisingh* v. *Shiamlal Dwarka Prasad*, A. I. R. (20) 1933 Nag. 312 : (29 N.L.R. 367), *Palaniappa Chetti* v. *Sithravelu Servai*, 31 Mad. 14 : (17 M. L. J. 478) and *Ram Ekbal Singh* v. *Baldeo Singh*, A. I. R. (1) 1914 Cal. 791 (1) : (25 I. C. 507). These were all cases between the tenant who alleged that he was wrongly dispossessed on one side and the landlord and a rival tenant said to have been settled by him on the other. These suits involved a question of title as between two rival tenants and were rightly held not to be covered by S. 7, cl. (xi).

[8] On the above grounds, I would dismiss this petition with costs. The hearing fee is assessed at one gold *mohar*.

[9] **Narayan J.**— I agree.

K.S. *Revision dismissed.*

A. I. R. (38) 1951 Patna 405 *[C. N. 102.]*

AGARWALA C. J.

Subba Rao and others—Petitioners v. *The King.*

Criminal Revns. Nos. 1297 and 1298 of 1949, D/-30-11-1949.

(a) Criminal P. C. (1898), S. 205 — Section applies only to case where summons and not warrant is issued in the first instance: A. I. R. (11) 1924 Pat. 46, *Foll.* [Para 2]

Anno. Cr. P. C., S. 205, N. 3, Pt. 1.

(b) Criminal P. C. (1898), Ss. 243, 242—Conviction on mere admission of facts alleged.

It is not sufficient for a conviction that the accused should admit the facts which the prosecution allege. Unless the facts alleged amount to an offence the accused cannot be convicted. [Para 3]

Anno. Cr. P. C., S. 243, N. 2, Pt. 2.

(c) Public Gambling Act (1867), S. 4—Scope — Gambling, if per se an offence.

Gambling is not *per se* an offence under the Gambling Act. It is only an offence to gamble in a common gaming house as defined in S. 1. Where, therefore, the accused merely met on a Diwali night for a friendly game of cards in the house of one of them, no offence is committed. [Para 3]

Anno. Public Gambling Act, S. 4, N. 1.

Baldeva Sahay and N. N. Roy — for Petitioners; *Sidheshwar Prasad Singh—for the Crown.*

Order.—The petitioners in these two applications have been sentenced to pay fines of Rs. 50 each under S. 4, Gambling Act. According to the charge-sheet, they were found in a room in the quarters occupied by a person named Sanyal in Jamshedpur, where they are employed by the Tatas, with the exception of Tapadia, who is an employee of the Imperial Bank. At the time of the arrival of the police they were playing cards. They were arrested and were released on bail and appeared before the Magistrate the next morning. On application they were permitted to appear by a pleader. Thereafter, the pleader was examined under S. 242, and it is recorded that he pleaded guilty, with the result that the petitioners were convicted and fined as above, and the amount of the stake money Rs. 34-13-6 which the police had seized was declared forfeited to the Crown. In addition, out of the amount of fine realised from the fines, Rs. 100 was directed to be paid to the police officers as reward.

[2] The Magistrate's procedure in accepting the plea of guilty, in the circumstances of this case, was entirely wrong. Section 205, Criminal P. C., declares that whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader. In *Emperor* v. *Dorabsha Bomanji*, 50 Bom. 250 : (A. I. R. (13) 1926 Bom. 218 : 27 Cr. L. J. 440), it was held that, if the accused are permitted to appear by a pleader under this section, the pleader may plead on their behalf. But in this Court it has been held that S. 205 applied only when a summons is issued. In these cases no summons was issued. The decision to which I refer is *Abdul Hamid* v. *Emperor*, 2 Pat. 793 : (A. I. R. (11) 1924 Pat. 46 : 24 Cr. L. J. 872). That was a case in which a warrant was issued in the first instance.

[3] There is also a further objection to the procedure adopted by the Magistrate. Section 242 requires that when the accused appears or is brought before the Magistrate, the particulars

of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted. Section 243 provides that, if the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly. It is not sufficient for a conviction that the accused should admit the facts which the prosecution allege. Unless the facts alleged amount to an offence the accused cannot be convicted. It is for that reason that S. 242 requires that the particulars of the offence of which he is accused shall be stated to him, and he shall then be called upon to show cause why he should not be convicted. There is no indication in the record of this case that the particulars of the offence were ever explained to the accused, or their pleader. The mistake that has been made in the Courts below appears to be in assuming that gambling is *per se* an offence under the Gambling Act. That is not so. It is only an offence to gamble in a common gaming house, which has been defined as any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, etc. Unless, therefore, Sanyal was keeping the house or room in which the accused were found for the purpose of making a profit for himself out of the gambling, the premises did not constitute a common gaming house. This occurrence appears to be one that ought never to have been brought into Court. It appears that the accused merely met on the Diwali night for a friendly game of cards in the house of one of them. That does not constitute an offence under the Gambling Act. The convictions and sentences are, therefore, set aside. The fines, if paid, will be refunded.

G.M.J. Conviction and sentence set aside.

A. I. R. (38) 1951 Patna 406 *[C. N. 103.]*

AGARWALA C. J.

Motilal Singh and others — Petitioners v. *Harishankar Singh — Opposite Party.*

Criminal Revn. No. 1120 of 1949, D/- 16-11-1949.

(a) Criminal P. C. (1898), S. 413 — Trial by second class Magistrate — Sentence passed when invested with first class powers — S. 413 applies.

When a second class Magistrate is invested with the powers of a first class Magistrate after the evidence in a trial before him is concluded and the case is fixed for judgment, the sentence of fine of Rs. 50 passed by him is one passed by a first class Magistrate and an appeal is barred by S. 413, Criminal P. C.: A.I.R. (29) 1942 Pat. 107, *Foll.*; A. I. R. (12) 1925 Pat. 472 and A.I.R. (20) 1933 P. C. 218, *Disting.* [Para 2]

Anno. Criminal P. C. S. 413 N. 4 Pt. 2.

(b) Criminal P. C. (1898), S. 245 — Enhancement of powers of Magistrate during trial—Effect.

When a second class Magistrate is invested with first class powers, after the trial is completed and before judgment is passed, he does not cease to be the Magistrate who conducted the trial. The Magistrate obviously continues to be the same Magistrate, although his powers are enhanced and has power to convict the accused. [Para 4]

S. Mehdi Imam —for Petitioners; R. J. Bahadur —for Opposite Party.

Order. — The facts of this case are as follows: The trial of the petitioners on a charge under S. 427, Penal Code, began in the Court of Mr. Ashraff, a Magistrate with second class powers, on 16-6-1948. Arguments in the case were concluded on 19-5-1949, when the case was postponed until 31st May for judgment. Judgment, however, was not delivered until 7th June when the accused were convicted and ordered to pay fines of Rs. 50 each. On 31-5-1949, the Magistrate was invested with first class powers.

[2] Against their convictions and sentences an appeal was preferred to the District Magistrate. The matter was heard by the Additional District Magistrate who treated it as an application in revision, holding that as Mr. Ashraff had first class powers on the date he delivered judgment, no appeal lay from the convictions and sentences passed by him in this case. Section 407, Criminal P. C., provides that any person convicted at a trial held by any Magistrate of the second or third class may appeal to the District Magistrate. The generality of this provision, however, is limited by S. 413 which opens with the words "notwithstanding anything hereinbefore contained," and then goes on to state that there shall be no appeal by a convicted person in cases in which a Magistrate of the first class passes a sentence of fine not exceeding Rs. 50. The Magistrate who passed the sentences in this case was a Magistrate of the first class at the time that he passed the sentences, and, therefore, S. 413 bars an appeal. This was the view which I took in *Deonandan* v. *Chalitar Mahton*, A.I.R. (29) 1942 Pat. 107 : (43 Cr. L. J. 7).

[2a] It is contended, however, that there has been a Division Bench decision of this Court in which a different view has been taken, namely, the case of *Sheobhanjan Singh* v. *Emperor*, A.I.R. (12) 1925 Pat. 472 : (26 Cr. L. J. 914). The facts of that case were that during the progress of a trial the second class Magistrate who was presiding was invested with first class powers. Thereafter the trial continued and some prosecution witnesses were cross-examined and discharged. Then, in the ordinary

course, arguments were heard and judgment was delivered. The report does not state what sentence the Magistrate had passed. It appears that the matter came before this Court on a reference by the Sessions Judge who was of opinion that the appeal lay to the District Magistrate. The learned Judges held that as part of the trial was held while the Magistrate was a Magistrate of the first class, the proper tribunal for hearing the appeal was the Sessions Judge and not the District Magistrate. There is nothing in the judgment of that case affecting the decision to which I have already referred. No reference was made to S. 413 of the Code, and the report does not disclose what the sentence was.

[3] The judgment in *Deonandan Mahton's case*, A. I. R. (29) 1942 Pat. 107 : (43 Cr. L. J. 7) proceeded on the basis that the judgment is no part of the trial. The learned advocate for the petitioners states that this view cannot be maintained in view of the decision of the Privy Council in *Basil Ranger Lawrence* v. *Emperor*, A.I.R. (20) 1933 P. C. 218: (34 Cr. L. J. 886). That was an appeal from Nigeria. After the accused had been convicted he was sentenced by the presiding Judge to three years' imprisonment, and the jury was discharged. On the application of the Solicitor General who conducted the prosecution the Judge revised this sentence in chambers without notice to the accused and in his absence. Commenting on the impropriety of this, their Lordships observed that it is an essential principle of criminal law that the trial of an indictable offence has to be conducted in the presence of the accused; and, for this purpose, trial means the whole of the proceedings, including the sentence. An alteration and recording of the sentence in the absence of the accused is not legal. The facts of that case are entirely different from the facts of the present case, and the observations of their Lordships of the Privy Council are not applicable to the facts of this case.

[4] It was lastly contended that Mr. Ashraff had no power to convict the accused in this case after he had been vested with first class powers. For this proposition reference was made to S. 245 of the Code, which states (1) that if the Magistrate, upon taking the evidence referred to in S. 244 and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal; and (2) where the Magistrate does not proceed in accordance with the provisions of S. 349 or S. 562 he shall, if he finds the accused guilty, pass sentence upon him according to law. As I understood the argument, the contention is that when a second class Magistrate is invested with first class powers, after the trial is completed and before judgment is passed, he ceases to be the Magistrate who conducted the trial. No authority was quoted for this proposition, and I can find no support for it anywhere. The Magistrate obviously continues to be the same Magistrate, although his powers are enhanced.

[5] Lastly, I was invited to examine this case on the merits. But the Magistrate in the Court of first instance has done that already, and the Additional District Magistrate has stated that although it was not necessary for him to discuss the facts as he was dealing with the matter in revision, he had satisfied himself that the findings of the first Court were supported by the evidence.

[6] The rule is discharged.

D.R.R. *Rule discharged.*

A. I. R. (38) 1951 Patna 407 *[C. N. 104.]*

DAS AND NAGESHWAR PRASAD JJ.

Ram Ram Sinha Chowdhury — Appellant v. *Nitai Chandra Ghose and others — Respondents.*

A. F. O. O. No. 45 and Civil Revn. No. 117 of 1947, D/- 31-3-1949.

Debt Laws—Bengal Money-lenders Act (X [10] of 1940), Ss. 34 (1) (b) (ii) and 36 (6) (a) (i) — Applicability—Decree passed by Court in Bihar—Application for scaling down and fixing instalments under Bengal Act, if maintainable.

A decree on the basis of a simple mortgage passed by the Patna Court in Bihar was transferred for execution to a Court in Bengal. The judgment-debtor filed an application for scaling down the decree and for fixing instalments, under Ss. 34 and 36, Bengal Money-lenders Act, to the Patna Court when the execution was pending in the Court in Bengal :

Held, that the application was not maintainable as the Bengal Money-lenders Act was not applicable to the case notwithstanding any agreement to the contrary between the parties. The Bengal Money-lenders Act and the Bihar Money-lenders Act are special laws vesting their Courts with jurisdiction over reviewing and revising decrees already passed in the matter of scaling down of interest or fixing of instalments. Such provincial legislations can bind and affect Courts within their jurisdiction and a Court in Bihar cannot be forced to apply the Bengal Money-lenders Act to a decree which it had passed. They create substantive rights of parties and Courts which have to decide such rights are to be governed by the law enacted in their Province. [Paras 2, 5]

Per *Das J. (obiter.)* — Even if the Bengal Act applied S. 36 (6) (a) (i) was not applicable as no proceeding in execution of the decree was pending before the Patna Court. The granting of instalments under S. 34 (1) (b) (ii) being discretionary the judgment-debtor was not entitled to the exercise of such discretion in the circumstances. [Paras 6 and 7]

Bhabanand Mukharji and Narottam Chatterjee — for Appellant; Sudhir Chandra Ghose and Ramanugrah Prasad (for Deputy Registrar Guardian) — for Respondents.

Nageshwar Prasad J. — The facts out of which this civil revision application and the miscellaneous appeal arise are these. The plaintiffs-opposite party in this case, Nitai Chandra Ghose, had advanced a sum of rupees two thousand on two simple mortgage bonds dated 5-5-31 and 7-5-31 to the petitioner-defendant in this case. On the principal and interest not being paid, Nitai Chandra Ghose brought a suit on the basis of the said two bonds against the defendant-petitioner in the Court of 3rd Sub-Judge of Patna, for a sum of Rs. 8500. The reason why the suit was brought in Patna was that there was stipulation in the bonds that the money loaned to the defendant was to be paid in Patna and thus the Court at Patna got jurisdiction over this matter, though the bonds were executed in Murshidabad and a part of the contract was fulfilled there. After contest, there was a decree for rupees four thousand passed by the Court on 15-4-40 in favour of the plaintiffs against the defendant in accordance with the provisions of Bengal Money-lenders Act of 1933, according to which a sum not more than the principal was to be decreed for interest whatever the stipulations in the contract might have been. The plaintiffs-decree-holders executed the decree and the execution proceedings were transferred to the District Judge of Murshidabad, and execution was started in the Court of the Subordinate Judge at Berhampur, district Murshidabad. It appears that the execution proceedings there lingered on on account of various objections and in 1943 the defendant-petitioner filed an application before the executing Court at Berhampur purporting to be under Ss. 11 and 13, Bihar Money-lenders Act, and S. 36, Bengal Money-lenders Act (Act X [10] of 1940) which had come into operation on 1-9-1940. This application was rejected by the executing Court and an appeal was filed by the petitioner-defendant before the Calcutta High Court which by its judgment and order dated 12-4-1945 dismissed the appeal and held that the Bengal Courts had no jurisdiction to reopen the decree which was passed by a Bihar Court. On 8-6-1945 an application under Ss. 34 and 36, Bengal Money-lenders Act (Act X [10] of 1940) was filed by the petitioner-defendant in the Court of the 3rd Sub-Judge at Patna. The gist of this application was that the petitioner-debtor sought further relief from the obligations of the decree by way of some further reduction in interest and thus an application was made to reopen the decree and request was made by this application to further reduce the interest and to fix instalments for payment of the reduced decretal amount. By its judgment dated 27-11-1946, the Court of the 3rd Sub-Judge at Patna rejected this application of the petitioner-judgment-debtor and hence an appeal and a revision have both been filed against the said judgment and order.

[2] Before the lower Court both the parties agreed to the application of the provisions of the Bengal Money-lenders Act of 1940 to this case as the transaction had taken place within the province of Bengal and as the defendant was a resident of Bengal. Though the learned Subordinate Judge decided this case on the basis of the parties conceding on this point he expressed his doubts as to the correctness of the proposition. In this Court the learned advocate for the plaintiffs-decree-holders has urged that the Bengal Money-lenders Act cannot govern this case as the decree in this case has been passed by a Court in Bihar and it is the Bihar Money-lenders Act, which would give powers to a Bihar Court for scaling down decrees and not the Bengal Act. It may be noted that this petition was filed before the Court of the 3rd Sub-Judge at Patna under Ss. 34 and 36, Bengal Money-lenders Act, and if that Act is found incapable of governing Bihar Courts the application has to be rejected. I propose, therefore, to consider this aspect of the matter also in spite of agreement between the parties in the Court below to have the matter decided according to the provisions of the Bengal Money-lenders Act. To my mind agreement on such points of law cannot by itself vest jurisdiction in a Bihar Court to apply the provisions of a law of the Bengal Legislature to the case. The learned advocate for the petitioner-judgment-debtor has cited before us the case reported in *State Aided Bank of Travancore Ltd.* v. *Dhrit Ram*, A. I. R. (29) 1942 P. C. 6 : (I. L. R. (1942) Bom. 318), which says that in cases arising out of contract it is the place of contract which governs the law applicable to it and not the place where the suit is brought. That was a case in which the contract had been found to be fully entered into in the Native State of Travancore and the suit had been brought in Bombay. In order to determine the right and liabilities of the parties arising out of the contract it was held in that case that the law of the State of Travancore where the transaction of the contract had been fully entered into was the proper law applicable to it. We have also been shown some observations in Westlake's Private International Law which says that the law of the country where the contract was entered into will govern cases arising out of the

contract. Even if I were to agree to this principle of law, it appears, and it is conceded, that the contract entered into between the plaintiffs and the defendant on the basis of the two bonds was performed partly in the district of Murshidabad, namely in Bengal and partly it had to be fulfilled in Patna where the plaintiffs-decree-holders reside inasmuch as the stipulation in the bonds was that the repayment of the loans due on the bonds was to be made in Patna. That is why the Court at Patna got jurisdiction over this matter. Therefore, even applying the principles enunciated in the Privy Council case, cited before us, the Bihar Court had jurisdiction in this matter and it passed a decree apparently without objection on the question of jurisdiction. But this is not all. The analogy of a contract will hardly apply to the circumstances of this case. The decree in this case arising out of that contract based on the two bonds was passed on 15-4-1940 by the Court of the 3rd Subordinate Judge at Patna and whatever the rights and liabilities of the parties were based on that contract had already been decided by that judgment and decree and the contract had merged in the decree. There was nothing more about the rights and liabilities arising out of the contract to be decided. On 1-9-1940, a law came into force, passed by the Bengal Legislature, which under certain circumstances gave rights to a debtor to apply before a Court, either before the passing of a decree or during execution proceedings, to move for scaling down of the decree and to fix periods of payment. This was a right given to the debtor not accruing to him from any contract but as a result of a special law which vested Courts with a jurisdiction to scale down decrees and to grant instalments for payment of the decrees on the request of the debtor. It cannot be said that this right arose because of the contract, and as such it cannot be said that the place of the contract was the determining factor in applying the law governing it. The Bengal Legislature had vested its Courts with special jurisdiction and responsibilities in the matter of scaling down decrees. Can the Bengal Legislature make special laws of this kind applicable to Bihar Courts and can they command the Bihar Courts to enforce the provisions laid down in their legislation in such cases? This is an intricate question. The Bengal Money-lenders Act and the Bihar Money-lenders Act are special laws vesting their Courts with jurisdiction over reviewing and revising decrees already passed in the matter of scaling down of interest or fixing of instalments. To my mind such Provincial legislations can bind and affect Courts within their jurisdiction and a Court in Bihar cannot be forced to apply the Bengal Money-lenders Act to a decree which it had passed. A Bench of this Hon'ble Court has held *Inder Chand* v. *Bansropan Sahu*, A.I.R. (35) 1948 Pat. 245 : (26 Pat. 307) in a case where a decree was obtained in the original side of the Calcutta High Court and it was transferred for execution to the Shahabad Court in the Province of Bihar that the transferee Court has to execute it in accordance with the law of procedure obtaining in the Courts in Bihar but it has to determine the rights and liabilities of the parties in accordance with the substantive law obtaining in the Court which passed the decree, that is, the transferor Court. In that case the judgment-debtors had made an application under Ss. 13 and 14, Bihar Money-lenders Act, and they applied to the Court to fix a valuation about the properties of the judgment-debtors and to sell only a small portion of the judgment-debtors' properties which are rights given to a judgment-debtor under the Bihar Money-lenders Act (Act VII [7] of 1939). The Bengal Money-lenders Act excepts commercial loans from the operation of the Bengal Money-lenders Act and the question in that case was whether the Bengal Act or the Bihar Act would apply. The Subordinate Judge in that case had held that the Bihar Money-lenders Act applied to the transaction and in appeal Meredith and Sinha JJ. reversed the decision of the Subordinate Judge and held that in matter where the question was about the determining of the rights and liabilities of the parties the law of the land which passed the decree was to govern. Meredith J. has observed the following in his judgment :

> "In my opinion, it is quite impossible to regard Ss. 13 and 14, Bihar Money-lenders Act, taken together as merely prescribing rules of procedure for execution. On the contrary, a substantive right is enacted by those provisions for the protection of the judgment-debtor. It is a matter of the substantive rights of the parties, that is of substantive law. As such the current of authority seems to be that in such matters the law of the province where the decree was passed will be applicable, and not the law of the province in which the decree is being executed."

In my opinion, the Bengal Money-lenders Act and the Bihar Money-lenders Act create substantive rights of parties and Courts which have to decide such rights are to be governed by the law enacted in their Province. In this view of the matter the application made by the judgment-debtor-petitioner before the 3rd Subordinate Judge at Patna must be rejected and, therefore, the civil revision and the appeal filed here fail.

[3] In this view of the matter, it is unnecessary to decide whether under S. 36, cl. (6) (a) (i),

Bengal Money-lenders Act, it was open to the lower Court to scale down the decree when no proceedings in execution were pending before it; or whether under S. 34 it was competent for the lower Court to fix instalments under the Bengal Money-lenders Act. I would, therefore, dismiss this application for civil revision and the miscellaneous appeal with costs to the decree-holders-opposite party. There will be no separate hearing-fee for this civil revision.

[4] **Das J.**—The principal question for decision in these two cases is if the petitioner, who is also the appellant in the miscellaneous appeal, is entitled to any benefit under the provisions of the Bengal Money-lenders Act (X [10] of 1940), hereinafter to be referred to as the Bengal Act. If the Bengal Act does not apply, then it follows that he is not entitled to the benefit of the provisions of that Act. If, however, the Bengal Act applies, then the further question arises if the particular provisions under which he wants relief apply in the present case.

[5] I agree with my learned brother that the Bengal Act does not apply in the present case, but in view of the importance of the question raised, I should like to explain my reasons very briefly. The principle for which Mr. Bhabanand Mukherji appearing for the petitioner-appellant has contended, was expressed most succinctly by Turner L. J. in delivering the judgment of the Privy Council in *Peninsular and Oriental Steam Navigation Co.* v. *Shand*, (1865) 3 MOO. P. C. (N.S.) 272 at p. 290 : (12 L. T. 808) :

"The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract."

Those observations were made in connection with a case in which a contract was made between British subjects in England, substantially for safe carriage of goods from Southampton to Mauritius. The performance was to commence in an English vessel, in an English port; to be fully completed in Mauritius, and the question was whether the English law would apply, or the French law which was in force at Mauritius. The decision was based on the ground

"that the actual intention of the parties must be taken clearly to have been to treat this as an English contract, to be interpreted according to the rules of English law."

Mr. Bhabanand Mukherji, therefore, contends that the law of the place of contract, which was in Bengal, will govern the present case. He has placed reliance on *State Aided Bank of Travancore, Ltd.* v. *Dhrit Ram*, A. I. R. (29) 1942 P. C. 6 : (I.L.R. (1942) Bom. 318), where the law on the subject was thus stated :

"The law which governs a contract depends upon the intention of the parties express or implied. There is no intention expressed in these documents and the Courts are left to infer the intention by reference to considerations where the contract was made and how and where it was to be performed."

Their Lordships came to the finding

"that not only the place where the contract was made, but also the place where the contract was to be performed was Travancore; therefore the law of that State governed the transaction."

In the case before us the contract was made in Bengal, but it had to be fulfilled in Bihar. It cannot, therefore, be said for certainty that the intention of the parties was that the law of the place of contract should govern the transaction. In cases of this nature, where the contract is made at one place, but has to be fulfilled at another, there is

"a competition between the *lex loci contractus celebrati* and the law of the place of fulfilment, intending by the latter the law of that jurisdiction which would be the *forum contractus* according to true Roman principles" (see Westlake's Private International Law, Edn. 5, p. 301).

There have been dicta of English Judges, some on the side of the former and some in favour of the place of fulfilment. It would have been necessary to go into this question more thoroughly and examine the decisions in favour of one principle or the other, if this case really turned upon contract or the intention of the parties express or implied in that contract. When the suit was brought in Patna, the parties agreed that the Bengal Money-lenders Act, 1933, would apply, and the Court applied the provisions of that Act so far as they were relevant. At that stage the question was still in the region of contract, depending on the intention of the parties express or implied in the contract. But after the passing of the decree, the rights of the parties arising out of the contract have already been adjudicated on and merged in the decree. The rights and liabilities which now arise, arise not out of the contract but out of the decree. A similar view was expressed by the Federal Court in *Subrahmanyan Chettiar* v. *Muttuswami Goundan*, 1940 F. C. R. 188 : (A.I.R. (28) 1941 F. C. 47), where their Lordships had to consider the validity of the Madras Agriculturists' Relief Act, 1938. At p. 202 of the report, Gwyer C. J., said as follows :

"It was then contended that, even if not wholly invalid, either the Act was invalid in part, in so far as it did or might affect promissory notes, or that it ought to be construed as not applying to promissory notes at all. But these questions do not, in my opinion, arise in the present case, because the liability on which the Act operated was a liability under a decree of the Court passed before the commencement of the

Act. It had ceased to be a debt evidenced by or based on the promissory note, for that had merged in the decree and had become a judgment-debt; nor could the appellant any longer have sued upon the note."

In the case before us also the debt on which learned counsel for the petitioner-appellant wishes the Bengal Act to operate is a judgment-debt. If the rights and liabilities of the parties now arise out of the decree or the judgment-debt, there is no room for the application of the principle that the law of the place of contract should govern those rights and liabilities. Mr. Bhabanand Mukherji has stated that he wants relief under S. 34 (1) (b) (ii) and S. 36 (6) (a) (i) of the Bengal Act. The former provision relates to the granting of instalments by the Court and the latter to a re-opening of the decree. It is clear that these are special powers given to the Bengal Courts which have nothing to do with the intention of the parties express or implied in a contract. Such powers cannot be exercised by the Bihar Courts in respect of a decree which was passed in Bihar, unless the Bihar Money-lenders Act gives such powers. Mr. Bhabanand Mukherji has conceded before us that if the Bihar Money-lenders Act applies, his client is entitled to no relief at this stage. For these reasons I would agree with the view of my learned brother that the Bengal Act does not apply at this stage.

[6] I may further state that, in my opinion, the petitioner-appellant is entitled to no relief under S. 36 (6) (a) (i) or under S. 34 (1) (b) (ii) of the Bengal Act, even if we were to hold that the Bengal Act applied. Section 36 (6) (a) (i) does not apply because there is no proceeding in execution of the decree pending before the Patna Court in which the application for relief was made. Mr. Bhabanand Mukherji has relied on some decisions, such as, *Dwarkadas Gobindram, Firm* v. *Saligram Rekhraj, Firm*, 17 Pat. 617 : (A.I.R. (26) 1939 Pat. 144), where in an entirely different set of facts and in connection with an entirely different question an observation was made to the effect that

"a Court which transfers a decree for execution does not thereby altogether lose control over the decree and is quite competent to recall it."

The point which has been urged by Mr. Mukherji is concluded by a decision of the Calcutta High Court in *Dr. S. Roy* v. *Karuna Kishore Kar*, A.I.R. (32) 1945 Cal. 452 : (I.L.R. (1944) 2 Cal. 70). It was observed in that case as follows:

"The sub-section does not say that the Court which passed the decree may exercise the powers granted by sub-ss. (1) and (2) whenever execution proceedings are pending anywhere. The order must be passed in execution proceedings, and not in any other proceeding. This means that execution proceedings must be pending before the Court which is asked to exercise such powers. One Court cannot pass orders in execution proceedings pending before another Court. Orders must be passed by a Court in its own proceedings. As no execution proceedings are pending before this Court which passed the decree, no application lies to this Court under S. 36 (6) (a) (i)."

[7] As to the relief under S. 34 (1) (b) (ii), I am of the opinion that having regard to the words used in the sub-section, it is a matter of discretion for the Court concerned whether to allow in stalments or not, this is so in spite of the fact that the word "shall" is used at the beginning of the sub-section and also in cl. (ii). If the matter is one of discretion, the circumstances are such that the petitioner-appellant is not entitled to the exercise of such discretion, in his favour.

[8] It was also contended before us that the application for relief under S. 36 (6) (a) (i) should be treated as a suit for relief under S. 36 (1) of the Bengal Act. Reliance was placed on the decision of *Bhupendra Nath* v. *Sushil Chandra*, A.I.R. (32) 1945 Cal. 370 : (49 C. W. N. 542). Having regard to the circumstances of this case, I do not think the application should be allowed to be treated as a suit. It is, however, unnecessary to examine these matters in detail in view of the findings that the Bengal Act does not apply.

[9] For these reasons I agree that the application in revision and the miscellaneous appeal must be dismissed with costs to the decree-holders-opposite party.

K.S. *Appeal & revision dismissed.*

A. I. R. (38) 1951 Patna 411 *[C. N. 105.]*

AGARWALA C. J.

Ramswarath Thakur — Petitioner v. *The King.*

Criminal Revn. No. 1441 of 1949, D/- 18-11-1949.

(a) Cotton Textiles (Control of Movement) Order (1948), Cl. 3 — General permit, cls. (2) and (3) —Railway parcel—Meaning.

A comparison of the language of cls. (2) and (3) of the general permit makes it quite clear that the Textile Commissioner intends to draw a distinction between a passenger's personal luggage and a railway parcel, and between goods carried by a goods train and goods carried by a passenger train. Clause (3) of the permit is not intended to apply to personal luggage at all, and, therefore, railway parcel does not include personal luggage as used in the general permit.

[Para 2]

(b) Cotton Textiles (Control of Movement) Order (1948), Cl. 3 — General permit, cls. (2) and (3) — Applicability.

Clause (3) of the permit is intended to permit an unlimited quantity of textiles by passenger train only if it does not constitute the personal luggage of a passenger travelling by train. If it constitutes the personal luggage of a passenger, it is governed by cl. (2) and the amount is limited to 10 pounds in weight. A person who, therefore, carries in his compartment as his personal luggage cloth weighing

2 mds., 20 srs., contravenes the provisions of the Order. [Para 2]

Akbar Imam — for Petitioner; G. P. Shahi — for the Crown.

Order. — The petitioner has been sentenced to pay a fine of Rs. 500 under S. 7, Essential Supplies (Temporary Powers) Act, 1946, for contravention of an Order issued under S. 3 of the Act. The facts are that the petitioner was travelling between the stations of Laheriasarai and Darbhanga on the Oudh Tirhut Railway, and had with him in his compartment, two gunny bags containing cloth weighing 2 maunds and 20 seers.

[2] In exercise of its powers under S. 3 of the Act referred to above the Central Government has issued the Cotton Textitles (Control of Movement) Order, 1948. Section 3 of this Order provides :

"No person shall transport or cause to be transported by rail, road, air, sea or inland navigation any cloth, yarn or apparel except under and in accordance with, (1) a general permit notified in the Gazette of India by the Textile Commissioner, or (2) a special transport permit issued by the Textile Commissioner."

It is not claimed in the present case that the petitioner was protected by a special transport permit issued by the Textile Commissioner. On 10-9-1948, the Textile Commissioner prescribed a form of general permit referred to in R. (3) of the Order of 1948, and this was published in the Gazette of India dated 11-9-1948. This permit divides India into a number of zones. Rule 2 of the permit is as follows :

"*Transport as personal luggage* : Any person may transport or cause to be transported by rail, road, air, sea or inland navigation, cloth or apparel as part of his luggage if such cloth and apparel do not together exceed 10 pounds in weight."

It will be observed that there is no limitation with regard to interzonal transport. The limitation is merely with regard to the weight that may be transported. Rule 3 is as follows :

"*Transport within a zone* : Any person may transport or cause to be transported by road, air, sea or inland navigation, or by goods train or as a railway parcel by a passenger train, any cloth, yarn or apparel from any place in any zone described in para. 1 to any other place in the same zone."

It is for a contravention of the former clause of the general permit that the petitioner has been convicted. It is not disputed now that in the compartment in which he was travelling he had 2 maunds and 20 seers of textiles in two gunny bags, and that he was travelling with these goods between Laheriasarai and Darbhanga, that is to say, he was travelling within one of the zones into which the country had been divided by the general permit, with the quantity of textiles referred to. It is contended, however, that the accused was entitled by cl. 3 to travel within any zone with an unlimited quantity of textiles and that the term "railway parcel" in this clause includes the personal luggage of a passenger. The term "railway parcel" has not been defined either by the Central Supplies Act or by the Order passed under it, or by the general permit or by the Railways Act. But a comparison of the language of cls. (2) and (3) of the general permit makes it quite clear that the Textile Commissioner intended to draw a distinction between a passenger's personal luggage and a railway parcel. It is also clear that he intended to make a distinction between goods carried by a goods train and goods carried by a passenger train. Bearing in mind that as personal luggage a passenger is permitted to carry either inside a zone or betwern zones textiles up to the weight of 10 pounds as personal luggage, it is not difficult to reach the conclusion that cl. (3) of the permit is not intended to apply to personal luggage at all, and, therefore, that railway parcel does not include personal luggage as used in this general permit. Normally goods are carried by a goods train. But a certain amount of merchandise is carried by passenger trains, if the appropriate rates of conveyance by such a train are paid. A passenger train, therefore, may carry both goods and the luggage of passengers travelling by the train. Clause (3) is not intended to exclude from its operation the luggage of passengers travelling by a train. Clause (3) is not intended to permit a passenger travelling by a train to carry an unlimited quantity of textiles, but to permit an unlimited quantity of textiles, by a passenger train only if it does not constitute the personal luggage of a passenger travelling by the train. If it constitutes the personal luggage of a passenger, it is governed by cl. (2) and the amount is limited to 10 pounds in weight. There is no merit in this application which is dismissed.

D.R.R. *Application dismissed.*

A. I. R. (38) 1951 Patna 412 *[C. N. 106.]*

AGARWALA C. J.

Dirgopal Singh and others — Petitioners v. *Rambrich Singh—Opposite Party.*

Criminal Revn. No. 1364 of 1949, D/- 18-11-1949.

Criminal P. C. (1898), Ss. 145, 537—Omission to state grounds for satisfaction as to existence of dispute—Effect.

The omission to comply with the express direction of the statute that the Magistrate shall make an order stating the grounds on which he is satisfied that a dispute likely to occasion a breach of the peace exists cannot be treated as a mere irregularity, curable under S. 537. Where, therefore, neither the notice issued to the parties nor the order passed by the Magistrate after hearing the parties indicated that he was satisfied as to the existence of any dispute likely to cause breach of the peace, the Magistrate could not

be held to have jurisdiction to proceed with the complaint: A.I.R. (22) 1935 Oudh 316, *Dissent.*; A. I. R. (20) 1933 All. 264 (F.B.), *Disting.* [Para 3]

Anno. Cr. P. C., S. 145, N. 15, Pt. 3.

Bindeshwari Prasad Sinha — for Petitioners; K. D. De and S. C. Mukherjee—for Opposite Party.

Agarwala C. J. — This is an application made to set aside an order passed in a proceeding under S. 145, Criminal P. C. The facts are that an Assistant Sub-Inspector of Police reported to the Sub-divisional Magistrate of Bihar that the chaukidar of village Mathura had made a report at the police station that certain persons were obstructing the ploughing of the field of Dukhit Singh, and that hence there was an apprehension of a breach of the peace, and that, in consequence of this, he, the Assistant Sub-Inspector, had been sent to the village by the Officer-in-charge of the police station. The Assistant Sub-Inspector proceeded to state that he went to the village and asked the parties not to quarrel and to produce before him the evidence relating to their possession. Both the parties did this. The Assistant Sub-Inspector ended with a suggestion that notices under S. 144 of the Code should be issued to both parties. The Sub-Divisional Magistrate issued notices against both parties on 21-7-1947, restraining them from going to the land in dispute and calling upon them to show cause why the prohibitory order should not be made absolute. Both parties appeared and filed written-statements in which each of them denied that he was likely to commit a breach of the peace, but asserting that his opponent might do so. On 10th September, the Magistrate decided to convert the proceeding into one under S. 145, and issued a notice to each party that from the police report and from the show-cause petitions he was satisfied that a *bona fide* dispute relating to possession of the land in question existed between the parties, and he, therefore, required them to appear in his Court and put in their written-statements regarding possession over the subject-matter of the dispute. Thereafter, evidence in the case was heard, and the order complained of was made. The order is challenged on the ground that the Magistrate has nowhere recorded that he was satisfied of the existence of a dispute likely to lead to a breach of the peace. He did not state so in the notice which he issued to the parties, nor record it in the order-sheet, and his final order makes no mention of the existence of a dispute likely to occasion a breach of the peace. It is, therefore, argued that, although the Magistrate may have been satisfied that there was a *bona fide* dispute with regard to possession between the parties, there is no indication that he was satisfied that that dispute was likely to occasion a breach of the peace.

[2] Section 145 of the Code provides that whenever a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class is satisfied that a dispute likely to cause a breach of the peace exists concerning any land, he shall make an order in writing stating the grounds for his being so satisfied. The statute, therefore, quite clearly requires that the Magistrate shall be satisfied of the existence of a dispute likely to occasion a breach of the peace and requires him to make an order in writing, stating the grounds for his being so satisfied. It is contended on behalf of the opposite-party, however, that the omission of the Magistrate to record that he is satisfied that the dispute between the parties is likely to occasion a breach of the peace is a mere irregularity to which S. 537 of the Code applies, and reliance is placed on the decision of a Full Bench of the Allahabad High Court in *Kapoor Chand* v. *Suraj Prasad*, 55 ALL. 301 : (A. I. R. (20) 1933 ALL. 264 : 34 Cr. L. J. 414 F. B.). The facts of that case were that one Suraj Prasad filed a petition under S. 145 of the Code alleging that his master Chunni Lal was in possession of a house, and that the opposite party were trying to interfere with that possession, with the result that there was likely to be a breach of the peace. The Magistrate took down the statement of Suraj Prasad on oath, and directed a police enquiry into the matter. On receipt of the police report he recorded the following order :

"There appears to be some basis for this complaint, to judge from the police report."

The case was then transferred to another Magistrate, who issued notices under S. 145 to both parties without recording that he was satisfied that the dispute between the parties was such as might lead to a breach of the peace. The opposite party, however, when he appeared before the Magistrate raised this point, and the Magistrate, on the evidence that was adduced before him, came to the conclusion that there was a likelihood of a breach of the peace. The final order that was passed in that case was challenged on the ground that the Magistrate had not recorded his satisfaction with regard to the likelihood of a breach of the peace prior to the institution of the proceedings or in the notice to the parties. The Full Bench took the view that the omission to do this was covered by S. 537 of the Code. They drew a distinction between a case in which a Magistrate is not satisfied regarding the existence of a likelihood of a breach of the peace before initiating the proceedings and a case in which

although satisfied, he has not recorded that he is so satisfied. This is quite clear from the following observation :

"In these circumstances, although we are of opinion that the Magistrate did not follow the letter of the law, we have every reason to believe that he was satisfied in his mind, on a perusal of the police papers and the sworn statement of the applicant, that there was a likelihood of the breach of the peace. Further, it appears that the opposite parties, on receipt of the notice, did raise the question as to the likelihood of a breach of the peace. The learned Magistrate expressly applied his mind to that point, and, on the evidence before him, came to the conclusion that there was a likelihood of a breach of the peace."

In the present case there is no indication that either of the parties raised this question before the Magistrate, or that at any stage of the proceedings the learned Magistrate applied his mind to that question.

[3] One of the learned Judges of the Full Bench case, King J., subsequently became Chief Justice of the Chief Court of Oudh. A decision of King C. J., in *B. B. Asghari Khanam* v. *Emperor*, 11 Luck. 157 : (A. I. R. (22) 1935 Oudh 316 : 36 Cr. L. J. 656) was also relied on by the opposite party. In the course of the judgment in that case the learned Chief Justice observes that it must be conceded that a Magistrate cannot take action under S. 145 unless he is satisfied regarding the existence of a dispute likely to cause a breach of the peace, and the mere fact that a Magistrate issues an order under S. 145 (1) would not necessarily lead to the inference that the Magistrate was satisfied regarding the existence of a dispute likely to cause a breach of the peace. In that case the proceedings stated on the complaint of one Ragho Ram who applied to the Sub-divisional Magistrate for action under S. 145 stating that he had been in possession of the land in dispute for some years, that he had sown the kharif crop during the current year and that on the 7th July certain of the opposite parties came to the land armed with lathis and tried to turn him out by force. He also alleged that on the 23rd of July when he went to the field to weed the crop the opposite party appeared armed with lathis and prevented him forcibly from weeding the crops and threatened to kill him if he did not desist from cultivating the plot in dispute. The Magistrate took down the statement of Ragho Ram on oath and the latter supported the allegations which he had made in his complaint. Thereupon the Magistrate issued an order directing the issue of notices under S. 145 (1) and calling upon the parties to put in their written-statements, but without recording the fact that he was satisfied that the dispute between the parties was likely to occasion a breach of the peace. The learned Chief Justice held that this omission was a mere irregularity. I am not so sure myself that the omission to comply with the express direction of the statute that the Magistrate shall make an order stating the grounds on which he is satisfied that a dispute likely to occasion a breach of the peace exists can be treated as a mere irregularity. But, for the purposes of this case, assuming it to be so, the question still remains whether the materials before the Magistrate were so coercive that it should be held that he must have been satisfied that the dispute was likely to occasion a breach of the peace, although he has not recorded that he was so satisfied. Unlike the two cases to which reference has been made, there was no statement on oath before the Magistrate. All he had before him was the report by an Assistant Sub-Inspector of Police in which the only reference to the existence of a dispute likely to occasion a breach of the peace was the statement of a chaukidar, that is to say hearsay evidence. He had, of course, before him also the written-statements which the parties filed in the proceeding under S. 144. In these statements, however, both parties disclaimed any intention of committing a breach of the peace, although purporting to be apprehensive that their opponents might do so. It may well be, in these circumstances, that the Magistrate, while being satisfied as to the existence of the dispute, was not prepared to accept the allegations that the opposite party was likely to cause a breach of the peace. In fact, the language of the notice issued to the parties in this case indicates either that the Magistrate was oblivious of the necessity of being satisfied that the dispute was one likely to occasion a breach of the peace or that, from the materials before him, all that he was satisfied about was that a *bona fide* dispute existed. Even after hearing the evidence of the parties his order makes no reference to any evidence that was before him of the likelihood of the dispute leading to a brerach of the peace, and does not state that he had come to any such conclusion. In the circumstances, I must hold that the Magistrate had no jurisdiction to enquire into this complaint in view of the absence of any reason to suppose that he was satisfied that the dispute before him was such as to be likely to lead to a breach of the peace. The order is, therefore, set aside. The Magistrate will, of course, be entitled to start a fresh proceeding if he is now satisfied that there is between the parties a dispute that is likely to lead to a breach of the peace.

D.R.R. *Revision allowed.*

A. I. R. (38) 1951 Patna 415 *[C. N. 107.]*

SINHA AND REUBEN JJ.

Ambica Prasad Singh and another — ***Appellants*** v. ***Ram Charitar Singh and another*** — ***Respondents.***

A. F. O. O. No. 75 of 1947, D/- 21-12-1949.

(a) Transfer of Property Act (1882), Ss. 3 and 6 (e) — **"Actionable claim" and "right to sue"** — **The words "right to sue" do not connote the same thing as the words "actionable claim."** [Para 8]

Anno. T. P. Act, S. 6 N. 16; S. 3 N. 21.

(b) Transfer of Property Act (1882), Ss. 3 and 130—Actionable claim—Decretal debt – Civil P. C. (1908), O. 21, R. 16.

A decretal debt is an actionable claim. The provisions of O. 21, R. 16, Civil P. C., do not necessarily indicate that the Legislature regarded a decree as outside the scope of actionable claims. [Paras 5 & 8]

Anno. T. P. Act, S. 3, N. 23.

T. K. Prasad — *for Appellants; Ramchandra Prasad Singh and Lakshmi Narayan Sinha* — *for* ***Respondents.***

Reuben J. — This appeal by the executing decree-holders is directed against an order of the Subordinate Judge at Gaya allowing an application under S. 47, Civil P. C.

[2] The decree under execution was obtained by one Puran Dai, proprietress of village Kathar, against Jagmohan Singh and twentythree others for arrears of rent for the years 1338 to 1343 Fasli in respect of a mokarrari tenure in the village. The decree was for an amount of Rs. 9774. After realising Rs. 7000 out of this sum by execution Mt. Puran Dai, on 8-7-1943, sold her milkiat interest in the village and the balance of the decretal dues to Ambica Prasad Singh, appellant 1, Mahesh Pandey, appellant 2 and one Adit Singh. The shares of these vendees are specified in the sale deed as being 0-5-6 pies, 0-6-6 pies and 0-4-0 annas respectively. Execution was taken out by the two appellants in the year 1946 under O. 21, Rr. 15 and 16, Civil P. C. It was sought against only three of the judgment-debtors, who are residents of Mauza Jarao, the other judgment-debtors being residents of Kathar. The objection under S. 47 filed by two of these judgment-debtors has succeeded on two grounds: (1) that twelve annas of the decretal dues have been transferred to one or other of the judgment-debtors and, therefore, an application for their recovery by execution does not lie under proviso 2 to O. 21, R. 16, and (2) that, as to the remaining four annas share, the appellant Ambica Prasad is legal practitioner and, therefore, is debarred by S. 136, T. P. Act, from enforcing by execution a decree obtained by him by assignment. The correctness of the decision is challenged in respect of both these grounds.

[3] As regards the first ground, the challenge has been somewhat half hearted, the reason being that the case of the applicant judgment-debtors is practically conceded by the execution petition itself. It seems to have been admitted before the Subordinate Judge that, subsequent to the transaction by which Puran Dai transferred her interest to Ambica Singh and others, there have been several transactions by which Mahesh Pandey and Ambica Singh have transferred portions of their interest to either the judgment-debtors or to close relatives of the judgment-debtors, the resulting distribution being that from Ambika Singh the daughter-in-law of Odai Nath Singh judgment-debtor has got a share of one and a half annas, and from Mahesh Pandey, Mahabal Singh judgment-debtor, the wife of Basudeo Singh judgment-debtor, the mother of Matukdhari Singh judgment-debtor, daughter-in-law of Jagmohan Singh judgment-debtor and the wife of Ramdeo Singh judgment-debtor have got respectively the shares of ten dams, fifteen dams, fifteen dams one anna and one anna making a total of four annas, thus leaving Mahesh Pandey with a share of two and a half annas. We find in the execution petition that all these purchasers are named as *pro forma* judgment-debtors, that is to say, judgment-debtors against whom no relief is sought in the execution proceeding. Further among the judgment-debtors, we find Adit Singh and in the explanation given in the execution petition, there is a note that he is the farzidar of the wife of Gariban Singh another of the judgment-debtors. The inclusion of all these persons as judgment-debtors clearly supports the case of the appellant-petitioners that these purchases were benami purchases by the judgment-debtors themselves. As regards the two and a half annas share remaining with Mahesh Pandey, the case of the applicant-judgment-debtors is that he is the farzidar of the judgment-debtors Chhabinath, whose son-in-law he is. The relationship was denied, but the evidence strongly points to the correctness of the Subordinate Judge's conclusion that he is, in fact, so related. Direct evidence to this effect was given by Ram Charitar applicant (A. W. 2) and Jhako Singh (A. W. 3). The applicant judgment-debtors took the bold course of examining as a witness on their behalf one of the judgment-debtors belonging to village Kathar, in respect of whom the allegation of farzi purchase had been made, namely, Ramdeo Singh. Naturally, the witness did not support the story of the alleged relationship, but instead of a direct denial, he said that he did not know if there is any such relationship. An equal uncertainty was shown by Balbhadar Singh,

witness 1 for the executing decree-holders, who began by a statement that Chhabinath is not the father-in-law of Mahesh Pandey, went on to the pretence that, though Chhabinath is his co-villager and his uncle he does not know if Chhabinath has or has not one daughter and ended by saying that he "cannot deny if Mahesh Pandey is the son-in-law of Chhabinath." This assumption of ignorance, which cannot but be false, speaks for itself, and, if we take this behaviour and consider the purchase in the name of Mahesh along with the numerous purchases in the names of close relatives of the judgment-debtors and relating to small portions of the decree, there can be little doubt that the purchases were, in fact, on behalf of the judgment-debtors. Apparently, the judgment-debtors by a series of purchases are trying to apportion between themselves the liability for satisfying the decretal dues, and execution has been taken out in the present case against the judgment-debtors who belonged to another village and, apparently, have not come into this scheme of adjusting the liability by private transactions.

[4] In connection with the plea of farzi purchase by the judgment-debtors, it has been suggested to us that the Subordinate Judge was under a mistake as regards the nature of the interest purchased by Mahesh Pandey and Adit Singh and transferred by the former to the persons named above. The fact is, we were told, that the purchase of these two persons was confined to the milkiat interest alone and that the decretal dues were entirely purchased by Ambica Singh. This was not the case of the executing decree-holders before the Subordinate Judge and is contradicted by the execution petition itself, since Mahesh Pandey is included as an executing decree-holder. This case has not been made out in the memorandum of appeal to this Court, and it is not open to the appellants to take this ground now.

[5] I come now to the second point. Section 136, T. P. Act, provides that no Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, any share of or interest in any actionable claim, and no Court of Justice shall enforce at his instance, any actionable claim so dealt with by him as aforesaid. It is urged that decretal dues are not an actionable claim within the meaning of this section. In support of this contention reference is made to *Afzal* v. *Ramkumar*, 12 Cal. 610, *Dagadu* v. *Vanji*, 24 Bom. 502 : (2 Bom. L. R. 414) and *Krishnaswami Naidu* v. *Andi Chetti*, 51 Mad. 681 : (A. I. R. (15) 1928 Mad. 478). Of these decisions, only the first is a reasoned judgment. Their Lordships gave four reasons for their holding that a decree is not an actionable claim, firstly, that what is intended by this term is an actionable claim and not a claim which has already passed into a decree, secondly, that the Code of Civil Procedure, which was passed in the same year as the Transfer of Property Act, distinguishes between debts and decrees, thirdly, that in S. 232, Civil P. C., there is special provision regarding the transfer of decrees and the notice necessary to be given in such cases and, fourthly, that S. 233 of the Code lays down the same rule in the case of decree as is prescribed by S. 137, T. P. Act, in the case of debts. The decision in *Dagadu's case*, 24 Bom. 502 : (2 Bom. L. R. 414) merely follows the authority of the Calcutta decision. *Krishnaswami's case*, 51 Mad. 681 : (A. I. R. (15) 1928 Mad. 478) follows these two decisions and cites also *Govindarajulu Naidu* v. *Ranga Rao*, 40 M. L. J. 124 : (A. I. R. (8) 1921 Mad. 113), which merely decides that a judgment debt is property and that a transfer of it by the guardian of a minor does not require the Court's consent under O. 32, R. 7, Civil P. C. Analysing the reasons given by their Lordships in the *case of Afzal*, 12 Cal. 610, they do not by themselves appear conclusive. The first ground seems to be plausible enough, but it is based on a mere consideration of the meaning of the words "actionable" and "claim" that is to say, a claim in respect of which an action lies is an actionable claim, and one in respect of which action has been taken and has fructified in a decree is not an actionable claim. It may be true that the Civil Procedure Code makes a distinction generally between debts and decrees. But there is necessarily a difference between the two independent of the question as to whether decrees are or are not actionable claims. A debt may arise in various ways; a decretal debt is a particular form of debt in which the liability of one party to another has been determined and fixed by a Court. The two are, therefore, not the same thing, although one is included in the other. Section 232, Civil P. C., of 1882 corresponds to O. 21, R. 16 of the present Code. It provides for the execution of a decree at the instance of the transferee, where the decree has been transferred by assignment in writing or by operation of law. It requires as a condition precedent to execution, that where the transfer is by assignment, notice in writing of the application shall be given to the transferor and the judgment-debtor. These provisions merely specify the conditions requisite for a transferee to obtain execution of the transferred decree. They do not necessarily indicate that the Legislature regarded a decree as outside the category of actionable claims and

not affected by the provisions of the Transfer of Property Act relating thereto. Section 137, T. P. Act, enacts that the person to whom a debt or a charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer. Section 233, Civil P. C., makes an equivalent provision in respect of decrees. This may have been done *ex majore cautela*, the idea being that a judgment-debt, being ascertained by a Court, might be treated as carrying greater weight than an ordinary debt and, therefore, being likely to be regarded as over-riding equities.

[6] The decisions in the above mentioned cases may at first sight be justified by the definition of an actionable claim in S. 130, T. P. Act, as originally enacted :

"A claim which the civil Courts recognise as affording ground for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary."

The mention of the pendency of a suit in the latter part of the definition suggests that the word "actionable" is used with reference to the possibility of the debt being sued for. Some doubt on this interpretation is cast, however, by cl. (d) of S. 135 as originally enacted :

"Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it. Nothing in the former part of this section applies . . . .

(d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment."

[7] Some doubt arose as to the meaning of this clause. It was interpreted by the Calcutta and Bombay High Courts to mean that the transferee of an actionable claim could recover the whole amount due if he succeeded subsequently to the transfer in obtaining a decree for this sum. The Allahabad High Court, however, held that the clause referred to the state of things existing at the time of the assignment, that is to say, the claim had already become fixed by a judgment of a competent Court or had been made clear by evidence and ready for judgment at the time of the assignment. The latter view was accepted and, in my opinion, rightly by a Full Bench of the Madras High Court in *Nilakanta* v. *Krishnasami*, 13 Mad. 225 (FB). On this interpretation, it would appear to follow that a judgment-debt is an actionable claim.

[8] In the course of argument before us, several other decisions were referred to as authorities for the proposition that a judgment-debt is not actionable claim. *Venkatarama Aiyar* v. *Ramasami Aiyer*, 44 Mad. 539 : (AIR (8) 1921 Mad. 56), *Prasanno Kumar* v. *Ashutosh Roy*, 18 Cal. W.N. 450: (A.I.R. (1) 1914 Cal. 60) and *Hari Prasad* v. *Kodo Marya*, 1 Pat. L. J. 427 : (A.I.R. (3) 1916 Pat. 10) are merely authorities that a decree for the ascertainment of mesne profits is not a "right to sue" within the meaning of cl. (e) of S. 6, T. P. Act. There is no reason for thinking that the words "right to sue" connote the same thing as the words "actionable claim." The terms "sue" and "suit" are well understood in India. They occur in the Code of Civil Procedure and have acquired a technical meaning. In cl. (e) of S. 6, there is, therefore, a distinct reference to a right on the basis of which a suit can be brought. Had the Legislature intended that the terms "actionable claim" should have a similar meaning, it seems unlikely it would have used the word "actionable" rather than a word derived from the terms "suit." The difference in language between S. 6, cl. (e) and the provisions of chap. 8, T. P. Act, therefore, suggest that there was no intention on the part of the Legislature to exclude judgment-debts from the category of actionable claims. *Ganpat Rai* v. *Sarupi*, 1 ALL. 446, which has also been cited, is merely an authority that the purchaser of a simple mortgage decree does not acquire a lien on the property mortgaged.

[9] Coming to the Transfer of Property Act, as it now stands, it is doubtful whether *Afzal* v. *Ram Kumar*, (12 Cal. 610) (*ante*) can be regarded as an authority for the proposition for which it is cited. Actionable claim is now defined as,

"a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive of the claimant, which the civil Court recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent."

The reference to the pendency or otherwise of a suit which occurred in the previous definition has been omitted. The definition has been brought into accord with the concept in English law of a chose in action, *vide* Halsbury's Laws of England, second Edn., Vol. 4 at p. 418 :

"The expression 'chose in action' or 'thing in action' in literal sense means a thing recoverable by action, as contrasted with a chose in possession, i.e., a thing of which a person has not only ownership, but also actual physical possession. The meaning of the expression has varied from time to time, but it is now used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession. It is used in respect of both corporeal and incorporeal personal property which is not in possession."

The term "chose in action" appears to be very elastic and Halsbury mentions that it includes

claims which are not enforceable in Court but which depend for their reduction into possession, if they are so reducible at all, upon a variety of conditions (*ibid*, Art. 782). The distinction in English law appears to be between a chose in action and a chose in possession. The former term indicates a claim in respect of which some action is necessary before it comes into possession of the person entitled thereto. This action is not confined to something indicated by the word "action" in a technical sense, and as just mentioned, no legal proceeding may be possible for reducing it into possession. Further it is clear that the term "action" covers proceedings in execution, and that judgment debts are regarded as choses in action (*ibid*, Art. 786). They seem also to have been treated as choses in action in the Supreme Court of Judicature Act of 1873, 36 and 37 Vict. Ch. 66 : *Forster* v. *Baker*, (1910) 2 K. B. 636 : (79 L. J. K. B. 664) and in the Law of Property Act, 1925, *vide* Halsbury's Laws of England, Second Edn., Vol, 4. Art. 794).

[10] In the case of choses in action, therefore, there is no reason for interpreting the word action in a technical sense so as to exclude a judgment-debt. Still more in India, where the word "action" is not used in a technical sense, there is no reason to interpret it in this manner. I am supported in this conclusion by S. 130, T. P. Act, as it now stands, which provides in sub-s. (2) that the transferee of an actionable claim, may upon the execution of a proper instrument of transfer, "sue or institute proceedings" for the same in his own name without obtaining the transferor's consent to such "suit or proceedings."

[11] I may further cite in support of this conclusion *Govardhan Das* v. *Friedmans Diamond Trading Co. Ltd.*, A I.R. (26) 1939 Mad. 543 : (188 I. C. 878) which unfortunately gives no reason, and *Digambar* v. *Satish Chandra*, A.I.R. (26) 1939 Cal. 717 : (185 I. C. 368) which, however, is based on some special facts. I may also refer to *Vythilingam Padayachi* v. *Sitharam Ayyar*, 23 Mad. 449 : (10 M.L.J. 77) where the decree in question was the decree of a foreign Court.

[12] In the result, I must hold that the Subordinate Judge has decided correctly on both the grounds and this appeal has no merits. The appeal will, therefore, be dismissed with costs.

[13] **Sinha J.**—I agree.

G.M.J. *Appeal dsmissed.*

A. I. R. (38) 1951 Patna 418 *[C. N. 108.]*

MANOHAR LALL AND RAMASWAMI JJ.

Ramkhelawan Poddar and others — Petitioners v. *The King.*

Criminal Revn. No. 216 of 1949, D/- 23-8-1949.

Public Safety — Bihar Maintenance of Public Order Ordinance (4 [IV] 1946), S. 6 (1) — Notification prohibiting any meeting or procession without sanction is *ultra vires*.

Section 6 enables the Provincial Government to prohibit public meetings and in sub-s. (2) enacts that a public meeting would be deemed to include a meeting which is open to any class or portion of the public whether held in a public or private place and whether admission thereto is restricted by the issue of tickets or otherwise. But the statute does not confer upon the Provincial Government the power to prohibit other meetings, for instance, meetings to which the public or any class of them are not admitted. [Para 5]

Where, therefore, a notification by the Provincial Government prohibits any meeting or procession without the sanction of the District Magistrate or Additional District Magistrate the Provincial Government acts in excess of the authority conferred upon them under S. 6 (1) of the Ordinance and the notification is *ultra vires* and no offence committed by violating it. 1917 A. C. 260 and (1929)1 K.B. 619, *Rel. on.*[Para 6]

Lakshmi Narain Sinha — for Petitioners; K. P. Varma — for the Crown.

Ramaswami J.— It is essential at the outset to relate the material facts giving rise to this rule.

[2] On 14-11-1946, Provincial Government issued a notification under S. 6 (1), Bihar Maintenance of Public Order Ordinance, 1946. By this notification, Government banned all processions, meetings, or assemblies except with the permission of the District Magistrate. The Ordinance was repealed on 15-3-1947, but the notifications issued under it were kept in force by S. 19, Bihar Maintenance of Public Order Act, 1947. The applicants were prosecuted before a Magistrate on the allegation that on 11-12-1948 they had assembled in uniforms to hold R. S. S. parade in the compound of the hospital at Teghra. On 29-12-1948 the learned Magistrate convicted the applicants under S. 6 (4) of the Act and sentenced them to suffer rigorous imprisonment for three months each and to pay a fine of Rs. 500 each. On 5-2-1949 the learned Sessions Judge upheld the conviction but reduced sentence of imprisonment to the period already undergone and the amount of fine to Rs. 300 each.

[3] The first argument in support of the rule is that the notification issued by the Provincial Government is beyond the scope of the powers conferred under S. 6, Bihar Maintenance of Public Order Ordinance. Learned Advocate referred to the unreported decision, *Ramkhelawan Singh* v. *The King* (Cr. App. No. 270 of 1948 decided on 8-12-1948) in support of his argument.

[4] Section 6 of the Ordinance provides :

"6. (1) The Provincial Government may, for the purpose of securing the public safety or the maintenance of public order, by general or special order, prohibit, restrict or impose conditions upon, the holding or of taking part in public processions, meetings or assemblies.

(2) For the purposes of sub-s. (1) any procession, meeting or assembly, which is open to the public or any class or portion of the public, whether held in a public or a private place and whether admission thereto is restricted by the issue of tickets or otherwise, shall be deemed to be a public procession, meeting or assembly as the case may be.

(3) Any police officer may take such steps, and use such force, as may be reasonably necessary for securing compliance with any order made under this section.

(4) If any person contravenes any order made under this section he shall be punishable with imprisonment for a term which may extend to one year or with fine or with both."

[5] The section enables the Provincial Government to prohibit public meetings and in sub-s. (2) enacts that a public meeting would be deemed to include a meeting which is open to any class or portion of the public whether held in a public or private place and whether admission thereto is restricted by the issue of tickets or otherwise. But the statute does not confer upon the Provincial Government the power to prohibit other meetings, for instance, meetings to which the public or any class of them are not admitted. The Government notification dated 14-11-1946, reads as follows :

"In exercise of the powers conferred by sub-s. (1) of S. 6, Bihar Maintenance of Public Order Ordinance, 1946 (Bihar Ordinance IV [4] of 1946), the Governor of Bihar, in view of the communal situation in the province, is pleased to direct that no meeting or procession shall be held without the sanction of the District Magistrate or Additional District Magistrate, as the case may be."

[6] Since this notification prohibits any meeting or procession without the sanction of the District Magistrate or Additional District Magistrate, it is manifest the Provincial Government have acted in excess of the authority conferred upon them under S. 6 (1) of the Ordinance. In my opinion, the notification is *ultra vires* and the petitioners committed no offence by violating it.

[7] It is axiomatic that an executive order made subordinately by the Government by virtue of the authority of a statute is subject to the judicial test whether the order falls within the periphery of the power thus conferred. If it does not, it is utterly void and of no effect. The high constitutional importance of this function is well expressed by Lord Shaw in *Rex* v. *Halliday*, (1917) A. C. 260 at p. 287 : (86 L. J. K. B. 1119) :

"The author of the power is parliament ; the weilder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of *ultra* or *intra vires* such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary Government and therein of grave constitutional and public danger. The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny."

[8] In *King* v. *Minister of Health; Ex parte Davis*, (1929) 1 K. B. 619 : (98 L. J. K. B. 636), an improvement scheme purporting to be made under the provisions of the Housing Act, 1925, after providing for the acquisition and clearing of an unhealthy area, proceeded to empower the local authority to sell, or otherwise dispose of as they thought fit, the cleared area or to appropriate it for any purpose approved by the Minister of Health. The scheme further provided that if the Minister so required the local authority should provide a number of dwellings, not exceeding 72, suitable for accommodation of persons of the working classes, on a site either within or without the area. The scheme had been presented to the Minister with a petition for its confirmation. The Court of appeal held that a rule *nisi* for a writ of prohibition prohibiting the Minister from proceeding further in the matter of the scheme must be made absolute on the ground that the Act did not authorise an improvement scheme containing an unrestricted power to sell or lease the cleared area, so that the Minister had no jurisdiction to consider the scheme. At p. 625, Lord Hewart states :

"There is indeed a precise and limited power conferred on the local authority to sell or let all or any part of the area comprised in the scheme. But it is a power guarded by special conditions and limitations. The selling or the letting is to be for the purpose of enabling the purchasers or the lessees to carry the scheme into execution and not otherwise. In other words in the Act there is a limited power to sell or to let while the purpose of the scheme before us is to confer on the local authority a power to sell, or to let freed from those or any limitations."

[9] The conviction in the present case must also be quashed upon the ground that the extension of the Bihar Maintenance of Public Order Act, 1947, has been declared invalid by a judgment of the Federal Court.

[10] Section 1 (3) of the Act enacted that it shall remain in force for a period of one year from the date of its commencement. The proviso contained a power to extend the operation of the Act for a further period of one year by the resolution of the two Houses of Legislature of the Province, and further gave the Provincial Government the power of modification, if any, of the Act. The Federal Court decided by their judgment dated 28-5-1949, (reported in *Jatindra Nath* v. *Province of Bihar*, A.I.R. (36) 1949

F.C. 175: 50 Cr.L.J. 897) that the proviso was *ultra vires* of the Provincial Legislature, and the extension of the Act beyond one year was invalid. The Federal Court also held that Bihar Act V [5] of 1949 was infructuous as the Bihar Maintenance of Public Order Act of 1947, which it sought to amend, had come to an end when the first year expired. On 3-6-1949 the Governor of Bihar promulgated ordinance II [2] of 1949. On 21-6-1949, this ordinance was declared *ultra vires* and invalid by a judgment of this Court. On the next date, that is, on 22-6 1949, the Governor of Bihar promulgated ordinance IV [4] of 1949 which re-enacted, in substance, the provisions of ordinance II [2] of 1949, which it purported to repeal. Mr. K. P. Varma referred to Ss. 23 and 24 of this Ordinance. Section 23 states :

"The Bihar Maintenance of Public Order Act, 1947, as extended for one year by a notification issued by the Provincial Government on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council and as amended by the Bihar Maintenance of Public Order (Amendment) Act 1948 and the Bihar Maintenance of Public Order (Amendment) Act, 1949, hereinafter referred to as the said Act), and the Bihar Maintenance of Public Order Ordinance, 1949 (hereinafter referred to as the said Ordinance) are hereby repealed."

Section 24 is to the following effect :

"All proceedings commenced, officers appointed or authorised, rules and orders made, sentences passed or acts ordered or done whether in exercise of any jurisdiction or power conferred or purporting to have been conferred by or under the provisions of the said Ordinance shall be continued and be deemed to have been respectively commenced, appointed or authorised, made, passed, ordered or done under this Ordinance and any enactment or document referring to any of the said provisions shall be construed to refer to this Ordinance or to the corresponding provision thereof."

[11] But it is manifest that S. 24 does not save orders made or sentences passed under the Bihar Maintenance of Public Order Act, 1947, or the Amendment Acts XXIX [29] of 1948 and V [5] of 1949. Section 24 only refers to orders made or sentences passed under the provisions of ordinance II [2] of 1949.

[12] It must, therefore, be held upon the authority of the decision of the Federal Court that the conviction in the present case is illegal.

[13] Upon these grounds I should make the rule absolute and set aside the sentences imposed on the applicants.

[14] **Manohar Lall J.**—I agree. The extension of the Bihar Maintenance of Public Order Act, 1947, has been declared *ultra vires* by their Lordships of the Federal Court. To get over this difficulty, Mr. K. P. Varma relied upon Ss. 23 and 24 of ordinance IV [4] of 1949 which was promulgated on 21-6-1949, and which re-enacted, in substance, the provisions of ordinance II [2] of 1949 which it purported to repeal. Section 23 is irrelevant for consideration in the present case. Section 24 does not refer to orders made or sentences passed under the Bihar Maintenance of Public Order Act, 1947, or the Amending Acts XXIX [29] of 1948, and V [5] of 1949. It only refers to orders made or sentences passed under the provisions of Ordinance II [2] of 1949—the present sentences were not passed under the provisions of these ordinances. I am, therefore, of the opinion that the conviction in the present case must be set aside.

V.B.B. *Conviction set aside.*

A. I. R. (38) 1951 Patna 420 *[C. N. 109.]*

MANOHAR LALL AND MAHABIR PRASAD JJ.

Ram Kirpal Pandey and others—Plaintiffs — Appellants v. *Janki Prasad Chaudhury and others — Defendants — Respondents.*

A. F. O. D. No. 72 of 1944, D/- 10-5-1949.

(a) Bengal Alluvion and Diluvion Regulation (XI [11] of 1825), S. 4 — Acquisition of land from river—Conditions to be satisfied — Claim founded on reformation on original site—Conditions to be fulfilled—Principle applicable to question between two riparian owners.

An acquisition of land from the sea or a river must satisfy two conditions before it can be claimed by an adjoining proprietor under the law of accession; (a) the acquisition must be by gradual, slow and imperceptible means. (b) The acquisition must be made from that which is part of the 'public territory,' the 'public domain' or the 'public waste,' as it is sometimes called, and not out of that which is the property of a private individual. A claim founded on the doctrine of 'reformation on original site' must also satisfy two conditions : (a) The site over which the land reforms must be clearly ascertained to be the property of a private owner. It must be shown that such owner has a subsisting title to the site at the time when he makes the claim. The rule which awards alluvial accretion to the owner of the adjoining land is subject to one very important qualification, namely, that the site over which the accretion forms is not proved to belong to another private individual because in determining the right of competing claimants to such accretion the law prefers the owner of the submerged but identifiable site to the owner of the bank. So long as the bed of a navigable river remains covered with water and is not vested in any private individual, it is regarded as 'public domain' or 'public territory' by means of alluvion. It is only where a portion of such 'public domain' adjoining the bank is vested in any private individual, that the title of the riparian proprietor of accretion yields to the title of the owner of the submerged site by what is called 'reformation.' The principle applies even where the question arises, between two riparian owners, who own property on either side of the river and where the land is washed away from one side of the river and reformed on the other side on the old ascertained site : 13 M. I. A. 467 (P.C.), *Foll.*; *Case law referred.* [Paras 17, 19, 20]

(b) Bengal Alluvion and Diluvion Regulation (XI [11] of 1825), S. 2—Custom—Proof—Proof by user — Allegation as to custom that mid-stream line of certain river is boundary line between two named villages.

The user whereby it is sought to prove a custom must not be too wide. Where the custom alleged is

that mid-stream line of a certain river is the constant boundary line between two named villages and what has been attempted to prove is that the mid-stream of the river wherever it runs forms the boundary of the riparian estates, and is consequently, the boundary between the two villages and there is no evidence to the effect that although the mid-stream of the river may not be the boundary of the riparian estates in other localities, it is so by custom in the locality in question, which in substance, is the custom pleaded the custom cannot be taken to be proved : (1876) 24 W. R. 603; (1908) 2 Ch. 586 and A.I.R. (14) 1927 P. C. 89, *Rel. on.* [Para 32]

(c) Compromise—Evidentiary value — Decision of Court—Subsequent compromise between parties.

Where after the decision of Court in a litigation there is a compromise between the parties, the compromise deprives the decision of much of its evidentiary value : A. I. R. (9) 1922 P. C. 59, *Foll.* [Para 34]

(d) Limitation Act (1908), Art. 144 — Diluviated lands reforming on old site—Indefeasible title acquired by third person—Lands if remain property of original owner.

The doctrine that diluviated lands, reforming on their old site, remain the property of their original owner does not apply to lands in which after their reformation an indefeasible title has been acquired by long adverse possession or otherwise: 3 Cal. 796, *Foll.* [Para 40]

Anno. Lim. Act, Arts. 142 and 144 N. 70 Pt. 4.

P. R. Das, Ganesh Sharma, Rajeshwari Prasad, M. P. Singh, Ramanugrah N. Singh and Rameshwar Prasad Sinha—for Appellants ; Dr. D. N. Mitter, Janak Kishore, D. C. Varma, A. C. Mitra, Harians Kumar and S. C. Chakravarty—for Respondents.

Judgment. — This appeal by the plaintiffs arises out of a suit for recovery of possession of 111 bighas and odd of land described in schedules I and II of the plaint.

[2] The question, which it raises for determination, is, whether these lands in suit, which, on the finding of the Court below, are reformations on the old site, which is clearly identifiable as being part of village Salha on the south-western bank of river Bakeya belonging to the plaintiffs, now, by reason of the flowvial action of the river, on its north-eastern bank, attached to village Hasanpur Khurd, belonging to the defendants, still belongs to the plaintiffs.

[3] The facts, which are no longer in dispute, are these; river Bagmati or Bakeya, as it is known in the locality, flows between villages Salha Tauzi Nos. 618 and 16072 belonging to the plaintiffs, and Hasanpur Khurd Tauzi No. 2704 belonging to the defendants. The mid-stream line of the river was the boundary line between the two villages, Salha and Hasanpur Khurd, at the time of the revenue survey in 1846, and, it appears that the whole of schedule II lands and a part of schedule I lands were, then, on the north-eastern bank of the river and within the boundary of Hasanpur Khurd. River Bakeya seems to have shifted its course slowly and gradually towards north-east, and at the time of the cadastral survey in 1900, the entire schedule I land, consisting of 76 bighas and odd, was on the south-western bank of the river appertaining to village Salha, and was surveyed as part of that village. The whole of Schedule II land, consisting of 35 bighas and odd, was, at that time, on the north-eastern bank of the river appertaining to village Hasanpur Khurd and was surveyed as part of that village. The mid-stream line of the river Bakeya was shown in the map prepared by the cadastral survey as being the boundary between the two villages. It appears, further, that the river Bakeya kept on shifting its course slowly and gradually towards north, in consequence of which, the last mentioned in Schedule II diluviated from the Hasanpur side and alluviated on the Salha side, and was taken possession of by the plaintiffs as having accreted to their estate without any objection whatsoever on the part of the maliks of Hasanpur Khurd. There was a partition between the maliks of Salha in the year 1914-15 and the lands mentioned both in schedules I and II were partitioned amongst them as appertaining to their village Salha.

[4] There is no dispute between the parties regarding the position which the river occupied up to the year 1915. The difference arises in regard to the time when, and the manner in which the river shifted its course thereafter. According to the plaintiffs, there was slow and gradual shifting of the course of this river towards west and south which led to 10 bighas of land out of the disputed lands being cut away and accreted to the land of Hasanpur Khurd on the north-east. Three or four years after, the plaintiffs allege, the river shifted again to the north and the east, and thus the 10 bighas of land came back to the Salha side, and the river Bakeya began to flow close to the north-east of the disputed land mentioned in schedule II of the plaint. The position thus occupied by the river in 1923, which, according to the case of the plaintiffs, remained fixed and unchanged until 1934, when as a result of the great earthquake and severe flood following in the wake of it, the levels in the locality having become disturbed, there was a sudden change in the course of the river shifting it to the west and south of Hasanpur Khurd throwing the lands in dispute on the north-eastern bank of the river and attaching them to Hasanpur Khurd. According to the case of the defendants, on the other hand, there was no change in the course of the river after the earthquake of 1934. According to them, after the partition of village Salha in 1914-15, the river began to shift slowly and gradually towards the west and south. The lands on the Salha side began slowly and gradually to diluviate and similarly to alluviate on the side of

Hasanpur Khurd. This process went on from 1915 to 1923 when the entire area mentioned in schedules I and II slowly and gradually came over to the side of Hasanpur Khurd, and was taken possession of by them as accretion to, and part of, and within the boundary of, their village Hasanpur Khurd Tauzi No. 2704, the mid-stream line of the river being by custom the boundary between the two villages Salha and Hasanpur Khurd. According to them, there has been no appreciable change in the course of the river since 1923 up till now, and the present course of the river which runs just to the west and south of the entire disputed land has been the course of the river since 1923.

[5] The plaintiffs base their claim to the land in dispute, on its having been cut off from their village by sudden change in the course of the river, and having reformed on the original site and being identifiable as part of the land appertaining to the village Salha, which was in their possession and which belonged to them before the river suddenly changed its course. They deny that there was slow and gradual shifting of the course of river from 1915 to 1923 from north-eastern side to the west-southern side of the disputed land as alleged by the defendants.

[6] The defendants, on the other hand, assert their right to retain possession of these lands on account of their having accreted on the lands of their village Hasanpur Khurd Tauzi No. 2704, slowly and gradually as also on account of a custom which, they plead, is prevalent in the locality, namely, the deep stream of the river being always the boundary between the two villages on either side of the river irrespective of the position that the course of the river may occupy at a particular time.

[7] The main questions of fact, therefore, which fell to be decided by the Court below were : (1) Whether the river Bakeya which ran just to the north and the east of the disputed lands, shifted all of a sudden its course in 1934 on account of the earthquake, to the south and the west of the disputed lands, or whether the position which the course of the river at present occupies, is the result of slow and gradual shifting of its course from the north and the east to the south and west of the disputed lands during the period, 1915 to 1923 ; (2) Whether the lands in dispute now on the north-eastern side of the river are reformations on the original site, which is identifiable as having been previously on its south-western side appertaining to village Salha ; and (3) whether the custom of the mid-stream being the constant boundary between the two villages Salha and Hasanpur Khurd, as alleged by the defendants, in para. 10 of the written statement, has been made out.

[8] The learned Subordinate Judge held that since 1923 there has been no appreciable change in the course of the river Bakeya, and that the case of the defendants that the lands in dispute came over to the Hasanpur side by slow and gradual shifting of the course of the river was true. He did not accept the case of the plaintiffs, namely, that there was a sudden change in the course of the river by reason of the earthquake in 1934. The learned Subordinate Judge, however, held that the disputed land had re-appeared on its old site which is identifiable as being that which in 1915 formed part of Salha belonging to the plaintiffs. He further held that the evidence adduced on behalf of the defendants that the general custom of the deep stream as being the constant boundary between the two riparian estates wherever river Bakeya flowed was not made out, but, that such a custom was proved to have been prevalent in the locality of the disputed lands. He also held that the disputed lands as they went on accreting to the lands of Hasanpur Khurd between the years 1915 to 1923, were taken possession of by the defendants and had since been in their possession. He, accordingly, held that the defendants were entitled to retain possession of these lands as part of their village, not only by reason of these lands having accreted slowly and gradually to their lands but also, for the reason, that by custom the middle line of the river was to be permanent boundary between these two villages. He held also that for the reason that the defendants had been in possession of these lands for more than 12 years, the plaintiffs' suit was barred by limitation. He, therefore, dismissed the plaintiffs' suit. Hence, this appeal.

[9] Mr. P. R. Das, appearing for the appellants, apart from attacking the finding of the Court below against the appellants on the question of the lands in dispute having been cut away from village Salha on account of the sudden change in the course of the river in 1934, as being erroneous, contends that the Court below, having found that the lands in dispute are identifiable as having reformed on its old site belonging to the plaintiffs, he should have held that the defendants had no title to retain these lands as accretions to their lands by slow and gradual process. He attacks the finding of the Court below in favour of the defendants on the question of custom pleaded by them as being inconsistent and self-contradictory. He contends further that custom to which S. 2 of Regulation XI [11] of 1825 refers applies only to cases of alluvion and diluvion,

and not to reformation in situ by sudden change in the course of a river. If, as found, the land claimed by the plaintiffs is reformation on the site which belonged to them, and if it be found that it is so by avulsion, he contends, the case is taken out of the purview of Regulation XI [11] of 1825, and the plaintiffs cannot be deprived of their lands either by reason of any custom or law of accretion, as incorporated in the Regulation. A custom, which in the case of a sudden change in the course of a river, will deprive a man of what is proved to belong to him will be unreasonable, and, as such, not provable under law. He relies on a decision of this Court in the case of *Bajrangi Raut* v. *Janak Prasad*, A. I. R. (23) 1936 Pat. 637 : (166 I. C. 198). He further contends that no such custom has been pleaded, much less proved in the case. In regard to the finding of the Court below against the plaintiffs, on the question of limitation, Mr. Das submits that it will be futile to assail that finding, if the finding of the Court below that lands alluviated on the side of Hasanpur Khurd in the manner alleged by the defendants, that is to say, by slow and gradual process between the years 1915 to 1922 is maintained. There is no evidence adduced on behalf of the plaintiffs that as lands went on alluviating on the side of Hasanpur Khurd slowly and gradually between these years, they went on taking possession of these lands. Their evidence is that as the disputed land came out suddenly on Hasanpur side in the year 1924, they took possession of it. If, the case of the plaintiffs that the formation of the land on the side of Hasanpur Khurd was due to a sudden change in the course of the river in 1934 is accepted, no question of limitation arises, as the suit is well within twelve years from that date, and whether the evidence adduced on their behalf that they took possession of the land as it came out suddenly in the year 1934 is believed or not is immaterial.

[10] Dr. Mitter, appearing for the respondents in reply, in support of the findings of the learned Subordinate Judge has taken us through the judgment under appeal and has nothing to add to the reasonings on which the judgment rests.

[11] For properly dealing with the contentions raised in this appeal, it will perhaps be convenient and useful to state, in as short a compass as possible, the law of alluvion and diluvion as declared and enacted by Regulation XI [11] of 1825, and as interpreted judicially by long chain of decisions beginning from the leading case of *Lopez* v. *Muddun Mohan*, 13 M. I. A. 467 : (5 Beng. L. R. 521 P. C.), such as *Hursahai Singh* v. *Lootf Ali Khan*, 2 I. A. 28: (14 Beng. L. R. 268 P. C.) and *Sardar Jagjot Singh* v. *Brijnath Kunwar*, 27 I. A. 81 : (27 Cal. 768 P. C.) running down to the case of *Maharaja Bahadur of Dumraon* v. *Secy. of State*, 54 I. A. 156 : (A. I. R. (14) 1927 P. C. 89) cited at the bar.

[12] For land on the bank of a river belonging to one proprietor to be cut off from one side and carried to the other and get attached to land belonging to another proprietor is of common occurrence. The process by which this transference of land from one side of the river to the other takes place may be : (1) that the bed of a river keeps on shifting slowly and gradually from one side to another, and it is only in course of years that any perceivable change takes place in the position of the bed of the river, and it is discovered that there has been diluvation of land on one side and alluviation of land on the other, and that the bed of the river has come to occupy a position different than what it originally did, (a) it being impossible, in some cases, to ascertain as to what the original site of the land so gained was : whether it has been gained from out of the bed of the river or out of the land on the high bank on the other side which is the property of a private individual ; (b) it being possible, in some cases, to determine with the help of maps and ancient documents the site on which land has reformed as being the site, which it originally occupied and which was the property of another although by long submergence of the land all external marks and means of identification have been obliterated ; (2) that there is a sudden change in the course of a river and the channel shifts in such a way that a portion of riparian estate is cut off without destroying the land-marks and the estate so cut off reforms on a clearly identifiable site of the diluviated property.

[13] The process last described is known as 'avulsio' or avulsion, meaning that which is being detached from the land of one person by open violence of a river becomes afterwards united with the land of another, as distinct from that, which is slowly and gradually added to land by what is called (alluvio) or alluvion first mentioned.

[14] Clause 1, S. 4 of Regulation XI [11] of 1825 indicates that

"when land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landholder, or as a subordinate tenure, by any description of under-tenant whatever."

[15] This rule is subject to an all important overriding proviso introduced by Courts of justice guided by the "principle of equity and justice" described by cl. 5 of section 4 of the Regulation.

[16] That proviso may be shortly stated thus :

"Where land is formed on a diluviated but ascertainable site, or where an ascertainable site is discovered by the recession or subsidence of waters, such land or discovered site belongs to him who has a subsisting title thereto."

[17] This is called the doctrine of 'reformation on original site', and it rests upon the principle that in contemplation of law, land covered by water is the same as land covered by crops. Law knows no difference between land covered by water and land covered by crops, provided the ownership of the land can be ascertained. The leading case on the subject is that of *Lopez* v. *Muddun Mohan*, 13 M. I. A. 467 : (5 Beng. L. R. 521 P. C.), already mentioned. The principle enunciated therein may shortly be formulated thus : (1) An acquisition of land from the sea or a river must satisfy two conditions, before it can be claimed by an adjoining proprietor under the law of accession ; (a) The acquisition must be by gradual, slow and imperceptible means. (b) The acquisition must be made from that which is part of the 'public territory', the 'public domain' or the 'public waste', as it is sometimes called, and not out of that which is the property of a private individual. (2) A claim founded on the doctrine of 'reformation on original site' must also satisfy two conditions : (a) The site over which the land reforms must be clearly ascertained to be the property of a private owner. (b) It must be shown that such owner has a subsisting title to the site at the time when he makes the claim.

[18] James L. J., who delivered the judgment of the Judicial Committee, assimilates the doctrine of reformation on original site to the law of accretion by alluvion, and describes the latter as 'an accretion and annexation longitudinally' to the riparian frontage, and the former as 'an accretion and annexation vertically' to the site.

[19] The rule which awards alluvial accretion to the owner of the adjoining land is subject to one very important qualification, namely, that the site over which the accretion forms is not proved to belong to another private individual because in determining the right of competing claimants to such accretion the law prefers the owner of the submerged but identifiable site to the owner of the bank. So long as the bed of a navigable river remains covered with water and is not vested in any private individual, it is regarded as 'public domain' or 'public territory' by means of alluvion. It is only where a portion of such 'public domain' adjoining the bank as here is vested in any private individual that the title of the riparian proprietor of accretion yields to the title of the owner of the submerged site by what is called 'reformation'.

[20] In the case of *Maharaja of Dumraon* v. *Secretary of State*, 54 I.A. 156 : (A. I. R. (14) 1927 P. C. 89) their Lordships of the Privy Council reviewed all the relevant decisions in the cases of *Nogendra Chunder Ghosh* v. *Md. Esof*, 10 Beng. L. R. 406 : (18 W. R. 113 P. C.), *Hursahai Singh* v. *Lootf Ali Khan*, 2 I. A. 28 : (14 Beng. L. R. 268 P. C.), *Sarat Sundari* v. *Surya Kant*, 25 W. R. 242, *Radha Proshad* v. *Ram Coomar*, 3 Cal. 796 : (1 C. L. R. 259), *Jaggot Singh* v. *Rani Brijnath Kunwar*, 27 I. A. 81 : (27 Cal. 768 P. C.) and while re-affirming the principles enunciated in *Lopez* v. *Muddun Mohan*, 13 M. I. A. 467 : (5 Beng. L. R. 521 P. C.), held, that the principle applied even where the question arose, as here, between two riparian owners, who owned property on either side of the river and where the land was washed away from one side of the river and reformed on the other side on the old ascertained site.

[21] The rules relating to alluvion and diluvion as well as the doctrine of reformation on old site just stated, are subject again, to one sweeping exception enacted by S. 2 of the Regulation, which lays down :

"Whenever any clear and definite usage of shikast and paiwast respecting the disjunction and junction of land by the encroachment or recess of a river may have been immemorially established for determining the rights of the proprietors of two or more contiguous estates divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage."

[22] The question may arise whether the custom mentioned in the section, just quoted, will apply irrespective of whatever the nature of the change in the course of a river may be, whether it be sudden, or whether it be gradual, whether the channel shifts in such a way as to cut off a portion of the riparian estate, the cultivated fields, trees and houses and all other landmarks remaining intact, or whether it encroaches upon a riparian estate so completely that portions of it reform on the opposite bank on the clearly identifiable side of the diluviated property.

[23] A decision of this Court in the case of *Bajrangi Raut* v. *Janak Prasad*, A. I. R. (23) 1936 Pat. 697 : (166 I. C. 198) cited on behalf of the appellants, holds that such a custom which will deprive a man of what is proved to belong to him in the case of sudden change in the course of a river will be unreasonable and is not provable under law. Dr. Mitter for the respondents has drawn our attention to a decision of the Allahabad High Court to the contrary in the case of *Radhey Shyam* v. *Ram Dhan Lal*, A. I. R. (30) 1943 ALL. 68 : (205 I. C. 505) which holds :

"Where the custom of the dhura is proved to exist between the proprietors of two villages whereby the main channel of the river dividing the villages was to be the constant boundary between them when the change in the course of the river was gradual and also when it was sudden, then even if the river left the villages altogether and went to the extreme limit of any of the villages, that fact can make no difference to the observance of the custom. Such a custom is not unreasonable and can be enforced."

[24] The question, however, does not fall to be determined in the present case for, as it will be seen presently, the custom pleaded by the defendants is limited to a transference of land from one side of the river to the other, by slow and gradual recession of the bed of the river, and it is not alleged that it applies also to such transference of land by sudden change in the course of the river, that is, by avulsion.

[25] In view of the principles applicable as between different riparian owners being that, unless well established and invariable custom to the contrary is proved, the title to the land, which re-appears in situ, is always in the original owner, and, in view of the finding of the Court below, which has not been challenged in this Court, that the lands in dispute have reformed on their original ascertained site, which, if held to belong to the plaintiffs, the defendants can resist the claim of the plaintiffs in the suit only if they succeed in establishing, as pleaded by them in their defence (1) that the lands in dispute alluviated and got annexed to their land by slow and gradual process between the years 1915 and 1922, and (2) that by an established immemorial and invariable usage and custom, the mid-stream line of the river is the constant boundary between villages Salha and Hasanpur Khurd, whatever changes may take place in the course of the river from time to time, excluding an enquiry as to whether the land so alluviating is a reformation on a site ascertainable and identifiable as the original one.

[26] The Court below, as already stated, has come to the finding that the case of the defendants, namely, that of slow and gradual accretion has been made out, and that the custom of the midstream line of river Bakeya as being the constant boundary between the two estates in the locality has also been proved.

[27] What, therefore, falls to be determined in this appeal is whether the learned Subordinate Judge has erred in coming to these findings and they can be set aside.

[28] We take up, first, the question of slow and gradual accretion. (After discussing evidence their Lordships came to the following conclusion.) We are inclined to rely on the evidence of these (plaintiffs') witnesses and come to the conclusion that it has been proved that the appearance of the disputed land on the side of Tauzi 2704, Hasanpur Khurd, on its original identifiable site belonging to the plaintiffs has been occasioned by sudden change in the course of the river in 1934, and is a case of reformation in situ by avulsion and not a case of slow and gradual alluviation. The finding of the learned Subordinate Judge to the contrary is erroneous and must be set aside.

[29] We would next take up the question of custom. The custom pleaded by the defendants, even if held as proved, and the finding of the Court below is affirmed in that respect, it will not avail the defendants in the present case because they have not pleaded nor attempted to prove that mid-stream line of the river Bakeya was to be the boundary between the two estates even in the case of transference of land from one side to the other by sudden change in the course of the river. The witnesses examined on behalf of the defendants depose to the custom of mid-stream line as the boundary between the two estates in cases of alluvion by slow and gradual process. The finding, therefore, that there was sudden change in the course of the river in 1934 and the transference of the land on the side of Hasanpur Khurd was due to such a change in the course of the river, which we have reached, is sufficient to dispose of this appeal, but as the finding on the question of custom in favour of the defendants has been given by the Court below and has been assailed on behalf of the appellants, it is necessary to consider it.

[30] The ground on which this finding has been attacked, in the first place, is, as already stated, that the Court below has come to conclusions in this regard which are self-contradictory. The custom pleaded by the defendants as contained in para. 10 of the written statement is :

"That in mauza Salha and Hasanpur Khurd and their other neighbouring villages there has been, from time immemorial, a custom and usage to the effect that the river Bakeya, which is also known as Bagmati may shift its course wherever it may, but the middle line of the bed of the said river will be the constant

boundary limit between both the villages lying on either side of the river."

The evidence adduced in the case in support of the custom pleaded in the written statement is that the mid-stream is the boundary between the two villages not only in all the places where river Bakeya runs but such a custom is prevalent in all the places where other rivers, such as, Gandak and Lakhandei flow. The Court below came to the definite finding that the evidence of these witnesses could not be accepted in regard to the custom being prevalent in all the places where the river Bakeya runs or in all the places where Gandak and Lakhandei flow. Relying on the same evidence, it is pointed out, the Court came to the contradictory conclusion that it was proved that the mid-stream line of the river Bakeya was the constant boundary between the villages Salha and Hasanpur Khurd, whatever changes there may be from time to time in the course of the river.

[31] Secondly, it is urged that of the documentary evidence, which has been relied upon by the Court below for the finding survey maps of 1847 and cadastral survey maps of 1898 have been misread and misconstrued by the learned Subordinate Judge. It is pointed out that the revenue survey maps and the cadastral survey maps showing mid-stream line of the river as boundary between the two villages Salha and Hasanpur indicate nothing more than that half the bed of the river was measured as part of each of the two villages at the time those maps were prepared, and that it is not permissible to draw therefrom an inference in regard to that line being the constant boundary between the two villages. The revenue survey maps and cadastral survey maps of the villages just below and above the two villages in question unmistakably show that mid-stream line has not always been taken as boundary between the villages on either side of the river. At some places adjacent to the locality in question, the river has been measured as wholly within the boundary of the village on one side. At places the river cuts the villages in two parts and runs through the villages. The contention on behalf of the appellants that these maps do not therefore afford any evidence in regard to the custom pleaded by the defendants must be accepted. It has not been shown that the land gained on one side and treated as part of the village on that side was not addition to that village by reason of alluviation by slow and gradual process, and, therefore, apart from any question of custom, was an accretion within the meaning of Regulation XI [11] of 1825, and the person to whose village it got annexed was entitled to retain it as part of that village. It is common ground that whatever accretions took place either to village Salha or to village Hasanpur up to 1915 were by process of slow and gradual alluvion. That being so, the proprietors of Hasanpur Khurd were entitled to treat the transference of small bits of land by such process as alluvial accretions. It is again clear therefore that mere proof of the fact that plaintiffs omitted to claim such lands from the defendants or the defendants did not claim such lands from the plaintiffs in the past, does not prove that by reason of the custom pleaded by the defendants claims to those lands were not made. It may well be that the parties, whose lands were so cut, could not identify that they were reformations on the original site, and, therefore, the maliks of the villages to whose lands they got attached were considered entitled to retain it. Something more indeed is required to be proved than mere abstention from laying claim to such lands on the part of the parties affected, before such conduct on their part can be considered adequate to prove the custom of the mid-stream line alleged by the defendants. It is justifiably urged that the conclusion of the learned Subordinate Judge in favour of this custom based on what he misconstrued as conduct of the plaintiffs themselves is erroneous.

[32] Thirdly, it is urged that the witnesses for the defendants state that the custom of mid-stream of the river being the constant boundary between the two estates prevailed in regard to the villages Hasanpur Buzurg on the south-west and Hasanpur Khurd on the north-east of the river. The revenue survey maps as well as the cadastral survey maps of these two villages belie this statement. The learned Subordinate Judge did not accept the evidence of these witnesses in this regard. The maliks of the other tauzis of Hasanpur Khurd, such as, D. Ws. 4, 7, 10, 14, 15, 26, 33, 34, 42 and 45 to whose evidence our attention was specifically invited by Dr. Mitter also state not only that the custom of deep stream is prevalent in the locality of Hasanpur Buzurg and Hasanpur Khurd, contiguous to the locality in dispute, but that this custom is prevalent in respect of all the villages on the banks of river Bakeya. These statements were not accepted by the learned Subordinate Judge as they were not supported by the revenue and cadastral survey maps of those villages. One fails to see how the learned Subordinate Judge came to rely upon the evidence of these witnesses for coming to the finding that the custom alleged was at any rate proved to have been prevalent in the disputed locality. We are inclined to concede to the contention urged on behalf of the appellants

that the evidence of custom adduced was of a nature too wide to prove the custom alleged and this evidence having been discarded, there was practically no material on which the finding, viz., that so far as the disputed locality was concerned, the custom was made out, could be based. Mr. P. R. Das referred us to Halsbury's Laws of England (Hailsham Edition) vol. 10, p. 12 and the cases of *Hammerton* v. *Honey*, (1876) 24 W. R. 603 and *Farquahar* v. *Newbury Rural Council*, (1908) 2 Ch. 586 for the proposition that

"the user whereby it is sought to prove the custom must not be of a nature too wide to support the custom alleged."

In *Hammerton* v. *Honey*, (1876-24 W. R. 603) Jessel, M. R. at p. 604 referring to the nature of the user necessary to support a custom said:

"It must not only be consistent with the custom alleged, but, if I may use the expression, not be too wide. For instance, if you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom."

In *Farquahar* v. *Newbury Rural Council*, (1908) 2 Ch. 586 at p. 589, Warrington J. found that the user of a roadway was too wide to support an alleged customary churchway confined to the inhabitants of the parish. In the case of *Maharaja of Dumraon* v. *Secretary of State*, 54 I. A. 156 : (A. I. R. (14) 1927 P. C. 89) where the pleading was that by reason of an immemorial custom in the locality in question by which land adhering by gradual alluvion to a riparian village becomes a part of the village to which it accretes, and evidence called for the defendant was directed to show that there was a custom by which accretions to the Sahabad side vested in the Shahabad Zamindar the deep stream of the Ganges being the constant boundary between the districts of Shahabad on the south and Ballia on the north of the river, their Lordships observed :

"The first thing to be noted is that the custom which the Maharaja by his witnesses attempted to prove was not the custom pleaded."

On a proper analysis of the evidence called for the defendants, it will be found that what has been attempted to prove is that the mid-stream of the Bakeya wherever it runs forms the boundary of the riparian estates, and, is consequently, the boundary between Salha and Hasanpur Khurd. There is no evidence to the effect that although the mid-stream of the river may not be the boundary of the riparian estates in other localities, it is so by custom in the locality in question, which in substance, is the custom pleaded. The contention of Mr. Das, therefore, that the learned Subordinate Judge has found the custom alleged by the defendants as proved on practically no evidence to that effect is well founded. The learned Subordinate Judge has at p. 235 of his judgment drawn a sketch showing the course of the river in question as it runs from north to south and has noted the riparian villages on its either side. At pp. 236 and 237, he has detailed the riparian estates where the survey and cadastral survey maps show the mid-stream as the boundary as also those, where they do not. From a mere look at the sketch it will appear that the places where the mid-stream is not shown as the boundary between the two estates, are those, where the river abandoning its straight course from north to south, makes a sudden loop either to the east or to the west, as for instance, between Pandaul and Kalujar, between Ugra and Tira, between Dath and Mankauli and between Aliabad and Rasulpur. At places, such as, village Jatmalpur the river cuts it into two parts and flows through the village. It appears, therefore, that except where the river runs in an even course from north to south, the mid-stream line is not adhered to as the boundary between the riparian estates specially so, where the river takes a sudden turn making a loop either to the west or to the east like the one it makes to the west in the locality in question.

[33] When the attention of the learned Subordinate Judge was drawn to the fact that the witnesses called for the defendant deposed falsely to the existence of the custom of deep-stream being the constant boundary between Hasanpur Buzurg and Hasanpur Khurd and in other places where the mid-stream line was not shown as the boundary line between riparian estates, he made the following observation:

"This is no doubt true, but merely on this ground the entire evidence of the defendants cannot be rejected as contended by the learned lawyer for the plaintiffs so far as their statements regarding all those places where the mid-stream line forms the boundary line is concerned. They are supported not only by the survey maps but there is practically no evidence adduced by the plaintiffs to show that in places within the Darbhanga district or even outside the Darbhanga district there was any departure from the custom where the mid-stream line of the river is shown in the survey maps as the boundary line."

It will be clear from the observation of the learned Subordinate Judge, just quoted, that his finding that the custom alleged was proved is not really based on the oral evidence called by the defendants but on the survey maps showing the mid-stream of the river in question as the boundary of the riparian estates. In relying upon the survey map for this purpose, the learned Subordinate Judge was, as already pointed out, in error in that he failed to appreciate that what was intended by drawing the mid-stream line in the survey maps

was to indicate that the bed of the river in question was the property of the riparian proprietors and not a public domain. At places where the bed of the river formed part of the riparian estates on either side half and half, the mid-stream line was drawn and at places it formed a part wholly of one estate either on one side or the other, such line was not drawn. The learned Subordinate Judge clearly failed to realise that the drawing of such a line in these maps had nothing to do with the custom alleged. The finding of the learned Subordinate Judge regarding the existence of the custom in the disputed locality not being based on his appreciation of the evidence of the witnesses examined before him, we feel no hesitation in coming to a conclusion on the question of custom contrary to that arrived by the learned Subordinate Judge who had the opportunity of seeing those witnesses.

[34] The documents, apart from the maps which were relied upon on behalf of the defendants in proof of the custom alleged were EXS. Y series, compromise petitions, in cases which arose between the maliks of the riparian estates close to the locality, in question. Exhibit Y is a compromise petition between the maliks of Sarisherpur lying on the west of Morojairam on the east of the river in question ending a litigation between them regarding the lands having slowly and gradually alluviated on the side of Morojairam. Exhibit Y-1 is a similar compromise ending a similar litigation between the maliks of Rupauli and Mankhauli. Exhibit Y-2 is a compromise petition between the maliks of Sarisherpur and Godhaura ending a similar litigation between the proprietors of these riparian estates. The custom of mid-stream of the river as the constant boundary between the two estates was recognised by those compromises. As to the evidentiary value of these documents, we need only cite the following passage from the decision of their Lordships of the Privy Council in the case of *Mahomed Ibrahim Rowther* v. *Sheikh Ibrahim Rowther*, A.I.R. (9) 1922 P. C. 59 at p. 62 : (45 Mad. 308) :

"The documents on which the defendants rely for proving the usage, begin in order of time with a decree of the Madras High Court in O. S. 5 of 1887, Ex. XII in which James J. decided in its favour. There was, however, an appeal from his decree which ended in a compromise, a circumstance which deprives his decision of much of its evidentiary value."

The only document which is a decision in favour of the custom alleged is EX. W-2, judgment of the Subordinate Judge of Darbhanga in a dispute between the maliks of Gangaura, a village to the north of Salha and Morojairam, situated north of Hasanpur Khurd, regarding lands diluviated from Morojairam and alluviated in Gangaura on account of the gradual recession of the river Bakeya from its original bed. At the time the present suit was heard in the Court below this judgment was pending in appeal before this Court. The appeal was heard by a Bench of this Court and the judgment of the learned Subordinate Judge was upheld. The judgment of this Court has been filed before us. It no doubt holds that the custom of the deep stream being the boundary between riparian estates was proved so far as that case was concerned. The decision of custom in that case appears to have been specifically limited to the locality in dispute in that case. Imam J., who delivered the judgment of this Court guarded himself by observing :

"For the purposes of this appeal I am not prepared to go so far as to hold that there is a custom that the mid-stream of the river Bakeya is in all circumstances the boundary line between the villages Morojairam and Gangaura. Having already found that the change in the course of the river Bakeya was slow and gradual I am satisfied on a consideration of the entire evidence that the plaintiffs have at least proved the custom that when the river Bakeya changes its course gradually the lands which alluviate belong to the village to which they accrete."

It will be seen, therefore, that the decision does not go so far as to hold that even if the lands in dispute are reformations on the original site they will by custom belong to the village to which they accrete. The evidence afforded by the judgment also is inadequate to prove the custom on which the defendants rely in the present case. The decision at any rate is not a decision showing an assertion of the custom alleged in respect of the locality in dispute in the present case. It will be seen that this dispute related to the villages on the banks of that part of the stream which was known as Lakhandei, and the river Bakeya had not at the time when the lands in question in that suit alluviated, ceased to run into Lakhandei. The custom alleged and proved in that case was in respect of river Lakhandei and not Bakeya. Bakeya, as already found in the earlier part of the judgment, no longer runs into Lakhandei, and as a result of the diversion of river Bagmati through Nandna Baha in Bulandpur the stream which was known as river Bakeya and used to meet Lakhandei just to the north of Gangaura at Tirmohanighat has completely dried up. The judgment of this Court, therefore, relating to a dispute between Gangaura and Morojairam can be of no assistance in deciding the custom regarding the locality in the present case. Reliance was also placed on EX. D-1 a notice issued by the cess revaluation officer to the defendants as maliks of Hasanpur Khurd TAUZI NO. 2704 for the lands which on

the report of the supervisor (EX. C) was supposed to have diluviated from Salha and accreted to that tauzi. The notice no doubt mentioned that

"the custom of that locality is that the land which is accreted towards either side of the river belongs to the proprietor who is on that side."

There is nothing to show as to how and on what information the cess revaluation officer came to make this statement. It appears that the cess revaluation officer was more concerned with fastening the liability for the payment of that amount of cess, which the Salha maliks were claiming to be deducted from the amount of cess payable by them in respect of lands which had become submerged. The statement in this notice can hardly be said to possess any evidentiary value for the purpose of proving the custom alleged in the present case.

[35] It appears that in support of his finding that the lands in dispute accreted to Hasanpur Khurd as alleged by the defendants between the years 1920 to 1923, and the defendants went on taking possession as the lands went on accreting in accordance with the custom pleaded by them, the learned Subordinate Judge has also relied upon the fact that the dispute regarding possession of these lands between the defendants and the plaintiffs arose in the year 1940 and not immediately after 1934. He says :

"If the disputed land had remained in Salha side upto 1934 and if by the creation of a phat by the earthquake the course of the river Bakeya there was diverted from the north and eastern side of the disputed land to the west and southern side, the defendants must have tried to take possession of that land immediately thereafter in 1934 on the basis of the custom and the dispute would have arisen at that time. There is absolutely no reason why the defendants would try to take possession of the land in 1940 as alleged by the plaintiffs."

The learned Subordinate Judge in the reasoning adopted by him has committed two obvious errors. The dispute regarding possession of these lands did not commence in 1940 but in the year 1938 when the plaintiffs were finally restrained by a notice under S. 144, Criminal P. C. dated 4-12-1938. Another error which he has committed is that he has failed to realise that the lands in dispute could not possibly have been culturable immediately on their re-appearance and must have remained water logged for a year or so as stated in the Flood Report already mentioned. He should have seen, to the contrary, that the fact that the dispute regarding possession of these lands arose during the cultivating season of 1938 is more consistent with the lands having come out suddenly towards the end of 1934, as alleged by the plaintiffs, than with the case of the defendants that it had alluviated slowly and gradually by the year 1923. To use the reasoning adopted by the learned Subordinate Judge, it has to be observed that there is no explanation for the dispute regarding possession of these lands to have arisen as late as 1938, if, as alleged by the defendants, these lands had alluviated in 1923, and the defendants had taken their possession peacefully in accordance with the custom alleged by them, without any obstruction on the part of the plaintiffs. The immediate cause for the dispute in regard to these lands between the plaintiffs and the defendants assigned on behalf of the defendants as being the dispute between the maliks of Gangaura and one Abdul Rahman of village Moro whose house and the masjid of the Musalmans had been cut away, and the site on which they stood had re-appeared on the side of Gangaura, is too thin to be accepted.

[36] In view of these considerations, we have no hesitation in setting aside the finding of the learned Subordinate Judge that the defendants have been able to prove that, apart from the law of accretion which awards to the proprietors of the villages to which lands accrete by slow and gradual alluviation, contained in Regulation XI [11] of 1825, such accretions, although reformations on their original site and identifiable as such, can be claimed by the proprietors of riparian estates by reason of the custom of the deep stream being the constant boundary, as contemplated by S. 2 of the Regulation. We hold that the defendants have failed to prove the custom alleged.

[37] It should be stated again that regard being had to the finding which has been reached in the present case that the lands in dispute were transferred to the side of Hasanpur Khurd by a sudden change in the course of the river in the year 1934, the custom as alleged, even if proved, would not have entitled the defendants to resist the claim of the plaintiffs to such portion of the lands in dispute admitted or proved to be reformations on the side which belonged to them and to which their title is still subsisting.

[38] The question for consideration, which now arises, is as to whether on the findings arrived at, the plaintiffs can be held to have proved a subsisting title to the whole of the lands in dispute covered by Schs. I and II of the plaint.

[39] It is common ground that only a portion of Sch. I land is reformation on the site, which was part of Salha, as it existed at the time of the revenue survey in 1846. A part of land of that schedule is on the site of Hansanpur Khurd Tauzi No. 2704, as it existed in 1846. By slow and gradual diluviation the land on this

site accreted to lands of Salha between the years 1846 and 1898 and was measured as part of Salha at the time of cadastral survey and remained in possession of the plaintiffs till it started diluviating in 1915, according to the defendants, or was suddenly cut away in 1934 and got attached to Hasanpur Khurd, according to the plaintiffs. It is clear, however, that even the site which originally belonged to Hasanpur Khurd and the land on which site accreted to the lands of Salha before 1898, remained in possession of the plaintiffs for a sufficiently long time to have given them indefeasible title to it by adverse possession, before it diluviated. The plaintiffs are, therefore, entitled to the whole of Sch. I land on the finding that it has reformed on the site of Salha as it existed at the time of the cadastral survey in the year 1898.

[40] Different considerations, however, are applicable to the lands covered by Sch. II which are reformations on the site which was originally the part of Hasanpur Khurd Tauzi No. 2704 before the lands on this site slowly and gradually diluviated between the years 1898 and 1915. Although the plaintiffs do not accept that the Sch. II lands wholly diluviated, and slowly and gradually accreted to Hasanpur Khurd between the years 1920 to 1923, but they do admit, as the fact is, that the lands adjacent to the river in question on the side of Salha used to be submerged every year and were not fit for cultivation. The cess re-valuation papers establish beyond doubt that the lands close to the river were submerged, and the plaintiffs claimed reduction of cess in respect of 77 bighas of land on that account. Thirtyfive bighas covered by Sch. II alluviated to Salha long after alluviation of Sch. I lands. The land of Sch. II was last to alluviate and is admittedly close to the river. It is clear, therefore, that the plaintiffs have not shown and cannot show that they have been in actual cultivating possession of Sch. II lands continuously for 12 years to have given them indefeasible title to the site covered by this land which admittedly was originally part of Hasanpur Khurd and belonged to the defendants before it was cut away in 1934. The Sch. II lands having reformed on their original site of Hasanpur Khurd to which the plaintiffs had not acquired title by adverse possession before they diluviated, and to which the title of the defendants is still subsisting, the defendants must be held entitled to retain them. It will be seen that on the doctrine in *Lopez* v. *Muddun Mohan*, 13 M. I. A. 467 : (5 Beng. L. R. 521 P. C.) as affirmed in the case of *Maharaja of Dumraon* v. *Secy. of State*, 54 I A. 156 : (A. I. R. (14) 1927 P. C. 89) while the defendants are entitled to retain the land covered by Sch. II as reformed on the old site which is their property, they are not entitled to retain possession of that part of Sch. I land which is also reformation on the old site of their village, because in those lands an indefeasible title has been acquired by the plaintiffs by long adverse possession. In the case of *Radha Prasad Singh* v. *Ram Kumar Singh*, 3 Cal. 796 : (1 C. L. R. 259), their Lordships of the Privy Council held that the doctrine in *Lopez* v. *Muddun Mohan*, (13 M. I. A. 467 : 5 Beng. L. R. 521 P. C.) that diluviated lands, reforming on their old site remain the property of their original owner, does not apply to lands in which after their reformation an indefeasible title has been acquired by long adverse possession, or otherwise.

[41] It may be stated that Mr. P. R. Das conceded that the appellants were not on strong ground in respect of their claim to Sch. II lands.

[42] It is clear that, as submitted by Mr. Das on the finding that the land in dispute was transferred to Hasanpur in 1934, no question of limitation arises. The suit is clearly within time.

[43] In the result, the appeal is allowed in part, the decree passed by the learned Subordinate Judge is varied, the plaintiff's title to lands covered by Sch. I of the plaint is declared, and it is ordered that they do recover possession of the same and the defendants be evicted therefrom. The plaintiffs' suit in respect of lands covered by Sch. II is dismissed, and the decree passed by the Court below to that extent is affirmed. The appellants are entitled to costs in this Court and the Court below proportionate to their success in the appeal.

D.H. *Appeal partly allowed.*

A. I. R. (38) 1951 Patna 430 *[C. N. 110.]*

AGARWALA C. J. AND MEREDITH J.

The Bar Council, Patna High Court— Petitioner v. *Commissioner of Income-tax, Bihar and Orissa, Patna — Opposite Party.*

Misc. Judicial Case No. 79 of 1949, D/- 17-8-1949.

Income-tax Act (1922), S. 4 (3) (i) — Fees received by Bar Council for enrolment of advocates and registration of apprentices—Income if exempt under S. 4 (3) (i).

Fees realised by the Bar Council for putting an advocate's name on the list of advocates and the registration of apprentices for their training under an advocate approved by the Bar Council are not exempt from income-tax as the income therefrom is not income derived from property held under trust or other legal obligation: A.I.R. (30) 1943 Mad. 137, *Foll.* [Para 4]

Anno. Income-tax Act, S. 4 N. 15.

A. C. Sinha — for Petitioner; S. N. Dutt — for Opposite Party.

Judgment.—This is a reference under S. 66 (1), Income-tax Act. The question referred to this Court is

"whether the income received by the Bar Council, Patna High Court by way of fees paid by the advocates for enrolling themselves to practise in the High Court and/or registration fee from apprentices of law is exempt under S. 4 (3) (i), Income-tax Act."

[2] The Bar Council maintains a list of advocates, and it is condition precedent to the right to practise in this Court that an advocate should be on the list maintained by the Bar Council. In order to have his name on this list an advocate is charged a fee prescribed by the Bar Council. A further condition to practise in this Court is that an advocate shall have served a certain term of apprenticeship with an advocate whose name appears on a list of advocates maintained by the Bar Council and approved by the High Court. These appear to be the only functions of the Bar Council with which we are concerned. The question referred to us is whether the fees realized by the Council for putting an advocate's name on the list of advocates and the registration fee for apprentices for their training under an advocate approved by the Bar Council are exempt from income-tax. The question specifically refers to S. 4 (3) (i). Section 4 (3) provides that:

"Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them."

Clause (i) is:

"Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto."

[4] It is quite obvious that fees received by the Bar Council for enrolling advocates or for registering apprentices is not income derived from property held under trust or other legal obligation. The same view was taken by the Madras High Court in *Commissioner of Income-tax, Madras* v. *Bar Council, Madras*, (1943) 11 I. T. R. 1 : (A.I.R. (30) 1943 Mad. 137). The answer to the question referred to us, therefore, must be in the negative. The Income-tax Department is entitled to the costs of the reference which we assess at Rs. 250.

M.K. *Answer in the negative.*

A. I. R. (38) 1951 Patna 431 *[C. N. 111.]*

REUBEN AND NARAYAN JJ.

Ramsaroop Mahto and others—Appellants v. *Mathura Prasad Singh and others—Respondents.*

A. F. A. D. No. 175 of 1947, D/- 30-8-1949.

Debt laws—Bihar Money-lenders Act (III [3] of 1938), S. 8, second proviso — Payment made by debtor being sufficient to cover interest payable on date of payment at bond rate and also portion of principal—It would go to reduce principal—Proviso does not violate general law in this respect.

The obvious meaning of second proviso to S. 8 is that, in spite of cls. (a) and (b) which empower the Court to reduce the interest in the case of a secured loan advanced before the commencement of the Act to 9 per cent. per annum, if any payment has been made by the debtor in excess of 9 per cent. per annum, it cannot be appropriated towards the principal, but it can by no means be interpreted to mean that, even if the amount paid is so high as to cover not only the interest payable on the date of the payment at the bond rate, but also a portion of principal, it would not go to reduce the principal. When the Legislature used the expression "to reduce the amount of the principal of the loan", it meant that, if the amount paid exceeds the amount of interest payable on the date of the payment, if calculated at the rate of 9 per cent. per annum, and is less than the amount of interest payable on the date of payment, if calculated at the bond rate, it would not go to reduce the amount of the principal. The proviso does not violate the general law that, when there is a payment covering the entire amount of interest due at the bond rate and also towards the principal, the excess payment will go to reduce the principal. According to the general law and also according to the common sense, a payment made on a certain date has to be appropriated towards interest and principal payable on that date and, if the payment exceeds the amount of interest due, it will go to reduce the principal : A. I. R. (28) 1941 Pat. 459 and A. I. R. (31) 1944 Pat. 303 (F. B.), *Ref.* [Para 6]

C. P. Sinha and Shivashwar Pd. Sinha — for Appellants; R. K. Choudhari and Lala Atul Chandra —for Respondents.

Narayan J. — This is a defendants' second appeal arising out of a suit based on a simple mortgage bond. The bond had been executed on 18-9-1925, by defendants 1 and 2 and by their deceased father Dhana Mahton in favour of the plaintiffs to secure a loan of Rs. 2250, which was to bear interest at Rs. 1-4-0 per cent. per month with yearly rests. It was stipulated that the entire principal amount with interest would be paid by the mortgagors on the 30th of Baisakh 1333, but only a sum of Rs. 400 was paid in Baisakh 1333 and subsequent to that, other paywents were made, all of which were endorsed on the back of the bond, the last payment having been made on 24-4-1932. All these payments have been credited by the plaintiffs towards interest, and they have sued for the recovery of the principal amount only, which is Rs. 2250.

[2] The defendants resisted the plaintiffs' claim on the ground of limitation, and they further contended that, according to the provisions of the Bihar Money-lenders Act, they were entitled to have the account re-opened, and that, if the account was re-opened, the plaintiffs would be found to have been overpaid.

[3] The Court of first instance negatived the plea of limitation, but it held that the plaintiffs were not entitled to claim interest at a higher

rate than 9 per cent. per annum. That Court credited the payments made by the defendants towards the principal and interest calculated at the rate of 9 per cent. and found that the plaintiffs had realised their entire dues besides Rs. 50 in excess.

[4] The plaintiffs appealed against the decision of the learned Munsif and the lower appellate Court, while agreeing with the learned Munsif that the claim was not time-barred, held that the plaintiffs were entitled to recover Rs. 1201. The lower appellate Court arrived at this figure after deducting the total payment, Rs. 3299, from Rs. 4500, which is the double of Rs. 2250, the view of the learned Subordinate Judge being that, as under S. 7, Bihar Money-lenders Act, the plaintiffs could claim only Rs. 4500 including principal and interest, the amount paid should be deducted from this amount.

[5] Mr. C. P. Sinha, for the appellant, has not presented before us the contention that the claim of the plaintiffs is time-barred, but he has tried to support the Munsif's view that the defendants were entitled to have the account re-opened under S. 8, Bihar Money-lenders Act and that, if the account was re-opened, the plaintiffs would be found to have been overpaid. Clauses (a) and (b) of S. 8, Bihar Money-lenders Act, are important for our purpose and they are in these terms :

" . . . . . the Court may exercise all or any of the following powers :

(a) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any interest in excess of nine per centum simple per annum in the case of a secured loan and twelve per centum simple per annum in the case of an unsecured loan;

(b) notwithstanding any agreement purporting to close previous dealings and to create a new obligation, re-open any account already taken between them and relieve the debtor of all liability in respect of any interest in excess of nine per centum simple per annum in the case of secured loan and twelve per centum simple per annum in the case of an unsecured loan."

[6] There are two provisos attached to this section, and the second proviso, which is being relied upon by the plaintiffs-respondents runs as follows :

"Provided further that if anything has been paid or allowed in respect of any liability for interest in excess of nine per centum simple per annum in the case of a secured loan and twelve per centum simple per annum in the case of an unsecured loan, nothing in cl. (a) or (b) shall be deemed to require the creditor to repay any amount so paid or allowed in excess or to reduce the amount of the principal of the loan."

There can be no doubt that, even though this loan had been advanced before the commencement of this Act, the Court can under S. 8 of the Act relieve the debtor of all liability in respect of any interest in excess of 9 per cent. per annum. According to the proviso if any amount has been paid in respect of any liability for interest in excess of 9 per cent. per annum, nothing in cls. (a) and (b) shall be deemed to require the creditor to refund the excess payment, nor would the excess payment go to reduce the principal. In this case, it is common ground that when the payments were made, neither the mortgagor nor the mortgagee thought of crediting the payment, towards interest to be calculated at any rate less than the stipulated rate and, therefore, when the payments were endorsed on the bond, the implied understanding was that they would be credited towards interest to be calculated at the bond rate. Even the last payment, as already pointed out, was made on 24-4-1932, that is, long before the Bihar Money-lenders Act was passed, and, therefore, it is manifest that at that time the understanding must have been that the payments would be credited towards interest at the bond rate. Of course, even if the amounts paid are credited towards interest at the bond rate, they would exceed the amount of interest due and would consequently go to reduce the principal. Mr. Sinha has argued that this proviso cannot be applied to this case, because the payment were made not only towards interest but also towards principal and he has relied on the words "nothing in cl. (a) or (b) shall be deemed to reduce the amount of the principal of the loan". The obvious meaning of this proviso is that, in spite of cls. (a) and (b) which empower the Court to reduce the interest in the case of a secured loan advanced before the commencement of the Act to 9 per cent. per annum, if any payment has been made by the debtor in excess of 9 per cent. per annum, it cannot be appropriated towards the principal, but it can by no means be interpreted to mean that, even if the amount paid is so high as to cover not only the interest payable on the date of the payment at the bond rate, but also a portion of the principal, it would not go to reduce the principal. When the Legislature used the expression "to reduce the amount of the principal of the loan", it meant that, if the amount paid exceeds the amount of interest payable on the date of the payment, if calculated at the rate of 9 per cent. per annum, and is less than the amount of interest payable on the date of the payment, if calculated at the bond rate, it would not go to reduce the amount of the principal. Mr. Sinha was not right in contending that one cannot put such an interpretation on the proviso unless one imports something which does not exist therein. The

Bihar Money-lenders Act has never been regarded as a very ably drafted Act, and nobody can be allowed to take advantage of the bad drafting by putting an interpretation upon the section which is against reason and common sense. The proviso was intended to help the creditor, but only to a limited extent, it being never the intention of the Legislature that even if the debtor pays something in excess of the amount of interest due calculated at the bond rate, it will not go to reduce the principal. It would be absurd to contend that, whenever there is a payment of interest at the bond rate as well as of a portion of the principal amount, the proviso cannot at all be applied. Whatever comes within the purview of the proviso would be governed by it, and certainly the proviso is neither exhaustive nor so wide in terms as to cover all cases of payment it does not violate the general law that, when there is a payment covering the entire amount of interest due at the bond rate and also towards the principal, the excess payment will go to reduce the principal. In *Jagatmaya Kumari* v. *Ram Bahadur Prasad*, 22 P. L. T. 293 : (A. I. R. (28) 1941 Pat. 459), a Division Bench of this Court had to consider the proviso, and the head-note in the law report correctly enunciates the principle laid down in this case. The head-note runs as follows :

"The proviso states that if any amount has been paid in respect of any liability for interest in excess of nine per cent. simple in the case of a secured loan, nothing in cl. (a) or (b) of the section shall be deemed to require the creditor to reduce the amount of the principal of the loan. The creditor is entitled to charge interest at the bond rate on that date and where on calculation it appears that the interest which was due to him on those dates was far in excess of the amounts actually paid, under the law the creditor was entitled to appropriate the payments towards interest and after the appropriation had been made those amounts could not be used to reduce the principal under S. 8, Bihar Money-lenders Act."

When their Lordships said that, after the appropriation had been made, the amount paid could not go to reduce the principal under S. 8, their Lordships meant that the advantage which would have otherwise accrued to a debtor because of cls. (a) and (b) would not accrue to him because of the proviso. Nothing more and nothing less is meant by this proviso, and any other view would render the proviso inept. The position, therefore, is that because of proviso 2 attached to the section the plaintiffs were at liberty to appropriate the payment towards interest at the bond rate in spite of what is contained in cls. (a) and (b) of the section, and, if there is any payment in excess of interest calculated at the bond rate, then it will go to reduce the principal. The calculation has to be made on this basis, and we are surprised to find that the learned Subordinate Judge, instead of crediting the different payments towards interest and principal on the dates the payments were made, had added them altogether and deducted the entire amount paid from the sum of Rs. 4500 which is double the principal amount of Rs. 2250. According to the general law and also according to common sense, a payment made on a certain date has to be appropriated towards interest and principal payable on that date and, if the payment exceeds the amount of interest due, it will go to reduce the principal. The decision made by the learned Subordinate Judge is, therefore, an arbitrary one; and not only he did not care to read S. 8 and understand the proviso, but he did not care to notice even what the learned Munsif had said with regard to S. 8, though the learned Munsif had, in his turn, committed a serious mistake by ignoring the provisos to S. 8. We have got a calculation made which has been accepted by both sides to be correct and, according to this calculation, if the payments made are credited towards interest at the bond rate and the principal, then the principal on the date of the last payment, that is, on 24-4-1932, would be reduced to Rs. 1185-13-9. Mr. Sinha has relied on a Full Bench decision of this Court in *Deo Nandan Prasad* v. *Ram Prasad*, 23 Pat. 618 : (A. I. R. (31) 1944 Pat. 303 F. B.) and specially on the observation of Meredith J. at pp. 631 and 632 of the report, which runs as follows

"It was open to the Court under cl. (b) to re-open the account between the parties notwithstanding the execution of the hand note of 1937 purporting to close previous dealings and creating a new obligation and, having done so it was open to the Court to relieve the debtor of all liability in respect of interest in excess of 12 per centum simple per annum, the loan being an unsecured one. Having regard to the nature of the provisions the word 'loan' in the section must be used, I consider, with respect to the original loan, and not the final transaction and the original loan in the present case was Rs. 400. The proper course in applying the section would, therefore, be to take the principal as Rs. 400, calculate interest at 12 per cent. per annum simple on that sum up to the date of the suit and give a decree for the amount left unpaid as so ascertained, if anything is still found due."

[7] But no further calculation is necessary in this case because the respondents' learned counsel has stated that he is not going to press for a decree for any interest on the principal amount of Rs. 1185-13-9 which is payable according to the calculation already made. In this suit, therefore, there will be a decree only for Rs. 1185-13-9. Mr. Sinha probably thought that this Full Bench ruling helps him to such an extent that we can adopt the calculation made by the learned Munsif, but if such a calculation is made the proviso would be ren-

dered nugatory and the Full Bench could never have intended that this proviso should be ignored. In this view, I am of the opinion that the plaintiffs-respondents in this case are entitled to a decree for Rs. 1185-13-9 only.

[8] The appeal is allowed in part and the decree of the lower appellate Court is modified to this extent that the plaintiffs will have a mortgage decree for Rs. 1185-13-9 only. The defendants are allowed six months' time for the payment of the decretal amount, and the plaintiffs will get interest at 9 per cent. per annum on the principal amount of Rs. 1185-13-9 from the date of the institution of the suit till the period of grace and future interest at the rate of 6 per cent. per annum on the entire decretal amount. The plaintiffs-respondents will get corresponding costs throughout. Because the appeal has substantially failed, the appellants will get no costs of this appeal.

[9] **Reuben J.**—I agree.

D.H. *Appeal partly allowed.*

A. I. R. (38) 1951 Patna 434 *[C. N. 112.]*

SHEARER AND SARJOO PRASAD JJ.

Sayeedah Khatoon and others—Petitioners v. *The State of Bihar and others — Opposite Party.*

Misc. Judicial Cases Nos. 170 and 140 of 1950, D/- 13-10-1950.

(a) Constitution of India, Arts. 19 (e), 10 and 226 — Married woman - Order for deportation — Right to relief — Bihar Administration of Evacuee Property Ordinance (III [3] of 1949), S. 11.

Where an order for deportation is served on a person residing in Great Britain or the United States of America, that person, if he can make out a *prima facie* case that he is a citizen & not an alien, is entitled to a writ of *certiorari* & on the return to that writ being made, to a judicial determination of the question of his status.

On marriage, a woman takes the domicile of her husband, &, during the continuance of the marriage at least, cannot, by any act of hers, acquire another domicile. [Para 3]

A woman born in India & married to a citizen in India, taking up temporary residence in Pakistan for medical treatment, would neither fall under cl. (i) of the definition of "evacuee' contained in cl. (c) of S. 2, Bihar Administration of Evacuee Property Ordinance, 1949 nor under cl. (ii) as the word "resident" occurring there must be construed as meaning a person who has taken up his or her residence in Pakistan permanently.

Even if that person comes within the definition of 'evacuee' in the Ordinance, nevertheless, she is also a citizen of India &, as such is entitled to remain in India. If, while in Pakistan, her conduct was such as to create suspicions as to her loyalty to the Indian Union, she may, on her return to India be subjected to such restrictions on her movements as Parliament may consider advisable & not be deported. [Para 4]

Per *Sarjoo Prasad J.* - A woman acknowledged by her husband as his wife can claim her husband's domicile, though it is not clear in what form that marriage was solemnised. [Para 8]

(b) Constitution of India, Arts. 31, 226 — Deprivation of possession by Custodian of Evacuee Property — Special remedy available under Administration of Evacuee Property Act — Right to writ of mandamus — Administration of Evacuee Property Act (1950), S. 28.

A lady executed & registered a deed of wakfnama on 4-5-1946, in respect of her property, which provided that she was to be the mutawalli & that on her death or her relinquishing the office her three sons were to be joint mutawallis. She resigned her office as well as her right to receive a share of the income by a letter on 2-5-1949. The Deputy Custodian of Evacuee Property holding her to be an evacuee & that her letter of 2-5-1949 amounted to a transfer of property took possession of the property. The sons who were admittedly citizens of India applied for a writ of *mandamus*. It being also found that the lady who was born in India & married to an Indian citizen was herself a citizen of India :

Held (1) that there was an infringement of the fundamental right of the petnrs. to hold & enjoy property; [Para 7]

(2) that there was no transfer of property subsequent to 14-8-1947 so as to bring it within the meaning of the expression "evacuee property" in the Administration of Evacuee Property Act 1950, & the question was of no consequence since the lady was found to be a citizen of India; [Para 6]

(3) that Art. 226 gave the H. C. original jurisdiction in all such matters to issue a mandatory injunction & the special remedy of an appeal provided by the Act was no bar to the exercise of the jurisdiction. [Para 7]

Per *Sarjoo Prasad J.*— Though it is a matter for concern whether when a special remedy is available the Ct. should not leave the petnrs. to pursue that instead of seeking to invoke the extraordinary jurisdiction of the H. C. under Art. 226 yet where in the circumstances of the case that remedy is not equally effectual, convenient & beneficial & would cause him irretrievable loss & damage by the time he gets it the H C. must act in the exercise of its powers to protect his interest. [Para 11]

P. R. Das, Khaleel Ahmed, Balbadra Pd. Singh & Padmanand Jha — for Petnrs ; Govt. Advocate & S. C. Chakravarty — for Opposite Party.

Shearer J. — These two applns. which have been heard together are applns. under Art. 226 of the Constitution. Very elaborate arguments have been addressed to us by Sir Sultan Ahmed, who appears in support of one of the applns. & by Mr. P. R. Das, who appears in support of the other. Mr. P. R. Das, for instance, invited us to declare that the Bihar Administration of Evacuee Property Ordinance. 1949, was an unconstitutional law. It is, however, quite unnecessary to go into this point or into some of the other points which were raised & the applns. can be very shortly disposed of. The petnr. in Misc. Judl. Case No. 170 of 1950 describes herself as Kumar Rani Sayeedah Khatoon, wife of Captain Maharaja Kumar Gopal Saran Narayan Singh. Kumar Rani Sayeedah Khatoon landed at the Palam Air Port in New Delhi on 14-5-1950. She was in possession of a permit granted by the High Comr. for India in Pakistan, which

entitled her to remain in India permanently She was, therefore, admitted, & proceeded to Gaya where her husband resides. On 19-5-1950, in accordance with the instructions contained on her permit, she made the permit over to the Sub-Inspector in charge of the police station within the jurisdiction of which the Maharaja of Tikari resides.

[2] On 23 7-1950, a notice was served on her by the Sub-Inspector stating that the High Comr. for India in Pakistan had withdrawn her permit & requiring her to return to Pakistan within seven days. It was further stated in the notice that, in the event of her failing to do so, she would be prosecuted. The learned Govt. Advocate has not been as fully instructed as he ought to have been, & is not in a position to tell us exactly what the nature of the prosecution, which was contemplated, was. As will appear presently, it is quite clear that in the appln. which she made for this permit, the petnr. did not make any statement which was untrue. It appears that she originally went to Karachi in the middle of 1948 & at the end of that year, being desirous to pay a visit to her family in India, applied for and obtainad a temporary permit. Presumably she did this in order to be able to go back to Pakistan &, presumably, in order to obtain such a permit, she stated that she was domiciled in Pakistan. This statement as will also appear presently, was erroneous & may conceivably have been untrue.

[3] I was at first disposed to take the view that the appln. was premature, & it would have been premature if it had been clear that the authorities intended to prosecute her & did not intend to make an order for her deportation until the conclusion of the criminal trial. Sir Sultan Ahmed, for the petn. has, however, pointed out that orders for deportation, which in England can only be made by a Secretary of State, in the case of persons who have migrated to India from Pakistan, be or at any rate are being made by quite subordinate officials including Sub-Inspector of Police. On further consideration I accept the contention of Sir Sultan Ahmed that the order which was se ved on the petnr. was, in substance an order for her deportation. It is well settled that, when an order of that kind is served on a person residing in Great Britain or the United States of America, that person, if he can make out a *prima facie* case that he is a citizen & not an alien, is entitled to a writ of *certiorari* &, on the return to that writ being made, to a judicial determination of the question of his status. The petnr. contends that she is a citizen of ndia, & the contention is well grounded. The petnr. was born in India, & is domicfled in India. On marriage, a woman takes the domicile of her husband, & during the continuance of the marriage at least, cannot, by any act of hers, acquire another domicile. That is, & always has been, the British law, & was incorporated into British law from the Canon law which, in matrimonial matters, regulated the conduct of Christians throughout the whole of Western Christiandom. It is obvious that to permit a married woman to acquire a domicile distinct from the domicile of her husband would be to undermine the marriage tie &, indeed, render the purpose for which the marriage was contracted no longer capable of performance. I can see no reason to suppose that the position under the Hindu law or under the Muhammadan law is otherwise. Quite certainly the Hindu conception of marriage is that it creates a tie no less inadmissible than was the tie created by the rite of marriage among Christians belonging to the Roman Catholic Church.

[4] The Sub Inspector of Police or whatever superior official, under whose directions he acted, appears to have taken the view that, the petnr. being as evacuee & having entered India under a permit, which, he erroneously thought, had been improperly obtained, he was bound to make an order for her deportation. An affidavit has been put in by the petnr. in which she states that she went to Karachi to obtain medical treatment under a hakim who had migrated from India to Pakistan in or after 1947. If that was really so, she would not fall under cl. (i) of the definition of "evacuee" contained in cl. (c) of S. 2 of the Ordinance nor would she fall under cl. (ii) as the word "resident" occurring there must be construed as meaning a person who has taken up his or her residence in Pakistan permanently & is not residing there temporarily for any such purpose as obtaining better medical treatment then he or she is, or thinks himself, or herself to be, in a position to obtain in India. I am by no means satisfied of the truth of what is contained in this affidavit &, if I had to act on it, I should have required a supplementary affidavit to be filed giving further & better particulars, such, for instance, as the name of the hakim & the address at which he practised in India & now practises in Karachi. Even, however, assuming that the statements made in the affidavit are untrue & that the petnr. comes within the definition of "evacuee" in the Ordinance, nevertheless, she is also a citizen of India & as such, is entitled to remain in India. Where the wife of a citizen of India goes to Pakistan, then, if, while in Pakistan,

she conducts herself in such a manner as to create suspicions as to her loyalty to the Indian Union, she may, on her return to India, be subjected to such restrictions on her movements as Parliament may consider advisable, restrictions, for instance, similar to those which were imposed on the wives of British subjects who, prior to their marriage, had been enemy aliens during the war. Parliament has, however, not yet considered it necessary, so far at least as I am aware, to impose such restrictions.

[5] The petnrs. in Misc. Judl. Case No. 140 of 1950 are the three sons of Kumar Rani Sayeedeh Khatoon. These petnrs. are the joint mutwallis of certain wakf property. On 2-10-1949, this property was taken possession of by the Deputy Custodian of Evacuee Property. It is not disputed that the petnrs. are citizens of India, & *prima facie*, therefore, the action taken by the Deputy Custodian was an infringement of their fundamental right to hold & enjoy property. The reason why the Deputy Custodian took the action which he did was that this property belonged originally to Kumar Rani Sayeedeh Khatoon. On 4-5-1946, she executed & registered a deed of wakfnama in respect of it. Under this deed, she appointed herself the mutwalli & appointed the eldest of her three sons as the naib mutwalli, who was, in her absence, to manage the property. The deed provided that one-half of the income should be paid to her & that the other half should be paid in equal shares to her sons. The deed further provided that, on her death or on her relinquishing the office of mutwalli, her three sons should at once become joint mutwallis. On 2-6 1949, Kumar Rani Sayeedeh Khatoon wrote a letter to the eldest of her sons, who was the naib mutwalli, stating that she relinquished her office of mutwalli & also relinquished her right to receive one-half of the income from the wakf property.

[6] The Bihar Administration of Evacuee Property Ordinance, 1949, came into operation on 21-6-1949, but was repealed & replaced by Ordinance XXVII [27] of 1949 of the Central Govt. which was subsequently enacted as the Administration of Evacuee Property Act, 1950 (XXI [21] of 1950). The latter Ordinance & the Act gave a more extended meaning to the expression 'evacuee property" & brought within the purview of the expression any property which had belonged originally to an evacuee which the evacuee had transferred after 14 8-1947. The Deputy Custodian apparently took the view that, on 2 6-1949, there had been a transfer of this property by Kumar Rani Sayeedeh Khatoon to her sons. In taking this view, the Deputy Custodian clearly misdirected himself. No transfer of property took place on 2-6-1949. The transfer & theonly transfer, of this property which had taken place, took place on 4-5-1946, when the deed of wakfnama was executed. What Kumar Rani Sayeedeh Khatoon did on 2 6-1949, was to resign her office of Mutwalli, & this she was entitled to do by writing under her own hand & was under no obligation to execute & register any deed. I see no reason myself to suppose that she could not similarly renounce her right to a share in the income from the property. But, as she is a citizen of India, it is quite unnecessary to go into this point.

[7] The learned Govt. Advocate referred us to S. 28 of the Act & contended that this Ct. had no jurisdiction to interfere. The remedy open to the petnrs. was, Mr. S. K. Mitra suggested, to appeal against the order of the Deputy Custodian General, Mr. P. R. Das, for the petnrs., has invited our attention to two decisions of the H. C. of Australia in which it was held that a statute which took away the right of a citizen to obtain a prerogative writ was void in so far as it was repugnant to Art. 75 (v), Australian Constitution Act, 1900 *The King* v. *Hickman*, 70 Comm. L. R 593 & *The King* v. *Commonwealth Rent Controller*, 75 Comm. L. R. 361. Article 75 (v), Australian Constitution Act, 1900, (Provides that):

"in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, the High Court shall have original jurisdiction."

Article 226, Indian Constitution, operates in exactly the same way. It is quite clear that under Art. 226 it is not merely open to us, but it is our duty, to interfere when, as in these cases, there has been a flagrant & unjustified invasion of the fundamental rights of citizens. The appnls. ought, in my opinion, to be allowed & the rules, which have been issued ought to be made absolute. In Misc. Jud. Case No. 140 of 1950 I would issue a mandatory injunction requiring the opposite party forthwith to make over to the petnrs. the property of which three of them are the mutwallis & of which he has wrongly taken possession. The petnrs. are also entitled to their costs.

[8] **Sarjoo Prasad J.**—I agree.

M. J. C. 170 of 1950—The petnr. may well be entitled to claim the domicile of her husband, Captain Gopal Saran Narain Singh of Tikari. It is not clear from the records as to in what form the marriage of the petnr. with the said Captain was solemnised. Sir Sultan Ahmed appearing for the petnr. could not throw any light on the point. It appears, however, that Captain Gopal Narain Singh acknowledges the

petnr as his wife, & there is nothing on the record to the contrary. In that view she can claim the domicile of her husband though I am not certain that the petnr. does not come within the definition of "evacuee" as given in the Evacuee Property Ordinance subsequently followed by an Act. My learned brother has, if I may respectfully say so, correctly pointed out that if her conduct creates suspicion as to her loyalty to the Indian Union, she may be subjected to such restriction as the Legislature may consider advisable.

[9] *M. C. J. 140 of 1950* — M. C. J. 140 of 1950 should be allowed on the short ground that the petnrs. who are the joint mutwallis of the waqf property are entitled to be in possession of the property & not the custodian who had no jurisdiction to take possession of the same. It is to be remembered that Kumar Rani Sayeedeh Khatoon, the mother of these petnrs. relinquished her interest as mutwalli of the said waqf-ul-aulad long before the Bihar Administration of Evacuee Property Ordinance (III [3] of 1949) came into force on 21-6-1949. In the circumstances on the terms of the deed these petnrs. became joint mutwallis. These petnrs. are undeniably citizens of India. The genuineness of the letter dated 2-6-1949, under which the mutwallishiip was relinquished by Sayeeda Khatoon has not been questioned before us. Therefore, under S. 11 (2) (a) of the Ordinance the "mutwalli" not being an "evacuee" the waqf properties could not vest in the custodian & even assuming that Sayeeda Khatoon herself was an evacuee she had already ceased to be a mutwalli & to represent the waqf property before the Ordinance came into operation. For these reasons the action of the custodion was *ultra vires* the Ordinance itself.

[10] It is contended by the learned Govt. Advocate that there is a procedure provided under the Ordinance which should have been followed by the petnrs. in order to get redress against any illegal act or conduct on the part of the custodian or the Deputy Custodian. He refers to Ss. 24, 25 & 28 of the Ordinance for this purpose. I agree with my learned brother that S. 28 of the Ordinance cannot stand in the way of our exercising the powers which have been vouchsafed to us under Art 226 of the Constitution.

[11] But the thing which has caused me most serious concern is whether when a special remedy is provided under a particular statute, we should not leave the petnrs. to follow that remedy instead of seeking to invoke our extraordinary jurisdiction by way of a writ under Art. 226 of the Constitution. I am, however, impressed with the argument of Mr. P. R. Das to this extent that in case of flagrant & unjustified invasion of the fundamental rights of a citizen we must act in the exercise of our powers to protect him against injury & give him the relief provided the circumstances of the case are such that otherwise the alternate remedy available to the citizen may not be equally effectual, convenient & beneficial & by the time he gets the relief, the citizen may have suffered irretrievable loss & damage. We are informed that in this case the petnrs. did prefer a claim which was dismissed by the custodian & against which an appeal has been presented to the Custodian General in Delhi. But the said appeal has been pending since long & no attempt has been made to dispose of the same ; while in the meantime the petnrs. are being put to great loss & harassment. Particular reference in this connection may be made to the statements in paras. 18 and 19 of the petn. which have not been controverted before us by the learned counsel for the State. P. R. Das rightly contends that in the circumstances of this case there is no other efficacious remedy left to the petnrs. than to apply to this Ct. under Art. 226 of the Constitution otherwise irreparable injury was likely to be caused to them. In his petn. he has given details of the various instances of damage caused & apprehended, & those details have not been disputed. For the above reasons I agree with my learned brother that there is pre-eminently a case where mandatory injunction should be issued on the opposite party to make over forthwith the possession of the properties to the petnrs. who are the joint mutwallis of the waqf-ul-aulad.

M.K. *Petition allowed.*

A. I. R. (38) 1951 Patna 437 *[C. N. 113.]*

LAKSHMIKANTA JHA C. J. AND REUBEN J.

Raghubans Prasad Singh and others — Petitioners v. *Lakhan Gope — Opposite Party.*

Criminal Revn. No. 492 of 1950, D/- 24-4-1950.

Constitution of India, Art. 134 (1)(c)—Certificate of fitness for appeal in criminal cases—Guiding principles—Appeal against orders in revision.

Some guidance as to the meaning of the phrase "a fit one for appeal to the S. C." in Art. 134 (1) (c) can be furnished by the decisions relating to similar provisions for civil appeals contained in S. 109 (c), Civil P. C., regarding which it has been held that certificate should not be granted in a case which does not involve question of wide public or private importance. Where there is no want of jurisdiction in the Mag., an error of law or an error in the procedure adopted by him, is not a sufficient ground to grant leave to appeal to the S. C., unless there was something so irregular or outrageous as to shock the very basis of justice. These principles apply with greater force in a case

where a certificate is sought for an appeal against an order of the H. C. passed in exercise of discretionary revisional powers. [Paras 4, 6, 7]

K. P. Varma—for Petnrs.

Order.—This is an appln. by three persons who have been ordered to execute bonds for Rs. 1000 each with two sureties in the like amount for keeping the peace.

[2] The Mag. on the basis of a petn. filed on 1-2-1949, by one Lakhan Gope & a police report thereon, started a proceeding under S. 107, Cr. P. C., & ultimately passed the order referred to above. The order was upheld in appeal by the 3rd. Addl. Ses. J., Patna. The matter then came to this Ct. in revision, and the Chief Justice by his order dated 4-4-1950, rejected the appln summarily.

[3] We are asked to grant a certificate under Art. 134 (1) (c), Const. Ind., which provides that an appeal shall lie to the S. C from any final order in a criminal proceeding of H. C. in the territory of India if the H. C. certifies that the case is a fit one for appeal to the S. C. There is a proviso to Art. 134 (1) which lays down that an appeal under sub-cl. (c) shall lie subject to such provision as may be made in that behalf under cl. (1) of Art. 145 & to such conditions as the H. C. may establish or require; we are not concerned in the present case with any such provision or condition.

[4] The only ground on which we can grant a certificate is that it is a fit case for appeal to the S. C. It is conceded that the Mag. took cognizance on a police report of a likelihood of a breach of the peace. The Mag. had territorial jurisdiction & he being responsible for the peace in the sub-division, considered the case one in which the petnrs. should be called upon to show cause against the execution of bonds for keeping the peace. Therefore, he did exercise his jurisdiction bearing in mind the peace of the sub-division. That being so, there is no want of jurisdiction in the Mag. There may or may not have been an error of law or an error of fact. Even if there was an error of law or an error in the procedure adopted by the Mag., we do not think that that is a sufficient ground to grant leave to appeal to the S. C.

[5] The provision for a certificate of fitness for appeal in original cases was unknown before the commencement of the Constitution. An appeal to the Privy Council could lie only by special leave, & the settled practice of their Lordships of the Judicial Committee was not to act as a Ct. of appeal, review or revision. They interfered only if it was shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial or grave injustice had been done. Unless there was something so irregular or so outrageous as to shock the very basis of justice their Lordships refused to interfere. It was pointed out by Lord Dunedin in *Mohindar Singh* v. *Emperor*, 59 I. A. 233: (A.I.R. (19) 1932 P.C. 234: 34 Cr. L. J. 18) that "their Lordships have repeated *ad nauseam* the statement that they do not sit as a Ct. of criminal appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice."

This observation was repeated in *Otto George Gfeller* v. *The King*, A.I.R. (30) 1943 P. C. 211 at p. 216: (45 Cr. L J. 241). The same view has been reiterated by their Lordships of the F. C. in the case of *Kapildeo Singh* v. *The King*, (A.I. R. (37) 1950 F. C. 80: 51 Cr. L. J. 1057) (Cr. App. No. 1 of 1949 of the Federal Court—an appeal arising by special leave against an order of the Patna H. C.). Their Lordships have held that the F.C. does not act in the exercise of its power to review the course of justice in criminal cases in the free fashion of a fully constituted Ct. of criminal appeal. A mere mistake on the part of the Ct. below, for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character.

[6] It is not pointed out that any injustice of a grave character has been done to the petnr. by reason of a mistake in the procedure. The observations of their Lordships apply with all the greater force in a case like the present, where a certificate is sought for an appeal against an order of the H. C. passed in exercise of discretionary revisional powers.

[7] Under Art. 134 (1) (c) of the new Constitution, the H. C. has to certify that the case is "a fit one for appeal to the S. C." Some guidance as to the meaning of this expression may be furnished by the decisions relating to the similar provision for civil appeals contained in S. 109 (c), Civil P. C., regarding which it has been held that a certificate should not be granted in a case which does not involve question of wide public or private importance: see *Banarsi Parshad* v. *Kashi Krishna Narain*, 28 I. A. 11 at p. 13; (23 ALL. 227 P. C.), *Radhakrishna Ayyar* v. *Swaminatha Ayyar*, 48 I.A. 31 at p. 34: (A.I.R.(8) 1921 P. C. 25), *Mritunjoy* v. *Balmakund*, 6 Pat. L. J. 125: (A.I.R. (8) 1921 Pat. 33), *Maung Ba Than* v. *District Council, Pegu*, 6 Rang. 43: (A. I. R. (15) 1928 Rang. 187), *Ruchcha Saithwar* v. *Hansrani*, 50 ALL. 640; (A.I.R. (15) 1928 ALL 220).

[8] Further guidance is afforded by the decision of their Lordships, of the Judicial Committee in the case of *Delhi Cloth & General Mills Co. Ltd.* v. *Income-tax Commr., Delhi*,

54 I. A. 421 : (A.I R. (14) 1927 P. C. 242). This was a case under the Income-tax Act. There was no provision for appeal to the P. C. under the Income-tax Act, 1922, till S. 66A was added by S. 8, Income-tax (Amendment) Act (XXIV [24] of 1926). The relevant provision with which we are concerned is S. 66A, cl. (2), which runs as follows:

"An appeal shall lie to His Majesty in Council from any judgment of the H. C. delivered on a reference made under S. 66 in any case which the H. C. certifies to be fit one for appeal to His Majesty in Council."

[9] While interpreting the words "to be a fit one for appeal to His Majesty in Council" Lord Blanesburg observed:

"These words are textually the same as the concluding words of S. 109 (c), Civil P. C., & coupled with the carefully limited referential words to the Civil P. C., in sub-s. (3), suffice, in their Lordships' judgment, to exclude from any right of appeal cases which fall within the requirements of S. 110 of the Code, & are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council. *It was conceded in argument that if sub-s. (2) of the section had stood alone, it would be difficult to escape from the construction of it which has just been indicated.*" (The underlinings (here italicised) are ours).

[10] Therefore, their Lordships have in interpreting S. 66A, sub-s. (2), adopted the same rule of interpretation as they have laid down for interpretation of the provision of S. 109, cl. (6), Civil P. C.

[11] In view of these decisions, we think we shall not be justified in granting a certificate under Art. 134, cl. (c) of the Constitution.

[13] A similar matter came up before us in *Mahanth Ramkishun Das* v. *The State*, (Cr. Revn. No. 91 of 1950) where we refused to grant a certificate. At that time the recent judgment in *Kapildeo Singh* v. *The King*, (A.I.R. (37) 1950 F. C. 80: 51 Cr. L. J. 1057) was not brought to our notice. We feel satisfied that the view we took in the case of *Mahanth Ramkishun Das* (Cri. Revn. No. 91 of 1950) is fortified by the recent order of the F. C. The appln. is rejected.

R.G.D. *Application rejected.*

A. I. R. (38) 1951 Patna 439 (1) *[C. N. 114.]*

SHEARER AND RAMASWAMI JJ.

The Province of Bihar — *Appellant* v. *Abdul Majid*—*Respondent.*

Federal Court Appeal No. 64 of 1949, D/-12-9-1950.

Civil P. C. (1908), Ss. 109 and 110 — Question involving right of public servant to sue State for arrears of salary — Leave to appeal to Federal Court.

The decision on a question of law as to the right of a public servant to sue the State for arrears of salary is not of such sufficient urgency as to justify the Court in granting leave to appeal to the Federal Court, though it cannot be disputed that the point involved is a substantial question of law. [Para 1]

Anno. C. P. C., S. 109, N. 10; S. 110, N. 17.

Govt. Advocate — for Appellant; M. Rahman and S. S. Asghar Husain —for Respondent.

Order.—Speaking with the greatest respect, we are unable to appreciate the ground on which Manohar Lall and Mahabir Prasad JJ., declined to follow the decision of the Judicial Committee in *High Commissioners for India and Pakistan* v. *I. M. Lall*, 75 I. A. 225 : (A.I.R. (35) 1948 P. C. 121). It cannot be disputed that a substantial point of law arises. The sum of money involved in the proposed appeal is, however, comparatively small. The learned Government advocate suggested that the question that arose was one of general public importance, being, namely, a question as to the right of a public servant to sue the State for arrears of salary. Suits of this kind may from time to time be instituted but, so far as we are aware, the necessity for instituting them can only occur at infrequent intervals. The decision on the question of law that arises is not, in our opinion, of such sufficient immediate urgency as to justify us in the present case in granting leave to appeal. The application will, accordingly, be dismissed, but there will be no order for costs.

V.B.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 439 (2) *[C. N. 115.]*

JAMUAR AND RAI JJ.

Mohit Lal Pandit — Petitioner v. *The State.*

Criminal Misc. Case No. 485 of 1950, D/-4-10 1950.

(a) Public Safety — Preventive Detention Act (1950), S. 3—Jurisdiction.

The mere fact that the detenu's activities extended over places within the area of adjoining district over which the Dist. Mag. has no jurisdiction does not deprive the Dist. Mag. of his authority to order his detention when at the time of making the order the detenu was admittedly within his district. [Para 3]

Per *Jamuar J.*—The order being one for preventive detention the Dist Mag. is entitled to draw an inference from the past acts of the detenu in those places. [Para 11]

(b) Constitution of India, Art. 22 (5) — Grounds of detention — Detention under S. 3, Preventive Detention Act, 1950 — Public Safety — Preventive Detention Act (1950), S. 3.

The expression "the maintenance of public order" is comprehensive enough to include "the security of the State" as used in S. 3, Preventive Detention Act, 1950. Therefore, when the grounds supplied to the detenu do not suggest that there were other grounds besides those mentioned it cannot be said that they do not disclose all the grounds merely because they were described as concerning maintenance of public order while the order of detention stated that the detention was for the security of the State as well. [Paras 4, 12]

(c) Constitution of India, Art. 22 (5) — Grounds of detention—Vagueness of —Public Safety—Preventive Detention Act (1950), S. 3.

The grounds on which the officer passes the order for detention within the meaning of S. 3, Preventive Detention Act, 1950 should not necessarily mean the detailed facts on which a prosecution in a criminal Ct. may be launched. It is not necessary to mention in the grounds the particulars in the same way as they are mentioned in a charge of a criminal offence.

It is not safe to judge the vagueness of grounds in a particular case with reference to the grounds in other cases. The decision will depend on the contents of the grounds in each case. Hence, where in a case of detention for instigating in collaboration with a notorious outlaw, the landless labourers to loot foodgrains the grounds served upon the detenu clearly mentioned the places at which the disturbances have taken place & also the period when they took place the mere fact that the exact date & hour & the part played by the detenu in each of the occurrences were not set out in detail will not render the grounds vague. [Para 5]

(d) Public Safety — Preventive Detention Act (1950), S. 3—Mala fides.

Preventive justice in all cases must proceed to a certain extent upon suspicion or anticipati n as distinct from proof. For passing an order for detention it is really the satisfaction of the Magistrate which is necessary. If the police have sufficient material to satisfy him he can act under the Act, even though there is no detailed evidence of the type on which a Ct. of law can convict an accused. Hence, the fact that the police were unable to furnish a detailed report till a date very near the one on which the order was passed cannot lead to the inference that the order was passed *mala fide* in the absence of materials. [Para 6]

(e) Constitution of India, Art. 25 (5)—"As soon as may be" — Held, delay of 22 days was not unreasonable in the case. [Para 8]

B. C. Ghosh and D. K. Sinha — for Petnr.; Govt. Advocate—for the State.

Rai J.—This is a petn. under Art. 226, Const, Ind., for issue of a writ in the nature of *habeas corpus* & for the release of the petnr.

[2] The facts relating to the detention of the petnr. may be stated as follows. The petnr. along with others was arrested by the Assistant Sub-Inspector of Police, Rupauli police station, & was forwarded in custody to the Sub-Divisional Officer, Sadar Purnea, with the following note :

"I have the honour to forward herewith in custody the following accused persons who are members of communists dacoits & who are exploiting the station in order to create trouble & breaking the peace, tranquillity of the locality. They are reported to be concerned in several looting & agitating the men in order to create chaos & confusion in the locality. They have acted in a manner prejudicial to the public safety & maintenance of the public order & it is, therefore, necessary that in order to maintain peace & tranquillity in the locality, they have to be detained under S. 2 (1) (a) of Bihar Maintenance Public Order (No. 2) Ordinance, 1949. Report for their detention is being submitted."

[3] The said learned Sub-Divisional Officer thereupon passed the following order :

"6-6-50 (1) Mohit Lal Pandit, son of Sukhai Pandit of Gaddighat; (2) Baldeo Mandal, son of Faudi Mandal of Sripur; (3) Nasib Mali son of Madhu Mali of Sripur; (4) Jagannath Mandal, son of Chuman Mandal of Sripur ; (5) Thothai Mandal, son of Ghina Chaudhury of Sripur; P. S. Rupauli, have been brought in custody for alleged offence under S. 151/107, Cr. P. C. They do not complain of any ill treatment. They are remanded to jail hajat till 9.6.50. If any bail petn., let it be put up."

The petnr. was not successful in getting bail before the learned Sub-Divisional Officer. He, however, moved the Ses. J. of Purnea & was granted bail on 3-7-1950. On 4-7-1950. the Dist. Mag. of Purnea was pleased to pass the following order for his detention :

"Whereas I am satisfied with respect to the person known as Mohit Lal Pandit, son of late Sukhai Pandit of village Gaddighat, P. S. Rupauli, Dist Purnia, that with a view to preventing him from acting in a manner prejudicial to the security of the State & maintenance of public order, it is necessary to make the following order :

Now, therefore, in exercise of the powers conferred by sub-s. (2) of S. 3, Preventive Detention Act, 1950 (IV [4] of 1950), I hereby direct that the said Mohit Lal Pandit be detained for a period of 6 months from 5-7-50.

He shall be placed in detention in Purnea jail & classified as Division III "X"."

The grounds of detention which were served on the petnr., are to the following effect :

"1. In league with notorious communist outlaw Nakshatra Malakar he is indulging in activities prejudicial to maintenance of public order.

2. He has been moving from village to village instigating the landless labourers to loot food-grains of the richer section of the people.

3. Directly as a result of these instigations & taking advantage of the scarcity of food-grains in the locality, the incited landless labourers & others organised a number of raids in different villages in the area comprised of the police stations of Naugachia, Bihpur & Rupauli within the period of 28th May till 3-6-1950, in course of which food-grains & other properties were looted from Kamats, shops & other premises by mobs sometimes numbering more than a thousand.

4. In these organized loots Shri Mohit Lal Pandit personally led some of these raids & played a big part in organizing all these lootings, synchronizing them with similar lootings perpetrated by an absconding criminal named Nakshatra Malakar of the Communist Party of India.

In these circumstances I am satisfied that if he is allowed to remain at large, he will indulge in activities prejudicial to the maintenance of public order. For the prevention of such activities I consider his detention necessary. Shree Mohit Lal Pandit is informed that he may make a representation in writing against the order under which he is detained. His representation, if any, may be addressed to the Under Secretary, Political Department, Special Section, & forwarded through the Superintendent of the Jail, as soon as possible."

In support of the petn. Mr. Ghosh, the learned Advocate for the petnr., urged several points. He urged that some of the places of loot & disturbance as mentioned in ground No 3 quoted above were outside the district of Purnea & hence the Dist. Mag. had no jurisdiction to issue the order of detention under S. 3, Preventive Detention Act, 1950. Now, out of the three police stations, namely, Naugachia, Bihpur & Rupauli within which the raids had been organised & loot had taken place, two of the police stations are within the adjoining district

of Monghyr, & police station Rupauli admittedly lies within the district of Purnea. The detenu was admittedly within the district of Purnea when the order in question was passed. In my judgment, there was no want of jurisdiction in the Dist. Mag. in passing the order in question. Section 3 of the Act does not contemplate any such restriction on the power of the Dist. Mag. If the activities of the detenu were carried out in villages situated within the adjoining police station of another district as well as in villages situated within the district of Purnea, it would not take away the jurisdiction of the Dist. Mag. of Purnea to take action as contemplated by the Act.

[4] Mr. Ghosh further contended that the order of detention contemplated the detention of the petnr. "with a view to preventing him from acting in a manner prejudicial to the security of the State & maintenance of public order". But grounds that were served on the petnr. disclosed grounds concerning "the maintenance of public order" only. According to him, therefore, the authorities concerned had withheld some of the grounds on which the detention of the petnr. had been based. He, in this connection, referred to Art. 22, cl. (5) of the Constitution which runs as follows :

"When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

He stressed that when the Constitution enjoined the service of the "grounds", it certainly contemplated all "grounds" on which the order was based & not only some of the "grounds". In support of his contention he further relied upon a recent decision of a Bench of this Ct. in the case of *Chandra Shekhar Prasad Singh* v. *The State*, Cr. Misc. C. No. 126 of 1950 : (A. I. R. (38) 1951 Pat. 389). He also relied upon a decision of the S. C. in the case of *Romesh Thapper* v. *State of Madras*, A. I. R. (37) 1950 S. C. 124 : (51 Cr. L. J. 1514), wherein Patanjali Sastri J. dealt with the distinction between "public order" & "public safety". According to Mr. Ghosh, the grounds relating to the maintenance of public order must necessarily be different from the grounds relating to the "security of the State". The Division Bench of this Ct. in the case of *Chandra Shekhar*, (A. I. R. (38) 1951 Pat. 389) has fully considered this aspect of the case & has also dealt with the judgment of their Lordships of the S. C. in the case of *Romesh Thapper* A. I. R. (37) 1950 S. C. 124 : (51 Cr. L. J. 1514). It has been clearly held in that case that the expression "the maintenance of public order" is comprehensive enough to include "the security of the State" as used in S. 3, Preventive Detention Act, 1950. The grounds served on the petnr. do not suggest that there were other grounds which led to the passing of the order of detention. In my judgment, therefore, there is no merit in the contention of the learned Advocate for the petnr. that the detention is invalid because some of the grounds have been withheld from the detenu.

[5] Mr. Ghosh further contended that the grounds served on the petnr. are vague & indefinite with the result that he is not in a position to make an effective representation to the proper authorities as contemplated by the Preventive Detention Act, 1950. In my judgment, the grounds are not vague or indefinite. The grounds do mention loot at several places within the police stations of Naugachia, Bihpur & Rupauli between the 28th of May & 3.6.1950. It may be kept in mind that the grounds on which the officer passed the order for detention within the meaning of S. 3, Preventive Detention Act, 1950, should not necessarily mean detailed facts on which prosecution in a criminal Ct. may be launched. It is not necessary to mention in the grounds the particulars in the same way as they are mentioned in a charge of a criminal offence. In support of his contention, that the grounds are vague & indefinite, Mr. Ghosh relied upon the decisions of this Ct. in certain unreported cases, such as Cr Misc. No. 425 of 1948, decided on 7-10-1948 ; Cr. Misc. 175 of 1949, decided on 3-5-1949; Cr. Misc. 529 of 1949, decided on 21-7-1949 ; Cr. Misc. 608 of 1949, decided on 10-8-1949; & *L. K. Barman* v. *The State*, Cr. Misc. No. 124 of 1950, decided on 5-4-1950: (29 Pat. 502). He also relied upon the case of *Nek Mohammad* v. *Province of Bihar*, A. I. R. (36) 1949 Pat. 1: (50 Cr. L. J. 44 F. B.). At the outset, I may mention that it is not safe to judge the vagueness of grounds in a particular case with reference to the grounds in other cases. The decision will certainly depend on the contents of the grounds in each case. It is not necessary for me to deal in detail with the grounds in those cases. To me it appears that the circumstances of those cases were different from the circumstances of the present case. In this case the locality where the disturbances are said to have taken place is clearly mentioned. The dates between which the disturbance took place have also been mentioned. It is true that exact date & hour & the part played by the petn. in each of the occurrences in detail has not been given in the grounds served upon him. But, in my opinion, that is not necessary. The contention of the

learned Advocate, therefore, that the grounds are vague & indefinite cannot be accepted.

[6] Mr. Ghosh further contended that the order of detention was *male fide*. He drew my attention to the various orders passed by the Sub-Divisional Officer before whom the petnr. was originally produced. On several dates, the Sub-Divisional Officer asked for a further report from the police regarding the activities of the petnr., but no such report was produced. He contended that if the police was not in a position to produce the report before the Sub-Divisional Officer, how could it produce the same before the Dist. Mag. on 4-7-1950, to enable him to pass the order of detention. It might have been that the police was not in possession of a detailed information regarding all the activities of the petnr. which were spread over several villages some of which were situated within the neighbouring district. The detailed evidence on which a conviction in a Ct. of law can be based may not have been available to the police by that date. Nevertheless, the police might have been in possession of such materials which would satisfy the Dist. Mag. to take action in accordance with the provisions of the Preventive Detention Act, 1950. It is really the "satisfaction" of the Mag. that is material. In answer to the argument of the learned Advocate for the petnr. the learned Advocate for the State relied upon the case of *Liversidge* v. *Anderson*, 1942 A. C. 206: (110 L. J. K. B. 724). He particularly relied upon the following passage in that report:

"The legislature obviously proceeds on the footing that there may be certain persons against whom no offence is proved nor any charge formulated, but as regards whom it may be expedient to authorise the Secretary of State to make an order for detention."

In this connection the case of *Rex* v. *Haliday*, 1917 A. C. 260: (86 L. J. K. B. 1119) may be referred to. In considering the advisability of taking action under a statute for detaining a suspect Lord Atkinson said as follows:

"And as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent on suspicion or anticipation as distinct from proof."

There is no reason in the present case to presume that the Dist. Mag's. action was *mala fide* in any respect. It appears that the utmost in his mind was the maintenance of public order & the satisfaction on the materials placed before him that the detention of the petnr. was justifiable in the circumstances of the present case.

[7] Mr. Ghosh further contended that the grounds in this case were served long after the passing of the order of detention. The provisions of Art. 22, cl. (5) of the Constitution of India contemplate that

"The authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made & shall afford him the earliest opportunity of making a representation against the order."

In the present case the delay is said to have been a delay of 22 days.

[8] The learned Advocate for the State, in this connection, submitted that the grounds of detention have to be forwarded to the State Govt. for approval, & unless the detention is approved on those grounds, they are not served on a detenu. According to him, the delay made in this case was not such unreasonable as required the issue of a writ contemplated by the present petn. Whatever may be the reason, I do not consider the delay in this case to be so unreasonable as to require this Ct. to act under Art. 226 of the Constitution.

[9] For the reasons given above, the petnr. is not entitled to the reliefs claimed in this petn. which is hereby dismissed.

[10] **Jamuar J.**—In support of this appln. for the release of the petnr. on the ground that his detention is illegal, Mr. Ghosh argued a number of points.

[11] In the first place, he contended that the Dist. Mag. of Purnea, who made the order for the detention of the petnr. had no jurisdiction to pass that order. The contention was that in ground No. 3 of the grounds of detention served upon the petnr. there was stated that directly as a result of instigations (coming from the petnr.) a number of raids had taken place in different villages in the areas comprised of the police stations of Naugachia, Bihpur & Rupauli, & since the police stations of Naugachia & Bihpur are not within the district of Purnea, the Dist. Mag. of Purnea had no jurisdiction to take notice of incidents which had occurred within those police stations & that therefore since a part of the grounds for the detention of the petnr. related to incidents outside the dist. of Purnea, the order of detention of the petnr. by the Dist. Mag. of Purnea was without jurisdiction. I am quite unable to give effect to this contention. In the same connection it was suggested that the Dist. Mag. of Purnea should not have taken into consideration the past activities of the petnr. in villages within the police stations of Naugachia & Bihpur. At the time of the passing of the order by the Dist. Mag. of Purnea, the petnr. was within his district. The order was for preventive detention, that is to say, it was meant for preventing the petnr. from acting in any manner prejudicial to the public safety & maintenance of order. The Dist. Mag, was, there-

fore, in my opinion, entitled to draw an inference from the past acts of the petnr. within those two adjoining police stations.

[12] The next contention of Mr. Ghosh was that whereas the order of detention served upon the petnr. was "with a view to preventing him from acting in any manner prejudicial to the security of the State & maintenance of public order," the last paragraph of the grounds served upon the petnr. shows that the grounds were only in respect of preventing the petnr. from indulging in activities "prejudicial to the maintenance of public order." Mr. Ghosh, in these circumstances, argued that the grounds served upon the petnr. disclosed merely the grounds regarding "the maintenance of public order" & not regarding "the security of the State," & hence his contention was that all the grounds had not been served upon the petnr.; the authorities having apparently withheld some of the grounds for the detention of the petnr. It is now well settled that the authorities making the order are bound to communicate all the grounds to a detenu & cannot withhold any ground on the basis of which the order of detention has been passed. The question in the present case, however, is whether any ground has been withheld. Mr. Ghosh's contention is based upon a distinction which he seeks to make between "the security of the State" & "the maintenance of public order." It has been recently decided by a Division Bench of this Ct. in the case of *Chandra Sekhar* in Cri. Misc. Case No. 126 of 1950 : (A. I. R. (38) 1951 Pat. 389) that the expression "the maintenance of public order" is comprehensive enough to include the expression "the security of the State." The distinction which Mr. Ghosh, therefore, seeks to make is not supported by the authorities. Clearly, therefore, the conclusion must be that the grounds served upon the petnr. are the grounds upon which the order for the detention of the petnr. is based & there is no suggestion that there were other grounds as well which have been withheld.

[13] The next argument in support of the petn. was that the grounds of detention served upon the petnr. are too vague & indefinite to enable the petnr. to make an effective representation to the proper authorities as contemplated by the Preventive Detention Act, 1950. The grounds have been set out in the judgment of my learned brother & I agree with the conclusions arrived at by him that this contention must fail.

[14] My learned brother has dealt with the other aspects of the case presented to us in the course of the argument & I find myself in general agreement with him.

[15] For these reasons I find no justification for ordering the release of the petnr. I would accordingly dismiss this appln.

M.K. *Petition dismissed.*

A. I. R. (38) 1951 Patna 443 *[C. N. 116.]*

DAS AND NARAYAN JJ.

The State v. *Dasrath Jha*—*Resp.*

Original Cri. Misc. Case No. 9 of 1950, D/- 19-12-1950.

(a) Contempt of Courts Act (1926), S. 2—Distinction in position of contemner and accused.

The position of an alleged contemner is not exactly that of an accused person, and unlike the latter he can always file an affidavit or make a statement on oath. [Para 3]

Anno. Cont. of Cts. Act, S. 2, N 2, Pt. 20.

(b) Contempt of Courts Act (1926), S. 2 — Proceedings for contempt—Nature of.

Proceedings for contempt of Court are of a summary nature; such proceedings are not suitable for the decision of a hotly contested question of fact. [Para 3]

Anno. Cont. of Cts. Act, S. 2, N. 2, Pt. 21.

(c) Contempt of Courts Act (1926), S. 1 — Distinction between criminal and civil contempts.

There is a fundamental distinction between contempts that are criminal and those that are civil. The former consist in a conduct that offends the Majesty of Law and undermine the dignity of the Court. A civil contempt, on the other hand, is a failure to obey a Court's order issued for the benefit of the opposing party, and the principal object of a civil contempt is to secure the enforcement of the order. The Courts do not ordinarily interfere unless the disobedience is shown to be wilful. [Para 3]

Anno. Cont. of Cts. Act, S. 1, N. 3.

(d) Contempt of Courts Act (1926), S. 3—Benefit of doubt.

Proceedings for contempt of Court, though not criminal, are of a quasi-criminal nature and, therefore, where there is any reasonable doubt, the person charged with contempt is entitled to the benefit of such doubt. [Para 3]

Anno. Cont. of Cts. Act, S. 3, N. 1, Pt. 15.

Govt. Advocate and S. R. Ghosal — for the State ; S. C. Misra and B. K. N. Singh — for Resp.

Narayan J. — This is a rule calling upon one Dasrath Jha, who is one of the defts. in Title Suit No. 20 of 1950 pending in the Court of the Subordinate Judge of Dumka to show cause why he should not be committed for contempt of Ct. The rule was issued on a report submitted to this Ct. by the learned Subordinate Judge, the report being that the deft. has been interfering with the Receiver's possession over the tank which is the subject-matter of the aforesaid suit. The suit is for recovery of possession of the said tank and for compensation, the contention of this deft. being that he was allowed to take possession of the tank by the manager or the agent of the pltf. who had promised to execute a lease in his favour. By an order dated 3-7-1950 one Babu Ram Narain Prasad, Pleader, was appointed the Receiver, and on

14-7-1950 he submitted a report to the learned Subordinate Judge that it had been reported to him by Mukhi Muchi & Jugal Misra whom he had deputed for announcing his appointment, that the deft. had prevented them from making the announcement & had refused to give possession of the tank to them as the Receiver's men. On that very date the deft. was directed to make over possession of the property to the Receiver, & the Receiver was directed to report by 20-7-1950 as to whether he had taken possession of the tank or not. On 25-7-1950, the Receiver reported to the learned Subordinate Judge that he had received a letter from the deft. on 14-7-1950 in which he had stated that the Receiver might continue in possession & that he would never interfere with his possession. The Receiver, however, further reported that his men, Jugal Misra & Mukhi Muchi had again been prevented by one Tope Singh from making the announcement & that about thirty persons had been found angling in the tank. Five out of these thirty persons were alleged to have told Jugal Misra that they had been angling with the permission of the deft. Jugal Misra & Mukhi Muchi filed affidavit before the learned Subordinate Judge in which they stated that they had been prevented from making the announcement by Tope Singh who is an employee in the tea-stall of Dasrath Jha, & three out of the five persons who are said to have admitted that they had been angling with the permission of the deft. also filed affidavits stating that they had caught fish with the permission of the deft. & that the defendant had taken his share out of the fishes caught. No counter-affidavit was filed by the deft., & the learned Subordinate Judge was of the opinion that though the deft. had undertaken not to interfere with the Receiver's possession he had actually interfered with his possession inasmuch as he had permitted other persons to fish in the tank.

[2] In this Ct., however, one counter-affidavit was filed on 21-11-1950 by one Sarbanand Missir on behalf of the deft. in which the allegations made against the deft. were controverted. On 14-12-1950, the deft. himself filed another affidavit in which he made the same statements which had been made by Sarbanand Missir in the affidavit filed on 21-11-1950. The contention of the deft. is that he has no concern whatsoever with Tope Singh, & that while Mukhi Muchi is a tenant of the pltf. & a servant in the pltf.'s estate, Jugal Missir is a sipahi in the pltf.'s estate. About Amal Chandra Roy, one of the three persons who are said to have fished in the tank, the contention of the deft. is that he is his sworn enemy and had filed a number of false complaints against him before the Provincial Congress Committee. About the two other persons who have sworn the affidavits, namely, Bhola Rakshit, & Nabanidhar Gorain, the deft. says that the former was himself an applicant for taking a lease of the pond in suit and that the latter is the pltf.'s raiyat & a thikadar of the timber belonging to the pltf. Dasrath Jha has made one very important statement in his affidavit, & it is this that when the fishing took place the Receiver himself was present.

[3] No doubt, it is a circumstance against the defendant that he did not file any counter-affidavit before the learned Subordinate Judge controverting the allegations which had been made by Jugal Misra, Mukhi Muchi, Bhola Rakshit, Nabanidhar Gorain & Amal Chandra Roy in their affidavits. But the position of an alleged contemner is not exactly that of an accused person, & unlike the latter he can always file an affidavit or make a statement on oath. As already pointed out, the deft. has been able to allege in this Ct. something against each of the deponents on whose affidavit reliance is placed on behalf of the State. It has been repeatedly pointed out that proceedings for contempt of Court are of a summary nature & that such proceedings are not suitable for the decision of a hotly contested question of fact. Of course, there is nothing to prevent us from taking evidence, & there is no hard & fast rule to the effect that no evidence can be taken. But the question is whether it would be desirable to hold an enquiry into the truth or otherwise of the statements made in the affidavits filed by Amal Chandra Roy & others. There is a fundamental distinction between contempts that are criminal & those that are civil. The former consist in a conduct that offends the Majesty of Law & undermine the dignity of the Ct. A civil contempt, on the other hand, is a failure to obey a Ct.'s order issued for the benefit of the opposing party, & the principal object of a civil contempt is to secure the enforcement of the order. The Cts. do not ordinarily interfere unless the disobedience is shown to be wilful. What is important to note in this case is that on 14-7 1950 this deft. had written a letter to the Receiver in which he had stated that as the tank had been put under the management of the Receiver, he would never go to the tank with the intention of fishing & that the tank would continue to be in the Receiver's possession. The Receiver had no doubt deputed two persons to announce his appointment by beat of drum, but it appears that he personally never went to the tank to take possession or to arrange for the fishing. It is a very striking circum-

stance that the Receiver never stated before the Ct. that he had been to the tank & that in his presence the deft. interfered with his management or possession. The Receiver has depended entirely on the report of the two persons one of whom is a drummer & the other, according to the allegation of the deft., a sipahi of the pltf.'s estate. We cannot at all be sure in this case that Jugal Missir & Mukhi Muchi are not persons connected with the pltf.'s estate & are persons who can be regarded as independent & disinterested & as such it will not, to my mind, be safe to act on the affidavits of these two persons; & it will be still more unsafe to act on the affidavits of the three other persons, Amal Chandra Roy & others. Regarding Amal Chandra Roy the deft. has been bold enough to state that he is his sworn enemy & had filed a number of false complaints against him before the Provincial Congress Committee. The deft. further says that he had filed a complaint against one Kalachand Chakravarti in which the charge was of black-marketing & that this Kalachand Chakravarti is the Mama (maternal uncle) of Amal Chandra Roy. Bhola Rakshit is said to be a dismissed compounder of the Dumka hospital & the allegation is that he had himself applied for a lease of this pond in suit. He was thus, according to the deft., a competitor for the lease of the tank in suit. Nabanidhar Gorain is said to be a raiyat & a thikadar of the pltf. It is to be noted that the pltf. is an absentee landlord, & it would appear from paragraph (1) of the plaint that he ordinarily resides in England & that his estate in Dumka is managed by his managers & agents. Amal Chandra Roy & others are not fishermen by profession, & it is very doubtful if the deft. would engage them for fishing in this disputed tank. Nabanidhar Gorain says in his affidavit that he had obtained a permit from the deft. for catching fish after he had paid the deft. Re: 1. If so, that permit ought to have been produced. If a permit had been issued by the deft. to Nabanidhar Gorain, there is no reason why similar permits should not have been issued to Bhola Rakshit & Amal Chandra Roy. Thus, some substantial criticisms can be advanced against the affidavits that have been filed by Amal Chandra Roy and others. Proceedings for contempt of Court, though not criminal, are of a quasi-criminal nature & therefore, where there is any reasonable doubt, the person charged with contempt is entitled to the benefit of such doubt. The circumstance that the Receiver himself never visited the tank & has not come forward with the statement that there was any interference by the deft. in his presence is by itself a very strong circumstance, & it appears to me to be quite unsafe to place absolute reliance on the affidavits that have been filed by Jugal Missir, Amal Chandra Roy & others. All Cts. before exercising their jurisdiction to commit for contempt have to act with care & circumspection, & on the materials that are available in the present case I am of opinion that the alleged contemner is at least entitled to the benefit of a reasonable doubt.

[4] I would, therefore, discharge this rule.

[5] **Das J.** — I agree.

V.S.B. *Rule discharged.*

A. I. R (38) 1951 Patna 445 *[C. N. 117.]*

NARAYAN AND C. P. SINHA JJ.

Dwarka Nath Sahai and others — Appellants v. *Kedar Nath Sahai and others —Respondents.*

A. F. O. O. No. 368 of 1948, D/- 4-12-1950.

(a) Arbitration Act (1940), S. 21—Parties to submission.

It is not necessary that all the parties to a suit should concur in an application for an order of reference in order to make the submission valid; it is only necessary that all the parties who are interested in the subject-matter of the reference should join in the submission. An award, therefore, in arbitration in a suit for partition of joint Hindu family, cannot be held to be invalid merely because the transferees from a coparcener whose interest is, however, protected by the order given by the arbitrator, were not parties to the submission. [Para 6]

Anno. Arb. Act, S. 21 N 3, 4.

(b) Hindu law — Partition — Partial partition admitted —Presumption—Onus of proof —Evidence Act (1872), Ss. 101-103

When a partition is admitted or proved, the presumption is that all the property was divided, & if anybody alleges that family property in the exclusive possession of any of the members after the partition is still to be deemed as joint property liable to be partitioned, he has to prove that allegation. But there must be either a clear admission or a definite finding to the effect that there was a partial partition, & in absence of an admission on the point a finding with regard to it can be given only after a consideration of the evidence adduced. [Para 8]

Anno. Evi. Act, Ss. 101-103 N. 47.

(c) Hindu law —Partition —Any arrangement for the sake of convenience in cultivation does not amount to partition. [Para 8]

(d) Arbitration Act (1940), S. 30 — Award — Setting aside —Error of law.

No Court will review the arbitrator's conclusions or findings if he has acted within his authority and according to the principles of justice and behaved fairly to both parties. [Para 12]

Where partition suit is referred to the arbitrator, and the arbitrator accepts one of the two versions put forward by the contending parties this cannot be regarded as a case in which the arbitrator can even be said to have committed an error of law. [Para 12]

Anno. Arb. Act, S. 30 N. 6.

Girja Nandan Prasad, Ram Nandan Prasad and G. S. Prasad — for Applts.; Roy Paras Nath and Umesh Ch. Prasad — for Respts.

Narayan J. — This appeal is directed against an order of the Subordinate Judge,

Bhagalpur, setting aside an award. The award had been given by one Mr. Anant Prasad who had been appointed an arbitrator by the parties of Partition Suit No. 5 of 1947, to decide the dispute which is the subject-matter of that suit. After the award had been submitted, the defendant No. 1 filed an objection & contended that the award was not fit to be accepted. This objection found favour with the learned Subordinate Judge who set aside the award & directed that the suit be heard on the merits.

[2] The pltfs & the deft. No. 1 are the descendants of one Babu Baij Nath Sahai. Baij Nath Sahai left two sons, Bhagwat Sahai & Bhawani Sahai. The pltf. No. 1 is the son of Bhawani Sahai, & the other pltfs. are the sons or grandsons of the pltf. No. 1. The deft. No. 1 is the son of Bhagwat Sahai, the other defts. being transferees from deft. No. 1. These other defts. never appeared in the suit, & on a petn. that was filed on 24-9-1947 by the lawyers representing the pltfs & the deft No. 1, the case was referred to arbitration & Mr. Anant Prasad, a common relation of the parties, was appointed the arbitrator. The award was submitted on 5-6-1948.

[3] The allegation of the pltfs. was that after the death of Bhawani Sahai, there arose a dispute between the mother of the pltf. No. 1 & the mother of the deft. No. 1, both the pltf. 1 & the deft. No. 1 being minors at the time, & because of the dispute the mother of the pltf. No. 1 left the ancestral house in Mahalla Shujaganj of the Bhagalpur town & began to reside in the garden house in Chunihartoli lane, & for the sake of convenience in cultivation, 60 bighas of land were divided, half & half, between the pltf. 1 & the deft. No. 1, & two houses in Chuniharroli lane were allotted to the mother of the pltf. No. 1 for her residence. This arrangement was alleged to have been made in the year 1906, & according to the pltfs.' case, all the remaining properties remained in joint possession of the pltfs. & the deft. though under the management of the deft. No. 1. This suit was instituted because the deft. No. 1 did not agree to a private partition.

[4] The deft. No. 1 was contesting the suit, & according to his allegation, there was a complete partition in 1906, as a result of which all the properties were divided between the pltf. No. 1 & the deft. No. 1. The deft's contention is that ever since the year 1906 he and the pltf. No. 1 have been in separate possession of the properties & have also alienated some of the properties allotted to their respective shares. The deft. No. 1 challenged the award on the following grounds : (1) that the arbitrator was guilty of misconduct; (2) that the award is invalid because of an error of law apparent on the face of the award; & (3) that the award is bad in law because it affects the interests of certain persons who did not join in the reference.

[5] The learned Subordinate Judge overruled the contention that the arbitrator was guilty of misconduct & also the contention that the award is bad because all the defendants had not joined in the reference. The learned Subordinate Judge has given good reasons to support his view that the arbitrator is not guilty of misconduct, that he had not got annoyed with deft. No. 1, & that he did not refuse to take oral evidence which the deft. No. 1 was prepared to adduce. These findings could not be seriously challenged before us, & we are in complete agreement with the learned Subordinate Judge on these points.

[6] There is also no merit in the contention that the award is bad because defts. other than the deft. No. 1 had not joined in the reference. The other defts. did not appear in the suit in spite of service of summons & with regard to the properties in respect of which there are transferees the order of the arbitrator is that they should be allotted to the share of the deft. No. 1. The arbitrator has also directed that if there be transferees from the pltfs. the properties transferred to such transferees will be allotted to the share of the pltfs. In *Raghu Nath* v. *Ram Rup*, 2 Pat. 777 : (A. I. R. (11) 1924 Pat. 33) it was pointed out that it was not necessary that all the parties to a suit should concur in an appln. for an order of reference in order to make the submission valid & that it was only necessary that all the parties who were interested in the subject-matter of the reference should have joined in the submission. This is a suit for partitioning the properties belonging to a Hindu family, & the real parties interested are only the pltfs & the deft. No. 1. In view of the directions given by the arbitrator the interest of the defts. other than the deft. No. 1 who are transferees from the deft. No. 1 will not at all be affected. These defts. did not put in appearance, & in fact, between them & the parties to the submission there is no matter in difference in the suit. The case of *Muhammad Khalil* v. *Abdul Rahim*, 7 P. L. T. 644 : (A. I. R. (12) 1925 Pat. 810) is also an authority to the same effect, & in view of the principles laid down in this case it is quite immaterial if the other defts. were no parties to the reference. Relying on this decision & also on the decision of Calcutta H. C. in *Jadu Nath* v. *Kailash Chandra*, 14 C. W. N. 75 : (37 Cal. 63), it was held in *Md. Syed Khan* v *Abdul Gafoor*, 10 P. L. T. 53 : (115 I. C. 680) that the award is binding as between the parties to the refer-

ence even if some of the parties interested were not parties to the submission. The award, therefore, cannot be held to be invalid because the defts. other than the deft. No. 1 whose interest is, however, well protected by the order given by the arbitrator, were not parties to the submission. The Privy Council decision in *Ram Protap* v. *Durga Prasad*, 53 Cal. 258 : (A. I. R. (12) 1925 P. C. 293) has no appln. in this present case, as will be clear from the perusal of the following observation made by their Lordships :

" In their Lordships' judgment such an award is in no true sense one made in obedience to the order of 23-5-1922. While it would not be easy to segregate the findings with reference to the matters in question in the suit from those not so in question—the findings in which Annardeyi was interested from those in which she was not—it is, their Lordships think, impossible to uphold an award in relation to a suit the conclusions of which were plainly coloured, if not dictated, by the view taken by the arbitrators of other questions between the parties or some of them to which the suit had no reference.'

Taking even a narrower view of the matter the award so far as it purported to constitute a new partnership, giving to a party who refused to come into it only rights which were far below those to which as a member of a dissolved partnership he was entitled, was not in their Lordships' judgment an award in any way contemplated or authorised by the order of reference."

[7] That was a suit in which there was a prayer for a dissolution of a family partnership and accounts. The members of the family referred to arbitration all matters in difference between them, & some of the difference so referred were not subject of the suit, and a member of the family who was not a party to the suit was interested in certain of them. The Court made an order referring to arbitrators all matters in difference in the suit between the parties to the suit, & the arbitrators made an award as to all the matters in dispute without determining between those which were the subject of the suit & those which were not. In such circumstances it was held that the award was " otherwise invalid ", & I have quoted a passage from their Lordships' judgment in which the grounds on which the award was set aside have been indicated by their Lordships. In *Gopal Das* v. *Baij Nath*, 48 ALL 239 : (A. I. R. (13) 1926 ALL 238), it was held that a partner in a firm against which a suit was pending was not entitled, unless there was a deed of authority, to enter into an agreement to refer the matters in dispute to arbitration so as to bind the other patnr. or patnrs. who had not agreed to or joined in the appln. to refer. Their Lordships took the view that in such a case it was open to a patnr. who had not agreed to a reference to challenge in revision the award & the decree based thereon upon the ground that the reference was illegal. Sulaiman J. had to make the following observation in this case :

" Where the appct. challenges the proceedings of the Ct. itself & attacks the reference made by the Ct. to the arbitrator, it is not merely a question of a wrong decision by the Ct. but may be one of irregularity or illegality committed by it in the exercise of its jurisdiction. . . . . The objection is not as to the validity of the award only, but as to the illegality of the reference to the arbitration."

And Mukherjee J. observed as follows :

" In order to establish the proposition that one of the members of a partnership business could refer a dispute to arbitration on behalf of all the members of the partnership, something more than the rules enacted in O. 30, Civil P. C. should be pointed out."

This ruling has certainly got no appln. to this case. We are not in this case concerned with a partnership business or a firm, it being quite manifest in this case that the real parties interested in the litigation are the surviving descendants of Baij Nath Sahai.

[8] It is the other objection which is more important & which was strenuously pressed before us. The contention is that there is an error of law apparent on the face of the award & that the award is consequently liable to be set aside. The learned Subordinate Judge was of the opinion that the arbitrator had laid down a wrong proposition of law, and that as that wrong proposition of law formed the basis of his award, the award was invadid. The wrong proposition of law which the arbitrator is said to have enunciated is that even when a partial partition is admitted, the onus is on the deft. to prove the allegation of private partition as made by him. The learned Subordinate Judge has also pointed out that the arbitrator has been inconsistent, inasmuch as though he has accepted the story of private partition of two of the houses in Chunihartoli lane, he has ordered a partition of all the houses. In my opinion, there is no such inconsistency in the award, & the arbitrator has not laid down any such wrong proposition of law which can be deemed to have affected his award. Nobody can dispute the proposition that when a partition is admitted or proved, the presumption is that all the property was divided, & if anybody alleges that family property in the exclusive possession of any of the members after the partition is still to be deemed as joint property liable to be partitioned, he has to prove that allegation. But there must be either a clear admission or a definite finding to the effect that there was a partial partition, & in absence of an admission on the point a finding with regard to it can be given only after a

consideration of the evidence adduced. It is certainly a question of fact in this case as to whether in the year 1906 there was a partition of some of the properties or a temporary arrangement with regard to some of the lands for the sake of convenience in cultivation. It is now very well recognised that any arrangement for the sake of convenience in cultivation does not amount to a partition, & in this case the pltfs. had come forward with a clear allegation to the effect that in the year 1906 & after the death of Bhawani Sahai, 30 bighas out of 60 bighas of land in village Nanan Pair & Gaura were allotted to the mother of the pltf. No. 1 for his maintenance, and two houses in Chunihartoli were allotted to him for residence, & that similarly 30 bighas out of 60 bighas were allotted to the mother of deft. No. 1.

[9] There is a distinct averment to the effect that this partition was only a partial partition "for the sake of convenience." It appears from the plaint that the feelings between the two widows, namely, the mother of the pltf. No. 1 & the mother of the deft. No. 1, had run so high that even a respectable relation of theirs like Rai Bahadur Shiva Shankar Sahai thought it desirable that the mother of the pltf. No. 1 should leave the residential house & should remove to the garden house at Chunihartoli. As advised by such a respectable relation, the lady with her infant son shifted to the garden house at Chunihartoli, & evidently under pressure from such a respectable person, there was an arrangement made for the cultivation of the 60 bighas of land. Each branch had to maintain itself, and it is simply natural that a temporary arrangement should have been made for the cultivation of the lands. The usufruct of such valuable lands could not have been allowed to be wasted, & without some temporary arrangement it was impossible to cultivate the lands when there was such estrangement of feelings between the two widows. There is great force in the contention of the applts. that with the pltf. No. 1 & deft No. 1 as minors it was impossible to make a permanent partition. It is stated in paragraph 14 of the written statement that the feeling between the mother of the pltf. No. 1 & the mother of the deft. No. 1 "grew from bad to wrose in 1906 & so the respective mothers of pltf. No. 1 & deft. No. 1, both of them being then minors & unmarried, & as guardians of their respective sons requested Rai Bahadur Shiva Shankar Sahai to partition all joint family properties between pltf. No. 1 & deft. No. 1 . . . . . & that the shifting of the pltf. No. 1 & his mother to the garden house in Chunihartoli lane was a result of an out & out partition, which was done & carried out by Rai Bahadur Shiva Shankar Sahai with the help of his brother Babu Anant Prasad."

[10] It is noteworthy that even according to the deft's. version the feelings between the two widows were very much strained, & the pltf. No. 1 & the deft. No. 1 were minors in the year 1906 when the private partition is said to have been effected. While it is quite probable that for the purposes of cultivation & residence some arrangement should have been arrived at, it is difficult to believe that a person of the status of Rai Bahadur Shiva Shankar Sahai would have a permanent partition made during the minority of the pltf. No. 1 & the deft No. 1. At any rate, it was a question of fact as to whether the pltf's. version that there was a partial partition in the year 1906 "for the sake of convenience", or the deft's version that there was a complete partition in that year of all the joint family properties was correct, & I fail to understand how the arbitrator can be said to have committed an error of law, if he has held, after a consideration of the evidence & the materials on the record, that the deft. had failed to prove that there was an out & out partition in or about the year 1906. If the arbitrator says that in 1906 the pltf. only got 30 bighas of land out of 60 bighas in villages Nanan Pair & Gaura & some houses in Chunihartoli lane, & the rest of the properties remained joint under the management of the deft. No. 1, that only shows that he has accepted the pltf's. version which is not that there was a complete partition but an arrangement for the sake of convenience. I need not repeat that the expression "for the sake of convenience" has been used in the plaint itself, and the arbitrator could not & has not attempted to make out a case for the pltfs. which they themselves had not made out. It is only a question of accepting the pltf's version or the deft's version, & certainly if the pltf's version is accepted, the question whether, because of an admission or proof of a partial partition, the onus will shift on the pltf. to show that there was a partition of all the joint properties does not arise.

[11] In this view, I am of the opinion that this is not a case in which it can be urged that the arbitrator has committed an error of law. There is no inconsistency in the decision of the arbitrator if he has ordered the partition of all the houses after holding with the pltf. that he had got the houses in Chunihartoli for temporary residence by him and his mother. This was also an arrangement which had to be made for the residence of the pltf. on account of the strained relations between the two widows after the death of:Bhawani Sahai. As was pointed out by the Judicial Committee in *Ghulam Khan* v. *Muhammad Hassan*, 29 Cal. 167 :

: (29 I. A. 51 P. C.) the arbitrator had to give his award on the whole case, and he being the Judge of law as well as fact a mere error of law committed by him cannot vitiate his award. The Judicial Committee in *Champsey Bhara & Co.* v. *Jivraj Ballo Spinning & Weaving Co. Ltd.*, 47 Bom. 578 : (A. I. R. (10) 1923 P. C. 66) referred with approval to the following observation of Williams J. in the case of *Hodgkinson* v. *Fernie*, (1857) 3 C. B. (N. S.) 189 : (140 E. R. 712).

"The law has for many years been settled, & remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all quessions both of law and of fact .....The only exceptions to that rule, are cases where the award is the result of corruption or fraud, & one other, which, though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying & forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

[12] In a very recent case *Durga Prosad Chamria* v. *Sewkishendas Bhattar*, 54 C.W.N. 74 :(A. I. R. (36) 1949 P. C. 334), their Lordships of the Judicial Committee observed as follows:

"However that may be, their Lordships are satisfied that the two points of law as to which it is said that the arbitrator's error vitiates the award were specifically referred to him to decide &, if this is so, it would be contrary to well-established principles such as are laid down in *In re King and Duveen*, (1913) 2 K. B. 32 : (82 L. J. K. B. 733) and *F. R. Absalom, Ltd.* v. *Great West (London) Garden Village Society*, (1933) A. C. 592 : (102 L. J. K. B. 648) for a Court of law to interfere with the award even if the Ct. itself would have taken a different view of either of the points of law had they been before it."

In this case it was a partition suit which was referred to the arbitrator, & as already pointed out there were two versions put forward by the contending parties. What has happened is that the arbitrator has accepted one of the versions; & this cannot, in my opinion, be regarded as a case in which the arbitrator can even be said to have committed an error of law. No Court will review the arbitrator's conclusions or findings if he has acted within his authority & according to the principles of justice & behaved fairly to both parties. The plea of misconduct has been overruled in this case, & there is no "legal misconduct" in this case. The finding of the learned Subordinate Judge that the decision is vitiated because it is based on a wrong proposition of law enunciated by the arbitrator appears to me to be altogether unsustainable. In the result, I am of opinion that the award is fit to be acted upon & a decree should be pronounced in terms of it.

[13] The appeal is allowed with costs, and it is directed that a decree would be passed and prepared in terms of the award; and thereafter the usual proceedings for the division and allotments would be taken.

[14] **C. P. Sinha J.**— I agree.

V.B.B. *Appeal allowed.*

A. I. R. (38) 1951 PATNA 449 (C. N. 118)

IMAM J.

Jai Ramdeo, Petnr v. Ramjanam Singh and others, Opposite Party.

Criminal Revn. No. 879 of 1950, D/- 9-1-1951.

Criminal P. C .(1898), S. 203 — Enquiry under — Nature of.

A complainant is entitled to have his complaint properly considered before it is dismissed under S. 203. While no one wishes to place a person accused of an offence to suffer undue harassment, so far as a Ct of law is concerned, its function is essentially to see that cases are disposed of according to law. It is not right for a Mag to make enquiries under S. 203 in such a fashion that from the record it cannot be said whom he examined and what was the source of his information. Private enquiries, which may involve extra-judicial information, are dangerous in any event. **(Para 2)**

Anno: Cr. P. C., S. 203, N. 9.

H. P. Sinha and U. C. Sharma, for Petnr — Gorakh Nath Singh, for Opposite Party.

ORDER: This is an appln by the complainant against the order of the Subdivisional Mag, Arrah, dismissing his complaint under S. 203, Cr. P. C. The Ses J. was moved to order further enquiry, but he declined to do so. It is best to quote the order of dismissal in full as it is a short order:

"Complainant's case is that he went with his labourers to collect Mahua when he saw the accused collecting his Mahua fruits. The complainant objected. The accused became ready to assault him. I have made enquiries in to this case & I have cross-examined the complainant. The cross-examination has revealed that the complainant & the accused are both claiming the Mahua fruits. The record shows that one of the co-sharers is dead & accused Ramjanam is claiming his share on his behalf. The complainant also admits that the complainant & the accused are fighting since a long time. The present dispute of Mahua is absolutely of civil nature & I see no substance in the complaint & dismiss it under S. 203, Cr. P. C."

(2) The statement made by the complainant on solemn affirmation shows that he alleged that Ramjanam was instigating & the other two accused pushed him & threw him down. The petn of complaint alleged that offences under Ss. 323, 504 & 379, I. P. C., were committed. Whatever the dispute about the fruit & the mahua tree may be, there is not a word in the order of dismissal of the complaint — which shows that the Subdivisional Mag at all had in mind as to whether an offence punishable under S. 323, I. P. C. had been committed in view of the assertion of the complainant that he had been thrown down & pushed by two of the accused at the instigation of Ramjanam. I think the complainant is entitled to have his complaint properly considered before it is

dismissed under S. 203 of the Code. While no one wishes to place a person accused of an offence to suffer undue harassment, so far as a Ct of law is concerned, its function is essentially to see that cases are disposed of according to law. I have very grave misgiving as to whether it is right for a Mag to make enquiries in such a fashion that from the record it cannot be said whom he examined & what was the source of his information. The Subdivisional Mag was no doubt entitled to make an enquiry, but he should have made the enquiry in such a manner as to give the complainant full knowledge of the nature of the enquiry & the source of the information which the Mag possessed in order that the complainant may know what exactly the Mag discovered which justified him in dismissing his complaint. Private enquiries, which may involve extra-judicial information, are dangerous in any event.

(3) The Mag states that he has cross-examined the complainant. I do not know under what procedure this cross-examination was done when the complainant was making his statement on solemn affirmation in support of his complaint. I do not think the Mag really intended to say that he had done cross-examination in the real sense. He may have put a few questions in order to elucidate the nature of the complaint & from the answers to those questions, the Mag may have come to the conclusion that the dispute about the mahua fruit was of a civil nature. It is difficult, however, to say that the order of dismissal as it stands today at all discloses as to what was the view which the Mag took concerning that part of the incident narrated by the complainant, namely that he was pushed & thrown down by two of the accused persons at the instigation of Ramjanam. In my opinion, the complaint has not been considered in accordance with law & the order of dismissal must be set aside. I would accordingly send the case back to the Subdivisional Mag for further enquiry when he should deal with the complaint & dispose it of according to law.

V.B.B. *Case remanded.*

A. I. R. (38) 1951 PATNA 450 (C. N. 119)

SHEARER AND SARJOO PRASAD JJ.

Amleshwar Dayal Sinha, Petnr v. The State of Bihar.

Misc. Judicial Case No. 212 of 1948, D/- 10-10-1950.

Bihar Agricultural Income-tax Act VII (7) of 1938 — Rules under-Rules 19 (2) and 19 (3) — Difference — Refund of excess amount — Claim by assessee not necessary under R. 19 (2).

The proviso to R. 19 (3) is completely at variance with R. 19 (2). The former rule contemplates that no refund can be allowed unless and until a claim has been made, and provides that such a claim must be made within a certain limited period. The latter, on the other hand, imposes an obligation on the tribunal which deals with the matter to cause a refund to be made, and by implication to be made immediately without any claim by the assessee. Moreover, when an assessee appeals against an assessment, there is implied in his appeal a claim to a refund of any sum which he may already have paid in excess. **(Para 1)**

Rajkishore Prasad, Balram Kumar Sinha and Rai Parasnath, for Petnr — Advocate General and R. Prasad, for the State of Bihar.

ORDER: In our opinion, the first of the two questions referred by the Board of Revenue should be answered in the affirmative, & the second in the negative. Section 27 (2), Bihar Agricultural Income-tax Act, 1938, imposes an obligation on the Agricultural Income-tax Officer to refund any amount which may have been paid by an assessee in excess. Sub-R. (2) of R. 19 imposes a similar duty on the Bihar Assistant Comr of Agricutural Income-tax & the Bihar Board of Agricultural Income-tax. In every case in which one of these tribunals is satisfied that the sum paid is in excess of what ought to have been paid, it is its duty to cause a refund to be made by the Bihar Agricultural Income-tax Officer concerned. In the present case, the reason, presumably, why the assessee did not apply for the return of the excess amount he had paid as soon as the Assistant Comr allowed his appeal was that the department carried the matter to a higher tribunal. It was convenient to the assessee and also certainly to the department for him not to do so. However that may be, R. 19 (2) certainly imposed a duty on the final tribunal, namely, the Bihar Board of Agricultural Income-tax, to cause a refund to be made. The proviso to R. 19 (3) is completely at variance with R. 19 (2). The former contemplates that no refund can be allowed unless & until a claim has been made, & provides that such a claim must be made within a certain limited period. The latter, on the other hand, imposes an obligation on the tribunal which deals with the matter to cause a refund to be made, &, by implication to be made immediately. The learned Govt Advocate appearing for the State of Bihar has invited our attention to S. 48 & S. 50 of the Indian Income-tax Act. Mr. Mitra is, no doubt, correct in saying that the draftsman of the rules under the Bihar Agricultural Income-tax Act had Ss. 48 & 50, Indian Income-tax Act, 1922, before him when he drafted R. 19. The draftsman, however, omitted to notice that refunds other than refunds of the kind referred to in S. 48 (2), Indian Income-tax Act are dealt with in the other sections contained in Chapter VII of the Act. It seems quite clear that S. 50 was intended to apply only to cases in which a claim had to be made for a refund, as, for instance, where double tax had been paid in India & in Pakistan, or in India & in the United Kingdom. In such a case, it is reasonable that if a claim for refund is not made within a certain period, the claim should not be entertained. When, however, an assessee appeals against an assessment, there is implied in his appeal a claim to a refund of any sum which he may already have paid in excess. The reference is disposed of accordingly. The petnr is entitled to his costs. The hearing fee is assessed at Rs. 100/-.

(2) Mr. Rai Paras Nath states that a sum of Rs. 100/- was deposited as costs, or as security for costs, in favour of the Board of Revenue. This amount must, of course, be refunded to him on an appln made to the Board of Revenue.

D.R.R. *Reference answered.*

A. I. R. (38) 1951 PATNA 451 (1) (C. N. 120)

B. P. SINHA AND C. P. SINHA JJ.

Surendra Nath Chatterjee, Applt v. Surendra Nath Basu, Resp.

A. F. A. O. No. 221 of 1950, D/- 22-11-1950.

Civil P. C. (1908), S. 47, O. 40, Rr. 1, 3, 4 (b) and O. 43, R. 1 (s) — Order directing receiver's property to be attached and sold on his failure to pay amount due from him — Second appeal.

Where a receiver fails to pay the amount due from him as directed by the Ct appointing him and the Ct directs the receiver's property to be attached and sold, the matter comes directly under O. 40, R. 4 (b) and not under S. 47. Such an order is appealable under O. 43, R. 1 (s) and not as an order passed under S. 47 having the force of a decree. The order passed on appeal from such order becomes final as an order passed on appeal in an appealable case. Second appeal is incompetent. (*Para 2*)

Anno: C. P. C., O. 40 R. 1 N. 51 and R. 4 N. 5.

S. Mustafi, for Applt — S. K. Mazumdar, for Resp.

B. P. SINHA J: This is an appeal by the Receiver in a litigation. He had been called upon by the Ct appointing him as such to pay a certain sum of money to the resp who had worked for him as a lawyer in the case. This Second Appeal purports to have been made under the provisions of S. 47, C. P. C., but, as will presently appear, it is manifest that the second appeal is incompetent.

(2) In a certain partition suit, the applt was appointed a receiver by the Ct. As a Receiver, he engaged the resp as his lawyer. For professional work done by the resp, the applt owed him money. The resp put in a petn in Ct either to grant him permission to sue the Receiver for his dues or to direct the Receiver to pay his arrears of fees. The Ct accepted the second prayer of the lawyer, & ordered payment of the amount found outstanding by the Ct on the bills submitted by the lawyer. As the amount was not paid as directed by the Ct, the resp proceeded to execute that order by attachment & sale of the Receiver's property. In the Ct of first instance, the only objection raised on behalf of the Receiver judgment-debtor was that the property sought to be proceeded against should be valued under the provisions of the Bihar Money-Lenders Act. The Ct overruled that objection, holding that that Act had no application to the nature of the dues owing to the resp. Hence, the Ct directed that the valuation as stated by both the parties would be entered in the sale proclamation. An appeal was taken to the learned Dist J. of Bhagalpur who dismissed it after overruling all the objections raised before him on behalf of the applt. It is not necessary to reiterate here all the objections raised by the applt in the lower appellate Ct. It was contended in the Ct below on behalf of the Receiver that the lawyer could not levy execution by treating the order of the learned Subordinate Judge as a decree for payment of money. The learned Dist J. has pointed out that the right of the lawyer to receive the money from the Receiver had not been seriously challenged: what was challenged was the method of realisation. The Ct of appeal below has pointed out that, under O. 40, R. 3 (c), it is within the competence of the Ct appointing the Receiver to direct him to pay such amount as may be due from him. The lower appellate Ct has found that the Ct below acted in accordance with the provisions of R. 3 of O. 40. There was no appeal taken from the order passed upon the Receiver to pay the amount in question to his lawyer. In the Cts below, it appears that the matter was treated as one under S. 47, C. P. C. That appears to have been a mistake, because the matter comes directly under the provisions of R. 4, O. 40 which provides that, where a Receiver fails to pay the amount due from him as the Ct may have directed, the Ct may direct the Receiver's property to be attached & sold, & the sale proceeds applied to liquidate the amount due from the Receiver. It may be that both the parties were under a misapprehension of the exact legal position. But it appears to me that the order passed by the Ct of first instance would come within the purview of R. 4 (b), O. 40, Civil P. C. such an order is appealable as an order under the provisions of O. 43, R. 1 (s). It is clear, therefore, that the order passed by the Ct of first instance was appealable as an order & not as an order passed in S. 47 proceedings having the force of a decree. The order passed by the learned Dist J., therefore, became final as an order passed on appeal in an appealable case. It is manifest, therefore, that no second appeal lies.

(3) But Mr. Mustafi, the learned counsel for the applt, has contended that in that event this appeal should be treated as an appln in revn, & he has contended that the Ct of first instance had no jurisdiction to proceed against the so-called judgment-debtor, without first finding that the Receiver had failed to carry out the orders of the Ct to pay a certain sum of money. In the events which have happened there is no doubt that the conditions laid down in Rr. 3 & 4 of O. 40 have been satisfied; but even then it will be open to the applt to move the Ct of first instance to grant him sufficient time to pay the dues of the resp who worked for the Receiver as his lawyer. But it must be held that there is no want of jurisdiction in the Ct of first instance to proceed as it did in enforcing payment of the money directed by it. The appeal is, therefore, dismissed but, in the circumstances, without costs. If the applt does not pay the amount within the time to be fixed by the Ct below, the execution proceedings will naturally proceed.

(4) C. P. SINHA J: I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (38) 1951 PATNA 451 (2) (C. N. 121)

JAMUAR AND RAI JJ.

The State v. Vishwanath Prasad Varma and another, Opposite Party.

Original Criminal Misc. No. 8 of 1950, D/- 27-10-1950.

Contempt of Courts Act XII (12) of 1926, S. 2 — Ct cancelling bail and remanding accused to jail custody — Flouting of such order by responsible officer of Ct — Contempt of Ct.

A bail granted to an accused was cancelled and a warrant for intermediate custody of the accused to a sub-jail was handed over to the Ct Sub-Inspector. Instead of complying with this order the Ct Sub-Inspector approached the

***Sub-Divisional** Officer to get an order for detention of the accused in the Ct-Lock-up. The Sub-divisional Officer without even varifying the statements contained in the petn filed on behalf of the accused purported to pass an order merely for the asking of the Ct Sub-Inspector under Rr. 9 and 164 A of the Rules for the Superintendence and Management of the Jails, directing that the accused may be sent either to the Central Jail or in the Ct-lock-up. The Ct Sub-Inspector then sent the accused to the Ct-lock-up:*

***Held** that the act of the Ct Sub-Inspector amounted to a clear disregard of the Ct's order and amounted to a Contempt of Ct; (Para 4)*

***Held also** that the Sub-divisional officer who was a responsible officer, ought not to have acted in the way that he acted and should not have allowed himself to be led away by the Ct Sub-Inspector who was out to see that the accused may not be sent to jail in spite of the order of the Ct. His action therefore also amounted to a contempt of Ct. (Para 6)*

Anno: Contempt of Cts Act, S. 1 N. 3.

Govt Advocate, for Opposite Party.

RAI J: In this case a rule had been issued by this Ct against Shri Vishwanath Prasad Varma, Ct Sub-Inspector of Police, Bettiah, & Shri Balaram Sinha, Sub-divisional Officer, Bettiah, to show cause why they should not be convicted for contempt of Ct for disobeying, evading or interfering with the course of justice.

(2) A case under Ss. 342, 392 & 323, I. P. C. was pending against one Rasdhari Singh, a constable of the local Police Station, in the Ct of Shri Viswanath Mishra, Munsif-Mag of Bettiah. The accused constable was continuing on bail granted by the learned Munsif-Mag. On 1-8-1950, an appln was moved before the trial Ct on behalf of the complainant mentioning that the accused constable was holding out threats to the prosecution witnesses & the lawyers. This appln was supported by five affidavits sworn by the prosecution witnesses & two affidavits sworn by the lawyers whom threats had been held out by the said Rasdhari Singh. The learned Munsif-Mag, after considering the matter, cancelled the bail of the accused. As usual a warrant for intermediate custody was issued on 1-8-1950, which has been exhibited in this Ct as Exh. 3. This warrant for intermediate custody was issued to the officer in charge of the Bettiah sub jail. On 2-8-1950, an appln was moved by the complainant before the trial Ct that the said Rasdhari Singh, who had been remanded to the jail custody had not been sent to Jail but was roaming about in the Ct. The learned Munsif-Mag at once called for a report from the Ct Sub-Inspector to whom he had handed over the accused with the custody warrant. He also called for a report from the jailor. The Ct Sub-Inspector reported that he had handed over the under-trial prisoner to Shri Vishwanath Prasad Varma & the latter in his report said that he had kept the under-trial prisoner in Ct-lock-up under the orders of the Sub-divisional Officer.

(3) The learned Munsif-Mag, after considering the explanation of the Ct sub-Inspector, Shri Vishwanath Prasad Varma, took his statement in open Ct on 3-8-1950 at about 12 hours. He was informed that even up to that date the under-trial constable Rasdhari had not yet been sent to Motihari Jail. The learned Munsif-Mag was of opinion that the Ct Sub-Inspector, Shri Vishwanath Prasad Varma, had intentionally flouted the orders of the Ct. He, however, reported the case to the Dist & Ses J. of Champaran for necessary action who has forwarded the matter to this Ct for appropriate action. This Ct issued the rule as mentioned above. The Ct Sub-Inspector as well as the Sub-divisional Officer have filed show-cause petns before this Ct. They both pleaded not guilty.

(4) I first propose to deal with the show cause petn of Shri Vishwanath Prasad Varma, the Ct Sub-Inspector of Bettiah. His statement was taken on 3-8-1950, before the learned Munsif-Mag. We have also examined him in this Ct. From his statement I am definitely of opinion that he was trying his best that evening to favour the under-trial prisoner, Rashdari Singh, in utter disregard of the order of the learned Munsif-Mag. From his evidence, as taken down in this Ct it is quite clear that he received the warrant of custody at 5 or 5.30 p.m. He says that he was shown an appln to be moved on behalf of the under-trial prisoner that he should not be removed to the Bettiah Sub jail. He gave an excuse before us that it was on account of that appln that he delayed sending the prisoner to Bettiah Sub jail, but I do not think that this was the real cause. Mr. A. A. Khan, Second Officer, who was in charge of the work of the Sub-divisional Officer at Bettiah at that time was, according to him, not approached till 6 or 6.30 p.m. Mr. Varma was the senior Ct Sub-Inspector in charge of the Bettiah Ct. He was so much partial to Rasdhari Singh that he also went to Shri Balaram Sinha, the Sub-divisional Officer, to get an order for detention of the under-trial prisoner in the Ct-lock-up. This act of his is a sufficient demonstration of his anxiety to so manoeuvre the whole thing that in spite of the order of the Munsif-Mag the under-trial prisoner may not be sent to Bettiah Sub jail. He anyhow persuaded Shri Balaram Singh to pass the order, Ex. 2. To me it appears that from the very inception he was trying to undo the order passed by the learned Munsif-Mag for the removal of Rasdhari Singh to jail custody. In my judgment his action amounts to a clear disregard of the Ct's order. He has, therefore, committed the offence of contempt of Ct. Though in this Ct he has tendered an unqualified apology, but in the circumstances of the present case I am of opinion that this apology is not a sufficient punishment so far as he is concerned. I, therefore, convict him under S. 2, Contempt of Cts Act XII (12) of 1926 & sentence him to pay a fine of Rs. 25/- or in default to rigorous imprisonment for one week.

(5) As regards the explanation submitted by Shri Balaram Sinha, the Sub-divisional Officer of Bettiah, I may say that the order passed by him does not befit an officer of his position. We have examined him in this Ct & from his evidence it has been amply demonstrated that he passed the order merely for the asking of the Ct Sub-Inspector & the lawyer for the accused. He did not even take the trouble to verify the statements contained in the petn Ex. 1. The reason given by Rashdari Singh in the petn for not being sent to Bettiah Sub jail was that he had recently arrested about half a

dozen dacoits who had been lodged in that jail. He pleaded in that petn that if he would be sent there his life would be endangered. The petn had been carefully kept vague regarding the dacoits & the place of dacoity . Shri Balaram Singh has admitted in his evidence that he did not know from before if the constable had arrested any dacoit who was lodged in the Bettiah Sub jail at that time. Neither the jailor nor the Superintendent of the Sub-jail was consulted in this matter. The Sub-divisional Officer claimed to have passed the order under Rr. 9 & 164 A of the Rules for the Superintendence & Management of the jails & Subsidiary jails in Bihar. These rules run as follows:

"9. Ordinarily the Sub-divisional Officer shall hold control of the local subsidiary jail & be the superintendent thereof. But at places where a civil assistant Surgeon is employed, he shall be the superintendent of the subsidiary jail, & the Sub-divisional officer shall exercise in regard to the subsidiary jail the same functions as are exercised by the Dist Mag in regard to a district jail. The local Govt may, however, appoint any other officer to be the superintendent of a subsidiary jail in lieu of either the Sub-divisional Officer or the civil assistant surgeon."

"164 A — When a large number of under-trial prisoners is arrested the Sub-divisional Officer may, in order to avoid serious overcrowding in the sub jail, commit, at his discretion, any of such prisoners to custody in the central or Dist jail to which the sub jail is affiliated, instead of in the sub jail. In such a case when, owing to the lack of sufficient escort or for any other reason, it is impossible to commit the prisoners direct to the central or Dist jail & they are therefore committed to custody in the sub jail, the Sub-divisional Officer may, when the necessary arrangements have been made, recommit the prisoners by warrant to custody in the central or Dist jail.

Whenever arrangements are made by the police to arrest a large number of prisoners at the same time, the officer making the arrangements should, if possible, inform the Sub-divisional Officer in advance & should at the same time make arrangements to supply a police guard to escort the prisoners to the central or Dist jail, or to assist in guarding the sub jail, if it should be necessary to commit the prisoners to the sub jail."

(6) To me it appears that there was no justification for passing the order, Ex. 2, which runs as follows:

"C. S. I. will take charge of the accused. He (accused) may be sent to Motihari Jail or may be kept in the Ct-lock-up."

He admitted in his evidence that the Ct Sub-Inspector could by this order keep Rashdhari Singh in the Ct-lock-up & not send him to Motihari Jail at all if he liked. In my opinion, if the matter would not have been brought to the notice of the learned Munsif-Mag subsequently, the accused might not have been sent to Motihari Jail. To me it appears that the Sub-divisional Officer was simply led away by the Ct Sub-Inspector who was out that evening to see that anyhow the constable may not be taken to jail against the specific orders of the Munsif-Mag. Though the learned Sub-divisional Officer in his evidence in this Ct said that he did not know as to what orders had been passed by the Munsif-Mag, but as a responsible officer he ought to have known it & he ought not to have acted in the way that he has acted in this case. In his case, however, I am prepared to accept the unqualified apology tendered by him.

(7) JAMUAR J: I agree.

K.S. *Order accordingly.*

A. I. R. (38) 1951 PATNA 453 (C. N. 122)

SARJOO PRASAD J.

Bhola, Petnr v. Kaushalya, Opposite Party.

Criminal Revn. No. 811 of 1950, D/- 13-11-1950.

Criminal P. C. (1898), S. 209 — Sufficient grounds for committing the accused — Duty of Ct.

It is certainly open to a Mag holding a preliminary enquiry in a case triable by a Ct of Sessions to examine the credibility of the testimony of witnesses, but he can do so, only for the limited purpose of seeing whether there is a 'prima facie' case for commitment and not for the purpose of coming to a decision whether the accused is actually guilty. His function is to see whether the case is a fit one for trial or commitment, and not whether the case is a fit one for conviction. Therefore, if there are two views possible of the evidence, although the Mag may be inclined to a view in favour of the accused, he should not, merely on that account refuse to commit the accused so long as there is a possibility of another view being taken by the Ct which finally comes to try him. It is only where, on the evidence on record, no other view is possible except the one in favour of the accused, that a Mag should refuse to commit such a case because there is really no evidence for trial. (*Paras 3, 4*)

Anno: Cr P. C., S. 209 N. 5.

K. P. Upadhyaya, for Petnr — Shambhu Prasad Singh and S. A. Saghir, for Opposite Party.

ORDER: The petnr in this case has moved against an order of the Dist Mag of Champaran directing the commitment of the petnr accused for trial before the Ct of sessions for a charge under S. 376, I. P. C. The Dist Mag has passed the order of commitment after setting aside an order of discharge passed by Mr. A. A. Khan, Mag of the First Class, Bettiah, who held an enquiry under Chapter XVIII of Cr. P. C.

(2) The allegation against the petnr is that on 20-9-1949, at about 9 a.m. he committed rape upon the complainant Mt. Kaushalya. This occurrence took place in village Telpore, about eight miles off from police station Laurya & twenty-two miles away from the Sub-division of Bettiah. The complaint was lodged by the girl on 21-9-1949, in Ct, which the Sub-divisional Mag referred for investigation to the local police without taking any steps to have the girl examined by a medical officer. The Sub-Inspector of Police received the order on 27-9-1949 when he recorded a first information & proceeded to investigate the case. The medical examination of the girl actually took place on 1-10-1949, almost ten days after the occurrence. The evidence of the doctor is that the girl is below the age of 16 years. A number of prosecution witnesses have been examined in the case, two of whom purport to be eye witnesses to the occurrence itself; & the evidence of the girl as

also that of the eye-witnesses is sought to be corroborated by the evidence of some other witnesses to whom the girl stated about the occurrence. The learned Dist Mag has observed that 'prima facie' the evidence of the eye witnesses is corroborated by some of the circumstances in the case, such as the absconding of the accused & the recovery of broken pieces of bangles from sugar cane field. He, therefore, thinks that 'prima facie' it was a case which should have been committed for trial & the learned Mag acted erroneously in discarding the prosecution evidence on balancing of probabilities. The learned Dist Mag has pointed out that although a committing Ct has every right to weigh the evidence before him in order to find out whether a 'prima facie' case has or has not been made out for the trial of the accused, he has no right to substitute his own judgment for the final judgment of the Ct which is competent to hold the trial. He has also pointed out certain errors in the judgment of the learned Mag in his appreciation of the evidence on the record.

(3) It is unnecessary for me to discuss the merits of the evidence & to make any observation which may be calculated to prejudice the trial of the accused. It seems to me that the view taken by the learned Dist Mag of the functions of a committing Ct is perfectly justified & is supported by numerous authorities of this Ct as also of other Cts. The main function of a committing Ct is to see whether the evidence is such that the accused should be sent up for trial or not. If he thinks that the evidence is of such a nature, then merely because ,as a trying Ct, he himself might not have been prepared to accept that evidence, he cannot discharge the accused. It may be that the trying Ct may take a different view of the evidence from the one which has been taken by the Mag himself. His function is to see whether the case is a fit one for trial or commitment, & not whether the case is a fit one for conviction. Therefore, if there are two views possible of the evidence, although the Mag may be inclined to a view in favour of the accused, he should not, merely on that account refuse to commit the accused so long as there is a possibility of another view being taken by the Ct which finally comes to try him. It is only where, on the evidence on record, no other view is possible except the one in favour of the accused, that a Mag should refuse to commit such a case because there is really no evidence for trial These propositions appear to have been well settled by various decisions of this Ct. In 'Moinuddin v. Sheogobind Sahu', A I R (28) 1941 Pat 505: (42 Cr L J 576), Meredith J. observed as follows:

"If the Mag, after weighing the evidence, is satisfied that it is evidence upon which no reasonable Ct could convict, it is his duty to discharge, but if it is a case of balancing probabilities, estimating pros & cons; if it is a case where a different Ct might possibly in his opinion come to a conclusion different from his own, then it is his duty to commit where the evidence is sufficient for conviction even though he may himself not think the evidence sufficient for a conviction."

(4) Again, in 'Ganga Prasad v. Bhagwat Deo', A I R (29) 1942 Pat 38: (42 Cr L J 767). Dhavle J. observed that it was the duty of a Mag making an enquiry under Chap 18 to decide on the materials before him whether or not there were sufficient grounds for committing the accused for trial, there could be no question that he was 'not only entitled but also bound to consider the evidence & weigh it. It is quite clear, however, that he must do so in order to discharge the limited duty laid upon him, & not by way of trying the case.

"Therefore, if the evidence was balanced however, unevenly in his opinion, then it was a matter which had to be tried, & it was the duty of the Mag to commit it for trial & not to discharge the accused."

This is what the learned Mag appears to have done, namely, that he has balanced the evidence in the light of probabilities. It may be that the sessions Ct may, in spite of these probabilities accept the direct evidence of the prosecution witnesses. The Mag in fact, as the learned Dist Mag points out, & there may be much substance in the reasons which he has advanced, relied upon probabilities which do not appear to carry much weight with the latter. My observations on this point should not be, in any manner, construed to prejudice the case of the accused, but I am only referring to it in order to illustrate the point that it was possible &, in my opinion, very reasonably possible to take a different view of the evidence, as the learned Dist Mag appears to have done. Reliance was placed upon a decision of this Ct, in 'Mander v. Karu Mander', 6 P L T 146: (A I R (12) 1925 Pat 279: 25 Cr L J 1089), & another decision of this Ct in 'Tincouri v. Emperor', 1 P L T 153: (A I R (7) 1920 Pat 46: 21 Cr L J 328). These decisions stand on their own facts & the propositions laid down there need not be disputed. As I have said, it is certainly open to a Mag holding a preliminary enquiry in a case triable by a Ct of sessions to examine the credibility of the testimony of witnesses, but he can do so, only for the limited purpose of seeing whether there is a 'prima facie' case for commitment & not for the purpose of coming to a decision whether the accused is actually guilty. It is true that this Ct has got full jurisdiction under S. 437, Cr. P. C., to revise the commitment order, under S. 436, made by a Dist Mag both on points of law as well as of facts. I have cursorily glanced through the evidence &, for the present, I am not inclined to differ from the view taken by the learned Dist Mag. The decision in 'Tincouri's case', (1 P L T 153: A I R (7) 1920 Pat 46: 21 Cr L J 328), was one in which Jwala Prasad J. pointed out that the evidence was such that no Ct would, upon the evidence, feel any hesitation in acquitting the accused. For these reasons, I am not inclined to interfere with the order passed by the learned Dist Mag. The rule is accordingly discharged.

K.S. *Rule discharged.*

A. I. R (38) 1951 PATNA 454 (C N. 123)

RAI J.

Rajkumar Singh, Applt v. Uchit Tatwa, Resp.

A. F. A. D. No. 1282 of 1949, D/- 13-12-1950.

T. P. Act (1882), S. 54 — Non-payment of price.

Title would be deemed to have passed to the purchaser, unless there was an intention on the part of the parties to the contract that title would

not pass until the entire consideration money had in fact been paid. *(Para 8)*

The circumstances of non-delivery of the original document of sale and non-delivery of possession are not of much importance for the purpose of determining what was the intention of the parties in a case where the suit has been filed only nine days after the sale. *(Para 10)*

Anno: T. P. Act, S. 54 N. 14.

S. N. Dutt and U. N. Sinha, for Applt — Baidyanath Jha, for Resp.

JUDGMENT: The pltf has filed this appeal against the judgment & the decree of the Addl Subordinate J., Bhagalpur, reversing those of the Munsif of Madhipura.

(2) The pltf filed the suit for declaration of his title to & recovery of possession of 13 kathas & 8 dhurs of land out of an area of 1 bigha 5 khata which he claimed to have been sold to him by a registered sale deed dated 12-1-1948. There are some other facts relevant to the case which may shortly be stated as follows. One Janak & his cousin Uchit jointly took settlement of about 3 bighas 9 kathas 18 dhurs of land in the name of Janak. On 8-12-1947, Janak sold 1 bigha 5 kathas to the deft for Rs. 1000/-. The deft was to discharge the mtge debt over this property which was encumbered by a mtge transaction dated 29-4-1940, for a sum of Rs. 200/-. The pltf was the mtgee under the said mtge bond. The case of the pltf is that after the execution of the sale deed on 12-1-1948, he paid Rs. 313/- in cash, Rs. 337/- was to be set off towards the dues of the mtge bond of 29-4-1940, & Rs. 50/- was to be paid at the time of receiving the receipt from the deft. As the pltf fell short of the amount of Rs. 50/- at the registration office, he agreed to pay it to the deft at the village & get back the receipt.

(3) It appears that there developed some estranged feeling between the pltf & the deft on 12-1-1948, which appears from the circumstances enumerated below. On 13-1-1948, the deft lodged a sanha at the police station which runs as follows:

"Entry No. 177 at 12 hours. Uchit Tatwa, son of Bansi Tatwa of Dhurgaon Mainirathi reported that his one head of bullock of the following description strayed from Madhipura since 12-1-1948."

The sanha thereafter gave the description of the bullock, its price being mentioned as Rs. 250/-. On 13-1-1948, a notice (Ex. 4 C on the record) was sent to the pltf by a pleader on behalf of the deft calling upon him to pay Rs. 250/- as the price of the bullock which the pltf had borrowed from the deft & which, according to the information of the pltf had strayed away. On 20-1-1948, a notice was given by a pleader of the deft calling upon the pltf to pay the consideration money of Rs. 600/-. The relevant portion of the notice runs as follows:

"From the instruction of my client, it appears to me that you got a sale deed executed by my client in respect of 13 kathas & 8 dhurs of land for a cash consideration of Rs. 600/-. But the consideration money was not paid at the time of the execution of the sale deed & you asked for the receipt from my client to take back the deed. That my client did not make over the receipt. Thereupon, you left the place in great annoyance & kept with yourself the former sale deed of my client. My client always asked you for payment of the consideration money & for return of the former sale deed. But you did not pay the money. Hence, through this notice you are hereby informed to pay the consideration money of Rs. 600/- & to return back the former sale deed to my client within two weeks from the date of the receipt of the notice & to obtain the receipt for the withdrawal of the sale deed, otherwise, my client will have the aforesaid sale deed "cancelled". Be it known that you did not derive any title to the land on the ground of the execution of the sale deed. The said sale deed neither was nor would be valid without the passing of the consideration money."

The present suit was filed by the pltf on 21-1-1948.

(4) The deft contested the suit. His case was that it was agreed between the parties that, after payment of the full consideration money, the pltf would come in possession of the property. He further contended that the terms noted in the sale deed had not been explained to him. He further challenged the case of the pltf that only Rs. 50/- had remained to be paid to the deft out of the consideration money of the sale deed.

(5) The trial Ct accepted the case of the pltf & decreed the suit with costs. On appeal the Addl Sub-ordinate Judge has taken a different view of the evidence. He has come to the conclusion that the pltf's case of payment of Rs. 213/- at the time of the execution of the sale deed has not been substantiated. He has further come to the conclusion that, as there was no endorsement on the mtge bond, it could not be deemed to have been satisfied. He has further held that title did not pass by execution of the document, which was to pass on payment of the consideration money. In that view of the matter, he allowed the appeal & dismissed the suit.

(6) Before this Ct Mr. S. N. Dutta, the learend counsel for the applt has contended that the finding of the lower appellate Ct regarding the non-payment of Rs. 213/- at the time of the execution of the sale deed as is the case of the pltf is vitiated because it has relied upon the evidence of defence witnesses 2 & 3 to hold that in fact Rs. 213 was not paid at the time of the execution of the sale deed, though those two witnesses had admitted in their evidence that they had arrived at the place at a later stage. They, according to him, were not competent to disprove the case or the pltf that he had paid Rs. 213/- at the time of the execution of the bond. He urged that the case should be remanded to the lower appellate Ct for fresh hearing. From the judgment of the learned Addl Sub-ordinate J. it appears, however, that he has come to that conclusion by taking into consideration other pieces of evidence as well apart from the evidence of defence witnesses 2 & 3. The relevant portion of his finding runs as follows:

"I have given a serious consideration on the oral evidence in this case. There seems no reason to disbelieve the evidence of D. Ws. 2 & 3 who are admittedly the attesting witnesses of this document. Besides, the circumstances discussed above disprove payment of Rs. 213/- at the time of execution of the sale deed. I disagree with the finding of the learned Munsif

& accepting the oral evidence on behalf of the deft I hold that Rs. 213/- was not paid at the time of execution."

In my opinion, it is not a case which I should remand for reconsideration of the evidence on the point of payment of Rs. 213/- at the time of the execution of the sale deed as is the case of the pltf.

(7) But as regards the other findings of the learned Addl Subordinate Judge, I am inclined to accept the submission of the learned counsel for the applt. Mr. Dutt has contended that from the sale deed itself it is clear that out of the consideration money of Rs. 600/-, Rs. 337/- was set off towards the mtge dues of the pltf. So, according to him, even if the finding of the lower appellate Ct regarding the non-payment of Rs. 213/- at the time of the execution of the bond were to stand, it was a case where a substantial portion of the consideration money had in fact been paid. The relevant portion of the sale deed dated 12-1-1948, runs as follows:

"I, the executant, require money for payment of mtge-debt under a deed executed by Janak Podar in favour of Babu Rajkumar Singh, purchaser of Sch. 2 (i.e.) a sum of Rs. 200/- (principal) besides interest, in all Rs. 337/- (three hundred & thirty seven); I am also in urgent need of money for household expenses. As a matter of fact, the aforesaid mahajan is ready to file a suit also which, if instituted, will cause great loss to me. Therefore, I, the executant, have of my accord & free will, in a sound state of body & mind, without coercion, pressure & intimidation on the part of anybody, executed this sale deed in favour of the aforesaid claimants in respect of the land specified above in Sch. 2 for a consideration of Rs. 600/-, half of which comes to Rs. 300/- & received the full amount in this way that I left Rs. 337/- (three hundred & thirty seven) in deposit with the aforesaid claimant (or vendee). The aforesaid vendee will set off the said amount, against the mtge debt & keep the mtge bond with himself as evidence of payment & received Rs. 263/- (two hundred & sixty three) in cash. Thus, I have received Rs. 600/- (six hundred). Now, not a single farthing is due from the aforesaid claimant. I, the executant, or my heirs & representatives, shall not put forth any claim on the score of non-payment of the aforesaid consideration money. If at any time (I, the executant, my heirs or representatives) do make any such claim, it is & will be deemed null & void. I have put the said vendee in possession & occupation of the vended property in my place. The aforesaid claimant should on payment of the zamindar's rent appropriate the produce of the aforesaid land, generation after generation, both in the male & female lines."

(8) Mr. Dutt has contended that from the recital in the sale deed as quoted above it is clear that the non-endorsement of the payment of Rs. 337/- on the back of the mtge bond in question would not change the position. The sale deed whose validity the pltf has accepted clearly shows that Rs. 337/- was to go to discharge the dues of the pltf. The mtge bond was to be kept in possession of the pltf himself. Hence, according to him, non-endorsement or non-tearing of the mtge bond would not change the position. In my opinion, there is much substance in the submission of the learned counsel. To me it appears that Rs. 337/- will be deemed to have been paid out of the consideration of Rs. 600/- which was the consideration under the sale deed in question. Mr. Dutta has further submitted that, according to the provisions of S. 54, T. P. Act, his client would be deemed to have acquired interest in the property vended. He further stressed that the pltf's claim for possession cannot be defeated for non-payment of the balance of the consideration money. Mr. Dutt further relied upon several decisions of this Ct in support of his contention that title would be deemed to have passed to the purchaser if part payment of the consideration is established. He relied upon the cases of 'Ramdhari Rai v. Gorakh Rai', 10 Pat 264: (AIR (18) 1931 Pat 236); 'Radhamohan v. Bipin Behari', 17 Pat 318: (AIR (25) 1938 Pat 505); & 'Pirtam Singh v. Jagannath', 27 PLT 426: (AIR (34) 1947 Pat 1). He contended that unless there was an intention on the part of the parties to the contract that title would not pass until the entire consideration money had in fact been paid, the title of his client could not be defeated. He further contended that he was all along anxious to pay the balance of the consideration money. In fact, the present suit was filed within nine days of the execution of the sale deed which showed the anxiety of his client to complete the transaction by paying the balance of the consideration money. The cases referred to above do support the contention of the learned counsel. In my opinion, in the circumstances of the present case title would be deemed to have passed by the execution & registration of the bond.

(9) Mr. Dutt further contended that from the notice (Ex. 4 (b)) which was sent by a pleader to the pltf, it was clear that there was no such intention that the title would not pass until the entire consideration had been paid. He referred to the various passages from the said notice which has already been quoted in the judgment. From the wording of this notice it is clear that there is no mention in it that it was the intention of the parties that title would not pass until the entire consideration money had been paid, though there is a mention that title to the land would not pass on the ground of the execution of the sale deed. But that is a different thing altogether. If in fact there was such an intention, it must have been mentioned in the notice sent by the pleader which was a very important aspect of the contract between the parties.

(10) The learned counsel for the resp, however, relied upon the case of 'Md. Murtaza v. Abdul Rahman', 27 Pat 122: (AIR (36) 1949 Pat 364). He contended that almost under similar circumstances a D. B. of this Ct had held in that case that title would not be deemed to have passed. He in that connection drew my attention to the judgment of, Meredith, J., in that case the relevant portion of which runs as follows:

"Once it is shown that what is stated in the document, though clear in itself, is not correct in relation to the existing circumstances, or unmeaning in reference to existing facts, then the problem arises as to what, by making these incorrect statements, the parties really meant.

The statements being incorrect a latent ambiguity arises. In this view there is a latent ambiguity in the present document, & that being so, we are, in my view, entitled to turn to extraneous evidence. Once we can do that, we can take into consideration the fact that the consideration was not paid, 'as bearing on the intention of the parties', & we can also take into consideration two other admitted facts, that the vendor retained the sale deed all along & never made it over to the vendee, & possession, though stated to have been delivered was never delivered."

It may be noted that the suit which had then come up in appeal before this Ct had been filed about eleven months after the execution of the sale deed in question. Therefore, the circumstances, the factum of non-delivery of the original document of sale, & non-delivery of possession, were considered relevant for the purposes of determining what was the intention of the parties. In the present case the suit has been filed only nine days after the sale, and, hence, those circumstances are of not much importance here.

(11) It, therefore, cannot be said that the circumstances lead to the conclusion that it was the intention of the parties that title would not pass until the entire consideration money had been paid. In the case of 'Md. Murtaza v. Abdul Rahman', 27 Pat 122: (A I R (36) 1949 Pat 364) & in the case of 'Motilal v. Ugrah Narain', (A I R (37) 1950 Pat 288) no consideration had passed at all.

(12) As regards the case of 'Motilal Sahu v. Ugrah Narain', (A I R (37) 1950 Pat 288) it may be mentioned that there the suit had been filed three years after the execution of the sale deed & so the delay in bringing the suit in that case might have been considered as a circumstance to show that it was not the intention of the parties that title would pass after the execution of the sale deed. The learned counsel for the resp relied upon the case of 'Raju Mahton v. Hossaini Mian', 59 I C 171: (A I R (7) 1920 Pat 774). In that case, however, the suit was filed ten years after the execution of the sale deed. Jwala Prasad, J., while delivering the judgment, observed as follows:

"It appears to me that the mere registration of the document in this case did not pass the title to the pltfs. Although more than 10 years after the execution of the sale deed have elapsed no attempt was made until the institution of the present suit by the pltfs to recover possession of the property or to enforce their right under the deed. The finding of the Ct that they were never in possession shows clearly that they never thought that they had acquired any title under the sale deed in question. It is impossible to conceive that a vendee would sleep over his right after paying the consideration money, for many years.

"I do not propose to discuss the various authorities on the point, for the principle appears to be simple & well established. Each case has to be determined according to the circumstances of that case, showing the intention of the parties."

The learned counsel for the resp further relied upon the case of 'Rasikananda v. Gangadhar', (1 Cut L T 1), but the facts & circumstances of that case are distinguishable. The relevant portion of the judgment of their Lordships in that case may be quoted as follows:

"The contract having been reduced into writing its terms must be sought from a consideration of the writing itself & having regard to the words which I have quoted that after taking from you the balance of Rs. 900/- we make you owner in possession thereof they clearly imply that the transfer of title & the payment of the Rs. 900/- were to be contemporaneous.....This is a simple case of a contract reduced into writing the terms of which are to be found from study of the writing & nothing else & to my mind the terms of the writing are quite specific.

This really concludes the case. The pltfs have not parted with their money nor have the defts parted with their title. Accordingly to my mind the suit should have dismissed."

But in the present case there is no such specific term in the sale deed in question. Hence, this case cannot come to the rescue of the deft-resp.

(13) In my view, the finding of the learned Addl Sub-ordinate Judge that the title would not be deemed to have passed to the pltf after the execution & registration of the document is not correct & must be set aside. The result is that the appeal succeeds in part & the suit of the pltf is decreed in a modified form. He is entitled to get possession after depositing the balance of the consideration money. As he has already deposited Rs. 50/- he may further deposit the remaining sum of Rs. 213/- before taking delivery of possession. Mr. Dutt is prepared to deposit the money in this Ct to the credit of the deft-resp. He is permitted to do so within one month from today. In the circumstances of the present case each party will bear its own costs throughout.

V.B.B. *Appeal partly allowed.*

A. I. R. (38) 1951 PATNA 457 (C. N. 124)

B. P. SINHA AND C. P. SINHA JJ.

Pragash Choudhury, Applt v. Dulhin Butani Kuer, Resp.

A. F. A. D. No. 1745 of 1948, D/- 24-1-1951.

(a) Hindu Law — Alienation — Widow — Powers of — Void or voidable.

Under the Hindu Law an alienation by widow of her husband's estate without legal necessity is not altogether void but only voidable by the next reversioner. He may affirm it or he may treat it as nullity. If the reversioner elects to affirm the alienation, he and the persons taking under him are precluded from exercising his or their rights to avoid the alienation and from questioning the transaction. (Para 6)

(b) Pardanashin lady — Deed executed by — Contract Act (1872), S. 16 — Evidence Act (1872), S. 111.

Although independent legal advice in the case of a deed executed by purdanashin lady is not in itself essential, the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it. (Para 6)

(c) Civil P. C. (1908), Ss. 100-101 — New case depending on finding of fact.

Where the question whether an alienation by a Hindu widow is affirmed by the reversioner

depends upon a finding of fact, it cannot be raised for the first time in second appeal.
(*Para 6*)

Anno: C. P. C., Ss. 100-101 N. 57.

(*d*) *Civil P. C. (1908), Ss. 100-101 — Plea abandoned in lower Cts is barred in second appeal.* (*Para 7*)

Anno: C. P. C., Ss. 100-101 N. 61.

N. Bagchi and R. K. Bagchi, for Applt — Lalnarain Sinha and R. S. Sinha, for Resp.

C. P. SINHA J: The deft is the applt in this second appeal having lost in both the Cts below. The pltf Dulhin Butani Kuer, daughter of one Dwarka Choudhury, had brought this suit for declaration of her title to & recovery of possession over the disputed lands together with mesne profits on the allegation that the deed of gift dated 28-2-1921 & the bazidawa dated 13-3-1939, were fraudulent, illegal & void.

(2) The pltf's case was that the property in suit belonged to her father Dwarka Choudhury, who died leaving behind him his widow Mt. Gango Kuer & his daughter, the pltf Mt. Gango Kuer, on the death of Dwarka Choudhury, succeeded to his properties. As she was a purdanashin lady, her affairs were looked after by the deft who was a son of her sister's husband & this deft lived with her although he was a resident of another village. The deft was able to get deed of gift executed by the said Mt. Gango Kuer on 28-2-1921 in his favour, transferring to him all the properties left by Dwarka Choudhury & which are the subject matter of this suit. The pltf further alleged that fraud had been committed by the deft upon Mt. Gango Kuer in getting this deed of gift executed in his favour. Mt. Gango Kuer died in the year 1934 & the pltf succeeded her as the only daughter left by Dwarka Choudhury. She lived at her husband's place & the management of the properties was, as before, left with the deft. It is further said that the pltf who also is a 'purdanashin' lady, was fraudulently induced to execute a deed of 'bazidawa' dated 13-3-1939. Some two years before the suit, when the deft stopped giving produce of the lands to the pltf & when she attempted to take khas possession, she was resisted by the deft who disclosed the nature of the two documents on the basis of which he asserted title to the properties in suit.

(3) The defence was that the pltf was not the daughter of Dwarka Choudhury & that Mt. Gango having died in the 1928, the suit, which was brought in the year 1945, was barred by limitation & adverse possession. It was further alleged that the deft was the son-in-law of Dwarka Choudhury, the last male holder, having married his only daughter named Mt. Lagni & that the two ladies, namely, Mt. Gango Kuer & the pltf had, with full knowledge & free will & after having independent advice, executed the two documents in question in his favour. It was also said that the pltf had relinquished all her rights in the properties by means of the 'bazidawa', aforesaid, & that no title was left with her.

(4) The Cts below have concurrently found that the pltf is the daughter of Dwarka Choudhury & that Mt. Lagni, the wife of the deft was not his daughter & consequently the deft was not the son-in-law of Dwarka Choudhury; that Mt. Gango Kuer died in 1934 & so the suit was not barred by limitation or adverse possession. The Cts below have also found that no fraud was committed by the deft in getting the two deeds, & deed of gift & the deed of 'bazidawa', executed by the two ladies in his favour. The finding of the final Ct further is that Art. 91, Limitation Act has no application.

(5) The learned counsel for the applt has contended, firstly, that upon the findings the deed of gift by the pltf's mother to the deft being a valid document & the pltf not having repudiated the same — rather having affirmed the said gift by her 'bazidawa' deed of 1939 — she was not entitled to maintain the present suit, &, secondly, that the suit was barred by three years' limitation under Art. 91, Limitation Act.

(6) It is true that under the Hindu Law an alienation by a widow of her husband's estate without legal necessity is not altogether void but only voidable by the next reversioner. He may affirm it or he may treat it as nullity. If the reversioner elects to affirm the alienation, he & the persons taking under him are precluded from exercising his or their rights to avoid the alienation & from questioning the transaction, (Ramgouda Annagouda v. Bhausaheb', 54 I A 396: A I R (14) 1927 P C 227). It appears however that this point was not raised by the deft at any stage of the litigation & if this point had been a question of law, pure & simple, the applt had been entitled to raise this point even in second appeal. In my view, however, the determination of this point depends upon the finding of fact — whether or not this deed of 'bazidawa' was executed by the pltf, a 'purdanashin' lady, with the knowledge as to the import of the document she was executing. As the point was not raised in the manner in which it is raised before this Ct, there was no consideration by the Cts below as to whether or not the pltf had substantially understood her rights & that she was in any manner affecting her rights by executing this deed of 'bazidawa'. Although independent legal advice is not in itself essential, "the disposition made must be substantially understood & must really be the mental act, as its execution is the physical act, of the person who makes it". ('Wajid Khan v. Ewaz Ali Khan', 18 I A 144: 18 Cal 545 P C). This view of the matter was re-affirmed by the P. C. in the case of 'Kundal Lal v. Mt. Musharrafi Begam', 63 I A 326: (A I R (23) 1936 P C 207). The only points pressed before the Cts below were, the question of limitation & whether Mt. Lagni, the wife of the deft, was the daughter of late Dwarka Choudhury; & no other point appears to have been pressed there. I, therefore, find that the question of affirmance of the deed of gift by the pltf cannot be gone into at this late stage in second appeal & I would accordingly hold that there is no merit in the first contention of the applt.

(7) It has been urged by Mr. Bagchi, the learned counsel for the applt that the suit is barred under Art. 91, Limitation Act. I find, however, that this point had been expressly abandoned by the applt in the Ct below, as the Ct below says:

"Before me three years' limitation under Art. 91, Limitation Act has not been urged. Probably the learned Advocate accepted the find-

ing of the learned Subordinate Judge on this point."

In view of the fact that deft had accepted the finding of the trial Ct on the question of applicability of Art. 91 to this case, I do not feel inclined to let the applt re-open the matter once again before this Ct. The applicability of Art. 91 will depend upon, whether or not the terms of the deed of 'bazidawa' were understood by the pltf at the time she was executing that document, that is to say, whether this document was executed after the pltf had understood the 'pros' & 'cons' of the transaction into which she was entering. I have already said that in the Cts below the question, whether the pltf had understood the terms of the document, was not raised. The applt, therefore, is not entitled to raise that point once again in this Ct when he had abandoned this point in the Cts below. In the view I take, it is not necessary to decide, whether the deed of relinquishment, by which no title to any property was conveyed, is covered by the provisions of Art. 91, Limitation Act.

(8) The result is that the appeal fails & it must be dismissed with costs.

(9) SINHA, J: I agree to the order proposed.

V.B.B. *Appeal dismissed.*

A. I. R. (38) 1951 PATNA 459 (C. N. 125)

B. P. SINHA AND C. P. SINHA JJ.

Mt. Bilas Devi, Decree-holder-Applt v. Bansidhar Sahu, Judgment-debtor-Resp.

A. F. O. O. No. 184 of 1948, D/- 13-12-1950.

(a) Civil P. C. (1908), O. 21, R. 17, O. 23 R. 3 — Compromise decree for maintenance —Execution.

A compromise decree declaring a Hindu widow's right to maintenance and making it payable on a certain date each month is executable and it is not necessary to institute a suit each time there has been a default. (Para 6)

Anno: C. P. C., O. 21, R. 17, N. 8; O. 23, R. 3, N. 27.

(b) Civil P. C. (1908), O. 23, R. 3 — Compromise decree — Construction.

The Ct is always in favour of construing a compromise in a manner which tends to shorten litigation and the Ct will always resist any attempt on the part of any of the parties to construe the decree in such a way as to multiply litigation. (Para 8)

Anno: C. P. C., O. 23, R. 3, N. 33.

Brahmadeva Narayan and Rameshwar Prasad Sinha, for Applt — S. N. Banerjee, for Resp.

B. P. SINHA J: This is a decree-holder's appeal from the decision of the learned Subordinate Judge of Arrah, dated 8-5-1948, partly allowing objections under S. 47, C. P. C. raised on behalf of the resp judgment-debtor.

(2) It appears that the applt instituted a suit for partition of properties said to have been joint family properties against a number of defts, including deft 5, Bansidhar Sahu, the resp in this case, who happens to be the nephew of her husband. The suit related to many items of immovable property as also of movables, including ornaments & pieces of furniture & clothing. The matter came up to this Ct on appeal from an order passed by the Ct below refusing to record a certain compromise. That case was Misc App No. 454 of 1945. A D. B. of this Ct succeeded in getting the applt, who was then also the applt & deft 5 to agree to certain terms of compromise which are as follows:

"1. That Mt. Bilas Devi shall be declared entitled to maintenance at the rate of Rs. 125/- (one hundred & twenty five) a month which shall be payable to her on the 7th of each English calendar month.

2. That the lady shall also get Rs. 5,000/- & the same shall be paid to her by deft 5 at the rate of Rs. 2,000/- a year & the balance of Rs. 1,000/- shall be paid in the third year after the first two instalments have been paid. The first two thousand rupees is to be paid on or before 15-1-1948, the second instalment on or before 15-1-1949, & the balance on or before 30-6-1949. In the event of non-payment of any of the instalments, the lady shall be entitled to realise the whole amount then due by execution.

3. That the lady shall also be paid Rs. 1,400/- on account of ornaments. Rs. 700/- must be paid by the deft 5 on or before 15-7-1947, & the balance of Rs. 700/- on or before the 15-1-1948. In the event of non-payment of the first instalment on the date fixed, the lady shall be entitled to realise the whole of Rs. 1,400/- by execution.

4. That it is also agreed that the lady shall be entitled to live in the house situated in Mahalla Abarpool in the town of Arrah. Neither the lady nor any of the parties to the suit shall be entitled to sell the house during the lifetime of the lady.

5. That, in the event of these instalments not being paid to the lady, interest shall run at six per cent from the date of default.

6. That the lady is entitled to arrears of maintenance at this rate from 7-4-1945. Respondents, 6, 7, 9, & 11 are minors. They are not a party to this compromise. They are not affected by this."

(3) The matter did not rest there. The two parties aforesaid appeared before the Ct where the suit was pending, & a decree was passed in the suit itself, recording the terms of the compromise aforesaid. As the judgment-debtor, deft 5, did not pay the amounts covered by the terms of the compromise, the decree-holder was compelled to take out execution, which was numbered as Exen. Case No. 4 of 1948. She claimed a total sum of Rs. 11,079/6/- being made up of the cash amounts mentioned in the terms of the compromise as also interest accrued due thereon plus arrears of maintenance for 34 months at the rate of Rs. 125/- per mensem with interest. The judgment-debtor filed an objection petn under S. 47 of the Code, contending, inter alia, that the decree-holder was not entitled to realise the several sums constituting her total claim as laid in the execution petn, without having recourse to a separate suit, & that the decree passed in the partition suit was "quite illegal & invalid & inexecutable". The judgment-debtor further contended in his objection that the decree passed was against law, as laid down in O. 23 R. 3, C. P. C. & as such it was unenforceable. The question was also raised that the decree-holder was not entitled to any interest either on the sums of 1,400 or 5,000 or on the amount of maintenance.

(4) The learned Subordinate Judge overruled the judgment-debtor's objection that the decree was inexecutable as a whole. But the Ct below

tion. As we propose to send this case back for a fresh decision, it will be open to the decree-holder to agitate this matter in the Ct. below, & the judgment-debtor cannot have any grievance on the score that he had no notice of that contention.

[3] Coming to the question of valuation of the property, it appears that the decree-holder sought to proceed against 71 bighas and odd out of the block of 144 bighas on the basis of the valuation arrived at by the Ct. during the execution proceedings, namely, Rs. 500 per bigha. That area perhaps would have been enough to liquidate the entire decree. But I find that, on material questions, the parties relied upon only affidavits and counter affidavits. The Ct. below was trying the case on the original side, & the persons who swore the affidavit & other competent witnesses could very well have been put in the witness-box, & subjected to cross-examination by the opposite party. That has not been done in this case. It is, therefore, directed that the case be re-heard by the Ct. below on evidence regularly recorded. The Ct. must make an attempt to come to a judicial finding as to the real value of the property. The proceedings under S. 13 (S. 16?), Bihar Money-Lenders Act are not a mere formal proceeding but a judicial proceeding meant to arrive at a fair valuation of the property, so that neither the judgment-debtor nor the decree-holder might be prejudiced.

[4] The orders passed by the Ct. below are, therefore, set aside, & the proceedings directed to be heard afresh. Costs here & in the Court below will abide the result.

V.S.B. *Case remanded.*

A. I. R. (38) 1951 Patna 462 *[C. N. 127.]*

B. P. SINHA AND C. P. SINHA JJ.

Surya Mohan Thakur—Applt. v. *The State of Bihar — Resp.*

Misc. Appeals Nos. 89 and 90 of 1950, D/- 14-12-1950.

(a) Bihar (War Acquisition of Property) Compensation Rules, 1943, R. 20 — Appeal against award filed beyond time—Delay if can be condoned under Limitation Act (1908), S. 5.

Limitation for an appeal against an award in a land acquisition case made under R. 75A, Defence of India Rules, read with S. 19, Defence of India Act, is prescribed by R. 20 Bihar (War Acquisition of Property) Compensation Rules, 1943. By virtue of the said R. 20, such an appeal is to be preferred within six weeks of the receipt by the parties of the notice of the signing of the award. Where, therefore, an appeal is filed beyond six weeks from the date of the receipt of the notice, the appeal is beyond time. And the delay cannot be condoned under S. 5, Limitation Act 1908, as that section has, by reason of S. 29, no application to such an appeal. [Para 6]

Anno. Lim. Act, S. 5, N. 4.

(b) Limitation Act (1908), S. 29 — Special Law.

A special law means law enacted for special cases in special circumstances as distinguished from the general law which applies generally. Thus, the Limitation Act is an example of the general law of limitation which applies to all classes of cases dealt with by the Act. While, the rules framed under the Defence of India Act containing provisions about limitation are rules made for purposes of emergency & the exigencies of the War. And such provisions do come within the purview of special law within the meaning of S. 29. [Para 5]

Anno. Lim. Act. S. 29, N 6.

(c) Bihar (War Acquisition of Property) Compensation Rules, 1943, R. 20 — Applicability of rule to award arising in case instituted before rules were promulgated.

Even where the case in which an award is made is instituted before the Bihar (War Acquisition of Property) Compensation Rules, 1943, were promulgated, yet if the award comes into existence after those rules have been framed it will come within the mischief of those rules & an appeal against an award will be governed by R. 20. [Para 6]

Jyotirmoy Ghosh and S. S. Rakshit — For Applt.; *Government Pleader — For Resp.*

B. P. Sinha J.—These two cases raise questions of first impression which do not ordinarily arise in these Cts. The questions which arise in both these cases are (1) whether S. 5, Limitation Act, can be applied to them, & (2) whether, if we decide that the provisions of S. 5, Limitation Act, are available to the applt. in the peculiar circumstances of these cases, the delay in filing the two appeals should be condoned.

[2] The facts of these two cases are similar except in one respect that, whereas Misc. Appeal 80 of 1950 arises out of the award in Land Acquisition Case No. 40 of 1946 arising out of Case No. 1 of 1943-44, Misc. Appeal 90 of 1950 arises out of Land Acquisition Case No. 39 of 1946 arising out of Case No. 1 of 1942-43. This difference has been sought to be made use of by the learned Cousel for the applt. as will presently, appear. The other facts of the case may be stated as common to both the cases as follows : Two appeals were filed on 21-3-1950 from two awards dated 13-12-1949, of the District Judge of Bhagalpur under R. 75A, Defence of India Rules, read with S. 19, Defence of India Act. On 14-12-1949, the applt. made an appln. for a certified copy of the awards. The requisite stamps were notified on 22-12-1949, & were delivered on 23-12-1949. The copy was ready for delivery on 7-1-1950, & was actually made over on 9-1-1950. The formal notice of the signing of the award was served on the applt., according to the affidavit, on 6-1-1950, though, according to the statement of the learned Advocate for the applt. it was on 7-1-1950. The statement on affidavit may be acted upon in preference to the statement at the Bar. The learned Stamp Reporter made a report to the

effect that, as the appeals had been filed beyond six weeks from the date of the receipt of the notice of the signing of the award, they were out of time. After that report of the Stamp Reporter, these applns. under S. 5, Limitation Act, have been made for condoning the delay, & the grounds stated for doing so are that, to the petnr's knowledge, there was no limitation for filing appeals provided under the Defence of India Act or the rules made thereunder; and that the petnr. was advised by his lawyer, a pleader of Bhagalpur, which advice he acted upon, that the ordinary period of ninety days provided for filing appeals to this Court would be applicable, & that he would get the benefit of the time requisite for obtaining a certified copy.

[3] There is no doubt that, if the provisions of S. 5, Limitation Act, can be invoked in aid of the petnr. in the special circumstances of this case, sufficient grounds had been made out for condoning the delay. It has taken us some amount of research to find out the relevant provisions of the law regulating to appeals to this Ct. from an award of the nature aforesaid. It is true that neither the Defence of India Act nor the rules made thereunder by the Central Government contain any provisions relating to the period of limitation for filing appeals against an award of the nature contemplated by the Act and the rules. By a notification, dated 26-5-1943, by the Govt. of Bihar published in the Bihar Gazette (Extraordinary) of that date, rules have been framed called the Bihar (War Acquisition of Property) Compensation Rules, 1943. Rule 18 is in these terms :

"When the Arbitrator has made his award, he shall sign it and shall give notice in writing to the parties to the reference of the making and signing thereof. He shall also send a copy of the award to the person or persons to be compensated and forward to the Collector, the award in original together with the records of the proceedings."

And R. 20 which is the rule providing for a period of limitation, is in these terms :

"Any appeal against the award of the Arbitrator shall be preferred within six weeks of the receipt by the parties of the notice referred to in R. 18."

[4] The relevant portions of S. 29, Limitation Act, are in these terms :

"(2) Where any special or local law prescribes for any suit, appeal or appln. a period of limitation different from the period prescribed therefor by the first schedule, the provisions of S. 3 shall apply, as if such period were prescribed therefor in that sch. & for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law :

(a) the provisions contained in S. 4, Ss. 9 to 18, & S. 22 shall apply only in so far as, & to the extent to which, they are not expressly excluded by such special or local law; &

(b) the remaining provisions of this Act shall not apply."

It will be seen from the provisions, quoted above, of S. 29, Limitation Act, that if these rules are within the purview of the words "special or local law" then S. 5, Limitation Act, is entirely out of the way. The sections of the Indian Limitation Act like S. 4, Ss. 9 to 18 and S. 22 are to apply not entirely but only to the extent they are not expressly excluded by such special or local law.

[5] It was attempted to be argued on behalf of the applt. that the special rule of limitation provided by the rules aforesaid do not come within the purview of special or local law & that, therefore, S. 29, Limitation Act, cannot stand in the way of the applt. But, in my opinion, there is no substance in this contention, because a special law means law enacted for special cases in special circumstances as distinguished frem the general law which applies generally. The Limitation Act is an example of the general law of limitation which applies to all classes of cases dealt with by the Act. The rules framed under the Defence of India Act were rules made for purposes of emergency & the exigencies of the war.

[6] It was next contended on behalf of the applt. that at least one of the cases, namely, Misc. Appeal No. 90, arose out of Case No. 1 of 1942 43 before the rules in question were promulgated. But the award has come into existence after those rules have been framed. Hence the award in question comes within the mischief of the rules which came into existence some years before the awards were made. Hence, the decision of a Division Bench of the Madras H. C. in *Kollegal Silk Filatures Ltd* v *Province of Madras*, I. L. R. (1948) Mad. 490 : (A.I.R. (36) 1949 Mad. 39) is of no assistance. In view of these considerations, it must be held that the applt. is not entitled to the benefit of S. 5, Limitation Act. The appeals must, therefore, be held to be barred by the special rule of limitation laid down by the rule quoted above made under the Defence of India Act.

[7] The appeals must, therefore, be dismissed. There will be no order as to costs.

[8] **C. P. Sinha J.**—I agree.

V.S.B. *Appeals dismissed.*

A. I. R. (38) 1951 Patna 463 *[C. N 128.]*

JHA C. J. AND REUBEN J.

Jharia Coal-field Electric Supply Co. Ltd, —*Applt.* v. *Kaluram Agarwala*—*Resp.*

Letters Patent Appeal No. 13 of 1949, D/- 21-12-1950, from judgment of Meredith J., D/- 26-7-1949.

(a) Contract Act (1872), S. 72—Money paid under illegal agreement—Recoverability.

Where money is voluntarily paid under an illegal agreement which has been carried into effect, the money so paid cannot be recovered back, if parties are *in pari delicto* & they had knowledge of the illegality of the agreement before payment.

Per *Reuben J.* — The principle applies whether money was paid under a contract or not.

[Paras 12, 21]

Anno. Con. Act, S. 72 N. 1.

(b) Contract Act (1872), S. 65 — Applicability.

The provisions of S. 65 apply to a case only if the parties are competent to contract & the agreement, though void from its inception, is discovered, after they have acted on the faith of it to be not enforceable by law. It has no application where the parties, though competent to contract, were *in pari delicto* & they knew the unlawfulness of the agreement before they acted on it. Nor does it apply where the object of the agreement was illegal to the knowledge of both parties & they acted on it or derived benefit therefrom : A. I. R. (9) 1922 P. C. 403, *Expl. & Distd.*

[Para 14]

Per *Reuben J.* — Section 65 cannot help a party where there is lack of mutuality, i. e., where he cannot himself restore the benefit he has received under the contract he cannot also recover the money he has paid under it. A further difficulty will arise for the application of the section when on his own argument there is no contract, for when there is no contract the section cannot apply. [Para 23]

Anno. Con. Act, S. 65 N. 1.

(c) Letters Patent (Patna), Cl. 10 — Points on which appeal may be heard.

Where a question raised for the first time in the appeal is a pure question of law, & can be decided on the findings of the Cts. below without investigation of any further fact, the applt. can be allowed to argue the question in the Letters Patent Appeal.

[Paras 16, 18]

Anno. C. P. C., Letters Patent, (Cal.) Cl. 15 N. 14.

B. C. De & P. K. Bose — for Applt.; K. C. Sanyal & S. C. Mazumdar — for Resp.

Jha C. J. — This is an appeal by the deft. under Cl. 10 of the Letters Patent from a judgment of a single Judge of this Ct. The pltf.'s suit is for the recovery of a sum of Rs. 646 (details of which are given in the schedules to the plaint), alleged to have been illegally realised from him by the deft. for the supply of electricity.

[2] The pltf. is a businessman & runs a flour Mill & also a business for charging batteries on a commercial basis. The deft. is a limited liability company incorporated under the Indian Companies Act, 1913, (hereinafter referred to as "the Company") & supplies electricity in the Jharia Coal-fields & other places under a license granted by the Govt. of Bihar in 1941, under the Electricity Act, 1910 (IX [9] of 1910). The license lays down the rates at which electrical energy can be supplied by the Company to consumers for "domestic" purposes & for "power" purposes. Cl. 10 of the license fixes the limits of the prices to be charged by the company for energy supplied by it. The rates are classified under two heads; (1) Domestic Supply, & (2) Power. The rates for "domestic supply" are :—

	"Per unit Rs. a. p.
(a) Light & fans (subject to discount of 25 per cent. on bills paid within 10 days of presentation). . .	0 7 0
(b) Refrigerating, heating & cooking (subject to a discount of 25 per cent. on bills paid within 10 days of presentation	0 3 0
& the rates for "power" are :	Per unit
(a) Energy used at any time during the day or night (subject to a discount of 25 per cent. on bills paid within 10 days of presentation) . .	0 4 0
(b) Energy used only between the hours of 10 p. m. & 5 p. m. of the following day (subject to a dsicount of ½ anna per unit on bills paid within 10 days of presentation)	0 3 0

etc , etc., etc."

[3] On 6-7-1942, the Bihar Electricity Control Order, 1942, made by the Governor of Bihar in exercise of his powers under R. 81 of the Defence of India Rules, was published. Cl. 3 thereof lays down the limits of supply of energy to industrial undertakings, and reads thus :

"No supplier shall distribute energy for power to any industrial undertaking except in such quantities & at such times & under such conditions as may be directed :

(a) by the Provincial Govt. in respect of any case on class of cases;

(b) by the Electric Inspector & Electrical Engineer, Bihar, in respect of such cases or class of cases as may be specified by the Provincial Govt."

In January 1943, the pltf. filed three requisitions for the supply of electrical energy, (1) for domestic purposes (2) for a flour mill & (3) for battery charging, & though no supply for battery charging was sanctioned by the Provincial Authority, the Company provided the pltf. with electricity for the three different purposes regulated by three different meters, for which he had to pay at three different rates. The supply started from February 1943, & went on up to June 1943 the charges were for lights & fans at 7 annas per unit under the heading "domestic purposes", & under the heading "power", for battery charging at 3 annas per unit, & for the flour mill at the special contractual rate of 2 annas per unit, subject to the usual rebates.

[4] Mr. Sims, the then Electrical Engineer & Electric Inspector to the Govt. of Bihar, came to know that energy was being supplied to the pltf. for battery charging, & he directed that the supply for battery charging be stopped. His instructions to the company were that if consumers wished to utilise energy for battery charging, they should do so from the energy supplied for "domestic" purposes & within the limits imposed by the Control Order. Interpreting the view of Mr. Sims to be that

it was open to the Company to permit consumers to use for commercial purposes energy supplied for 'domestic" purposes within the prescribed limits the Company published a general notification on 24-5-1943, in a local newspaper, stating *inter alia* :

"consumers are hereby informed that on & from 1-7-1943, the following rates will be charged for energy consumed : (1) for battery charging, radios & other unessential purposes at annas seven per unit."

[5] On 29-5-1943, the Company also served a notice on the pltf. that the charge for current used for battery charging would be increased from 3 annas to 7 annas per unit. The pltf. thereupon wrote to the Company a protest letter objecting to the increase, but, in spite of the protest, he used the energy for battery charging & paid at the increased rate with the surcharges, which the Company purported to charge under Cl. 10, Electricity Control Order.

[6] The present suit was brought, as already stated for recovery of Rs 646, as set out in the different schedules to the plaint. The case of the pltf. is that he is entitled to claim the refund with interest inasmuch as the payments were made under protest.

[7] The trial Ct. dismissed the suit with regard to the claim for refund of the money paid as the price of energy for battery charging (as set out in Sch. A), surcharge realised by the deft in respect of the use of energy for battery charging (as set out in Sch. C) & a charge, in excess of actual consumption of energy for the flour mill, made on the basis of a minimum consumption (as set out in Sch B), but decreed the suit in regard to other claims. There was an appeal by the pltf. & also a cross-appeal by the deft. but both the appeal & the cross appeal were dismissed. Thereafter, there was a second appeal by the pltf. which came up for hearing before Meredith. J., who decreed the whole suit, but granted leave to appeal under the Letters Patent, Meredith J., summarises the findings thus :

"I have held that it (i.e. supply of energy for battery charging properly fell, & could only fall, under the heading 'power' & was not domestic supply at all. To the knowledge of both parties & with the consent of the Company it continued to be drawn by the pltf. in his capacity of the owner of an industrial undertaking from the special power plug & measured by the special meter supplied by the Company for that specific purpose."

[8] On appeal under the Letters Patent, the only point urged by Mr. B. C. De, on behalf of the deft.-applt. is that the pltf. is not entitled to the refund of Rs. 205 claimed on account of money realised by the Company at the increased rate for the supply of energy for battery charging, nor to the refund of the surcharge levied at 100 per cent. thereon. In other respects the decree in favour of the pltf. is not challenged. The argument of Mr. De is is that, as the money was paid under an illegal agreement, & as the parties were *in pari delicto* & the illegal purpose has been carried out, the pltf. is not entitled to seek the aid of the Ct. for the relief.

[9] In my opinion, the argument of Mr. De is unassailable. The supply of energy for commercial purposes must fall under the heading "power", the usual rate for which could not exceed 4 annas per unit under Cl. 10 of the license.

[10] The pltf. & the deft. entered into the bargain in contravention of the provisions of Cl. 3 of the Control Order. Both parties knew that they were entering into an illegal agreement, the object of which was obviously opposed to law as well as public policy. They no doubt relied upon Mr. Sims' interpretation of the Control Order; but, in my opinion, Mr. Sims' interpretation seems to be a device intended to circumvent the mandatory provisions of the Control Order The parties might have acted in ignorance of law, but that cannot be pleaded as an excuse, & the Ct. cannot help the pltf. who has not come to Ct. with a clean hand. The consideration of the bargain was illegal, & its object opposed to public policy. The Control Order was made on 5-7-1942 & duly notified in the Bihar Gazette (Extraordinary) on 6-7-1942. The parties had full notice of the order since the date of its publication in the Gazette *Mahadeo Prasad* v. *Emperor* 24 Pat. 781 : (A. I. R. (33) 1946 Pat. 1 : 47 Cr. L. J. 497 F.B.). The conduct of the parties shows that both sides were *in pari delicto*, & the bargain, which was in fraud of the provisions of the statute, was carried out by them. Therefore, the money paid by the pltf. though under protest, is irrecoverable with the aid of Ct.

[11] It is well settled that persons who have entered into an agreement forbidden by law or condemned by public policy are not entitled to seek the aid of a Ct of law for any relief if they are *in pari delicto* & the illegal purpose of the agreement has been carried into effect. It is useful to recall in this connection the well-known observations of Lord Mansfield in *Holman Et Al'*, v. *Johnson*, 1 Crow p. 342 : 98 E. R. 1120 at p. 1121 which reads thus

"The objection, that a contract is immoral or illegal as between pltf. & deft. sounds at all time very ill in the mouth of the deft. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the deft. has the advantage of, contrary to the real justice, as between him & the pltf. by accident, if I may so say. The principle of public policy is *this ex dolo malo non oritur actio*. No Ct. will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If,

from the pltf's. own stating or otherwise, the cause of action appears to arise *ex turpi cause*, or the transgression of a positive law of this country, there the Ct. says he has no right to be assisted. It is upon that ground the Ct. goes; not for the sake of the deft. but because they will not lend their aid to such a pltf."

Mellor J., enunciates the same principle in *Taylor* v. *Chester*, (1869) 4 Q. B. 309 at pp. 313-14 : (38 L. J. Q. B. 225) thus :

"The maxim that '*in pari delicto potior ast conditio possidentis*', is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of pltfs. or defts. but is founded on the principles of public policy, which will not assist a pltf. who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back,' for the Cts. will not assist an illegal transaction in any respect."

Collins, M. R. in *Harse* v. *Pearl Life Assurance Co.*, (1904) 1 K. B. 558 at p. 563 : (73 L. J. K. B. 373) has observed that :

"It is clear law that where one of two parties to an illegal contract pays money to the other, in pursuance of the contract, it cannot be recovered back . . . . unless there can be introduced the element of fraud, duress, or oppression."

Halsbury in his Laws of England (Vol. 7, 2nd edition, page 175) summarises the law on the point thus :

"If, however, the illegal purpose has been carried out or the contract has been substantially performed, money paid under the contract can no longer be recovered, except where it appears that the parties were not *in pari delicto*, for instance, where the pltf. shows that he was induced to enter into the contract by fraud, duress or oppression on the part of the defendant."

Equally explicit is the condemnation of such contracts by Swayne J. in *Meguire* v. *Corwine*, (10 U. S. S. C. 108 Lawyers' Ed. Book 25, p. 899 at p. 901). He says :

"Frauds, of the class to which the one here disclosed belongs, are an unmired evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and minors of the public welfare, and of free Govt. as well. The latter depends for its vitality upon the virtue and good faith of those for whom it exists, and of those by whom it is administered. Corruption is always the forerunner of despotism."

[12] The Madras H. C. has held in *Ramanayudu* v. *Suryadevara Seetharamayya*, 58 Mad. 727 : (A. I. R. (22) 1935 Mad. 440 F. B.) that money paid for carrying on an illegal contract is irrecoverable with the assistance of Court. Chapman J. in *Bindeshwari Prasad* v. *Lakharaj Sahu*, 1 Pat. L. J. 48 at p. 62 : (A. I. R. (3) 1916 Pat. 284) has observed that

"where the illegal portion of an agreement has been carried into effect, the whole matter is outlawed and the Court will not aid either party to retrieve his position if he is not able to show that he has been less to blame than the other. '

On a revise of the authorities referred to above. I am clearly of the opinion that, where money is voluntarily paid under an illegal agreement which has been carried into effect, the money so paid cannot be recovered back, if parties are *in pari delicto* and they had knowledge of the illegality of the agreement before payment.

[13] Mr. Sanyal has urged on behalf of the pltf. that the payment was made by the pltf. not voluntarily, but under undue influence, coercion or oppression ; therefore, the pltf. is entitled to recover back the amount so paid, because he is less to blame than the deft. and in support of this contention he relied upon the case of *Ram Kumar* v. *Nanda Kumar*, 50 Cal. 639 at pp. 645-647 : (A. I. R. (11) 1924 Cal. 248). In my opinion, the principle enunciated here has no application to the present case. In that case it was found, as a fact, that the transaction was the result of an undue influence practised upon the pltf. by the defts. and so relief was granted. In the present suit the case of fraud, undue influence or oppression was not set out in the plaint, nor any issue raised or argument advanced in any of the Courts below. There is no material on the record to show that the defendant company in any way brought pressure, undue influence or coercion on the pltf. to take the supply of energy for "power" purposes and pay at the rate prescribed for "domestic" purposes. Therefore, the principles governing cases where relief has been granted against a bargain brought about by undue influence, fraud or coercion cannot apply to the present case. In my opinion, the agreement was made by the free consent of parties and there is no manner of doubt that the pltf. and the deft. were equally guilty in entering into the bargain, knowing full well that the transaction was in contravention of the provisions of the Control Order.

[14] Mr. Sanyal has next contended that even if the agreement was void, the defendant, having received an advantage under it, must compensate the pltf., and in support of his contention he relies upon the provisions of S. 65, Contract Act, which provides that

"when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

In my opinion, the provisions of S. 65 cannot govern the present case. The provisions of this section can apply only if the parties are competent to contract, and the agreement, though void from its inception, is discovered, after they have acted on the faith of it, to be not enforceable by law. It has no application where the parties, though competent to contract, were *in pari delicto* and they knew the

unlawfulness of the agreement before they acted on it. Nor does it apply where the object of the agreement was illegal to the knowledge of both parties and they acted on it or derived benefit therefrom. Mookerji J. in *Ledu* v. *Hiralal*, 19 C. W. N. 919 at p. 923 : (A. I. R. (3) 1916 Cal. 266), has observed that

"the words of the section can only be aptly applied in such cases as that of an agreement which is subsequently found to be void on account of some latent defect or of circumstances unknown at the date of the agreement, or of an agreement which is afterwards made void by circumstances which supervene."

[15] Mr. Sanyal has strongly relied on the decision of the P. C. in *Harnath Kuer* v. *Indar Bahadur Singh*, 50 I. A. 69 : (A. I. R. (9) 1922 P. C. 403) and has urged that on the authority of this case the pltf. is entitled to be compensated under the provisions of S. 65, Contract Act. In my opinion, the facts of that case were quite different and the principles enunciated by the Judicial Committee cannot apply to the present case. In the case before the P. C., money had been advanced to the deft. to prosecute his suit for a declaration that a certain will was not genuine. The deft. as the reversioner of the testator got a declaration that the will was a forgery, and he was held to be the reversioner. Before the succession opened, he transferred his right in two villages by a sale to the pltf.'s husband in consideration of the money advanced to him for the prosecution of the suit. When the succession opened, the pltf. brought a suit for possession of the villages with an alternative prayer for payment of money. The pltf. erroneously set up a case that the right of the deft. was to be determined by reference to the provisions of the Oudh Estates Act. Though the transaction took place before the T. P. Act came into force, it was settled law that the reversioner has only an expectancy in the lifetime of the limited owner, and such an expectancy was inalienable. The Judicial Committee pointed out that the agreement of sale was void from its very inception, and therefore, the pltf. was not entitled to any relief for the recovery of possession of the villages specified in the plaint. But as there had been no actings of the faith of this illegal agreement the parties were held to be relegated back to the position before the transaction of sale took place, & in this view of the matter the pltf. was held entitled to recover compensation, & in assessing the compensation their Lordships took into consideration the amount advanced to the deft. by the pltf.'s husband. Neither the consideration nor the object of the transaction of the loan was unlawful within the meaning of S. 23, Contract Act, Mookerjee J., in *Ledu* v. *Hiralal*, 19 C. W. N. 919 at pp. 921-22 : (A. I. R. (3) 1916 Cal. 266) has succinctly put the law on the point thus:

"It is plain that although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed if the agreement is actually criminal or immoral; where the contract is illegal because contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it."

The principle, therefore, on which compensation was allowed to the pltf. by the Judicial Committee has no appln. to a case like the one before us.

[16] Mr. Sanyal has lastly contended that, as the question raised was never argued at any earlier stage, it is not open to the applt. to raise this question for the first time before us. In my opinion, this point is equally unsustainable. As the question raised is a pure question of law, & can be decided on the findings of the Courts below without investigation of any further fact, we have allowed the appellant to argue the question before us. In this connection I may quote the observation of Lord Reid in *Shiba Prasad* v. *Srish Chandra Nandi*, 28 Pat. 913 at p. 924 : (A. I. R. (36) 1949 P. C. 297).

"The learned Chief Justice appears to have overlooked the provisions of S. 72, Contract Act. This section was only mentioned in passing by the Subordinate Judge, & it would seem that it was not argued, or only faintly argued, before the Subordinate Judge or in the H. C. that S. 72 applied to the case. The applt. the resp. in the cross-appeal, submitted to their Lordships that in these circumstances their Lordships should not now receive an argument based on S. 72, but their Lordships are unable to exclude from their consideration the provisions of a public statute. It is regrettable that their Lordships do not have the assistance of the view of the H. C. on this matter. Their Lordships impute no blame to the learned Judges of the H. C., but they feel bound to consider the argument which has now been adduced."

We are also fortified in this view by the decisions in *Maha Prasad* v. *Ramani Mohan*, 41 I. A. 197 : (A. I. R (1) 1914 P. C. 140); *M. E. Moola Sons, Ltd.* v. *Perin R. Burjorjee*, 59 I. A. 161 : (A. I. R. (19) 1932 P. C. 118) & *Debi Charan* v. *Mehdi Hussain*, 1 Pat. L. J. 485 : (A. I. R. (3) 1916 Pat. 317). Under the circumstances, the appeal is allowed & the decree modified by disallowing the claim on account of the price received for energy supplied for battery charging & the surcharge thereon ; but as the point was not raised in any of the Cts. below, we make no order as to the costs of this appeal.

[17] **Reuben J.**— I agree.

[18] That there is no inflexible rule against the entertainment in a Letters Patent appeal of a point not raised previously appears from *Debi Charan* v. *Mehdi Hussain*, 1 Pat. L. J. 485 : (A. I. R. (3) 1916 Pat. 317), *Sattappa*

Gurusattappa v. *Mahomedsaheb*, 60 Bom. 516: (A. I. R. (23) 1936 Bom. 227) & *Fitzholmes* v. *Bank of Upper India, Ltd.*, 8 P. L. T. 377 : (A. I. R. (14) 1927 P. C. 25). The principle that should guide appellate Ct. in entertaining a new point has been well stated by Lord Watson in a passage which has been cited with approval by the Judicial Committee in *M. E. Moolla Sons Ltd.* v. *Perin R. Burjorjee*, 59 I. A. 161: (A. I. R. (19) 1932 P. C. 118). His Lordship observed :

"When a question of law is raised for the first time in a Ct. of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the place cannot be disposed of without deciding nice question of fact in considering which the Ct. of ultimate review is placed in a much less advantageous position than the Cts. below. But their Lordships have no hesitation in holding that the course ought not in any case to be followed unless the Ct. is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts if fully investigated would have supported the new plea." [*Connecticut Fire Insurance Co.* v. *Kavanagh*, (1892) A. C. 473 (61 L. J. P. C. 50)].

[19] A suggestion has been made that the Electrical Engineer & Electric Inspector sanctioned the supply of energy for battery charging in exercise of his power under sub-cl. (c) of Cl. 3, Electricity Control Order. The reference is to the record made by Mr. Sims in his Note Book (Ex. C) & Tour Note (Ex. C (2)) of, a discussion he had with the Company & the pltf. on 11-9-1943. From these documents it appears to me that Mr. Sims did not purport to act in exercise of his power under Cl. 3, Electricity Control Order ; he merely interpreted the law as modified by the Control Order & advised the Company & the pltf. as to the proper course to be pursued by them.

[20] There is another answer to this argument. If this was a direction under Cl. 3, Control Order, why should it not be held that the charging of the domestic scale of prices was a condition imposed by Mr. Sims in exercise of his power under Cl. 3, Control order ? If so, the supply made & the price realised was legal, & the pltf. not entitled to recover.

[21] Another argument addressed to us was that the cases cited relate to contracts, but here there was no contract since the pltf. did not agree to the price & surcharge charged by the Company. I do not think that the fact relied on makes any difference. The principle enunciated by Lord Mansfield in the passage cited by my Lord the Chief Justice is that the Ct. will not aid a man who founds his cause of action on an immoral or illegal act; if on the pltf.'s own showing or otherwise the cause of action appears to arise *ex turpi causa* or from the transgression of a positive law of the country, the Ct. is entitled to refuse its help to the pltf. Consider the facts of the present case. Under the control order it was not permissible to supply energy for battery charging for commercial purposes without the sanction of the Provincial Govt., or of the Electrical Engineer & Electric Inspector. To the knowledge of the company & of the pltf. this sanction had not been obtained. Nevertheless, the company supplied, & the plaintiff accepted, energy contrary to the provisions of the control order. There was a difference between the parties as to the proper charge for the supply, but the pltf. paid the price & surcharge demanded & went on doing this from month to month so that the illegal supply of current to him might continue. Therefore, the money was paid in order to effect an illegal purpose & that illegal purpose was effected. Could there be a case more apt for the application of the principles enunciated by Lord Mansfield ?

[22] It is useless for the pltf. to talk of coercion, & to urge that he was compelled to pay what was demanded because otherwise the supply of energy would have stopped. This contention might perhaps have been of avail if the pltf. had been entitled to a supply of the energy on a lower price than that demanded by the company. Here the pltf. was not entitled to the supply on any terms. Hence, the payment made by him, even though he made it under protest, was made to obtain an illegal supply & the Ct. will not help him to recover it.

[23] Finally, I think that, for lack of mutuality, S. 65, Control Act, will not help the pltf. The pltf. wants under this section to recover the money paid by him to the Company but it is not possible to make him restore the advantage that he has himself derived, namely, the supply of energy. Another difficulty arises out of the argument just urged, namely, that there was no contract between the parties. If there was no contract, S. 65 has no application.

[24] I would like to add that I see no reason to think that the interpretation given by Mr. Sims in Ex. C & Ex. C (2) was consciously intended to circumvent the law. His position is explained by another document. [Exhibit D (3) dated 30-7-1943] & he seems to have been honestly mistaken.

M. K. *Appeal allowed.*

A. I. R. (38) 1951 Patna 469 *[C. N. 129.]*

RAMASWAMI AND C. P. SINHA JJ.

Firm Ram Kishun Shah Etwari Sahu — Petnr. v. Jamuna Prasad and others — Opposite Party.

Civil Revn. No. 487 of 1950, D/- 28-11-1950.

(a) Houses and Rents—Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), S. 11 (3)—Occupation—Meaning of.

Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself, constitute an occupation. The owner of vacant house is in possession but as long as he leaves it vacant he is not in occupation; nor is he an occupier. [Para 5]

(b) Civil P. C. (1908), O. 39, R. 1, S. 115 Temporary injunction — Grant of — Considerations — Specific Relief Act (1877), S. 53.

What the Ct has to determine in granting injunction is whether there is a *bona fide* contest between the parties & when there is a fair & substantial question to be decided as to the rights of the parties in the suit it is not necessary for the purpose nor is it right that the Ct. should further examine the question in dispute or anticipate the decision of the question in the suit itself.

No doubt it is in the discretion of the lower Cts. to grant or not to grant an order of temporary injunction but that discretion has to be exercised according to well settled judicial principles. Where on the contrary they act in an arbi rary manner & refuse the prayer without finding whether a *prima facie* case has been made out they fail to exercise a jurisdiction vested in them by law & the H. C. ought to interfere in revision for the ends of justice. [Paras 5 & 6]

Anno. C. P. C., O. 39, R. 1, N. 3 ; S. 115, N. 11; Specific Rel. Act, S. 53, N. 2.

Mahabir Prasad & Kanhaiyaji — for Petnr.; Sir Sultan Ahmad, Khaleel Ahmad & I. B. Singh — for Opposite party.

Ramaswami J. — The question to be examined in this case is whether the petnrs. are entitled to be granted a temporary injunction against the opposite party restraining the latter from executing the order of eviction made by the House Controller, Monghyr.

[2] The petnrs. alleged that they were the tenants of the house in dispute which belonged to one Khan Bahadur Mirja Noor Beg; that on 16-4-1949, Jaldhar Prasad & Dasrath Prasad purchased the house & on 6-8-1949, the opposite party filed an appln. under the Bihar Buildings (Lease, Rent & Eviction) Control Act (Act III [3] of 1947) for evicting the petnrs. The opposite party alleged that they had purchased the holding for the construction of a petrol pump & Dist Mag. of Monghyr had granted a "no objection" certificate for the construction & installation of the petrol pump. On 11-3-1950, the House Controller, Mr. S. N. Mallik, allowed the appln. & ordered the petnrs. to vacate the house. An appeal was filed before the Comr. of Bhagalpur, who by his order dated 16-6-1950 rejected the appeal. On 31-5-1950, the petnrs. filed a suit for declaration & permanent injunction against the opposite party on the ground that the House Controller had no jurisdiction to make an order of eviction under S 11, sub-s. (3), Bihar Buildings (Lease, Rent & Eviction) Control Act, 1947. On 1-6-1950, the petnrs. asked for issue of an *ad interim* injunction against the opposite party restraining the latter from executing the order of eviction. The learned Munsif refused to grant *ad interim* injunction, which order was upheld by the learned Dist. J. in appeal.

[3] In support of this rule, the learned Advocate-General stressed the argument that there was a fair & substantial question at issue between the parties; that the petnrs. would suffer irreparable damage if temporary injunction be not granted & that the lower Ct's. had acted in an arbitrary manner & refused to grant the injunction asked for.

[4] In my opinion, the argument of the learned Advocate-General is well founded & must prevail. It is important to notice that in para. 6 of the plaint the petnrs. had asserted that the order of eviction made by the House Controller was illegal & without jurisdiction for the reason that the Standard Vacuum Oil Company had obtained the "no objection" certificate & would also construct the petrol pump &

"the defts. will become the company's tenants & pay rent to the company for the pump, & the defts. on the other hand would be getting a certain amount of rent from the company only for the land given or leased out to the company."

In the written statement, the opposite party asserted that

"they require the premises *bona fide* for their personal use for carrying on the business of Agency in petrol & mobil oil, & though the pump will be supplied by the company. the land & house belong to the petnrs. & shall remain their property and the business shall be the personal business of the defts as Agents of the Standard Vacuum Oil Co. Ltd., & even after the termination of the Agency, if it at all happens at any future date the house & land shall remain the property of the defts."

It should also be noticed that in the order of eviction, the House Controller has overruled the objection of the petnrs. on the ground that though "the premises if the petrol pump is installed will be only on hire to the Standard Vacuum Oil Co. for their use." Sub s. (3) of S. 11 would be applicable & the tenants ought to be evicted from the house in dispute. In another portion of the order, the House Controller has said that though the Standard Vacuum Oil Co. would be in occupation of the building

"that will be through the petnr. himself In that case also it can be safely held that the landlord requires the building reasonably & in good faith for his own occupation."

The question for decision in this suit would, therefore, arise whether the word "occupation" in sub-s. (3) of S. 11 of the (Act III [3] of 1947) covers, on proper construction, the case of the opposite party who, as alleged in the plaint, have become the agent of the Standard Vacuum Oil Co. & proposed to demolish the existing building & erect new one in its place for the purpose of installation of a petrol pump.

[5] Reference may be made in this context to the scope & meaning of the word "occupation" as used in S. 11 of the Act. As observed in *Rex* v. *St. Pancras*, (1877) 2 Q. B. D. 581 at p. 588 :

"Occupation includes possession as its primary element, but it also includes something more. Legal possession does not, of itself constitute an occupation. The owner of vacant house is in possession & may maintain trespass against any one who invades it; but as long as he leaves it vacant he is not in occupation; nor is he an occupier."

In another case 31 M. L. T. 114 it was stated that :

"The word 'occupy' is a word of uncertain meaning. Sometimes it indicates legal possession in the technical sense, as when occupation is made the test of ratability; & it is in this sense that it is said that the occupation of (?) premises by a servant if such occupation is subservient & necessary to the service is the occupation of the master. At other times occupation denotes nothing more than physical presence in a place for a substantial period of time."

It is manifest, therefore, upon the pleadings that the decision of the suit will depend upon the proper construction of sub-s. 3 of S. 11 of the Act & also upon the disputed question of fact regarding which the parties have not adduced evidence as yet. In my opinion, there is a fair & substantial question to be decided as to the rights of the parties in the present suit. It is not necessary for our present purpose nor is it right that we should further examine the question in dispute or anticipate the decision of the question in the suit itself. What the Ct. has at this stage to determine is whether there is a *bona fide* contest between the parties or, as observed by Turner L. J. in *Walker* v. *Jones*, (1865) L. R. 1 P. C. 50 at p. 61: (35 L. J. P. C. 30):

"The real point is, not how these questions ought to be decided at the hearing of the cause, but whether the nature & difficulty of the questions is such that it was proper that the injunction should be granted until the time for deciding them should arrive."

It is quite sufficient if the Ct. find a case which shows that there is a substantial question to be investigated & that matters should be preserved in *status quo* until that question can be finally disposed of. Reference may be made to *Israil* v. *Shamser Rahman*, 41 Cal. 436 (A.I.R. (1) 1914 Cal. 362) which is an authority in support of this view. Applying this principle to the present case, I hold that the petnrs. are entitled to be granted a temporary injunction restraining the opposite party from executing the order of eviction passed by the House Controller until the disposal of the suit in the Ct. of the Munsif.

[6] On behalf of the opposite party, the argument was stressed that it was in the discretion of the lower Cts. to grant or not to grant an order of temporary injunction, & the H. C. ought not to interfere in such a case. But I am of the opinion that the lower Cts. have not exercised their discretion according to well-settled judicial principles but, on the contrary, have acted in an arbitrary manner. Instead of finding whether a *prima facie* case has been made out, the lower appellate Ct. has indeed decided the whole suit by finding that

"there was no lack of jurisdiction on the part of the House Rent Controller in passing the eviction order & the title suit filed is merely a contrivance to extend the period of stay of the applts. in the house as long as possible."

It is manifest that the lower Cts. have in this case failed to exercise a jurisdiction vested in them by law & the H. C. ought to interfere in revision for the ends of justice.

[7] For these reasons, I would make the rule absolute, set aside the order of the lower Cts. and grant a temporary injunction restraining the opposite party from executing the order of eviction made by the House Controller.

[8] The appln. is accordingly allowed with costs. Hearing fee two gold mohurs.

[9] It is necessary that the learned Munsif should take up the hearing of the suit & dispose of it as soon as possible. If the suit is not disposed of by the middle of January next, an explanation should be submitted to the H C.

[10] **C. P. Sinha J.**—I agree.

M.K. *Petition allowed.*

A. I. R. (38) 1951 Patna 470 *[C.N. 130.]*

MEREDITH A. C. J. & RAMASWAMI J.

The King v. *Baldeo Paswan and others* — *Accused.*

Jury Reference No. 15 of 1949, D/- 11-1-1950.

(a) Criminal P. C. (1898), S. 307 (3)—Reference under S. 307—Powers of High Court.

The H. C. under S. 307 is not entitled to come to its own independent decision upon the evidence & adopt it. The verdict of the jury has to be respected unless it is perverse-unless it is one which no reasonable body of men could have arrived at upon the evidence. The Ses. J. cannot make a reference under S. 307 merely because he considers the verdict of the jury wrong. He can only do so if he considers it too wrong as to be impossible one for reasonable men to form upon the evidence. [Para. 7]

While the criterion of reasonableness or unreasonableness in the verdict is ordinarily to be applied, the test of reasonableness on the part of the jury might not be conclusive in every case. The ends of justice must be the determining factor both for the Ses. J. in

making the reference & for the H. C. in disposing of it. [Para. 8]

Anno. Cr. P. C. S. 307, N. 11.

(b) Criminal P. C. (1898), S. 307 — Reference under—Criterion to be applied.

The ultimate criterion which the Ses. J. has to apply in deciding whether or not to make a reference, is not the objective one or whether the verdict is reasonable or unreasonable, but the subjective one, whether he "disagrees with the verdict of the jurors and is clearly of opinion that it is necessary for the ends of justice" [Para 9]

Anno. Cr. P. C., S. 307, N. 3, 4, 5.

(c) Criminal P. C. (1898), S. 367 — Evidence — Appreciation of—Duty of prosecution.

It is the duty of the prosecution to place all the relevant evidence before the Ct., & not to aim at a conviction at all costs, be the accused innocent or guilty. [Para 9]

Anno. Cr. P. C., S. 367, N. 8.

Awadhesh Nandan Sahay, Ayub and Chhatrapati Kumar Sinha — for the Reference; The Standing Counsel—Against the Reference.

Meredith A. C. J. — This is a reference against the verdict of a jury, made under S. 307, Cr. P. C., by the learned first Addl. Ses. J., Patna. The reference is in respect of four persons Baldeo Paswan, Tilakdhari Paswan, Gajo Mahto & Dwarka Dhanukard is against an unanimous verdict of guilty by the 7 jurors. The learned Judge is of opinion that the verdict is perverse, & that it is necessary to refer the case to the H. C. in the interests of justice.

[2] The four persons who are the subject of the reference were tried with six others for the murder of one Ram Saran Prasad *alias* Bhandariji of village Badi, police station Giriak, on the night of 23-4-1948. There were a number of charges, some of the accused being charged under S. 147, Penal Code, some under S. 148, all under S. 302 read with S. 149, all under S. 302 read with S. 34 & all under S. 120B for conspiracy, this last charge being triable with the aid of assessors. The verdict of the jury was unanimous throughout. They held all the accused not guilty under Ss. 147, 148 & 302/149 clearly for the reason that they did not consider it established that five or more persons took part in the crime, & they acquitted six of the accused altogether; but they found the four abovementioned accused guilty of murder under S. 302 read with S. 34 & as assessors, they expressed the opinion that these persons were also guilty under S. 120B. The learned Judge accepted all the verdicts of acquittal. Also, not accepting the verdict of the assessors, he found all the accused not guilty on the conspiracy charge. He, accordingly, referred only the cases of the four persons mentioned, & the question is whether the verdict of the jury finding them guilty of the murder should be accepted.

[3] The deceased was sleeping under a tree just outside the verandah of his *dalan* in village Badi. At about 11-30 P. M. he had his throat cut almost from ear to ear, causing immediate death. Only one other injury was found on his body, a skin-deep incised wound near the collar-bone. The murder was a remarkable one in many respects. First of all, it was the night of the full moon. Secondly, the deceased Bhandariji was sleeping almost surrounded by other people. At least six people, & possibly eight, were sleeping within a few feet of him. These circumstances disclose most remarkable boldness on the part of murderer or murderers. Secondly, it is not claimed that any one was recognised except Baldeo Paswan. Two persons Ramji Mahton (P. W. 4) & Basudeva Narayan (P. W. 6), who were sleeping within a yard or two of the deceased, claim that they were wakened on hearing a gurgling sound & recognised Baldeo Paswan running away to the south & east. They told three people, Ram Prasad Singh (P. W. 1), Prasadi Mahton (P. W. 7) & Gobind Mahton (P. W. 8), what they had seen, but did not inform the rest of those who had assembled, the reason they give being that they were afraid Baldeo Paswan might abscond. At 3 A. M. Ram Prasad Singh with the *dafadar & chaukidar*, who have not been examined, set out for the police station six miles distant, & first information was lodged by Ram Prasad at 6 A. M., it being mentioned therein that Ramji & Basudeva had recognised Baldeo Paswan as one of the assailants. During the course of the investigation the Sub-Inspector recovered a *falsa* from a bush near the scene of occurrence & a *gupti* or sword-stick was made over to him by Tilakdhar Paswan. He seized these as both appeared to be blood stained. But the report of the imperial Serologist is that though there were traces of blood on both, they were too disintegrated for it to be possible to say if the blood was human. As late as the 1st of May the Sub-Inspector examined one Lachmi Prasad (P.W. 14), who claimed to have been sleeping in the verandah of the *dalan* & to have witnessed the whole occurrence. This man is a teacher in the lower primary school at Badi, & his story was that he woke up at the sound of footsteps at about midnight, & saw the accused Sadasiva holding the legs of Bhandariji while the accused Baldeo Paswan was holding his head. Gajo Mahto, son of Sadasiva, gave a *falsa* blow on the throat of the deceased, & then the accused Dwarka Dhanuk cut his throat with a *gupti*. As he was afraid the accused had seen him, he ran off & went to the

home of a relative, six or eight miles distant, where he remained until the 30th without speaking to anyone.

[4] The Sub-Inspector also succeeded in collecting some, not very satisfactory, evidence that the *falsa* recovered was the property of Sadasiva. Some of the witnesses sleeping near the deceased also told him a story that some time before the crime the accused Dwarka Dhanuk came to where the deceased was sleeping accompanied by one Kuldip Babaji, awakened the deceased by pressing his legs on the pretext of asking for *ganja*, & afterwards had some conversation with him & went away The suggestion is made that this was a sort of reconnaissance made to discover how soundly the deceased and those round him were sleeping.

[5] At a very late stage, the 19th of May, two absconding accused Lachhu Mahto & Ram Saroop Mahto surrendered before a Mag. & made confessions in which they told a story of the crime, corresponding very much in detail with that told by Lachmi (P. W. 14). The learned Judge, after hearing argument about these confessions in the absence of the jurors, came to the conclusion that they were inadmissible as they were adduced by pressure & promises held out by persons in authority. Accordingly, these confessions were not put to the jury. The two accused who made them have been acquitted. I may say at once that the Crown has not challenged the Judge's conduct in excluding these confessions; so the question whether they were rightly excluded does not arise. On the other hand, a point has been made on behalf of the accused that there was a misdirection because the Judge did not specifically warn the jury that they must pay no heed to these confessions. There is nothing in this point. Quite obviously, the jury did pay no heed to the confessions since they acquitted those who made them. They certainly could not have used them as against any of the persons they did find guilty because they were not told, & did not know, who had been named in those confessions. The most they could have known as a result of the evidence of the officer who recorded the confessions was that the two accused persons whom they acquitted had made confessions of some sort.

[6] The prosecution sought to ascribe a number of separate motives for the murder. It was said that some days before the occurrence a meeting had taken place to elect a village *panchayat*. Baldeo Paswan & some other villagers had objected to the election of the deceased & of P. W. 1. & there was some quarrel over that, & the deceased was said to have abused Baldeo Paswan. It was further said that he had also censured Baldeo Paswan because his daughter had illicit intimacy with another villager. Various other grounds of grievance on the part of the other accused persons were suggested, & in fact the prosecution case was that the deceased had made himself generally disliked in the village, & as President of the local Advisory Committee he had offended the villagers by the methods he adopted in the distribution of kerosene oil, cloth, sugar, etc.

[7] The method of approach to a reference like this has been finally laid down for us by the P. C. in *Ramanuuraha Singh* v. *Emperor*, 73 I. A. 174 : (A. I. R. (33) 1946 P. C. 151). The gist of that decision is that the H. C. is not entitled to come to its own independent decision upon the evidence & adopt it. The verdict of the jury has to be respected unless it is perverse—unless it is one which no reasonable body of men could have arrived at upon the evidence. Section 307 says that "due weight" is to be given to the opinion of the jury & to the opinion of the Judge. Where the opinion of the jury is a possible one upon the evidence, it is only by accepting the view of the jury that the H. C. can give "due weight' to their opinion. Their Lordships do not explain what the section means by saying that due weight must also be attached to the opinion of the Judge; but clearly, on the view taken, the opinion of the Judge cannot enter into the picture at all unless & until the opinion of the jury be first found to be unreasonable. The effect of this decision is to make it very difficult for the Ses. J. to make a reference. He cannot do so merely because he considers the verdict of the jury wrong. He can only do so if he considers it so wrong as to be an impossible one for reasonable men to form upon the evidence. I do not know whether their Lordships intended or contemplated it; but I think the effect of this decision may well be to cause Govt. to modify the law with regard to jury trials in this country, if it does not decide to abolish the system altogether. The unsatisfactory manner in which the system is working is notorious, & all those connected with the administration of criminal justice in the country must know of numerous cases of miscarriage of justice.

[8] Let us now apply the criterion laid down by the P. C. to the facts of the present case. (After discussing the evidence the judgment proceeded :) In the P C. case already referred to their Lordships recognised that, while the criterion of reasonableness or unreasonableness in the verdict was ordinarily to be applied, the test of reasonableness on the part of the jury might not be conclusive in every case. They

said it was possible to suppose a case in which the verdict was justified on the evidence placed before the jury. But, in the light of further evidence placed before the H. C., the verdict is shown to be wrong. In such a case the ends of justice would require the verdict to be set aside though the jury have not acted unreasonably. And their Lordships emphasized that the requirements of the ends of justice must be the determining factor both for the Ses. J. in making the reference & for the H. C. in disposing of it. There is no further evidence before the H. C. in the present case. The diary is not evidence. Nevertheless I venture to think that this case comes within the exceptional class contemplated by their Lordships. As I have pointed out, the Ct. is entitled to refer to the diary to aid it, & having done so, the ends of justice require that it should not be ignored. The learned Ses. J. is to be congratulated that he has had the courage to make this reference even in the case of Baldeo Paswan, where the verdict was not *prima facie* unreasonable.

[9] This case holds two lessons, & they cannot be too strongly emphasised. The ultimate criterion which the Ses. J. has to apply in deciding whether or not to make a reference, is not the objective one of whether the verdict is reasonable or unreasonable, but the subjective one, whether he (to quote the words of the section) "disagrees with the verdict of the jurors ..... and is clearly of opinion that it is necessary for the ends of justice." Secondly, it is the duty of the prosecution to place all the relevant evidence before the Ct., & not to aim at a conviction at all costs, be the accused innocent or guilty. This has often been said before : it cannot be said too often.

[10] I would accept the reference in the case of Baldeo Paswan also & would, accordingly, set aside the verdict of the jury & acquit him.

[11] **Ramaswami J.**—I agree.

V.B.B. *Reference accepted.*

A. I. R. (38) 1951 Patna 473 *[C. N. 131.]*

MEREDITH C. J. AND RAI J.

The State v. *Banwari Singh and others* — *Acoused.*

Jury. Ref. No. 14 & Cri. Appeal No. 442 of 1949, D/- 28-2-1950.

(a) Criminal P. C. (1898), S. 307 — Trial by jury —Misdirection—Interference—Test.

Reference under S. 307 must fail where it is not possible to hold that on the evidence the jury could not reasonably come to the verdict it did. At the same time it is always necessary to remember that in the case of jury trial & a reference the final criterion, which must eventually determine the matter, is whether in the opinion of the H. C. there has been a miscarriage of justice or not. [Para 8]

Anno. Cr. P. C., S. 307, N. 11 ; S. 423, N. 40.

(b) Criminal P. C. (1898), Ss. 297 and 423—Jury trial — Misdirection — Omission to tell jury that order under S. 144 was not evidence of possession held no misdirection when the Judge gave them no reason to suppose that S. 144 order was evidence of possession. [Para 9]

Anno. Cr. P. C., S. 297, N. 11 ; S. 423, N. 40.

(c) Criminal P. C. (1898), S. 144—Order under—Evidentiary value.

Though the decision in a proceeding under S. 144 is not by itself proof of possession, yet it is a circumstance supporting an inference that the persons in whose favour the proceeding terminated would not be likely to allow his possession to be disturbed from any part of the property. [Para 9]

Anno. Cr. P. C., S. 144, N. 8.

(d) Criminal P. C. (1898), Ss. 297 and 423—Jury trial — Misdirection — Omission to tell jury that prosecution had not relied on certain evidence when it was not altogether rejectable.

In a case where the occurrence related to a dispute about the possession of certain plot, simply because where the two versions differed as to the actual details of the occurrence, the Public Prosecutor chose to rely upon the version of the police witnesses rather than of the local witnesses, it by no means follows that the evidence of those local witnesses must be rejected altogether by the jury on the point of possession. In such circumstances, omission on the part of the Judge to tell the jury that they must place no reliance on the evidence of the local witnesses, does not amount to misdirection. [Para 10]

Anno. Cr. P. C., S. 297, N. 11 ; S. 423, N. 40.

(e) Penal Code (1860), S. 96 — Right of private defence — Two parties arming themselves for a fight to enforce their supposed right of possession to field—Fight started in presence of police & despite their attempts to prevent it & telling parties not to fight — No crop on land nor any urgency about ploughing the field—Both parties held were in the wrong in fighting & both were unlawful assemblies—There was no right of private defence on the part of either. [Para 17]

Anno. Penal Code, S. 96, N. 2.

S. N. Sahay, D. L. Nandkeolyar and Awadh Kishore Prasad — for the Reference and Applts. ; Standing Counsel and Gauri Shankar Prasad — Against the Reference and for the State.

Meredith C. J. — We have to deal with a reference under S. 307, Cr. P. C. made by the learned Sess. J., Patna, & also with an appeal by such of the accused as were convicted by the jury & in regard to whom the learned Judge accepted the verdict. The persons who are the subject-matter of the reference are Banwari Singh, Ram Naresh & Shyam Dutt Singh. The verdict of the jury was in every case a majority verdict of four to three. In the case of Banwari Singh, the jury found him guilty under Ss. 148 & 324, Penal Code. The Judge thinks that the verdict was right under S. 148, but wrong under S. 324. In the case of Ram Naresh Singh, the jury also found him guilty under Ss. 148 & 324 but the learned Judge thinks that there was no sufficient evi-

dence of identification, & accordingly he should have been acquitted altogether In the case of the third man, Shyam Dutt Singh, the jury found him guilty only under S. 148, but for lack of satisfactory identification the Judge wants him also acquitted altogether.

[2] The applts. are Awadhbehari Singh, Ramjatan Singh & Ramanuj Singh. Awadh Bihari was found guilty by the jury under S. 147, & the Judge, accepting that verdict, has convicted him & sentenced him to two years' rigorous imprisonment. The same applies to Ramanuj. In the case of Ramjatan, the verdict of the jury was guilty under Ss. 148 & 324. The Judge, accepting, it has convicted under both sections, & sentenced him under S. 148, to three years' rigorous imprisonment, & imposed no separate sentence under S. 324.

[3] The case arose out of an occurrence which took place on 19-8-1948, at about 9 A. M. in village Koraitha situated three quarters of a mile from the Bikram Police station, & the trouble arose over the cultivation of plot No. 1126 of the village. This was claimed by both parties, Akura Singh (P. W. 1) claiming it by a deed of gift from one Dila Kuer. The prosecution party examined several witnesses to prove their possession of the plot & also put in the judgment of a Munsif. It appears that some of the plots of Dila Kuer, though not 1126, had been acquired by the Govt. in connection with Bikram Aerodreme, & the compensation had been awarded to Akura Singh as donee from Dila Kuer. The accused Awadhbihari filed a suit claiming half the compensation on the ground of the record of rights which showed the joint possession, half & half, of Dila Kuer and Suraj in 1911, & he claimed a half share through Suraj Singh & subsequent partition. This suit had failed, & been dismissed. It was also established that some months before the occurrence there had been an order under S. 144, Cr. P. C.. against Awadhbihari.

[4] The accused led no evidence of possession & merely put in a judgment of the appellate Ct. in which the decision of the Munsif had been modified, and Awadhbihari's claim to a half interest in the plots in suit (not 1126), had been accepted. This judgment, however, came into existence after the present occurrence. The learned Judge, both in his charge to the jury and in his letter of reference, pointed out that there were two different versions of what took place in the occurrence—one that of Akura Singh (P. W. 1) & his witnesses Baiju Ram (P. W. 2), Rajnandan (P. W. 5) & Indrasan Singh (P. W. 7) & the other the version of three police witnesses, an Assistant Sub Inspector, (P. W. 10) a constable (P. W. 11) & a chaukidar, Khaderan Dusadh (P. W. 12) who were actually present during the occurrence. The version of the first group of eye witnesses was that those four persons were uprooting paddy seedlings in their plot just on the north of plot 1126. The accused Awadhbihari, Banwari, Ram Jatan & Shyam Dutta came armed to the disputed plot with their ploughman Bifan Dusadh, who began to plough up the plot which was then fallow. Tarkeshwar (killed) sent P. W. 5 to Akura Singh in order to inform him, & Akura then came to the place of occurrence & protested to Awadhbihari, who ordered him to be assaulted. Just then several helpers of the accused persons arrived. Tarkeshwar also protested. Thereupon accused Ramnaresh gave a bhala blow to Tarkeshwar in the chest, & accused Banwari gave him one garasa blow on the head, & another garasa blow which he stopped with his hand. Tarkeshwar went to a short distance to the east & fell down. Alakh Narain (P. W. 6) was assaulted by several of the accused persons including Ram Naresh, Banwari & Shyam Dutt. Accused Ram Naresh & Ram Jatan gave bhala blows to Bindeshwari (also killed), & accused Harbans gave a bhala blow to Indrasan (P. W. 7). After the assaults were over the accused persons fled away. The injured persons were taken to the dispensary at Bikram where Tarkeshwar & Bindeshwari died an hour or two later after making dying declarations in the presence of a Sub-Registrar.

[5] The version given by the police witnesses was that the chaukidar (P. W. 12) gave information at about 8-10 A. M. at the Police station that there was an apprehension of a breach of the peace between the two parties, & both were collecting men. The Sub-Inspector (P. W. 13) then deputed the Assistant Sub-Inspector & the constable to go to the spot & try to prevent a breach of the peace. When they came to the spot, they found accused Awadhbihari Singh & five or six others already standing armed with lathis & bhalas on the eastern ridge of the disputed plot which was being ploughed on their behalf. P. W. 10 began to make enquiries from Awadhbihari, & just then Alakh Singh, Indrasan, Tarkeshwar, Bindeshwari & three or four others came armed with lathis from the northeast. It should be explained that adjoining the disputed plot on the east is the field of one Jagu Dhobi. When the prosecution party arrived on the eastern ridge & Jagu Dhobi's field, one of its members threw out a challenge. This challenge was accepted by Awadh Bihari's party & both parties then advanced towards each other & a free fight took place in the field of Jagu Dhobi. In the course of that fight, Tarkeshwar & Bindeshwari, Alakh & Indrasan

received injuries. They remained at the place of occurrence, but all others of both parties fled away. The constable & the Assistant Sub-Inspector did not see any body injured on the side of the accused, nor was it proved at the trial that any one on the side of the accused had received any injuries.

[6] The learned Judge expressed the opinion that the eye witnesses of the first group had not given out a truthful version. P. W. 1 had admitted before the police that the men of his party had lathis with them, & there was a free fight, but he did not stick to his statement in Ct. P. W. 2 admitted before the Sub-Inspector that Tarkeshwar, Bindeshwari Alakh Indrasan, Ramanand & Akura came to the place of occurrence with lathis at the same time as the police did. Rajnandan (P. W. 5) admitted before the police that his father & uncles were armed with lathis, & there was a free fight. He went back on that statement at the trial. According to these witnesses, the assaults took place on plot 1126, but the victims fell in Jagu Dhobi's field on the east. The Sub-Inspector found blood stains, a cut finger, a broken tooth, a lathi & some vomitted substance in Jagu Dhobi's field, & no blood stains in the disputed field, & there could be no doubt that the fight took place in Jagu Dhobi's field, as stated by the police witnesses. He mentions that he had taken all these circumstances into consideration. The learned Public Prosecutor stated before the Ct. that he would rely upon the second group of eye-witnesses (P. Ws. 10, 11 & 12) & not upon the first group of eye witnesses, namely P. Ws. 1, 2, 5 & 7.

[7] It should be mentioned that there were charges also under S. 302 against Ram Naresh, & charges under S. 302 read with S. 149 against the rest. The jury acquitted upon those charges, & evidently the learned Judge agreed with their acquittal because he has not suggested in his letter of reference that there should have been any convictions other than those actually made by the jury under Ss. 148, 147 & 324.

[8] Mr. S. N. Sahay who has appeared for the applts. & also for the persons who are the subject of the reference, has strongly argued that there are misdirections in the charge vitiating the verdict, & therefore, the applts should be acquitted & the reference should be accepted, even if it is not possible to hold that the verdict of the jury was such that no reasonable body of men could have arrived at that verdict. The criterion is laid down by the P. C. in the recent case of *Ramanugrah Singh* v. *Emperor*, 78 I. A. 174: (A. I. R. (33) 1946) P. C. 151 : 47 Cr. L. J. 905). It is quite obvious that the question of misdirection is most important in this case, & indeed the main question. If there has been no misdirection, the appeal must clearly fail, & I may add that the reference must fail also, because I do not think it is possible to hold that on the evidence the jury could not reasonably come to the verdict it did. At the same time it is always necessary to remember that in the case of a jury trial & a reference the final criterion, which must eventually determine the matter, is whether in our opinion there has been a miscarriage of justice or not because S. 423 (2), Cr. P. C. says:

"Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the Jury of the Law as laid down by him."

I may say at once that, having considered the entire evidence of the case, I see no reason to think that there has been any miscarriage of justice, at least against the accused if the verdict of the jury errs, it appears to me that it errs in favour of the accused in not convicting of any offence except those I have mentioned.

[9] Coming now to the question of misdirection, Mr. Sahay in the first place says that the learned Judge was wrong in telling the jury about the order under S. 144, Cr. P. C., without telling them that that was not evidence of possession. The Judge, it is true, did not give them that direction, but at the same time he gave them no reason to suppose that S. 144 order was any evidence of possession. He referred to it only in narrating the history of the dispute, & in that he was right. The matter was not irrelevant because as pointed out by a Bench of this Ct. in the *King* v. *Jagdish Tewari*, A. I. R. (37) 1950 Pat. 79: (51 Cr. L. J. 551) though the decision in a proceeding under S. 144 is not by itself proof of possession, yet it is a circumstance supporting an inference that the persons in whose favour the proceeding terminated would not be likely to allow his possession to be disturbed from any part of the property. That is certainly a factor which the jury were entitled to consider. Would it be likely, after obtaining an order under S. 144, that the prosecution party would ever have allowed the accused to come into cultivating possession thereafter so as to be in peaceful possession at the time of the occurrence without there having been some previous occurrence at the time of the accused attempting to take possession on the expiry of the S. 144 order? Not only that, but the Judge in another part of his charge did make it clear to the jury that this was not evidence of possession, because he said to them: "If you do not believe the

evidence of P. Ws. 1, 2, 5 & 7 there is no reliable evidence of possession over plot No. 1126."

[10] Next Mr. Sahay says there was a misdirection because the Judge did not tell the jury that they must place no reliance on the evidence of P. Ws. 1 2, 5 & 7 upon any point in view of the fact that the Public Prosecutor had not relied upon them. On the contrary, he simply narrated the entire facts, drew their attention to the difference in the versions & the attitude of the Public Prosecutor & quite clearly left the evidence of these witnesses to them, because, as I have stated he said "If you do not believe the evidence of P. Ws. 1, 2, 5 & 7 there is no reliable evidence of possession over plot No. 1126." That clearly means he left it open to them to believe these witnesses on the point of possession. In my opinion, the Judge was not wrong in taking that course. Simply because, where the two versions differed as to the actual details of the occurrence, the Public Prosecutor chose to rely & quite rightly, upon the version of the Police witnesses rather than that of the local witnesses it by no means followed that the evidence of those local witnesses must be rejected altogether by the Jury on the point of possession and on the point of identification I have read the evidence of those witnesses, & while no doubt they did distort the facts to some extent in their own favour it was not such as in my opinion, must be rejected altogether on all points. It could at least afford some corroboration of the Police witnesses, for example, on the point of identification & it also was not entirely irrelevant on the question of possession, having regard to the fact that the accused had put in absolutely no evidence of possession & the prosecution had in its favour, to some extent at that time, the facts that there was a civil Ct. decision completely negativing the claim to title on the part of the accused & an order under S. 144 against them shortly before. In my opinion there is no misdirection here either in the charge.

[11] I now come to the most important point made by Mr. Sahay. The learned Judge after telling the jury that there was no reliable evidence of possession unless they believed P. Ws. 1, 2, 5 & 7 went on to say:

"It seems to me that the question of possession over plot No. 1126 is not of any importance if you believe the evidence of P. Ws. 10. 11 & 12 because their evidence discloses that the fight was between two armed parties, both prepared for a fight in connection with the enforcement of a right or supposed right of possession over plot No. 1126. If you believe, in view of the evidence of P. Ws. 10, 11 & 12, that Awadhbihari's party consisted of five or more persons & that their common object was by criminal force to enforce a right or supposed right of possession in respect of plot No. 1126, you can hold that the members of that party have committed the offence of rioting."

Mr. Sahay says that this amounts to a very serious misdirection because the case was not of the type referred to in *Kabiruddin* v. *Emperor*, 35 Cal 368 : (7 Cr. L. J. 256) where it can be held that both parties having come armed determined on fighting the matter out neither can have any right of private defence.

[12] Mr. Sahay has cited a number of decisions on this point but, in my view, there is a clear line of distinction between the facts in those cases & the facts in the present case, which seem to me much more closely analogous with the facts in *Kabiruddin* v. *Emperor*, 35 Cal. 368 : (7 Cr. L. J. 256). Mr. Sahay first relies on *Fauzdar Rai* v. *The Crown*, 3 Pat. L. J. 419 : (A. I. R. (5) 1918 Pat. 193 : 19 Cr. L. J. 241) wherein it was laid down that there a person in possession of property sees an actual invasion of his rights to that property, if that invasion amounts to an offence under the Penal Code, he is entitled to assert his right by force & to collect for that purpose such numbers & such arms as may be absolutely necessary for this purpose. There is, however, a very important qualification in this case. The learned Judges add "Provided only that there is no time to have recourse to the protection of the Police authorities" & it is also to be noticed that this ruling refers to a person in possession of property, whereas in the present case the accused made no attempt worth the name to prove their possession of the property. Their Lordships in that case did not dissent from *Kabiruddin* v. *Emperor*, 35 Cal. 368 : (7 Cr. L. J. 256). They merely distinguished it, & indeed no case has been cited before us in which that ruling has been actually dissented from. On the contrary they quoted a passage without dissenting from it:

"There can be no right of private defence either on one side or on the other where both parties are evidently aware of what is likely to happen & turn out in force. The right of private defence cannot be pleaded by persons who, expecting to be attacked, go out of their way to court an attack."

[13] Mr. Sahay next relies upon *Sunder Buksh* v. *Emperor*, 3 Pat. L. J. 653: (A I.R. (5) 1918 Pat. 308 : 19 Cr.L.J. 983). But here again there is an obvious distinguishing feature. That was a case where a man found the opposite party actually cutting his crops. He sent a message to the Police, & then returned & found that he could not save those crops if he waited for the Police. They would have been already cut & therefore, he was held justified in resorting to force to put a stop to the cutting.

[14] Mr. Sahay's next case is *Subedar Singh* v. *Emperor*, A.I.R. (20) 1933 Pat. 434: (34 Cr.L.J.

1075). There it was held that a party in possession of a property is entitled to resist by force an attack made on his property. But the important qualification is added "provided there is no time to have recourse to the public authorities for protection" & it was also added that there was nothing in the case to show that the accused had any reason to believe that an attack would be made on them while they were ploughing. Hence this case is clearly distinguishable.

[15] The same remarks apply to Mr. Sahay's next case, *Nareshi Singh* v. *Emperor*, 2 Pat. 595 : (A.I.R. (11) 1924 Pat. 388 : 25 Cr. L. J. 1228). Here again *Kabiruddin* v. *Emperor*, 35 Cal. 368 : (7 Cr L. J. 256) was not dissented from but distinguished on facts. Their Lordships pointed out that in *Kabiruddin case*, (35 Cal. 368 : 7 Cr. L. J. 256) the applts. were members of an unlawful assembly, firstly because they were attempting to enforce a right or a supposed right by violence, & secondly, because there was sufficient time to inform the authorities. Then they said :

"Where, however, possession is, undisputed or where there is no time to seek the assistance of the authorities, I cannot agree that there is any obligation upon a person entitled to exercise the right of private defence & to defend his person or his property to retire from the field merely because his assailant threatens him with violence."

Nobody can quarrel with that proposition. But the important thing is that that was a case where possession was undisputed, & there was no time to call in the Police.

[16] Lastly Mr. Sahay cites *Silajit Mahto* v. *Emperor*, 36 Cal. 865 : (4 I. C. 19). But the facts there were entirely different from those in the present case. In that case they said upon the facts which had been established that the common object was not to enforce a right or supposed right but rather to maintain undisturbed the actual enjoyment of a right.

[17] The fact is it is difficult to lay down a general rule in these matters. Each case depends on its own facts. Now what were the facts in the present case? Both parties had been collecting men for a fight from the morning. Information had been sent to the Police. The thana was quite close & the parties must have known that the Police would come almost at once. Without waiting for the Police or giving the Police a chance to settle the matter peacefully, the accused persons, whose claim at that time was at the best extremely doubtful, collected a number of armed men knowing; as they must that the other side had also collected men, & they go to the spot, & having lined up their armed men, start the ploughing of this field, about which it does not appear that there was any urgency at all; & when the other side comes & issues a challenge, in the very presence of the Police they advance to meet them, accepting that challenge, not upon the land, but before the other party had reached the land, & despite the fact that the Police Officer present was doing his best to prevent a fight, & was telling both parties that they must not fight. In my opinion it was the duty of both parties in such circumstances to leave matters to the Police who could be trusted to see that the dispute was settled peacefully, if necessary by proceedings under S. 145. If the accused retired & left matters to the Police, they had no injury to expect. There was no crop in the land which could be cut. There was no possibility of any danger to the properties. It was the duty of both parties to obey the directions of the police officer, & in my opinion, both parties in fighting in those circumstances were entirely in the wrong & both were unlawful assemblies. I consider that this was a case where there was no right of private defence on the part of either. I think, therefore, that the learned Judge was not wrong in telling the jury that, if they did not believe the evidence of possession, they could nevertheless decide the case disregarding that aspect. We do not know whether the jury did discard the evidence of possession. It may well be that they came to the conclusion that the prosecution party were in possession, &, in my personal opinion, if that was the basis upon which they acted, it was a correct basis. But I also think that if they acted on the Judge's instruction that possession was irrelevant, then also their verdict could not be upset on that ground. There was undoubtedly a defect in the charge having regard to what happened. The charge should have specified that one of the common objects was to assault. In the circumstances it undoubtedly was so. If nothing more, it became a common object the moment the party of the accused advanced towards the other party against the orders of the Assistant Sub-Inspector. The charge, however, did not specify "assault" as a common object, but specified "by criminal force or show of criminal force to enforce a right or supposed right of possession in respect of plot 1126 from Akura Singh."

[18] There was, therefore, a defect in this charge. But it was not, in my opinion, such as to cause any prejudice to the accused, & it would be curable under S. 537, Cr. P. C. The charge at least does refer to the use of force or show of criminal force. That was the gravaman of the charge & the accused did use force knowing full well they had no justification, in the circumstances, for doing so, irrespective of whe-

ther they were in possession or not, though I am of opinion they were not in possession, & had no right of private defence of property.

[19] In my opinion there were no misdirections of a serious nature in the charge such as could occasion a failure of justice.

[20] Apart from the general questions, Mr. Sahay for the applts. has argued the case of Ramanuj, because, he says this man was identified only by the Chaukidar, & the chaukidar was short-sighted. He could not identify the accused at 25 feet in the dock, & had to go close. But the chaukidar said in his evidence that he identified the accused on the spot from a distance of three or four cubits. He was standing with them on the eastern ridge, & must have been at very close quarters, & had ample opportunity to make identifications. If the jury accepted the evidence of this solitary witness, they were certainly entitled to do so, & could not be called unreasonable in doing so. There was evidence. Then Mr. Sahay says the identification was only on the ridge before the fight. There was no evidence that this accused took an actual part in the fight. But the chaukidar did not identify the man as a spectator. He identified him as one of the armed group waiting to fight armed with a lathi & he went on to say that the party then fought with the other party. In such circumstances the jury, in my opinion, were fully entitled to draw the inference that this man must have been one of the rioters, & in my opinion, it was quite a reasonable inference too.

[21] Coming now to the reference. The learned Judge is quite satisfied with the identification of Banwari Singh & his conviction under S. 148. As to that, he is clearly right. The man was identified with a garasa not only by the chaukidar but also by the constable. This was the only man identified by this constable at a test identification parade & he made no mistakes. As for the conviction under S. 324, there may be no direct evidence of Police witnesses, but as I have said, there was no reason why the jury should absolutely discard the evidence of the local witnesses, & there were also the dying declarations. Therefore, I am not prepared to hold that the jury could not reasonably have found this man guilty under S. 324. The matter, however, is of no importance. In the case of the applt. Ramjatan, the learned Judge accepted the convictions under Ss. 148 & 324, but impose no separate sentence under S. 324. I think he might well have done the same in the case of Banwari instead of making a reference, & that is what I propose to do.

[22] As for the other two, Ramnaresh and Shyam Dutt, the identification is only by the Assistant Sub-Inspector. The Assistant Sub-Inspector at a test identification, a month after the occurrence, identified these two & one more. But he also identified three persons wrongly. Mr. Sahay, therefore, argues that the jury could not reasonably have acted on his evidence alone. Had they acted on this evidence alone, the case would be a marginal one. They saw the Assistant Sub-Inspector in the box. They must have noticed the manner, in which he gave evidence & in which he made the identifications, & they might conceivably, without being wholly unreasonable have decided to rely upon his evidence despite his mistakes at the test identification. But in fact, for the reasons I have already given, the evidence of the Assistant Sub-Inspector did not stand wholly alone. There was also the evidence of the local witnesses to which, I think, the jury were entitled, if they saw fit, to attach some weight as a corroboration, & here again there were also the dying declarations. Bindeshwari, who seems to have been in his full senses when he made his dying declaration & told a story consistent with the Police version, mentioned Ram Naresh as one of his assailants. Tarkeshwar told a confused story, & it appears to me that his mind was probably wandering as he was very near death. But the fact remains that he did expressly name both Ram Naresh & Shyam Dutt. The dying declarations were not very clearly put to the jury. They were not expressly told that they were good evidence, but nevertheless they were mentioned to the jury & it may be that the jury, as they were entitled to do, did attach some weight to them.

[23] In these circumstances I do not think that any sufficient ground has been made out for interference with the verdict of the jury in any case. I see no reason to think that in this case there has been any miscarriage of justice; rather I think some of the accused at least get off very lightly. I would, therefore, dismiss the appeal & I would reject the reference & accept the verdict of the jury. It follows that Banwari Singh, Ramnaresh & Shyam Dutt must also be convicted under S. 148, & as in the case of Ramjatan, I would impose a sentence of three years' rigorous imprisonment. Banwari Singh and Ram Naresh must also be convicted under S. 324, but there is no necessity, in my opinion, for any separate sentences. They must now surrender to their bail.

[24] **Rai J.**—I agree.

V.B.B. *Appeal and reference rejected.*

A. I. R. (38) 1951 Patna 479 *(C. N. 132.)*

NARAYAN J.

Bankim Chandra Chakravarty — Applt. v. Ramkrishna Singh and another — Resps.

Cr. Reference No. 4 of 1950, D/ 27-3-1950.

Criminal P. C. (1898), S. 147—Proceedings under —Stay—Revival.

The Mag. is competent to pass an order staying or dropping the proceedings under S. 147 before him on the ground that a civil suit had been instituted & that there was no likelihood of breach of the peace after the institution of the civil suit & the Sub-Divisional Mag. has no jurisdiction to revive such proceedings subsequently. [Paras 1, 3]

Anno. Cr. P. C., S. 145 N. 48.

J. M. Ghosh — for the Reference; B. Mukharji — against the Reference.

Judgment. — This is a reference by the Addl. Ses. J. of Manbhum-Singhbhum recommending that the order of the Sub-divisional Mag. of Dhalbhum in relation to a proceeding under S. 147, Cri. P. C. be set aside. On the report of the Police that a dispute likely to cause a breach of the peace existed between the parties with regard to certain plots of land said to be a playground, a proceeding under S. 147 was drawn up on 14-5-1948. In this proceeding Ramkrishna Singh & another were the first party, & Bankim Chandra Chakraverty was the second party, & on 22 9-1948, the case was transferred to one Mr. G. K. Prasad for disposal. On 17-3-1949, the second party, Bankim Chandra Chakravarty, filed a petn. before the learned Mag. in which he stated that a civil suit having been filed before the Subordinate Judge of Chaibassa with regard to the land in dispute, the proceeding might be stayed till the decision of that civil suit. It was further stated in this petn. that there was no likelihood of any breach of the peace on account of the conduct of the second party & that the right, which was in question in the proceeding, was pre-eminently a matter to be dealt with by the Civil Ct. On this petn. the learned Mag. passed the following order :

"17-3-1949 —Second party file a petn. stating that a civil suit is pending between the parties & the suit lands are the same as the subject-matter of the present proceeding. I am satisfied from the papers shown to me by the party that a civil suit for the suit land is pending between the parties. The proceeding has been pending for a long time. There does not seem to be any apprehension of breach of the peace now that the matter is pending before a civil Ct. The proceeding is, therefore, stayed."

For about six months after this order had been passed, none of the parties took any step & the first party did not move any higher Ct. against this order of the learned Mag. It was on 6-9-1949, that a gentleman of the name of Priparesh Mukharjee filed a petn. before the Sub-divisional Mag. of Dhalbhum praying that he might be allowed to get the games played on the land in dispute. This petn. is an unstamped petn. & though on this petn. the learned Sub-divisional Mag. wrote an order on 6 9-1949, directing that the petn. should be sent to the Ct. concerned for disposal, on that very date he wrote another order in the order sheet of this case which runs as follows :

"This record has been put up to me today. I do not know of any provision of law under which a Mag. can stay a proceeding under S. 147, Cr. P. C. There does not appear to be any injunction from the Civil Ct. to that effect. As a civil suit is likely to take an indefinite period of time, this case is withdrawn to general file & transferred to Mr. B. Singh for favour of re-starting the hearing & concluding the trial."

The second party then moved the learned Ses. J. of Manbhum-Singhbhum against this order, & his appln. was heard by the Addl. Ses. J. who by his letter dated 23-12-1949, referred the matter to this Ct. with a recommendation that the order of the learned Sub-divisional Mag. reviving the proceeding be set aside. The view taken by the learned Addl. Ses. J. is that the proceeding had come to an end by virtue of the order which had been passed by the Mag. Mr. G. K. Prasad under S. 145 (5), Cr. P. C., & that the subsequent order of the learned Sub-divisional Mag. dated 6-9-1949, for "re-starting the hearing & concluding the trial" was without jurisdiction. In my opinion, the view taken by the learned Addl. Ses. J. is correct, & this reference must be accepted. Sub-s. (4) of S. 147 lays down that an order under this section shall be subject to any subsequent decision of a civil Ct. of competent jurisdiction, & sub-s. (1) of S. 147 says that an enquiry has to be made in the manner provided in S. 145, & that the provisions of that section shall as far as may be, be applicable in the case of such inquiry. It need not be pointed out that the object of S. 145 or S. 147 is to enable a Mag. to intervene & pass a temporary order with regard to the property in dispute which will be effective only so long as the actual right of one of the parties has not been determined in a civil litigation. The Legislature never intended that this section should be used by any party manoeuvring for possession for the purpose of civil litigation, the sole purpose, which the Legislature had in view, being the prevention of the breach of the peace. These provisions are additional weapons in the hand of the Mag. for maintaining peace in the area for the peace of which they are responsible. I have referred to this well-known principle, because the argument of Mr. Bhabanand Mukharji for the first party has been that the grounds as contemplated by sub-s, (5) of S. 145, Cr. P. C. did not exist in this case so as

to enable the Mag. to drop the proceeding. In *Manindra Chandra* v. *Barada Kanta*, 30 Cal. 112 : (6 C. W. N. 417), it was held by a D. B. of the Calcutta H. C. that a Mag. had jurisdiction to cancel an order passed under sub-s. (1) of S. 145, Cr. P. C. & to stay proceeding if he felt satisfied, whatever the source of his information might be, that the state of things did not exist, which would give jurisdiction to proceed with the inquiry. In this case, their Lordships quoted a passage from the judgment of the same H. C. in *Tarini Charan* v. *Amulya Ratan*, 20 Cal. 867, which runs as follows :

"Now the first question which arises is the effect of an order striking off proceedings under S. 145, Cr. P. C. As Mr. Woodroffe has told us, there is a series of decisions with regard to the effect of striking off the file of a Court applns in civil matters; but we think that those stand on an entirely different footing from proceedings of a quasi-criminal description. The section itself provides for a case; where a Mag. can cancel his order. Those are cases where parties show him that no dispute exists, & if the likelihood of a breach of the peace has ceased to exist before the proceedings under S. 145 have terminated, it follows that there can be no necessity for a continuation of such proceedings. The result of those applns which were sanctioned by the Mag. practically amounted to cessation, at any rate, for the time being of any likelihood of a breach of the peace. That must have been the view which the Mag. took of it, as he considered it unnecessary to proceed, at any rate then, with those proceedings. We think that unless it can be shown that there is a legislative enactment, giving a power to that effect, cessation by the order of the Mag. of any criminal proceedings must, until that order is set aside, operate, not only as staying the proceedings, but destroying them."

It follows that whenever a Mag. is satisfied that there is no likelihood of a breach of the peace, he discontinues the proceeding; the Mag. can stay it, & the order of stay passed by him will be tantamount to a termination of the proceeding. A single Judge of the Madras H. C. in *Suryanarayana* v. *Ankineed Prasad*, 47 Mad. 713 : (A. I. R. (11) 1924 Mad. 795 : 25 Cr. L. J. 978) observed that when the Mag. is able to act on a police report or other information in starting proceedings under S. 145, there is no reason why he should not stay further proceeding on similar information without being obliged to record such evidence as the parties may produce with the same formality as he would have done, if he had gone on with his enquiry instead of dropping it. In another Madras case *D. Narasayya* v. *C. Venkiah*, 49 Mad. 232 : (A. I. R. (12) 1925 Mad. 1252: 27 Cr. L. J. 95) also the same principle was reiterated & it was pointed out that it was open to a Mag. to drop the proceeding if he was satisfied that there was no likelihood of a breach of the peace. Krishnan J. made the following observations with regard to cl. (5) of S. 145 :

"Clause (5) of S. 145 provides for a special case where as the Mag. is proceeding with the trial of the question of possession, the parties to the proceedings or even other persons who are interested are given the right to show that no dispute likely to cause a breach of the peace exists or has existed. The existence of this clause does not take away the power of the Mag. himself to drop proceedings, if he is satisfied that there is no further likelihood of a breach of a peace."

At one stage of his argument, Mr. Mukharji, expressed the view that 'staying the proceeding' does not mean 'dropping the proceeding,' & he also pointed that the order of Mr. G. K. Pd. does not show that he had cancelled the previous order under sub s. (1) of S. 145. But the word "stayed" has been used in cl. (5) and the authorities referred to above conclusively establish that it means the dropping of the proceeding or the termination of the proceeding. It is true that the learned Mag. did not say in so many words that he had cancelled the order under sub-s. (1) of S. 145; but when he said that he had stayed the proceeding, he certainly meant that the order under sub-s. (1) stood cancelled. There can be no doubt that in this case the Mag. had very good grounds to make the order which he made. As already pointed out, an order under S. 147 would be subject to any subsequent decree of a civil Ct. of competent jurisdiction, & the second party had rightly stated in his petn. that the right which was the subject-matter of dispute could only be properly determined by a civil Ct. & that there was no likelihood of a breach of the peace when the parties had already begun to fight in the civil Ct. with regard to the right in question. The proceeding terminated when the order was passed on 17-3-1949, & this proceeding could not be revived unless the Mag. received fresh information about a breach of the peace. As was pointed out by the Calcutta H. C. in *Kalananda Singh* v. *Rameshwar Singh*, 15 C. W. N. 271 : (11 Cr. L. J. 729), the jurisdiction is solely based on the imminence of a breach of the peace, & the Mag. must be satisfied that a dispute exists which is likely to lead to a breach of the peace. The information & the grounds on which the proceedings could be revived in September 1949, could not be the same on the basis of which they had been started in October 1948. I have already pointed out that when the learned Sub-divisional Mag. passed his order dated 6 9-1949, for re-starting the proceeding six months had elapsed & during those six months the first party had not moved any higher Ct. against the order dated 17-3-1949, & had not applied for the revival of the proceeding. Mr. Mukharji was not right in submitting that the order of the learned Sub-divisional Mag. should be taken to be an order under

sub-s. (2) of S. 528, Cr. P. C. In fact, the order of the learned Sub-divisional Mag. is open to very serious criticism. He revived the proceeding on an unstamped petn. filed by one who was no party to the proceeding, but a complete stranger, without at all considering the circumstances under which the Mag. Mr. G. K. Prasad had passed the order dated 17-3-1949 & the powers which he had for making an order in terms contemplated by sub-s. (5). The learned Sub-divisional Mag. has said in his order that he does not know of any provision of law under which a Mag. can stay a proceeding under S. 147, Cr. P. C. & that there was no injunction from the civil Ct. for staying the proceeding. As already pointed out, the word 'stayed' has been used by the Legislature in its wisdom & there are several authorities which have interpreted this word to mean the termination or the dropping of the proceeding. I, therefore, wonder how the Mag. thought that there was no provision of law under which a Mag. could stay a proceeding under S. 147, Cr. P. C. It further appears that he was unmindful of what is contained in sub-s. (4) of S. 147 & also of the fact that since the termination of the proceeding in March 1949, the first party had taken no step for the revival of the proceeding, which is a clear indication of the fact that he was satisfied that there was no apprehension of a breach of the peace.

[2] Mr. Mukharji referred to a decision of this Ct. in *Sastu Sahu* v. *Nathuni Thakur*, 6 P. L. T. 258 : (A. I. R. (11) 1924 Pat. 689 : 26 Cr. L. J. 105). But the facts of that case are clearly distinguishable from the facts of the present case. What happened in that case was that a Mag. after examining the witnesses & after hearing the arguments of a case under S. 145 did not pass any order for about ten months. To quote from the judgment of Kulwant Sahay J.,

"the learned Sub-divisional Mag. apparently forgot all about the case until he was reminded of it when he was going away on transfer" & he then hurridly disposed of the case with an order which runs as follows: I find I passed no final order in this case. As so long time has elapsed, I do not think any breach of the peace is likely. I, therefore, strike the case off."

Certainly this was a most dishonest way of disposing of a case under S. 145, Cr. P. C. & the decision in that case cannot be cited as a precedent in this case in which the proceeding was stayed or dropped because a civil suit had been instituted & because there was no likelihood of breach of peace after the institution of the civil suit.

[3] In my opinion, the order that has been passed by Mr. G. K. Prasad was an order which he was competent to pass according to the provisions of the Criminal Procedure Code, & the learned Sub-divisional Mag. had no jurisdiction to revive the proceeding & to transfer it to another Mag. for disposal. As has been pointed out by this Ct. in *Luti Singh* v. *Ramkirit Singh*, A. I. R. (28) 1941 Pat. 105 : (42 Cr. L. J. 340), even a Dist. Mag. has no power to revise an order under S. 145 passed by a Mag. subordinate to him, & all that he can do is to call for the record under S. 435, & if he considers that the order should be interfered with, his duty is to refer it to the H. C. It seems obvious that this learned Sub-divisional Mag. assumed a jurisdiction which he never possessed & at the instance of one who had been no party to the proceeding. I, therefore, agree with the learned Addl. Ses. J. that the order of the learned Sub-divisional Mag. should be set aside.

[4] The reference is accepted, & the order of the learned Mag. dated 6-9-1949, is set aside.

D.H. *Reference accepted.*

A. I. R. (38) 1951 Patna 481 *[C. N. 133.]*

RAMASWAMI AND RAI JJ.

Dipnarain Mahton and others — *Applts.*
v. *Bihari Mahton and others* — *Resps.*

A. F. A. D. Nos. 2348 & 2355 of 1947, D/- 10-1-1951.

Cosharers—Joint possession—Compensation for occupation of excess land—Limitation Act (1908), Arts. 142, 144.

Where one co-sharer is in separate possession of the common land without objection from, or ouster or exclusion of, the other co-sharers, he is under no obligation either to account or to pay compensation to such co-sharers in respect of the profits which have accrued to him by reason of the skill or industry which he has employed in making good use of the property while he was in possession. [Para 5]

Anno: Lim. Act, Arts. 142-144, N. 35.

Chhatrapati Kumarsinha — *for Applts.*; *Girja Nandan Prasad* — *for Resps.*

Ramaswami J. — These appeals are presented against the judgment of the Addl. Subordinate Judge, Patna.

[2] The question to be examined in these appeals is whether the pltfs. are entitled to recover compensation for their share of the produce of the land in dispute for the years 1348 to 1350 Fasli from the various defts. To enable this question to be considered, it is necessary to state the material facts so far as they are proved or admitted. The pltfs. alleged that 00.28 acre of khata No. 4, 01.50 acres of khata No. 27 & 29.83 acres of khata No. 3 were undivided bakasht land which belonged to the sixteen annas maliks; that the defts. were to cultivate the land & to divide to (sic) the pltfs. their share of the produce. Defendants 1 to 7 contested the suit on the ground that khata No. 4 was not the bakasht land of the sixteen

annas landlords. As regards khata No. 3, the defts. asserted that excepting 00.95 acre the entire area was divided amongst the maliks before the survey & the possession of the different maliks was noted in the record-of-rights. As regards .95 acre of khata No. 3 & 1.64 acres of khata No. 27, it was stated that these lands were also divided amongst the maliks before the survey had taken place. The defts. therefore, denied that the pltfs. were entitled to compensation representing any share of the produce. The learned Munsif, upon a consideration of the evidence, held that the pltfs. were entitled to a decree for compensation.

[3] In appeal, the learned Subordinate Judge reversed the decree of the Munsif holding that the pltfs. were not entitled to recover any compensation from the defts. The learned Subordinate Judge found (1) that khata No. 4 was not the bakasht land of the sixteen annas landlords, but defts. 12 to 14 alone were entitled to cultivate it; (2) that as regards khata Nos. 3 & 27, there is no complete partition, but the maliks were cultivating the land separately by some kind of mutual arrangement and (3) that defts. 1 to 7 were in possession of more than 14 acres of bakasht land, though, as a matter of fact, they were entitled to hold about 12 acres according to their sixteen annas milkiat share. After reaching at this finding of fact, the lower appellate Ct. considered that the pltfs. were not entitled to a decree for compensation because there was no proof that the defts.-cosharers had excluded the pltfs. or ousted them from their possession or had challenged their title to the joint possession of the land of which they were tenants-in-common.

[4] In support of these appeals, learned counsel for the appellants stressed the argument that since defts. 1 to 7 were found in possession of more than their proper share of the bakasht land, the pltfs. were entitled to a decree, though there was no ouster or exclusion alleged in the plaint. Learned counsel referred to the cases of the *Midnapur Zamindary Co. Ltd.* v. *Naresh Narayan*, 29 C. W. N. 34 : (A. I. R. (11) 1924 P. C. 144) & *Watson & Co.* v. *Ramchund Dutt*, 18 Cal. 10 : (17 I. A. 110 P. C.) in support of his argument. But the facts of these cases are manifestly different from those of the present case. In case of those cases the cosharer was held entitled to a decree for compensation or mesne profits because the defts.-cosharers had excluded him or ousted him from possession or had impeached his title to the joint possession of the land of which they were cosharers. Learned counsel referred to the following passage in *The Midnapur Zamindary Co. Ltd.* v. *Naresh Narayan*, 29 C. W. N. 34 at p. 40 : (A. I. R. (11) 1924 P. C. 144) :

"Where the lands in India are so held in common by cosharers, each cosharer is entitled to cultivate in his own interests in a proper & husband-like manner any part of the lands which is not being cultivated by another of his cosharers, but he is liable to pay to his cosharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a cosharer is not an ouster of his cosharers from their proprietary right as cosharers in the lands. When cosharers cannot agree as to how any lands held by them in common may be used, the remedy of any cosharer who objects to the exclusive use by another cosharer of lands held in common is to obtain a partition of the lands."

[5] But this passage has got to be read with reference to the context of the facts of that case. The Midnapur Zamindary Co., Ltd. had resisted the pltf's claim in that suit & had challenged the pltf's title both upon the ground of adverse possession & also because they had purchased in execution of a decree a jote which they had themselves granted in respect of a part of the land of which they were entitled to joint possession with the pltf. On the contrary, the present case falls within the ambit of *Chandra Kishore* v. *Biseswar Pal*, 55 Cal. 396 : (A. I. R. (15) 1928 Cal. 216) in which the Ct. refused to grant a decree in a suit brought by the cosharers against another cosharer of immovable property to recover compensation for the occupation by the deft. of more than his share in the land of which all the cosharers were tenants-in-common. The principle is that where one cosharer is in separate possession of the common land without objection from, or ouster or exclusion of, the other cosharers, he is under no obligation either to account or to pay compensation to such cosharers in respect of the profits which have accrued to him by reason of the skill or industry which he has employed in making good use of the property while he was in possession. The *ratio* of *Chandra Kishore* v. *Biseswar Pal*, 55 Cal. 396: (A. I. R (15) 1928 Cal. 216) was followed by a single Judge of this Ct. in *Shiva Narain* v. *Chandrasekhar Prasad Singh*, A. I. R. (20) 1933 Pat. 616 : (150 I. C. 251). The Calcutta case was also approved by a Division Bench of this Ct. in *Raj Ranjan Prasad* v. *Khobhari Lal*, A. I. R. (28) 1941 Pat. 90 : (20 Pat. 162) in which a decree was granted to the cosharer-pltf. for compensation because there was exclusion of the pltfs. & there was defiance of their title on the part of the defts.

[6] Reference should be made to *Lachmeswar Singh* v. *Manowar Hossein*, 19 Cal. 253 : (19 I. A. 48 P. C.) in which the Judicial Committee held that property does not cease to be joint merely because it is used so as to produce more

profits to one of the joint owners who had incurred expenditure for that purpose, than to the others, where the latter were not excluded. Joint property being used consistently with the continuance of the joint ownership & possession, without exclusion of the cosharers who do not join in the work, there was no encroachment on the rights of any of them, as regards common enjoyment, so as to give ground for a suit. The suit was brought against the Maharajah of Darbhanga in reference to a ferry over the river Bagmati, near the Kamtowl Indigo Factory, of which the Manager, Mr. Halliday, on behalf of the Maharaja who had purchased it, was made a deft. As purchaser of the factory, the Maharaja had become a proprietor of a two-annas share in village Baigra which village adjoined Kamtowl & of the ferry. The pltfs. were the owners of the remaining fourteen annas of this Mouza, & they brought this suit, for a declaration of their right to profits of the ferry proportionate to the amount of their shares of the village. The defence of the Maharaja was that he had an exclusive right to the ferry by prescription. On the ground that the Maharaja & his predecessors had for more than twenty years worked the ferry, thus acquiring a prescriptive right to do so, the suit was dismissed in the Munsif's Ct. The decision was reversed by the H. C. who held that the pltfs. are entitled to an account of the profits from the defts. & to recover their share thereof The Judicial Committee reversed on appeal the decree of the H C. & held that the suit ought to be dismissed. Lord Hobhouse who pronounced judgment of the Judicial Committee distinguished the case of *Watson & Co.* v. *Ramchund Dutt*, 17 I. A. 110: (18 Cal. 10 P. C.) on the ground that there was exclusion of the pltf.-cosharers in that case.

[7] The principle has been clearly expounded in an English case *Henderson* v. *Eason*, (1852) 17 Q. B. 701 : (21 L. J. Q. B. 82) in which Parke B. laid down that :

"If one tenant-in-common occupied, & took the whole profits, the other had no remedy against him while the tenancy-in-common continued unless he was put out of possession, when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety, & the other accepted that appointment, in which case an action of account would lie, as against a bailiff as in the case of the owner of the entirety of an estate"

His Lordship further observed that :

"There are obviously many cases in which a tenant-in-common may occupy & enjoy the land or other subject of tenancy-in-common solely & have all the advantage to be derived from it, & yet it would be most unjust to make him pay anything. For instance, if a dwelling-house, or barn or room, is solely occupied by one tenant-in-common, without ousting the other, or a chattel is used by one co-tenant-in-common and nothing is received, it would be most inequitable to hold that he thereby by the simple act of occupation or use, without any agreement, should be liable to pay a rent or anything in the nature of compensation to his co-tenants for that occupation or use, to which, to the full extent to which he enjoyed it, he had a perfect right."

[8] Upon these grounds I would affirm the decree of the lower appellate Ct. & dismiss these appeals with costs.

[9] **Rai J.**—I agree.

V.B.B. *Appeals dismissed.*

A. I. R. (38) 1951 Patna 483 *[C. N. 134.]*

RAMASWAMI AND RAI JJ.

Surya Lall Karamkar — Applt. v. *Tulsi Modak — Resp.*

A. F. A. D. No. 187 of 1948, D/- 16-1-1951.

(a) T. P. Act (1882), S. 116—Possession in pursuance of invalid lease—Effect.

Where in pursuance of an invalid lease the pltf. has obtained possession of the land & has paid rent to the landlord for several years & has obtained rent receipts the pltf. will be deemed to be a tenant from month to month under S. 116. [Para 3]

(b) Lim. Act (1908), Arts. 142, 144—Title as possessor.

Possession is a good title against all persons except the rightful owner & entitles the possessor to maintain an ejectment suit against any other person than such owner who dispossesses him. [Para 4]

Anno. Lim. Act, Arts. 142 & 144 N. 15.

(c) Civil P. C. (1908), O. 41, R. 33 — Subsequent events—Power of appellate Court.

As a general rule a Ct. of appeal in considering correctness of the judgment of the Ct below will confine itself to the state of the case at the time such judgment was rendered & will not take notice of any facts which may have arisen subsequently. [Para 7]

It is true that the Ct. of appeal will in exceptional case take into account the facts & events which come into existence after the decree appealed against; but the Ct. will do so only for the purpose of shortening litigation & for meeting the ends of justice. [Para 8]

Anno. C. P. C., O. 41 R. 33 N. 4.

Baidyanath Jha — for Applt.; *Baidyanath Pd. Samaiyar & Hari Kishore Thakur — for Resp.*

Ramaswami J.—The question to be decided in this appeal is whether the lower appellate Ct. was right in granting the pltf. a decree for ejecting the deft. Surya Lall Karmakar, from a small piece of land located in Bhatta Bazar of the town of Purnea.

[2] The pltf. Tulsi Modak brought the suit alleging that he had taken settlement of 7 kathas of land in Bhatta Bazar from Sm. Charusila Debi & that he had executed a registered Kabuliat dated 27-7 1914 for a period of five years from 1321 to 1326 Mulki Sambat. It was said that the pltf. held over after expiry of the term & had been paying rent to the sons of Charusila Debi after the latter's death. The deft. had taken settlement from the pltf. by a registered Kabuliat dated 1-5-1939 for a period

of six years. After the expiry of the period of the lease the pltf. had asked the deft. to give up possession & had also served upon him a notice to quit. Since the deft. refused to give up possession pltf. brought the suit for a declaration of title & ejectment of the deft. from the land. The main ground of defence was that the kabuliat executed by the deft. was not given effect to & the document was inoperative. The deft. on the contrary, alleged that there was a special agreement between him & the pltf. according to which deft. agreed to pay rent direct to Janendra Nath Dey & his brothers who were the successors in interest of Sm. Charusila Debi. The deft. maintained that the pltf. had no title & that he ought not to be granted a decree for ejectment. The learned Munsif accepted the defence case & refused to grant decree to the pltf. The learned Dist. J. Purnea, reversed the decision of the Munsif in appeal holding that the pltf. was entitled to a decree for ejecting the deft. from the land in suit.

[3] In support of this appeal Mr. Baidya Nath Jha submitted a twofold argument. In the first place he contended that no registered patta was executed by Sm. Charusila Debi in favour of the pltf. & in consequence the lease was invalid under S. 107, T. P. Act. The learned counsel argued that the pltf. was a mere trespasser & cannot succeed in the suit for ejectment. In my opinion, this argument is untenable & cannot succeed. It has been found in the present case that in pursuance of the invalid lease the pltf. had obtained possession of the land & had continued to remain in possession till the date of the institution of the suit. It has also been found by the lower appellate Ct. that the pltf. had paid rent to the landlord for several years & had obtained rent receipts. Upon these facts it is manifest that the ratio of the case *Alauddin Ahmad* v. *Aziz Ahmad*, A. I. R. (21) 1934 Pat. 369 : (148 I. C. 684) will apply & it must be held that the pltf. will be deemed to be a tenant from month to month under the provisions of S. 116, T. P. Act. In the case to which reference has been made the tenant remained in possession of the property under a verbal lease for six years & it was held by the Division Bench that a verbal lease for more than one year accompanied by delivery of possession was valid for the first year & if there was holding over on the part of the tenant he was estopped from denying the relationship of landlord & tenant & he cannot escape payment of rent for the period he was in occupation as tenant on the ground that the verbal lease was not binding as a lease for the period agreed upon. In the present case, therefore, it is plain that the pltf. had proved sufficient title to maintain the suit for ejectment of the deft. from the land.

[4] There is another aspect of the case which must be dealt with. The rule is well-established that possession is a good title against all persons except the rightful owner & entitles the possessor to maintain an ejectment suit against any other person than such only who dispossesses him. In *Pemraj Bhawaniram* v. *Narayan Shivaram*, 6 Bom. 215 (F.B.) S obtained a money decree against the sons & heirs of A, & under that decree attached a shop as part of A's estate. N (father of A) applied to have the attachment removed under S. 246, Civil P. C., (VIII [8] of 1859), alleging that the shop was his. The appln. was rejected & the shop was sold in execution & bought by P, the deft. N then brought this suit against P (the purchaser) to establish his title. The Subordinate Judge dismissed the suit. In appeal, the Dist. J. reversed that decree, holding that the pltf. had been in possession of the shop, & had proved his title. The deft. appealed to the H. C. Upon these facts an F. B. held that the pltf. having his possession at the date of the execution sale, it lay upon the deft. (P), who claimed the property, to prove a title in himself or in the judgment-debtor A, & that, he having failed to do this, the pltf. was entitled to a decree declaratory of his right to the property as against the deft. At p. 215 the report states :

"It is true that the pltf. in the present case did allege title by conveyance, & that the Dist. Ct. has not found that title to be proved; but the pltf. by his plaint also relied upon his possession, & the Dist. Ct. has found that possession to be proved. We have seen that possession is a good title against all persons except the rightful owner & entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him. The pltf. does not ask the Ct. to declare that he had a good title against the world. He merely asks for a declaration that he has a good title against the deft. Pemraj who has purchased the premises (whereof the pltf. is in possession) as the property of Anant Narayan, but is unable to show that Anant Narayan had either title to or possession of those premises. Nay more, we understand the Dist. J. as substantially finding that the pltfs. have shown that Anant Narayan had not any such possession. There cannot be any doubt that under those circumstances, if Pemraj had caused the plaintiff to be evicted, the pltf. would within the time limited by law, have been entitled to maintain ejectment against Pemraj, because the pltf's. possession was a good title against everybody except the true owner. This being so, we fail to perceive any good reason for requiring the pltf. to wait until he is evicted, or for preventing him from obtaining a declaration of that which is, beyond all doubt, his right, viz., that his title as possessor is good against a person who is seeking to disturb that possession, & who has not a colour of title to the land in dispute & has never had possession of."

[5] Reference may be made in this context to *Asher* v. *Whitlock*, (1866) 1 Q. B. 1 : (35

L. J. Q. B. 17) in which it was held that a person in possession of land, without other title, has a devisable interest; and the heir of his devisee can maintain ejectment against a person who has entered upon the land, & cannot show title or possession in any one prior to the testator. Cockburn C. J., said :

"I take it is clearly established that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine."

And again he said :

"It is too clear to admit of doubt, that if the devisor had been turned out of possession, he could have maintained ejectment. What is the position of the devisee ? There can be no doubt that a man has a right to devise that estate which the law gives him against all of the world, but the true owner."

and again :

"We know to what extent encroachments on waste lands have taken place; and if the lord has acquiesced, & does not interfere, can it be at the mere will of any stranger to disturb the person in possession"?

Finally he said :

"On the simple ground that possession is good title against all out the true owner, I think the pltf. is entitled to succeed."

Mellor J. after saying that "the fact of possession is prima facie evidence of seisin in fee", added :

"In the common case of proving a claim to landed estate under a will, proof of the will & of possession or receipt of rents by the testator is always prima facie sufficient, without going on to show possession for more than twenty-years. I agree with the Lord Chief Justice in the importance of maintaining that possession is good against all but the rightful owner."

[6] Upon a review of these authorities it is manifest that the pltf. can properly maintain the present suit for ejectment of the deft.

[7] It was pointed out by the learned counsel in support of the appeal that the pltf. has died subsequent to the filing of the second appeal in the H. C. Reference was made to *Charan Mahto* v. *Kamakhya Narayan*, 6 P. L. T. 98 : (A. I. R. (12) 1925 Pat. 357) & it was contended that S. 116, T. P. Act, did not contemplate the position of the heirs or assignees of the original lessee but it contemplated the position of the lessee himself after the determination of the lease & it was only in the case of the lessee of a property who remained in possession thereof after the determination of the lease granted to him that the lease is in the absence of an agreement to the contrary renewed from year to year or month to month according to the purposes for which the property is leased. But it is well established that as a general rule a Ct. of appeal in considering the correctness of the judgment of the Ct. below will confine itself to the state of the case at the time such judgment was rendered & will not take notice of any facts which may have arisen subsequently. As illustrations of the general rule, reference may be made to the cases of *Govinda* v. *Perumdevi*, 12 Mad. 136 where it was held that a suit for a declaratory decree by a reversioner to impeach the validity of alienations by a Hindu widow is not affected by the death of the widow during the pendency of the litigation; *Ramananoan* v. *Pulikutti*, 21 Mad. 288 : (8 M. L. J. 121) where a pltf. who had sued at a time when he had no subsisting title was not allowed the benefit of a title which had accrued to him during the pendency of the litigation & *Wamanrao* v. *Rustomji*, 21 Bom. 701 where a pltf. who had sued for a declaratory decree was allowed to proceed with the suit even after he had acquired title to the property & had become entitled to consequential relief. In *Ponnamma* v. *Arumogam*, (1905) A. C. 383 : (74 L. J. P. C. 102) a suit was brought in 1898 for partition, or alternatively for a sale of certain parts of an intestate's estate, & it appeared that the intestate had died in 1884, that no letters of administration had been taken out, that the widow & son had made a division of the immovable estate between themselves. The S. C. of Ceylon dismissed the suit on the ground that by S. 547, Civil P. C., which was the law in force when the action was commenced, it was not maintainable in the absence of any administrator on the record. Before the case was heard Ordinance No. 12 [XII] of 1904 was enacted by which a proviso was added to S. 547 to the effect that no action for the recovery of, or involving proof of title to, any property movable or immovable included in the estate of any person who died intestate before the commencement of the Ordinance of 1889 should be defeated by reason only that letters of administration to the estate of such person have not been issued. On behalf of the applt. it was contended that S. 547 was not applicable & the suit ought to have been decreed by the Judicial Committee in appeal. The prayer was rejected & Lord Davey pronouncing the judgment of the Judicial Committee states at p. 388:

"To the first argument it is sufficient answer to point out that the judgment of the S. C. was given more than four years before the new Ordinance was passed, & their Lordships have only to say whether that judgment was right when it was given. It is unnecessary, therefore, to discuss the question whether any intention is sufficiently shown to take this case out of the well-known rule on the construction of statutes, that the rights of the parties must be decided according to the law as it existed when the action was commenced."

[8] It is true that the Ct. of appeal will in exceptional cases take into account the facts & events which come into existence after the decree appealed against; but the Ct. will do so only for the purpose of shortening litigation &

for meeting the ends of justice. In the present case, there is no exceptional reason suggested on behalf of the applt. why the H C. should take into account in disposing of the appeal the circumstance that the pltf. is dead & his heirs have been substituted in his place.

[9] Upon these grounds I should affirm the decree of the lower applt. Ct. & dismiss this appeal with costs.

[10] **Rai J.** — I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 486 *[C. N. 135.]*

B. P. SINHA AND C. P. SINHA JJ.

Janki Prasad Choudhary & others — *Petnrs.* v. *Ram Kripal Pandey and others* — *Opposite Party.*

Civil Revn. No. 20 of 1950, D/- 19-12-1950.

(a) Limitation Act (1908), S. 14 (2) — 'For the same relief'.

An application for review of judgment of the High Court is substantially for the same relief as that prayed for in an application for leave to appeal to Supreme Court, the objective in each case being the reversal of the judgment of the High Court. [Para 4]

Anno. Lim. Act, S. 14, N. 19.

(b) Limitation Act (1908), S. 14 (2) — 'Good faith'— Ultimate result of proceeding cannot determine bona fides of a party - Person filing petition for leave to appeal to Supreme Court on advice of eminent counsel on ground that a substantial question of law was involved—Fact that applicant failed to make out substantial question of law does not affect his bona fides even if he might have been too optimistic in presenting application. [Para 5]

Anno. Lim. Act, S. 14, N. 20.

(c) Limitation Act (1908), S. 14 (2) — 'Defect of jurisdiction or other cause of like nature'.

Where an application for leave to appeal to Supreme Court is rejected on the merits on the ground that the petitioner had failed to satisfy the conditions precedent for granting of such leave, it can be said that the Court was unable to entertain it from a defect of jurisdiction or other cause of like nature within the meaning of S. 14 (2). [Para 7]

Anno. Lim. Act, S. 14 N. 23, 24.

(d) Limitation Act (1908), S. 14 (2) — 'Or other cause of a like nature', meaning of.

The words 'or other cause of a like nature' in S. 14 (2) should be liberally construed. They must be construed *ejusdem generis* with defect of jurisdiction, that is to say, the defect must be of such a character as to make it impossible for the Court to entertain the suit or application and to decide it on merits. [Para 7]

Anno. Lim. Act, S. 14 N. 24.

Sultan Ahmad and Janak Kishore — for Petnrs.; Ganesh Sharma & Medni Prasad Singh — for Opposite Party.

B. P. Sinha J. — This is an application under section 5 of the Limitation Act for condoning the delay in making the application for review of a judgment of this Court.

[2] During the course of the argument, it appeared to me that this was really not a case for condonation of delay under section 5 of the Limitation Act. I pointed out to Sir Sultan Ahmad that the application really turned on the interpretation of section 14 of the Limitation Act. If the case could come within the purview of section 14, the application would be in time, and, the petitioners need not have taken recourse to the provisions of section 5 of the Limitation Act: if, on the other hand, the case did not attract the provisions of section 14, it will be necessary for the petitioners successfully to bring the case within the purview of section 5, as will presently appear.

[3] The facts relevant to the present application are stated below. On the 10th of May, 1949, this Court delivered the judgment. On the 8th of June, 1949, the decree of this Court was sealed and signed. On the 14th of June, 1949, an application was made to this Court for leave to appeal to the Federal Court. This application stood dismissed on the 25th of January, 1950. On the 25th of February, 1950, an application for special leave was made to the Supreme Court, which rejected the application on the 9th of May, 1950. The application for review of judgment was made on the 19th of July this year, just on the re-opening day after the long vacation. It will be observed, on a reference to the dates aforesaid, that, if the time occupied in prosecuting the application for leave to appeal in this Court and for the special leave to appeal in the Supreme Court were excluded, the last date for making the application for review of judgment would fall during the long vacation, and that, therefore, the application presented on the 19th July, 1950, would be in time.

[4] Hence, it is necessary to consider the provisions of section 14 (2) in this connection. There can be no doubt that the applicants had been prosecuting, with due diligence, their application for leave to appeal filed in this Court and the application for special leave filed in the Supreme Court against the same party. But the question is : Were the petitioners prosecuting those applications "for the same relief" for which he has made the application for review of judgment? In my opinion the relief prayed for in the application for review of judgment is substantially the same as that prayed for in the application for leave to appeal the objective in each case being the reversal of the judgment of this Court. Though it may be said that the immediate relief in the application for leave to appeal in this Court or in the Supreme Court was for permission to lodge the appeal, the ultimate objective certainly was the reversal of the judgment to be appealed from.

[5] But it has been argued on behalf of the respondents opposite party that it cannot be said that those applications, which proved infructuous, were being prosecuted in good faith, because, it was argued, according to the definition of "good faith" in section 2 of the Limitation Act, the application was not being prosecuted with due care and attention. In this connection, it was urged that the valuation of the relief sought in this case was under ten thousand rupees, and that, therefore, the petitioners could have known that they could not succeed in getting the necessary leave without making out a substantial question of law. But, in my opinion, there is no substance in this contention. The petitioners were out to make out substantial questions of law. It is true they failed in doing so; but the ultimate result of the proceedings cannot determine the *bona fides* of the party. The petitioners were being advised by eminent counsel, and had left no stone unturned to obtain the relief asked for. The petitioners may have been too optimistic; but that consideration cannot affect their *bona fides*.

[6] The most serious controversy in this case arises on the interpretation and application of the last clause of sub-section (2) of section 14, that is to say—Can it be said in the present case that the application for leave to appeal either in this Court or in the Supreme Court was not entertained on account of "defect of jurisdiction or other cause of a like nature"?

[7] The petition in the present case is that the suit had been found to have been properly valued at a sum less than ten thousand rupees. The judgment of this Court on appeal partly reversed the decision of the trial Court, and, therefore, if the value of the subject-matter of the suit and the appeal were ten thousand or above—and later twenty thousand or above—the appeal would have been admitted as a matter of course. But, as the valuation was less than the minimum prescribed for an appeal as a matter of course, the petitioners for leave to appeal had to make out that substantial questions of law were involved in the appeal. This they failed to do, in the opinion of the Courts concerned, though they may have been advised that they had a reasonable chance of getting their application for leave to appeal allowed. But this Court, when it refused the application for leave to appeal, or when the Supreme Court rejected the application for special leave to appeal, did so apparently on the ground that the petitioners had failed to satisfy the conditions precedent to the granting of the leave asked for. Can it be said in these circumstances that this Court, or the Supreme Court, was unable to entertain the application from a defect of jurisdiction? The term "jurisdiction" has been used in several senses. In a limited sense, it may include the power of a Court to do a certain thing. It may be argued on behalf of the petitioners that this Court, or the Supreme Court, was powerless to entertain the appeal, as the necessary conditions precedent had not been satisfied. On behalf of the opposite party, it may be argued that the application aforesaid had been dismissed by this Court or by the Supreme Court on their merits. But the fact remains that the appeal was not entertained. The broad principle underlying the provisions of section 14 of the Act is, naturally, the protection against the bar of limitation of a litigant honestly pursuing his remedies, or supposed remedies, to get his case tried on merits, and failing to get his relief on account of the inability of the Court to give him a hearing on merits—see in this connection the observations of their Lordships of the Full Bench of the Allahabad High Court in the case of *Mathura Singh* v. *Bhawani Singh*, 22 ALL. 248 at p. 253 : (1900 A. W. N. 64). There is no doubt that the petitioners failed twice in their attempt to have their appeal entertained on its merits in this Court and in the Supreme Court, though their application for leave to appeal at both the stages was dismissed on its merits. Hence, in my opinion, the facts and circumstances of this case are within the terms of the last clause of section 14 (2). But, even assuming that I am not right in holding that the petitioners' appeal was not entertained from a defect of jurisdiction, in my opinion, their case would be covered by the alternative clause "or other cause of a like nature". These words, of course, have got to be construed *ejusdem generis* with defect of jurisdiction, that is to say, the defect must be of such a character as to make it impossible for the Court to entertain the suit or application, and to decide it on its merits—see in this connection the observations of their Lordships of the Full Bench of the Lahore High Court in the case of *Bhai Jai Kishun Singh* v. *Peoples Bank of Northern India*, A. I. R. (31) 1944 Lah. 136 : (I. L. R. 1944 Lah. 451 F.B.). It has also been repeatedly held that the words of this section, and particularly the words "or other cause of a like nature", should be liberally construed : *vide Mathura Singh* v. *Bhawani Singh*, 22 ALL. 248 : (1900 A.W.N. 64 F.B.) and the Full Bench decision of this Court in the case of *Lal Bihari Lall* v. *Bani Madhava*, 30 P. L. T. 201 : (A. I. R. 1949 Pat. 293 F.B.) where the decisions of their Lordships of the Judicial Committee in the

cases of *Ramdutt Ramkissendas* v. *E. D. Sassoon & Co.*, 56 I. A. 128 : (A. I. R. (16) 1929 P. C. 103) and *Brij Indar Singh* v. *Kanshi Ram*, 44 I. A. 218 : (A. I. R. (4) 1917 P. C. 156) have been referred. In my opinion, these words are wide enough to cover a case like the present.

[8] For the reasons given above, I would hold that the petitioners' application is covered by the provisions of section 14 of the Limitation Act, and that, therefore, the application for review of judgment is not barred by time. Though this application has been vehemently opposed by the opposite party, in all circumstances of this case, I would direct each party to bear its own costs in this proceeding.

[9] **C. P. Sinha J.**— I agree.

K. S. *Application allowed.*

A. I. R. (38) 1951 Patna 488 *[C. N. 136.]*

RAMASWAMI AND SARJOO PRASAD JJ.

Trustees of the Provident Fund of the Tinplate Co. of India, Ltd. & another — *Applts.* v. *Muktilall Agarwala & others* — *Resps.*

A. F. O. O. Nos. 265 to 280 of 1948, D/- 12-5-1950.

(a) Provincial Insolvency Act (1920), Ss. 2 (d), 28 (2), 56 (3) proviso — Property — Meaning of — Provident Fund.

Whatever the nature of the property may be, the inslvt. should have an interest in present to dispose of the same, & not such an interest which may depend upon the fulfilment of certain conditions or contingencies. The definition of the term "property" as used in the Act contemplates that the power of disposition must be an unconditional power. It is only such a property that is divisible amongst the creditors of the inslvt.

Rules 17 & 18 of the Rules of the Provident Fund created by the Tinplate Co. of India Ltd. for the benefit of their employees show that the members of the fund have no disposing power over the fund. They are bound by the rules & it is only on the conditions mentioned in the rules that the fund under certain circumstances become payable to the members concerned. That being so, the said funds are not the property of the inslvt. members within the meaning of S. 2 (d) & are not divisible amongst the creditors as contemplated by S. 28 (2). By the mere act of inslvcy. the inslvt. members cannot compel the trustees to make payment of the funds standing in the various accounts, & if the inslvts. cannot do so, the receiver or the Ct. cannot remove the trustees from the custody of the same as enjoined by the proviso to sub-s. (3) of S. 56. A. I. R (33) 1946 Pat. 430 & A. I. R. (36) 1949 Pat. 337, *Dissent. from.*

[Paras 6, 8]

Anno. Pro. Ins. Act, S. 2 N. 3; S. 28 N. 3; S. 56 N. 5.

(b) Transfer of Property Act (1882), S. 12 — Scope of.

(Quære) Whether S. 12 invalidates conditions which are in derogation of the rights of the transferor. [Para 10]

Anno. T. P. Act, S. 12 N. 1.

Bhabanand Mukherji & S. K. Chaudhury — for Applts.; B. N. Mitter & A. K. Mitter — for Resps.

Sarjoo Prasad J.—This is a batch of misc. appeals arising out of an order of Mr. S. Ahmad, Dist. J. of Purulia, dated 26-6-1948. All these appeals have been heard together as they are directed against the same judgment & involve common questions for adjudication.

[2] The cases arise out of applns. filed by the resp.-creditor under S. 4, Provincial Insolvency Act (Act V [5] of 1920). In those applns., the creditor alleged that certain sums of money lying in deposit in the provident fund account of the Tinplate Co. of India Ltd. under the management & control of the trustees of the Tinplate Co. provident fund were the property of the inslvts. within the meaning of S. 2 (d), Provincial Insolvency Act, & that the said property accordingly vested in the receiver appointed in the inslvcy. proceedings & was available for distribution & division amongst the creditors under S. 28 (2) of the aforesaid Act.

[3] The applns. were opposed by the inslvts. as also by the Tinplate Co. Ltd. & the trustees of the fund aforesaid. Their contention was that the Tinplate Co. had created a fund by an indenture dated 15-7-1930, for the benefit of their employees & their families & had made a declaration of trust according to law transferring & vesting the said funds in the trustees who had admittedly the control, custody & management thereof. The fund being trust property & subject to rules & regulations framed under the instrument of trust, the inslvts. had no present interest in them. They, therefore, urged that the said deposits in the provident fund accounts could not be regarded as property of the inslvts. within the meaning of the Insolvency Act; nor were they available for distribution amongst the creditors of the inslvts.

[4] The learned Dist. J. who dealt with these applns. held by his order under appeal that the members of the provident fund, namely, the inslvts. had got disposing power over their provident fund monies standing to their credit in two of the accounts, & that, therefore, the provident fund was the property of the inslvts. which vested in the Insolvency Ct. & was available for distribution to the creditors under the provisions of the Insolvency Act. He also found that the property in the funds in question had not vested in the trustees who had simply the power of control & management over the funds in question. Against this order of the learned Dist. J the trustees of the provident fund of the Tinplate Co. of India Ltd, as also the Company have preferred the above appeals.

[5] On behalf of the applts. Mr. Bhabanand Mukherji contended that the decision of the learned Dist. J. is erroneous on both the points. His contention is that the inslvts. who were the employees of the Tinplate Co. had no present right of disposition over the funds in question except under the rules of the trust, & that the property in the funds was, as it appears from the terms constituting the fund, vested in certain trustees, & therefore, the trustees could not be divested of the funds in question so as to make them available to the Insolvency Ct. for distribution amongst the creditors of the inslvts. It appears to me that both these contentions of Mr. Mukherji are correct & must prevail.

[6] Section 28 (2), Provincial Insolvency Act, requires that

"on the making of an order of adjudication, the whole of the property of the inslvt. shall vest in the Ct. or in a receiver as hereinafter provided, & shall become divisible among the creditors."

Therefore, if the funds in question are the "property of the inslvt," it cannot be doubted that they would vest in the Ct. or a receiver for purposes of distribution among the creditors. Now, the word "property" has been defined in S. 2 (d) of the Act. It includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. There is no doubt that this definition of the word "property" is not exhaustive because the language itself shows that it includes any property having the characteristics mentioned in the definition, namely, property over which or the profits of which any person has a disposing power which power he can exercise to his advantage. It follows, therefore, that whatever the nature of the property may be, the inslvt. should have an interest in present to dispose of the same, & not such an interest which may depend upon the fulfilment of certain conditions or contingencies. In that case, the power of disposition cannot be exercised without let or hindrance by the person concerned. Therefore, the definition of the term "property" as used in the Act contemplates that the power of disposition must be an unconditional power. It is only such a property that is divisible amongst the creditors of the inslvt. This view of the law is also supported by reference to S. 56 (3) of the Act which lays down:

"Where the Ct. appoints a receiver, it may remove the person in whose possession or custody any such property as aforesaid is from the possession or custody thereof:

Provided that nothing in this section shall be deemed to authorise the Ct. to remove from the possession or custody of property any person whom the inslvt. has not a present right so to remove."

The Ct. or for the matter of that the receiver appointed in the inslvcy. proceedings is in no better position in the exercise of this power of disposition than the inslvt. himself. If the inslvt. has no present right to remove a person from the custody & control of a certain property, then the receiver or the Insolvency Ct. cannot do so, because the latter only steps into the shoes of the inslvt. with respect to the inslvt.'s property.

[6-A] In *Sat Narain* v. *Behari Lal*, A. I. R. (12) 1925 P. C. 18 : (6 Lah. 1) the Judicial Committee when dealing with the definition of the term "property" in S. 2 (e), Presidency Towns Insolvency Act, which is exactly in the same terms as S. 2 (d), Provincial Act, observed as follows: "Section 2 seems to contemplate an absolute & unconditional power of disposal". There can be no doubt that where this power of disposal is hedged in & surrounded with conditions, it cannot constitute the property so as to vest in the receiver or the Ct. As the case in question has given rise to some controversy, it would be useful to refer briefly to the facts in which the decision was given. The pltfs. in the case had sued to enforce a right of pre-emption. The defts. contested the pltf.'s right on the ground that the father of the pltfs. & the head manager of their family had been adjudicated an inslvt. & from the said date the whole of the family estate & effects including the property through which the right of pre-emption was claimed had vested in the Official Assignee. The contention, in other words, was that when a Hindu governed by the Mitakshara school is adjudged an inslvt. under the Presidency Towns Insolvency Act, 1909, not only his own rights but all the rights & interests of his sons who are the coparceners in the joint family property vest in the Official Assignee by virtue of the adjudication alone. The learned Dist. J. did not accept the contention & decided in favour of the pltfs. On appeal to the H. C., there was a reference to a F. B. & the point formulated for decision was :

"Does an order of adjudication passed against a father vest in the Official Receiver his son's interest in the joint family property ?"

Sir Shadi Lal who delivered the judgment of the F. B. answered the point in the affirmative, but in doing so, he observed :

"I must say that if the matter were *res integra*, I should find considerable difficulty in subscribing to the doctrine that the son's interest in the joint family property should in the event of the father's inslvcy. be regarded as the latter's property which vests in the Official Receiver."

The learned Judge also held that upon general principles of Hindu law governing the rights of the father & his son in the coparcenary property, an order of adjudication against the father has only the effect of replacing the father by the Official Receiver, & that the order does not by itself vest in the latter the interest of the son in the property. The Judicial Committee did not agree that the point should have been answered in the affirmative, & set aside the decree of the H. C. restoring that of the learned Dist. J. Their Lordships of the Judicial Committee, however, pointed out that it may be that under the provisions of S. 52 or in some other way that property may in a proper case be made available for payment of the father's just debts, but it is quite a different thing to say that by virtue of his inslvcy. alone the interest of the sons also vests in the assignee, & no such provision should be read into the Act. It would be seen that the Judicial Committee quite clearly made a distinction between the vesting of the property itself & the power which a Mitakshara father exercises in making his son's share in the joint family liable for payment of his debts. This power, their Lordships held, might within the terms of S. 52 vest in the Official Receiver but not the interest of the son in the joint family property itself. Indeed Sir Shadi Lal himself in delivering the opinion of the F. B. was conscious of this distinction & felt difficulty in subscribing to the contrary view. It is important to note that there is no corresponding section to S. 52, Presidency Towns Insolvency Act, in the Provincial Insolvency Act, & therefore, whatever may have been observed in regard to the scope of S. 52 is of little assistance to us in the construction of the present enactment.

[7] On behalf of the resps., Mr. B. N. Mitter has drawn our attention to a F. B. decision of this Ct. in *Bishwanath* v. *Official Receiver*, 16 Pat. 60 : (A. I. R. (24) 1937 Pat. 185 F.B.). Mr. Mitter contends on the authority of this decision that the definition of the term "property" as used in the present Act must be deemed to include property over which an inslvt. has a conditional & qualified right of disposition. It is difficult to see how the decision of the F. B. is really of any assistance to him on the point. In the F. B. in question their Lordships held that the power or the right which the father has under the Hindu law to sell his son's interest for the payment of his proper debts is property within the meaning of Ss. 28 (2) & 59, Provincial Insolvency Act. This decision appears to be based upon certain other decisions of various other Cts.; for instance, *T. S. Balavenkata Seetharama* v. *Official Receiver, Tanjore*, 49 Mad. 849 : (A. I. R. (13) 1926 Mad. 994 F.B.), *Anand Prakash* v. *Narain Das*, 53 ALL. 239 : (A. I. R. (18) 1931 ALL. 162 F.B.), *Haridas* v. *Lallubhai*, 55 Bom. 110 : (A. I. R. (18) 1931 Bom. 50) as also on a decision of the P. C. in *Sat Narain* v. *Sri Kishen Das*, 17 Lah. 644 : (A. I. R. (23) 1936 P. C. 277). The power of a Hindu father to dispose of the interest of his sons in the joint family property is a power which he can always exercise to his benefit. If he does exercise such a power, the sale would be a good sale unless the sons choose to get it set aside on the ground that the father's debt was illegal or immoral; otherwise the power of disposition may be unconditionally exercised by the father. To this limited extent the power in question may be regarded as property within the meaning of the Act so as to vest in the receiver, on the father being adjudged an insolvent, but beyond that the receiver cannot displace the interest of the sons in the joint family property, and the said property remains the property of the sons. It is true that some of the observations made in the decision of the Judicial Committee, if pushed to their logical sequence, may be found not to be in complete accord with the view taken by this Court in the F. B. decision in *Bishwanath Sao's case*, (16 Pat. 60 : A. I. R. (24) 1937 Pat. 185 F. B.) but there is no doubt in my mind that the view taken by the Judicial Committee in regard to the meaning of the term "property" as used in S. 2 (e), Presidency Towns Insolvency Act applies with equal force to the definition of "property" in S. 2 (e) (sic) of the present Act. Therefore, whatever may be said of the power or the right which the father has under the Hindu law to sell his sons' interest for the payment of his debts, I am of opinion that the property mentioned in the Insolvency Act must be such that the insolvent has "an absolute and unconditional power of disposal" thereof. Applying these principles, I shall now see whether in the present case the insolvents can be said to have such power of disposal over the trust funds in question.

[8] It is admitted that the insolvents are the employees of the Tinplate Co. The Tinplate Co. of India Ltd. have created a fund for the benefit of their employees and the insolvents are members of the said fund. In the provident fund there are three kinds of accounts, namely, A, B & C accounts. The 'A' account relates to the contribution made by a member of the provident fund out of his earnings. At the end of each year a sum equal to the amount contributed by the employee-member

of the provident fund from his earning during that year is contributed by the Company in the name of the member, and this is called the 'B' account, while the 'C' account is a further contribution made by the Company in proportion to the dividends paid by the Company on its ordinary share capital during any financial year. This 'C' account is really a contribution by way of bonus. The claim of the creditors in particular relates to the funds lying in deposit in the 'A' and 'C' accounts. As to whether these funds are vested in the trustees or not, I shall deal with the point later. The rules of the funds which have been exhibited in the case show that the management and control of the fund is vested in the trustees. All the employees of the Company except certain covenanted employees on higher grades are eligible for membership of the fund on completion of one year's service if they apply for such membership with certain declaration relating to the disposition of the money available in the event of death of the member which declaration is of course open to be cancelled and revised by the member if he so desires. The monies of the fund, as R. 8 shows, are to be invested by the trustees in accordance with the provisions from time to time in force under the Provident Fund Relief Act, 1929. On *retirement* of any member with the consent of the General Manager of the Company before completion of fifteen years of service the member is entitled to be paid the entire amount standing to his credit in 'A' and 'C' accounts together with one-fifteeth of the monies standing to his credit in 'B' account for each completed year of service. In case of *dismissal* for misconduct or *resignation* without the consent of the General Manager before completion of 15 years' service, he is to be paid only the amount then standing to his credit in 'A' & 'C' accounts, the fund in 'B' account in that case being forfeited. On *termination* by any means of a member's service after completion of 15 years' service, the member shall be paid the entire amount then standing to his credit in 'A', 'B' & 'C' accounts. Therefore, the funds become payable under certain conditions of retirement or dismissal or termination of service according to rules governing the fund. It is important to notice that under R. 17 of the rules no member of the fund shall have any claim on the monies standing to his or her credit otherwise than in accordance with the provisions of the rules. Rule 17 further provides that any assignment by a member of the monies which would otherwise be payable to him shall be void, and in the event of any member being assignee or being adjudicated insolvent, the monies shall be liable to be forfeited provided the trustees in their absolute discretion do pay and apply the same for the benefit of the member or his dependents. Rule 18 is another important rule which shows that withdrawals by members of the money standing to their credit in the fund shall not be allowed by the trustees except on special grounds. These rules, to my mind, quite clearly show that the members have no disposing power over the funds in question. They are bound by the provident fund rules specified above, and it is only on the conditions mentioned in the rules that the funds under certain circumstances become payable to the members concerned. That being so, it is difficult to hold that the said funds are the property of the insolvents within the meaning of S. 2 (d), Insolvency Act, or that they can be divisible amongst the creditors as contemplated by S. 28 (2) of the Act. By the mere act of insolvency these insolvents cannot compel the trustees to make payment of the funds standing in the various accounts, and if the insolvents cannot do so, the receiver or the Court cannot remove the trustees from the custody of the same as enjoined by the proviso to sub-s. (3) of S. 56 of the Act.

[9] In an unreported decision of this Court in Civil Revns. Nos 620 & 746 of 1948 decided on 20-12-1948, in which the present decree-holder-resp. was the petnr., Meredith J. (as he then was) had occasion to construe the rules in question. In that case, in pursuance of an attachment order a notice was issued upon the Tinplate Co. Ltd. to show cause why the sums in question standing to the credit of the debtors in the provident fund managed by the Company should not be paid in Court. The Company objected to the payment on the ground that under the provident fund rules the sums laying to the credit of any employee could not be paid to him until he retired from service or his service was otherwise terminated as contemplated by the rules. The decree-holder, on the contrary, asserted that the judgment-debtors had full disposing power over their provident fund deposits and so the Company could be compelled to pay. The learned Munsif held that the decree-holder had no better rights than the judgment-debtors. The judgment-debtors having no disposing power over these sums during the continuance of their service, the Company could not be compelled to pay the amounts in Ct. for payment to the decree-holder. Meredith J. upheld the decision of the learned Munsif. In construing the rules, Meredith J. observed as follows :

"These conditions are contractual, & there is nothing illegal about them or to prevent their enforcement

either against the employee or in his favour. It would be absurd to assert that when a member joins the Fund & makes contributions he is entering upon a colourable transaction designed to defeat possible creditors. The object of the Fund is specified in R. 2 as 'to accumulate for the benefit of the Company's employees who have joined the Fund, certain sums as a future provision for them & for their families.' It is perfectly legal arrangement, & indeed a laudable one, & I can see no reason why the Cts. should regard it with disfavour. Under the Provident Funds Act Govt. & Railway Provident Funds, substantially similar in nature, have been completely protected from the hands of creditors—a sufficient indication of the view taken by the Legislature with regard to Provident Funds. Such Funds are established not as a devise to enable workers to defeat their creditors, but to protect them against themselves—against extravagance against running into debt, & so to ensure some provision for their old age & their dependants. A money-lender who lends money to a member of a Provident Fund as against his assets in that Fund surely does so with his eyes open, & can have, in my view, no legitimate grievance if he subsequently finds difficulties in his way."

I entirely agree with these observations. I must, however, make it clear that I am not in agreement with his Lordship in regard to his views as to whether the ownership of the fund had vested in the trustees.

[10] In this context reference may be made to a decision *In re Earnest Clarence O'brien*, 60 Cal. 926 : (A. I. R. (20) 1933 Cal. 701) on which reliance has been placed by the learned counsel for the resps. In that case there was an adjudication order against an inslvt. on 23-5-1932. The inslvt. had entered the service of the Company on 1-1-1914, & he was discharged on account of his inslvcy. on 31-5-1932. Before he filed his appln. for inslvcy. certain sums of money stood to his credit in the books of the provident fund which were under three heads (1) London's contribution, (2) his contribution & (3) bank's contribution. I should observe that the provident fund in question was created under certain rules, as in the present case, by the Company for the benefit of its employees who were entitled to become members of the fund. The Official Assignee contended that the property in the funds had vested in him, & he asked for an order compelling the trustees to pay the fund forthwith. It was found that under the rules of the fund the member was entitled to claim payment from the fund only under certain circumstances as specified in the rules. The learned Judge who decided the case, therefore, held that the inslvt. on discharge could not claim any payment in respect of that part of the fund which was contributed by the Company because he had not served the requisite period. The learned Judge, therefore, held in regard to the amounts under the first & third heads that the Official Assignee could not get the same. In regard to the second head, that is, the personal contribution of the member, the learned Judge found that on the date of the inslvcy. the inslvt. had no property in the funds because he was still in the service of the Company, & that any claim he might have could only arise upon his discharge when he would cease to be a member. He, however, held that inasmuch as the inslvt. had been already discharged from service on account of his inslvcy., his claim to the amount under the second head had become vested in him when his service terminated & must be paid to the Official Assignee. This decision, therefore, does not in any manner support the contention of the resps. On the other hand, if at all, it shows that so long as the conditions mentioned in the rules are not fulfilled, the funds are not payable to the inslvt. &, as such, they cannot vest in the receiver appointed to take charge of the estate of the inslvt. This decision has been also relied upon by Mr. Mitter, counsel for the resps. in support of the argument that under S. 12, T. P. Act, R. 17 of the present rules which provides for forfeiture of the funds in case of assignment or inslvcy. is void. His argument is that if the provision as to forfeiture in the rules is void under S. 12, T. P. Act, the funds would become payable to the Official Assignee forming the assets of the inslvt. In my opinion, it is doubtful if S. 12 of the Act can apply to such a case. Section 12 invalidates only those conditions which are in derogation of the rights of the transferee & not those which are in derogation of the rights of the transferor. Be that as it may, it is really not necessary to decide the matter for our present purposes. I have already held that under the provident fund rules discussed above, the inslvts. have no right of disposition over the funds in question, &, as such, the amounts standing in those accounts cannot vest in the receiver.

[11] It has been further argued by the learned counsel for the resps, that the words of S. 28 (2) of the Act, viz., that "the whole of the property of the inslvt. shall vest in the Ct. or in a receiver" are wide enough to cover a property of this nature. It seems to me, however, that the language of S. 28 (2) by itself cannot solve the problem. One has again to look back to the meaning of the term "property" as contained in the definition in S. 2 (d) of the Act which means & includes any property over which the inslvt. can exercise his disposing power. It was held in *Damodar Chaube & Co.* v. *Madan Makund*, A. I. R. (34) 1947 Pat. 7: (223 I. C. 330) that "the definition of the word 'property' in the Provincial Insolvency Act is not exhaustive." It is, however, difficult to understand how the expression "property" in the Provin-

cial Insolvency Act can mean property over which or the profits of which the inslvt. has not got disposing power. As has been observed by their Lordships of the Judicial Committee in *Sat Narain* v. *Behari Lal*, 52 I. A. 22 : (A. I. R. (12) 1925 P. C. 18)

"the property of an insvlt. which by S. 17, Presidency Towns Insolvency Act, (which corresponds to S. 28, Provincial Insolvency Act) vests in the Official Assignee must mean only the property which is divisible amongst his creditors."

In *Damodar Chaube's case*, (A. I. R. (34) 1947 Pat. 7: 223 I. C. 330) there was an argument advanced that the interest of the inslvt. in certain Govt. promissory notes vested in the receiver. This was claimed on the basis of a certain agreement under which after the demise of a lady, Mt. Rajwanti kuer, the inslvts. would be entitled to take the Govt. promissory notes from the Imperial Bank of India. The Ct. below held that the interest of the inslvts. in the Govt. promissory notes was not a mere chance of succession, & in view of the terms of the agreement they could not be assigned to the receiver or to any other person so as to be available for distribution amongst the creditors so long as Mt. Rajwanti Kuer was alive. The decision was affirmed by this Ct; & the contention that the word "property" in S. 2 (d), Provincial Insolvency Act, would include a property of this character did not find favour with their Lordships. Their Lordships held that during the lifetime of Mt. Rajwanti kuer the inslvts. had no disposing power in respect of the Govt. promissory notes, & had, therefore, no such property as would vest in the Ct. or the receiver under S. 28 (2) of the Act.

[12] Counsel for the resps. has in this connection relied upon a decision of this Ct. in *D. Palaiya* v. *T. P. Sen*, 16 P. L. T. 167: (A.I.R. (22) 1935 Pat. 211) in which it was held that under S. 28 (2), Provincial Insolvency Act on the making of the order of inslvcy. the provident fund money vested in the receiver, but the facts of that case are clearly distinguishable. In that case on the terms of the contract between the parties as embodied in the provident fund rules, it was found that at all times during the years of service the amount contributed by the employee was within his disposal. The receiver was, therefore, held entitled to attach the provident fund money of the employee. That being so, I cannot agree with the learned Dist. J. in his conclusion that the provident fund money vested in the receiver & was capable of distribution amongst the creditors of the inslvts.

[13] Mr. Mukherji has next argued that the property in the funds actually vested in the trustees & was not the property of the inslvts. under Ss. 5 & 6, Trusts Act. A trust in respect of moveable property is created by declaration of the intention creating such a trust, the purpose of the trust, the beneficiary, & the trust property & by transfer of the trust property to the trustee. The learned counsel for the resps. has contended that there is really no transfer of the trust property in favour of the trustees, & he contends on a reference to the rules that all that has been transferred is the control & management of the funds of the trust. He refers to R. 1 of the Rules & regulations which says that "the management of the fund & the control of its funds shall be vested in the trustees who will undertake such management . . . ." There would be much force in the contention if R. 1 stood alone, but I have shown from the other rules that the investment of the funds, the control of the funds & the distribution of the funds have all vested in the trustees. If after the creation of the trust the author of the trust has no interest in the trust property except under the rules thereof & the entire dominion over the trust property is to all intents & purposes vested in the trustees, which is so in the present case, I cannot see how it can be argued that there has been no transfer of interest in favour of the trustees. After all, the various emblems of ownership as evidenced by the rules are all vested in the trustees, & the members of the trust or the company for the matter of that have no control over it. In such a case, the only inference possible is that the trust fund was for all purposes vested in the trustees. I am conscious of the fact that a contrary view was taken by a single Judge of this Ct. in *Gopal Das* v. *Abdul Jabber*, A.I.R. (33) 1946 Pat. 430: (228 I. C. 478) & that the said decision was followed by another learned Judge of this Ct. sitting single in *Muktilal* v. *Tinplate Co. of India Ltd.*, A.I.R (36) 1949 Pat. 337. With all respect to the learned Judges, I am afraid, I cannot agree with their view in regard to the construction of the rules. In this connection Mr. Mitter has relied upon a decision of the Judicial Committee in *The King* v. *Paulson*, A. I. R. (7) 1920 P. C. 190. In that case, it was quite obvious from the terms creating the alleged trust that there was no intention on the part of the author to divest himself of the interest in the property, & the P. C. therefore, held that it was in substance a scheme for the management of the property during the absence of the creater of the trust; as such the ownership in the property had not vested in the trustees. The case is quite different here. But even then it is contended by Mr. Mitter that the interest of a beneficiary

under a trust can also vest in the inslvt. That again brings us to a consideration of the point whether it is such an interest as can be regarded as property within the meaning of the Insolvency Act. The beneficiary's interest may be assignable or may be in the nature of an actionable claim but that itself does not take us very far unless we also find that it is an interest capable of distribution amongst the creditors of the inslvts. as contemplated by S. 28 (2) of the Act. It has been held in *Secy. Burma Oil Subsidiary Provident Fund India Ltd.* v. *Dadibhar Singh*, A.I.R. (28) 1941 Rang. 256 that even though in a provident fund account an amount stands to the credit of a member, he obtains no interest in it until the payment. This shows that the mere fact that a certain amount is credited to a member's account does not indicate that he holds an interest in such amount. The member's right to have the money paid to him will arise only in the event of his dismissal or retirement as provided in the rules of the fund which may or may not happen before his death, or his becoming insane. And this applies both to contribution or subscription made by the member out of his salary & contribution made by the company. It was held in that case that such monies even though credited to the member's account could not be attached in execution of a decree against him. It was further held in that case that the word "debt" used in S. 60 & O. 21, R. 46, C. P. C., means an actually existing debt that is, a perfected & absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen. To a similar effect is a decision in *Gajraj Sheokarandas* v. *Hukamchand Sarupchand*, A.I.R. (26) 1939 Bom. 90: (I.L.R. (1939) Bom. 109). I find myself in complete agreement with the view taken in these decisions notwithstanding some of the observations made by the learned Judges of this Ct. sitting single in the two decisions referred to above, *viz.*, *Gopal Das* v. *Abdul Jabber*, A.I.R. (33) 1946 Pat. 430: (228 I. C. 478) & *Muktilal* v. *Tinplate Co. of India Ltd.*, A.I.R. (36) 1949 Pat. 337.

[14] For the above reasons, the appeals must be allowed & the order of the learned Dist. J. set aside with costs. As the above appeals have been heard together, I consider that there should be only one hearing fee payable to the applts.

[15] **Ramaswami J.**—I agree.

D.H. *Appeals allowed.*

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A. I. R. (38) 1951 Patna 494 *[C. N. 137.]*

SHEARER AND JAMUAR JJ.

Har Kishun Singh & others — Petnrs. v. *Chhotan Mahton & others — Opposite Party.*

Original Criminal Misc. No. 11 and Cri. Revn. No. 1684 of 1950, D/- 4-1-1951.

(a) Criminal P. C. (1898), S. 144 — Mandatory order.

Where the Mag. by his order proposed to go in person to the *bandh* in question & to the bed of the stream & to make certain alterations in them with a view to restoring them to the condition in which he believed them to have been when the record-of-rights was prepared.

***Held* that the order was wholly without jurisdiction.** [Para 2]

Anno. Cr. P. C., S. 144, N. 6.

(b) Contempt of Courts Act (1926), S. 1 — Contempt—What amounts to.

When an order of stay or other such prohibitory order has been made by the H. C. & when the Subordinate Judge or Mag. is informed of the order by an advocate or pleader, he ought ordinarily to accept what is stated by the advocate or pleader, & stay further proceeding. Certainly, he ought to do so, if the advocate or pleader is in a position to satisfy him as to the source of his information & is prepared to support it by an affidavit. If the Subordinate Judge or Mag. disregards such information & continues the proceeding, he may find it a matter of difficulty to satisfy the H. C. that he believed in good faith that no prohibitory order had been made. It cannot however be said that when a subordinate Judge or Mag. neglects to take such steps to satisfy himself as to the correctness of the information supplied to him that a prohibitory order has been made, he is liable to be committed for contempt of Court. [Para 3]

Anno. C C. Act, S. 1, N. 3.

S. N. Sahai & Bindeshwari Prasad Sinha — for Petnrs.; Nawal Kishore Prasad and Devendra Prasad — for Opposite Party; Advocate-General & T. Nath — for the State.

Shearer J. — This appln. in revision is directed against an order made by the learned Sub-divisional Mag. of Bihar in a proceeding under S. 144, Cr. P. C. This proceeding was instituted in consequence of an apprehension of a serious riot occurring between men belonging to four villages over the right to take water from a stream known as the Saraswati Nadi. Two *pynes* take off from this stream at point almost opposite to one another & irrigate land in Sabalpur & Naipokhar respectively. When the record of rights was prepared, the level of these two *pynes* was higher than the level of the bed of the Saraswati river, & in order that water might be taken into the *pynes*, a *bandh* was put across the river. This *bandh* consisted of blocks of stone & *kankar*. The other two villages concerned are Panditpur & Nahub which are situated about a mile or so further down the course of the stream. These two villages are also irrigated by *pynes* which take off from the stream more or less opposite to one another. The men of Panditpur &

Nahub, being in great need of water owing to the then prevailing drought, were anxious not merely to deepen the bed of the stream between the *bandh* & their own *pynes* but also to alter the *bandh* in such a way as to make water percolate through it. Apparently a large quantity of silt had been deposited on the *bandh* & the men of Panditpur & Nahub wished to remove this mud which had, as it were, caked on to it & transformed the *bandh* into a solid mud *bandh*. The learned sub-divisional Mag. made an order restraining the men of Sabalpur & Naipokhar from interfering with the men of Panditpur & Nahub while they were cleaning or deepening the channel of the stream at any point beyond a distance of one hundred yards from the *bandh*. As to the portion of the stream immediately below the *bandh* & as to the *bandh* itself, the learned sub-divisional Mag. stated in his order that nothing should be done unless he himself were present & directed it to be done. It further appears from his order that he did not intend to make any alterations in the *bandh* or in this part of the bed of the stream except in the presence of the pleader-commr. who, had, at instance relaid the survey map, & of the pleaders appearing for both parties. An appln. in revision was preferred against the order of the learned sub-divisional Mag. & this appln. was dismissed by the learned Dist. Mag. The order of the learned Dist. Mag. was made on 4-12-1950, & on the day following the present appln. in revision was made to this Ct. In admitting the appln. my Lord the Chief Justice directed that there should be a stay of further proceedings. A copy of this order was sent out by the office of the Ct. in accordance with the usual practice, on the day on which it was passed. Unfortunately, however, the copy was not sent, as, I think, it should have been, to the Ct. of the sub-divisional Mag. but to the Ct. of the Dist. Mag. In consequence of this & of some most regrettable delay which took place in the office of the Dist. Mag., the order did not reach the sub-divisional Mag. until 11-12-1950. Now, it so happened that on 10-12-1950, the Dist. Mag. & the sub-divisional Mag. were both at Rajgir on other business, & in connection with that business had to go to the immediate vicinity of the *bandh*. Certain men belonging to Nahub & Panditpur approached the sub-divisional Mag. & asked him to take the opportunity of his being there to go & make the alterations, which he proposed to make, in the *bandh* & in the bed of the stream. The learned sub-divisional Mag. gave them a reply which led to their going to the stream & proceeding to dig it up. At 11 a. m., that is, an hour or so after the villagers of Panditpur & Nahub had been to him, another individual appeared & told him that the H. C. had ordered a stay of further proceedings. In support of what he said, this man produced a letter which is said to have been written by the advocate who appeared for Bajo Singh of Sabalpur in the present appln. in revision to the pleader who had appeared for him in the Ct. of the sub-divisional Mag. The sub-divisional Mag declined to act on this assurance that a stay of proceedings had been granted while the Dist, Mag., it is said, took the letter & tore it up. This has not been specifically denied by Mr. K. N. Singh in his affidavit & I must take it that this is what actually happened. The Dist. Mag. & the sub-divisional Mag. went back to Rajgir to complete their other business & a couple of hours or so later while they were in the inspection bungalow, they were told that the men of Sabalpur and Naipokhar had collected a large mob, & that there was an immediate apprehension of a breach of the peace. The sub-divisional Mag. at once hastened to the scene of occurrence &, fortunately, on his arrival, the mob which had been collected & some men in which were armed dispersed. The petnr., Bajo Singh, then applied to this Ct. asking that a rule should be issued on Mr. K. N. Singh, the Dist. Mag., & on Mr. S. K. Mukherjee, the Sub-divisional Mag., requiring them to show cause why they should not be committed for contempt of Ct. on the ground that they had ignored or disobeyed the order staying proceedings. A rule was issued by my Lord the Chief Justice & Reuben J. & the rule has been heard along with the appln. in revision. I will deal in the first place with the appln. in revision.

[2] It is, I think, perfectly clear that the order of the learned Sub-divisional Mag., or, at all events, that portion of it relating to the *bandh* & to the bed of the stream immediately below the *bandh* was an order which was made wholly without jurisdiction. As I have said, the learned Sub-divisional Mag. proposed to go in person to the *bandh* & to the bed of the stream & to make certain alterations in them with a view to restoring them to the condition in which he believed them to have been, when the record of rights was prepared. Mr. Nawal Kishore Prasad, for the opposite party, said that a mandatory order could be made under S. 144, Cr. P. C., & cited in support of his contention the decision of Agarwala J., sitting singly, in *Lachmi Narayan* v. *Nandkishore*, A.I.R. (27) 1940 Pat. 57 : (41 Cr. L. J. 98). That, however, was a case in which an order was made for the removal of a *bandh* & the party against whom the order was made had an op-

portunity of appearing & showing cause against its removal. What, however, the learned Sub-divisional Mag. proposed to do in the present case was himself to make certain alterations in the *bandh* & in the bed of the stream. Presumably, he would, at the time, have considered any objections which might have been raised by the men of Sabalpur & Naipokhar; but even so, it is not at all as if he had made an order requiring certain specific things to be done & given the person against whom that order was made an opportunity of showing cause against it. Moreover, apart from this, the learned Sub-divisional Mag. appears to have acted on little or nothing more than a mere speculation that, at the time when the record of rights was prepared, a certain volume of water must have percolated through the *bandh* & reached Panditpur & Nahub. The entry in the *fardabpashi*, however, probably recorded no more than the fact that, at the time when it was prepared, the *bandh* was a *bandh* of a certain kind. There appears to be nothing in the *fardabpashi* to suggest that the men of Panditpur & of Nahub had any right to take water from the stream unless & until the level of the water in the stream was sufficient to overtop the *bandh* & reach their *pynes* in the ordinary course of gravitation. If the men of Panditpur & Nahub assert a right to have the *bandh* altered & to have the bed of the stream deepened immediately in front of the *bandh*, they must institute a suit & ask for a mandatory injunction. Clearly, unless evidence is adduced, it is impossible to say what changes have occurred since the record of rights was prepared, & whether in spite of these changes & of the length of time which has elapsed, the men of Panditpur & Nahub possessed & still possess the rights which they assert. Mr. Nawal Kishore Prasad for the opposite party contended that, in any event, the other part of the order made by the learned Sub-divisional Mag. could be supported. I agree that as the men of Panditpur & Nahub have a right to take water from the stream through their respective *pynes*, they must, as a necessary corollary, also have a right to clean out the bed of the stream from time to time so as to enable water to enter their *pynes*. If any further dispute arises regarding this part of the stream, the learned Sub-divisional Mag. would, I think, be well advised to deal with the matter under S. 147, Cr. P. C., unless it is quite plain to him that the men of Panditpur & Nahub are undoubtedly exercising a right which they possess, & the men of Sabalpur & Naipokhar are unreasonably obstructing them in the exercise of that right, in which case, action might perhaps appropriately be taken under S. 107 of the Code. The order of the learned Sub-divisional Mag. has ceased to be operative, & it is, therefore, not necessary to make any order formally setting it aside. With these observations the appln. in revision will be dismissed.

[3] I now turn to the rule which has been issued on Mr. K. N. Singh & Mr. S. K. Mukherjee to show cause why they should not be committed for contempt. A decision in this matter clearly depends on what, exactly, was said by the Sub-divisional Mag. to the men of Panditpur & Nahub. Mr. Mukherjee in his affidavit says that, while he permitted them to go & dig in or clean the bed of the stream, he made it quite clear to them that they were to do nothing in the area immediately below the *bandh*. Mr. Mukherjee also says that, when he went to the stream in order to prevent the riot or disturbance which was impending, the men of Panditpur & Nahub were carrying on their operations at a point some five hundred yards or so away from the *bandh*. In the affidavit of Bajo Singh, on the other hand, it is stated that the operations were being carried on within, what I may call, the prohibited area. Mr. Sri Narayan Sahay has said that, if the operations were in fact being carried on well outside that area, the men of Sabalpur & Naipokhar would not have collected in the manner they did, as they had not previously resisted the men of Panditpur & Nahub in cleaning out the lower portion of the bed of the stream. The learned counsel has also pointed out that on 10-12-1950, the period of sixty days during which the order was to be in operation expired & suggests that the men of Panditpur & Nahub deliberately went to the prohibited area as they knew that on the day following the order would cease to have any effect. It is not, however, at all clear to me that any digging had, in fact, been done previously in any part of the stream. It appears to me quite possible that neither party did anything as an appln. in revision had been made to the learned Dist. Mag. In any event, it is quite clear from the order made by the learned subdivisional Mag. that he intended that nothing whatever should be done in this prohibited area unless he were himself present to direct the operations. That being so, it appears to me in the highest degree unlikely that he intended that on 10-12-1950. when he himself was engaged elsewhere on other business, the men of Panditpur & Nahub should be permitted to go & carry on such operations as they themselves chose in it. I must accept the affidavit of Mr. Mukherjee that he made it clear to the men of Panditpur & Nahub that they were not to enter or do anything in the prohibited area although they might clean out or dig in the

bed of the stream below it. So far as Mr. Mukherjee is concerned, the order made by this Ct., was an order prohibiting him from doing what he proposed to do in this prohibited area, & if, as I am satisfied in the case, he did & said nothing to countenance anything being done in it, there has been no contempt of any order of this Ct. Mr. Sri Narayan Sahay, for the petnr., said that the intention of this Ct. was not merely to stop the learned sub-divisional Mag. from himself carrying on or directing operations in this prohibited area, but also to stop anything being done in any part of the stream between the two sets of *pynes*. This may conceivably have been so, but if it was, the proper order to have been passed, would have been an order in the nature of an injunction addressed to the parties belonging to Panditpur & Nahub. I am not prepared to say that any duty was cast on the sub-divisional Mag. to see that nothing whatever was done anywhere in the bed of this stream pending the order finally made on the appln. in revision by this Ct. There has been a certain amount of argument at the bar as to whether the Dist. Mag , Mr. K. N. Singh, was shown justified in disregarding the letter which was to him. This point is really one which is now of no more than academic importance. I ought, however, I consider, to make certain observations regarding it. When an order of stay or other such prohibitory order has been made by this Ct. & when the subordinate Judge or Mag. is informed of the order by an advocate or pleader, he ought, I consider, ordinarily to accept what is stated by the advocate or pleader, & stay further proceedings. Certainly, he ought, to do so, if the advocate or pleader is in a position to satisfy him as to the source of his information & is prepared to support it by an affidavit. The reason why the subordinate Judge or Mag. should invariably take such a course is that an advocate or a pleadar is an officer of the Ct. & is not likely to supply information as to the correctness of which he is not himself completely satisfied. If an advocate or pleader acts improperly or carelessly & it eventually turns out that no prohibitory order has been made by this Ct. suitable action can be taken against him. If, on the other hand, the subordinate Judge or Mag. disregards such information & continues the proceeding, he may find it a matter of difficulty to satisfy this Ct. that he believed in goodfaith that no prohibitory order had been made. There are decisions both in India & in England which show that when a subordinate Judge or Mag. disregards a prohibitory order of which he has been given a notice in this way, it amounts to a contempt of Ct. *vide Sati Nath* v. *Ratanmani*, 14 I. C. 803 : (15 C. L. J. 335) & *Ex-parte Langley*, (1880) 13 Ch. D. 110: (49 L. J. Bk. 1). Mr. Sri Narayan Sahay, for the petnr., contended that it was the duty of the subdivisional Mag. to examine the document which was handed to him by Sheodeni Singh, & that if, on examination, he saw any reason to distrust its authenticity, to require Sheodeni Singh to put in an affidavit. The learned Counsel for the petnr. supported this part of his argument by reference to *Babu Ratnessari* v. *Empress*, 2 C. W. N. 498 ; *Hem Chandra* v. *Mathur Santhal*, 16 C. W. N. 1031: (13 Cr. L. J. 766) & *Gouri Shanker* v. *Collector of Muzaffarpur*, A. I. R. (12) 1925 Pat. 553 : (26 Cr. L. J. 965). These decisions support to some extent the contention which has been put forward. None of them, however, goes so far as to lay down that, when a subordinate Judge or Mag. neglects to take such steps to satisfy himself as to the correctness of the information supplied to him that a prohibitory order has been made, he is liable to be committed for contempt of Ct. I think myself that Mr. K. N. Singh acted improvidently in tearing up this letter without apparently reading it, & that he would have been better advised to have read it & to have considered whether or not it did not show, satisfactorily enough for him to have acted on it, that an order staying further proceedings had been made by this Ct. It is, however, quite impossible to say that either he or Mr. Mukherjee deliberately committed any contempt of Ct. The rule which has been issued on them will accordingly be discharged, but in the circumstances, I would not make any order for costs against the petnr. Bajo Singh.

[4] **Jamuar J.**—I agree.

D.H. *Order accordingly.*

A. I. R. (38) 1951 Patna 497 *[C. N. 138.]*

DAS AND NARAYAN JJ.

Sagri Bhagat and others — Petnrs. v. *The State of Bihar.*

Criminal Misc. Nos. 629 and 642 of 1950, D/- 14-12-1950.

Criminal P.C. (1898), Ss. 497, 498—Prosecutions under S. 7, Essential Supplies (Temporary Powers) Act—Non-bailable offence—Power to grant bail—Essential Supplies (Temporary Powers) Act (1946), S. 13A.

Where the petnrs. for bail are being prosecuted under S. 7, Essential Supplies (Temporary Powers) Act, for non-bailable offences & S. 13A of that Act has no application, the stringent conditions necessary for the grant of bail under that section cannot be applied & the Ct. is free to enlarge the petnrs. on bail, like any other accused, on the well established principles.

[Paras 9, 11]

After the amendment of 1923, the principle to be deduced from Ss. 496 & 497 is that the grant of bail is the rule & the refusal is the exception. The discretion of the Cts. is now less fettered than it was before, & S. 497 as it now stands, draws a distinction between non-bailable offences which are punishable with death or transportation for life & other non-bailable offences. The result is that in the former case the Mag.'s power for granting bail are restricted but it is not so in the latter class of cases. Of course, in every case the Mag. has to exercise his discretion, but the discretion has to be exercised judicially & not arbitrarily. [Para 5]

Section 498 under which H. C. passes an order for bail has given an unfettered discretion to the H. C. or the Ct. of Session to admit an accused person to bail & it is a mistake to imagine that S. 498 is controlled by the limitations of S. 497 except when there are not reasonable grounds for believing that the accused committed the offence, or there are reasonable grounds for believing that he is not guilty, in which cases it becomes a duty to release him. [Para 9]

In every case it is the cumulative effect of all the combined circumstances that must weigh with the Ct. & considerations are too numerous to be classified or catalogued exhaustively. [Para 9]

Per *Narayan J.*—Bail is not to be withheld merely as a punishment, the responsibility as to bail being merely to secure the attendance of the accused at the trial. [Para 7]

Per *Das J.* — While it is true that bail cannot be withheld merely as a punishment & the primary object of the provisions relating to bail in the Cr. P. C. is to secure the attendance of the accused persons at the trial, securing the attendance of the accused person or the possibility of his absconding is not the only consideration at the time when an appln. for the grant of bail is made. There are many other considerations. [Para 13]

In the case of petnrs., accused under the Essential Supplies (Temporary Powers) Act, the Ct. is entitled to take judicial notice of the existing serious situation as to essential supplies of food, cloth, etc., & consider its bearing on such questions as the nature of the accusation, gravity of the offence alleged, chance of repeating the offence or of absconding, etc., when an appln. for the grant of bail is made. At the same time it must also be remembered that bail is not refused as a punishment, nor for putting obstacles in the path of the defence. [Para 13]

It would be wrong to refuse bail on a supposition that the defence may ultimately prove to be wrong. [Para 17]

Anno. Cr. P. C., S. 497 N. 4; S. 498 N. 1.

Baldeo Sahay, Kanhaiyaji & Devendra Prasad — for Petnrs.; Govt. Advocate—for the State of Bihar.

Narayan J.—These are applns. for bail by certain persons who are being prosecuted under S. 7, Essential Supplies (Temporary Powers) Act. The appln. which has been registered as Cr. Misc. No. 629 of 1950 has been filed by one Sagri Bhagat, son of Baldeo Bhagat, & by Sagri Bhagat's son Nathuni Bhagat. The other appln. is by three persons, named Ramsunder Panjiar, Dhanukdhari Ram & Ramprit Singh. Both the cases had been placed before my Lord the Chief Justice sitting singly & in Cr. Misc. No. 629 his Lordship passed the following order on 15-11-1950 :

"This appln. will be heard. Issue notice returnable within ten days. The question whether this matter will be referred to a Division Bench will be considered later on."

By virtue of an order passed in Cr. Misc. No. 642 of 1950 on 23-11-1950 both the applns. were ordered to be put up before a Division Bench for hearing, & the order of his Lordship the Chief Justice dated 23-11-1950 runs as follows:

"This appln. will be heard. Issue notice returnable within seven days. Let this appln. be put up for hearing with Cr. Misc. 629 of 1950 before a Division Bench."

It has been stated by Mr. Baldeo Sahay, who appeared for the petnrs., that the reason for placing these applns. before a Division Bench is to get an authoritative decision on the question whether bail can or should be granted in such cases.

[2] On 7-12-1950 we directed that the petnr. Sagri Bhagat of Case No. 629 & all the petnrs. of the other case be released on bail to the satisfaction of the Dist. Mag., & we have now to give detailed reasons for the order which we have passed. The question of bail does not arise so far as Nathuni Bhagat, the appct. 2 of Case No. 629, is concerned inasmuch as this appct. has since been detained by reason of a detention order passed under the Preventive Detention Act, 1950.

[3] Regarding the petnr. 1, Sagri Bhagat of Case No. 629 it is alleged that he is aged more than 70 years & on account of age & infirmity, is incapable of doing any business. This petnr. is being prosecuted on the ground that when his house, shop & godown were searched 552½ pairs of saris & dhoties were found, though, according to the Stock Register the stock should have been only 551 pairs. The other allegation against this petnr. is that he had kept a certain quantity of cloth concealed in a *bhuskar*. The alleged difference in the account is quite negligible, & the only allegation against this petnr. which has to be considered seriously is whether he had kept some cloth concealed in a *bhuskar*. The petner.'s answer to this allegation is that the *bhuskar* in which the cloth was found belong to one Mulchand Sah.

[4] The petnrs. in the other case are dealers in grains, & when their shop or godown was searched 106 bags of rice & 77 bags of gram were found, though, according to the stock register, there should have been a balance of 15 bags of rice & 41 bags of gram. Their explanation was that some time before the search 91 bags of rice had been received from certain other traders & that they had been brought in a country boat which was unloaded at a ghat known at Jehanabad Ghat. From the ghat 10 bullocks carts are said to have brought these

bags, & it is said that the names of the cartmen are recorded in Gari Bhara Bahi which has been seized by the Govt. With regard to the bags of gram which were found in excess, the explanation was that they had been received on the day of the search from one Rameshwar Chaudhury on the understanding that they would be kept with the petnrs. temporarily & would be later despatched to Jaintpore Mela. These are the short facts of the two cases, & bail was refused not only by the Mags. before whom the cases against these petnrs. are pending but also by the Ses. Judges.

[5] There can be no doubt that the offences for which the appcts. have been charged are not bailable. The sentence provided for the offences charged is imprisonment for three years, & according to Sch. II, Cr. P. C. such offences against other laws as are punishable with imprisonment for three years & upwards are not bailable. Section 496, Cr. P. C, is, therefore, not applicable to this case, but Ss. 497 & 498 would be applicable, & the question is whether under the circumstances of these present cases, this Ct. can direct that these appcts. be admitted to bail. Sub-section (1) of S. 497 runs as follows :

"When any person accused of any non-bailable offence is arrested or detained without warrant by an officer, in charge of a Police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life;

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail."

And sub-s. (2) of the section which is the appropriate provision applicable where investigation, enquiry or trial has been proceeding runs as follows :

"If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided."

Under the old S. 497, the general rule was that bail was not to be taken in respect of non-bailable offences, but as was pointed out by the Calcutta H. C. in the case of *Nagendra Nath* v. *Emperor*, 51 Cal. 402 : (A. I. R. (11) 1924 Cal. 476 : 25 Cr. L. J. 732) the alteration in S. 497 by S. 136 of Act XVIII [18] of 1923 which substitutes the words "an offence punishable with death or transporation for life" for the words "the offence of which he is accused" must be regarded as the result of a liberalising influence on the policy of the Legislature, & it is well-recognised that after this amendment the principle to be deduced from Ss. 496 & 497 is that the grant of bail is the rule & the refusal is the exception. The discretion of the Cts. is now less fettered than it was before, & the section, as it now stands, draws a distinction between non-bailable offences which are punishable with death or transportation for life & other non-bailable offences. The result is that in the former case the Mag's. powers for granting bail are restricted but it is not so in the latter class of cases. Of course, in every case the Mag. has to exercise his discretion, but the discretion has to be exercised judicially & not arbitrarily.

[6] Cases have laid down the tests which have to be applied in disposing of a petn. for bail, but no Ct. can lay down exhaustive or inflexible tests. Boys J. in *Emperor* v. *H. L. Hutchinson*, 53 ALL. 931 : (A. I. R. (18) 1931 ALL. 356 : 32 Cr. L. J. 1271) mentioned the following circumstances which have to be considered in disposing of a petn. for bail.

"(i) The nature & the gravity of the charge.

(ii) The severity or degree of the punishment which might follow in the particular circumstances in case of a conviction.

(iii) The danger of the appct. absconding if he is released on bail.

(iv) The character, means & standing of the appct.

(v) The danger of the alleged offence being continued or repeated, assuming that the accused is guilty of having committed that offence in the past.

(vi) The danger of witnesses being tampered with.

(vii) Opportunity to the appct. to prepare his defence".

And Mukherji J. in the case of *Nagendra Nath* v. *Emperor*, 51 Cal. 402 : (A.I.R. (11) 1924 Cal. 476 : 25 Cr. L. J. 732) observed that the proper test to be applied in the solution of the question whether bail should be granted or refused was whether it was probable that the party would appear to take his trial, & that this test was to be applied by reference to the following considerations :

"(a) The nature of the accusation.

(b) The nature of the evidence in support of the accusation.

(c) The severity of the punishment which conviction will entail."

[7] The decision in *Nagendra Nath* v. *Emperor*, 51 Cal. 402 : (A. I. R. (11) 1924 Cal. 476 : 25 Cr. L. J. 732) was followed by a Division Bench of this Ct. in *Krishna Chandra* v. *Emperor*, 6 Pat. 802 : (A.I.R. (14) 1927 Pat. 302 : 28 Cr. L. J. 621) & Mullick A. C. J. observed that the principles on which the Cts. should exercise their discretion in regard to non-bailable offences had been set out in *Nagendra Nath* v. *Emperor*, 51 Cal. 402 : (A. I. R. (11) 1924 Cal. 476 : 25 Cr. L. J. 732) and that bail was not

to be withheld merely as a punishment, the responsibility as to bail being merely to secure the attendance of the accused at the trial. We are bound by this decision which is not in any way affected by the decision made in a later case *Hikayat Singh* v. *Emperor*, 11 Pat. 280 : (A.I.R. (19) 1932 Pat. 209 : 33 Cr. L. J. 574). This decision was given in an appeal & a death reference matter, & during the course of the judgment Courtney-Terrell C. J. made the following observation :

"The accused persons when they appeared before him were at once released on bail & this fact together with the unpopularity of the deceased & his sons amply account for the refusal of the villagers to come forward & describe what they must undoubtedly have seen. We must point out in the most emphatic way for the future guidance of Mags. & Ses. Judges that save in exceptional cases, persons accused of crimes punishable with long terms of imprisonment should not be released by them on bail. The richer the accused & the more easy it is for him to find bail, less it is desirable that he should be released, & in no circumstances whatever, without an order of the H. C. should any persons accused of murder be allowed bail. In England a person charged with murder is never in any circumstances released on bail & the opportunities in India for the corruption of witnesses are so great that the risks involved cannot be exaggerated."

[8] The question did not directly arise in this case, & it cannot be said that the rule of law as laid down in *Krishna Chandra Jagati's case*, (6 Pat. 802 : A.I.R. (14) 1927 Pat. 302 : 28 Cr.L.J. 621) should be followed by us because of this observation of Courtney-Terrell C. J. In this case we are not concerned with an offence which is punishable with death or transportation for life, & even the learned Govt. Advocate did not oppose the appln. for bail filed by Sagri Bhagat. He, however, opposed the appln. for bail filed in the other case, & that on the ground that because of the insertion of S. 13A in the Essential Supplies (Temporary Powers) Act by Act LII [52] of 1950 called the Essential Supplies (Temporary Powers) Amendment Act, 1950, the powers of granting bail in such cases have been very much restricted. Section 13A runs as follows:

"*Special provisions regarding bail*—Notwithstanding anything contained in the Code of Criminal P. C., 1898 (Act V [5] of 1898), no person accused or convicted of a contravention of any order under S. 3 relating to foodgrains which is punishable under the proviso to sub-s. (2) of S. 7 shall if in custody, be released on bail or on his own bond unless—

(a) the prosecution has been given an opportunity to oppose the application for such release and (b) where the prosecution opposes the application, it appears to the Court that there are reasonable grounds for believing that he is not guilty of such contravention."

But it was conceded by the learned Govt. Advocate that the Proviso to sub-s. (2) of S. 7 is not applicable to this case. This proviso runs as follows :

"Provided that where the contravention is of an order prescribing the maximum quantity of any foodgrain that may lawfully be possessed by any person or class of persons, and the person contravening the order is found to have been in possession of foodgrain exceeding twice the maximum quantity so prescribed the Court shall—

(a) sentence him to imprisonment for a term which may extend to seven years and to a fine not less than twenty times the value of the foodgrain found in his possession."

[9] According to this proviso, the person contravening the order must be in possession of foodgrain exceeding twice the maximum quantity prescribed, & it is not the prosecution case that the appcts. Ramsunder Panjikar & others were found to be in possession of foodgrain exceeding twice the maximum quantity prescribed. These appcts., therefore, stand on the same footing as Sagri Bhagat of the other case, & if on the well-established principles Sagri Bhagat can be released on bail, as the learned Govt. Advocate has frankly conceded, these appcts. should also be enlarged on bail. As I have already pointed out these appcts. have offered some explanation for the excess stock that was found in their shop or godown, & this explanation will require a serious consideration at the time of the trial.

[10] Lastly, I must point out that S. 498, Cr. P. C., under which a H. C. passes an order for bail has given an unfettered discretion to the H. C. or the Ct. of Session to admit an accused person to bail & as was pointed out by an F. B. of the H. C. in *Emperor* v. *Joglekar*, 54 ALL. 115: (A. I. R. (18) 1931 ALL. 504: 33 Cr. L. J. 94 F.B.) it is a mistake to imagine that S. 498 is controlled by the limitations of S. 497 except when there are not reasonable grounds for believing that the accused committed the offence, or there are reasonable grounds for believing that he is not guilty, in which cases it becomes a duty to release him. It was further pointed out in this case that Mag. can proceed under S. 497 only, & their discretion is regulated by the provisions of that section, but that S. 498 confers upon a Ses. Judge or the H. C. wide powers to grant bail which are not handicapped by the restrictions of the preceding section. The discretion is certainly unfettered but as already pointed out every discretion should be exercised judicially. I respectfully agree with their Lordships' view that in every case it is the cumulative effect of all the combined circumstances that must weigh the Ct. & that considerations are too numerous to be classified or catalogued exhaustively. In the circumstances, in these two present cases, we are of opinion that there are reasonable grounds for admitting to bail the appct. Sagri Bhagat of case No. 629 & all the

appots. of the other case. These are the reasons in support of our order which we passed in these two cases on 7-12-1950.

[10a] **Das J.**—I agree generally with the reasons given by learned brother, but would like to add a few observations to avoid the possibility of any misunderstanding or misapprehension.

[11] First and foremost, it is clear & beyond dispute that in the cases before us S. 13A, Essential Supplies (Temporary Powers) Act has no application; therefore, the stringent conditions necessary for the grant of bail under that section cannot be applied; & it is not necessary for us to examine those conditions.

[12] Second, the offences alleged to have been committed by the petnrs. are non-bailable offences; the grant of bail in such cases is governed by S. 497, Cr. P. C., so far as the Ct. or officer before whom the accused person appears or is brought initially; so far as the H. C. or Ct. of Session is concerned, the relevant section is S. 498, Cr. P. C.

[13] I agree with my learned brother as to the effect of S. 497. The matter is one of discretion, but it has to be exercised judicially & according to principles which are by now well established. These principles have been explained more than once in decisions to which my learned brother has referred it would serve no purpose to repeat them. But one thing must be made clear. While I agree that bail cannot be withheld merely as a punishment & the primary object of the provisions relating to bail in the Cr. P. C. is to secure the attendance of the accused persons at the trial, I do not subscribe to the view that securing the attendance of the accused person or the possibility of his absconding is, the only consideration at the time when an appln. for the grant of bail is made. I think that there are many other considerations some of which have been stated in the decisions referred to by my learned brother; the difficulty of laying down a formula of universal application is that the considerations will vary from case to case, & the exercise of the discretion, according as it must to certain principles cannot be confined within the framework of a cut & dried formula. I am even prepared to go to this extent that the Ct. is entitled to take judicial notice of the existing serious situation as to essential supplies of food, cloth, etc., & consider its bearing on such questions as the nature of the accusation, gravity of the offence alleged, chance of repeating the offence or of absconding, etc., when an appln. for the grant of bail is made. At the same time, it must also be remembered that bail is not refused as a punishment, nor for putting obstacles in the path of the defence.

[14] As to the observations in *Nikayat Singh's case*, 11 Pat. 280 : (A.I.R. (19) 1932 Pat. 209 : 33 Cr. L. J. 574) it is sufficient to state that they were made in a case of murder (in an appeal from a sentence of death) & do not purport to introduce any new principle in S. 497, Cr. P. C.

[15] I agree that S. 498, Cr. P. C., gives a wider discretion to the H. C. or the Ct. of Session; but again the discretion has to be exercised judicially & according to well-established principles, & it would be wrong to suppose that those principles are absolutely independent or in supersession of the limitations imposed by S. 497. Such a supposition would mean that the power given by S. 498 can be exercised arbitrarily a meaning which must be rejected.

[16] In the case of Sagri Bhagat, the important point to note is that he is not the licensee though his son Nathuni, is. Nathuni has been detained under a detention order, & no question of admitting him to bail arises. Sagri Bhagat in an old man aged about seventy, & his case is that he was neither the licensee nor was he engaged in the business. These circumstances, if true, are in his favour.

[17] In the second case, the excess of some bags of gram cannot be the subject of any complaint, because, as stated by the learned Ses. Judge, gram is not a controlled commodity. As to the excess of 91 bags of rice, the petnrs. have given an explanation. Whether that explanation is true or not will, no doubt, be considered at the trial. In refusing bail, the learned Ses. J. has stated that if the petnrs. are allowed bail, evidence is likely to be tampered with & even concocted. While I agree that such a consideration does properly arise on an appln. for the grant of bail, I am not satisfied that the petnrs. can, in any way, tamper with the prosecution evidence. The relevant books were seized by police & are in their custody. It is obvious that the petnrs. cannot tamper with those books. They have filed affidavits of several persons to show that the rice was received on the 11th October, on several bullock carts. This is the defence of the petnrs. & in my opinion, it would be wrong on principle to refuse bail so as to put an obstacle in the path of the defence. The defence may be right or wrong, & I am expressing no opinion on merits. All that I say is that it would be wrong to refuse bail on a supposition that the defence may ultimately prove to be wrong.

[18] These, in substance, are my reasons for granting bail to the petnrs.

V.B.B. *Applications allowed.*

A I R. (38) 1951 Patna 502 *[C. N. 139.]*

REUBEN & NARAYAN JJ.

Sailajananda Pandey & another — *Applts.*
v. *Lakhichand Sao & others* — *Resps.*

A. F. A. D. No. 2144 of 1947, D/- 26-9-1949.

(a) Bengal Land Revenue Sales Act (XI [11] of 1859), Ss. 37 & 53 — Revenue sale of estate — Re-purchase of by proprietor — His rights under re-purchase.

Section 37 is subject to the provisions of S. 53. Where, therefore, a proprietor re-purchases the estate after it has been sold for arrears under the Act, he acquires the estate subject to all its encumbrances existing at the time of the sale & does not acquire any rights in respect of under-tenants or raiyats which were not possessed by him at the time of the said sale. [Para 7)

(b) Adverse possession — Trespasser entering upon property under defective grant — Possession of part of property — Inference of adverse possession as to rest when can be raised — Limitation Act (1908), Arts. 142 & 144.

When a trespasser enters upon property under a defective grant, the grantor's intention to give possession of the whole of the property cannot be assumed, when the grantor is not the owner & the adverse possession operates to the extent of the actual possession. It may, however, extend further by the grantor's failure to assert his possession, though to his knowledge the trespasser is treating the property as forming one unit with the property in his actual possession. [Para 12]

(Position as regards constructive possession of trespasser when the grant is of the whole by the owner & when it is by a person who does not own the property exhaustively discussed.)

Anno. Limitation Act, Arts. 142 & 144 N. 12, 56, 60.

(c) T. P. Act (1882), S. 53A — Objection under, cannot be raised for first time in second appeal — Civil P. C. (1908), S. 100. [Para 8]

Anno. T. P. Act, S. 53A N. 20 Pt. 1; Civil P. C. Ss. 100 101 N. 28.

(d) Civil P. C. (1908), S. 100 — Legal effect of facts proved is a question of law & can be raised at any stage. [Para 19]

Anno. Civil P. C., S. 100 & 101 N. 28, 32.

(e) Civil P. C. (1908), O. 41, R. 31—Duty of first appellate Ct. as final Ct. of fact. *(Per Narayan J.)*

Per *Narayan J.*—The Legislature has entrusted a very important duty to the first appellate Ct. It is for that Ct. to decide finally all questions of fact on which the disposal of the suit might depend. It must appear from the judgment of the lower Appellate Ct. that it has made an honest endeavour to make a proper appraisement of the merits of the cases put forward by the parties, & it should never appear to the litigant public or to the superior Ct. that it has agreed with the trial Ct. simply because it was not inclined to take much trouble over the case.

If the lower Appellate Ct. does not examine the facts & the evidence for itself & does not even mention the points which the case raises, it will be certainly failing in its duty. [Para 22]

Anno. Civil P. C., O. 41, R. 31, N. 5, 6, 7 & 10.

B. De & K. D. Chaterji — for Applts; L. K. Jha, R. S. Chatterjee & Medni Prasad Singh — for Resps.

Reuben J.—This is an appeal by the pltfs. from a decision of the Addl. Dist. J. Purulia, confirming a decree of the Addl. Subordinate Judge, Dhanbad.

[2] Pltf. 1 is the proprietor of village Muraidih in pargana Newagarh of the Dhanbad Subdivision. Pltf. 2 is his minor son. Pltf. 1 has executed in favour of his son a *mokarari* lease in respect of 25 bighas of coal bearing land in this village. The suit was brought to eject the defts. from five kathas out of this land, on the allegation that they have wrongfully taken possession of a coal quarry therein sunk by the pltf. 1. Defendant 2 is the son of deft. 1. They contested the suit, alleging that they are holding the suit land as a part of 46 bighas of coal-bearing land in this village, the surface & underground rights in which were settled with deft. 1 in 1910 by the then proprietors, Shyamlal Pande & others under an unregistered grant, & claiming to have acquired an indefeasible interest in the land by holding it adversely since then.

[2] Pltf. 1 is the son of Shyamlal Pande, but does not derive his title by inheritance from him. According to the recitals in the plaint, this village was sold in execution of a mtge. decree against the proprietors Brijbehari Pande (uncle of pltf. 1) & others, & was purchased by Mukteshwar Trigunait, Sarat Trigunait & Kalipada Trigunait, from whom pltf. 1 purchased the village by a registered sale deed dated the 2nd of Baisakh, 1338. The mauza was then sold in a revenue sale & was purchased by one Sachindranath Chakravarti. Pltf. 1 brought a title suit to set aside the sale. In accordance with a compromise in the suit, Sachindranath Chakravarti sold the mauza to pltf. 1 by a registered sale deed dated 6-7-1940.

[3] The *hukumnama* (EX. A) under which the defts. claim is unregistered & purports to create a permanent heritable jagir. The Cts. below have accepted the story of the alleged settlement & hold that deft. 1 entered on the property in pursuance of it, but he did so as a trespasser, the *hukumnama* being unregistered. They hold that since then he has been continuously in possession of the whole area of 46 bighas. They have rejected the story of pltf. 1 having sunk a quarry in the suit land & having been forcibly dispossessed in 1944. Only three instances of the exercise of direct possession over the property have been found: (1) the sinking & working of a quarry to the north of the suit land for a period of over twenty years, (2) the sinking & working of a quarry to the east of the suit land in 1937 & (3) the sinking & working of a quarry on the suit land in 1943. The Cts. below consider that, the deft. 1 having entered under a grant from the proprietors, his act of possession over any portion of the property

must be deemed to have given him constructive possession over the whole of the property covered by the grant. On these findings they hold that deft. 1 has been in possession of the suit property openly, peacefully & as of right for more than twenty years, that he has thereby acquired a tenancy right under pltf. 1 & cannot be ejected.

[4] Mr. De, on behalf of the pltfs. has contended, firstly, that the Cts. below misdirected themselves on the point of adverse possession in holding that the defts. had constructive possession over the suit property previous to 1943, & secondly, that, even if it be held that the defts. were in adverse possession of this property, their possession cannot affect pltf. 1, as he derives his title from a purchaser at a revenue sale.

[5] On the other side, Mr. R. S. Chatterji, who appeared for the defts. 1 & 2, has contended that, under S. 53A, T. P. Act, his clients are entitled to resist ejectment.

[6] Before taking up the question of adverse possession, I shall deal with the other two points which are readily disposed of neither of them having been raised in the Cts. below.

[7] There is no substance in Mr. De's second point. Under S. 37, Bengal Land-Revenue Sales Act, 1859 (Act XI [11] of 1859), a purchaser of an entire estate in the permanently settled districts of Bengal, Bihar & Orissa, sold under the Act for the recovery of arrears due on account of the same acquires the estate free from all encumbrances which may have been imposed upon it after the time of settlement, & is entitled to avoid & annul all under-tenures & forthwith to eject all under-tenants. This right of the purchaser at a revenue sale is subject to an exception under S. 53, Bengal Land-Revenue Sales Act, which provides that, excepting sharers with whom the Collector has opened separate accounts, any recorded or unrecorded proprietor or co-partner, who may purchase the estate of which he is proprietor or co-ptner. or who by re-purchase or otherwise may recover possession of the said estate, after it has been sold for arrears under the Act, shall by such purchase acquire the estate subject to all its encumbrances existing at the time of the sale, & shall not acquire any rights in respect to under-tenants or *raiyats* which were not possessed by the previous proprietor at the time of the sale of the said estate. Here, according to the plaint itself, pltf. 1 was the previous proprietor by his purchase of the mouza from the Trigunaits. Therefore, when he purchased the estate back from Sachindranath Chakravarti, he brought himself within the mischief of S. 53.

[8] The objection under S. 53A fails because it raises questions of fact which should have been put in issue at the trial. The shield which this section provides is available only against "the transferor or any person claiming under him." Also, it is not available against a transferee for consideration who has no notice of the contract or of part performance thereof. Now, as I have indicated, there is said to be in the chain of title a revenue sale. At a revenue sale, the interest that passes is not the interest of the defaulting proprietor, but the interest of the Crown subject to the payment of Govt. assessment : *Surja Kanta* v. *Sarat Chandra*, 18 C. W. N. 1281 : (A. I. R. (1) 1914 P. C. 82), *Narayan Das* v. *Jatindra Nath*, 54 I. A. 218 : (A. I. R. (14) 1927 P. C. 135). Therefore, if the sale was in fact a revenue sale, it would have been open to the pltf. 1 to contend that he was not a person claiming under the "transferor". The question was a question of fact, & so also was the question of notice. Neither of these questions was put in issue.

[9] The question of prescribing for title by means of constructive possession is a difficult question, & it is disappointing to see the summary manner in which it was dealt with by the learned Addl. Dist. J. Having found that the first act of direct possession by the defts. over the property in suit occurred in 1943, he observed that the question was whether in these circumstances the defts. could be said to have acquired a title in it by adverse possession, & went on:

"This position has been very lucidly discussed by the learned Subordinate Judge & I have no manner of hesitation in agreeing with him on the principle of law propounded by him. The case laws on the subject that were cited before me are only those which have been referred to by the learned Subordinate Judge in his judgment & it is not necessary for me to repeat the same. The main contention of the learned Advocate appearing on behalf of the applts. was that the cases relied on by the learned Subordinate Judge are authorities for the proposition that where the lessee takes possession under a valid title & works on different portions at different times of the land which is not capable of direct possession in any other way his possession of a part would be considered to be possession for the whole land which was demised by the owner to him but these decisions are no authority for holding the same principles to be true in case of a trespasser in whose case the claim regarding adverse possession must be limited to the area actually worked on for the full period of twelve years in view of the observations made in *Nageshwar Bux* v. *Bengal Coal Co. Ltd*, A. I. R. (18) 1931 P. C. 186 at p. 188 : (10 Pat. 407). This decision has also been discussed by the learned Subordinate Judge in his judgment & I do not think that the view taken by the learned Subordinate Judge is displaced by the observations made by their Lordships in the P C. decision. It is no doubt true that as a matter of general rule as observed by their Lordships in the above decision where claim for a title is invented merely on adverse possession it must

be limited to the actual area actually possessed by the trespasser for the full period of twelve years but, in my opinion, there is a wide distinction which should be maintained between a rank trespasser without any basis for title & one who claims to hold it on the basis of some grant from the owners of the lands which is incomplete & therefore invalid under the law. In the case of latter he cannot be treated on the same footing as a man having no grant whatsoever to claim the lands. In the present case the defts. have not squatted on the lands out of their own accord & it is clear that they have come upon the lands with the consent & with the permission of the landlords who had actually demised the lands to him but for want of registration such demise has become invalid. That being the position the defts. have practically been brought on the land by the landlords themselves & as such even according to the decision in the above case by their Lordships in the P. C. they must be held to have acquired title to the entire area."

The case referred to by the learned Judge is *Nageshwar Bux* v. *Bengal Coal Co. Ltd.*, A. I. R. (18) 1931 P. C. 186 : (10 Pat. 407), which he evidently regards as entirely supporting the pltfs.' contention. It is true that their Lordships of the P. C. observed in that case that there is undoubted authority for the proposition that where a person without any colour of right wrongfully takes possession as a trespasser of the property of another, any title which he may acquire by adverse possession will be strictly limited to what he has actually so possessed, & that, in the case of a mine, there is no presumption in law that the possession of a part of a seam infers possession of the whole seam, much less of all the seams in the mineral field in which part of a seam has been worked. Had the learned Judge perused this decision more carefully, however, he would have found that their Lordships were not speaking of possession in the limited sense of direct working. In their words "possession is a question of fact & the extent of the possession may be an inference of fact." Their Lordships went on to consider several facts which, in their opinion, in the case before them entitled the defts. to the inference that they were in adverse possession of the whole area in suit. A perusal of this portion of the judgment would have indicated to the learned Judge a line of investigation directed to ascertain whether in the present case the area in suit formed one unit with the other areas worked by the defts.

[10] It is not clear how the learned Judge arrived at what, in his opinion, is the position of person who enters upon property under a defective grant from the owners of the property. He does not state the reasoning by which he came at this conclusion. Nor does he mention any authority, although a relevant quotation occurs in the judgment of the Subordinate Judge from the judgment of Lord Cranworth L. C. in *Davis* v. *Shephard*, (1866) 1 Ch. A. 410 : (35 L. J. Ch. 581) :

"When the owner of real property, whether surface land or minerals, binds himself by a written agreement to grant a lease, & suffers his intended lessee, without a lease, to take possession, he must be understood to allow the lessee to take possession of all which he has engaged to demise. In the case of demise of unworked minerals, there can hardly be said to be actual possession of any part of them except of what the intended lessee is actually working; but I think that when the lessor allows his intended lessee to take possession & the lessee does take possession & commences working accordingly, he must be considered as constructively in possession of all which the lessor has bound himself to demise."

[11] The normal position as regards adverse possession by a trespasser is as stated in the case of *Nageshwar Bux Roy*, A. I. R. (18) 1931 P. C. 186 : (10 Pat. 407) *(supra)*. The law does not favour a trespasser & his adverse possession will be strictly limited to the area which is in his "possession." But we must be clear as to what is meant by "possession." The Cts. while not favouring a trespasser, must be fair to him & must treat him as in constructive possession where the nature of the property & the manner of holding it justify such an inference. In *Mohammad Fateh Nasib* v. *Sir Swarup Chand Hukumchand*, A. I. R. (29) 1942 Cal. 1 : (I. L. R. (1941) 2 Cal. 434), a Bench of the Calcutta H. C. stated the doctrine of constructive possession in the following words, which received the approval of the P. C. in *Mohammad Eateh Nasib* v. *Sir Swarup Chand Hukum Chand Firm*, A. I. R. (35) 1948 P. C. 76 : (50 Bom. L. R. 632) :

"The proper test to be applied in a case of this nature is whether the predecessors of the pltfs. for a period of twelve years or more exercised such dominion over the property in suit as to justify an inference of fact that they were in possession of the whole. It was not necessary that they should prove affirmatively that their predecessors had actually been in physical possession of every square inch of this land, but it should have been considered whether the acts of possession which had been proved would legitimately show that the predecessors of the pltfs. had enjoyed dominion over this property in the manner in which such dominion is normally exercised."

[12] That a trespasser is entitled in a proper case to an inference of constructive possession has been conceded by Mr. De & by Mr. K. D. Chatterji. They would confine this, however, to the kind of possession dealt with in the case of *Nageshwar Bux Roy*, (A. I. R. (18) 1931 P. C. 186 : 10 Pat. 407) that is to say, where the property in dispute can be regarded as forming a unit along with other property of which the trespasser is in direct & immediate possession. They challenge strenuously the correctness of the proposition laid down by the Addl. Dist. J. that, in the case of a defective grant, the lessee on entering gets

possession to the full extent of the grant. Mr. K. D. Chatterji crystallises the argument as follows. There is one kind of constructive possession which is on a par with actual possession. For instance, while I am holding only one end of a stick, I am in actual possession of the whole of it. In this way, a trespasser may be regarded as in possession of a whole unit of property of which he actually holds only a part. But, apart from this, the notion of constructive possession is inconsistent with adverse possession. This is a consequence of the principle that possession follows title; for, if the trespasser is not in actual possession of any part of the property, that part must be taken to be in the possession of the owner. The fallacy in this reasoning lies in regarding the constructive possession of the owner as automatically accompanying his title. In fact, it depends on his mental attitude, or supposed mental attitude. When property is not in the actual possession of anyone, & there is nothing to prevent the owner of the property from exercising his dominion over it, & he has not done anything to show that he has abandoned the property, the Ct. will presume on his part the intention of possessing the whole of that property, & will regard the absence of others from the property as due to his excluding them from it in pursuance of this intention. This constitutes his constructive possession & we say, "possession follows title." It is this mental element which explains the normal position as regards adverse possession by a trespasser; in the case of a trespasser coming upon property without any claim of right, there can be no presumption that he intends to hold anything more than he actually holds & on the other side, there is the constructive possession of the owner requiring to be displaced by something positive done by the trespasser. The positive element is supplied where there is something in the manner in which the trespasser holds the property to indicate an intention to hold more than the property in his direct possession. If that additional portion is not in the direct possession of anybody to that extent the constructive (possession ?) of the owner may be regarded as overborne & the possession of the trespasser may be taken to extend over this portion also. For this to happen, the constructive possession of the trespasser must have in it sufficient of the nature of real possession to overbear the constructive possession of the owner. This happens in the case of partial possession of the nature described by Mr. K. D. Chatterji, that is where the portion actually held forms part of what must be regarded as one unit of property. To my mind, entry under a defective grant constitutes another class of such cases. The grant itself has the effect of making the property granted into one unit, for when the grantee enters into the property in pursuance of the grant he must be taken to intend to take possession of the whole of the property & the grantor in allowing him to enter into possession must be taken to intend to allow him to take possession to this extent. It is, therefore, that the grantor's constructive possession is overborne. This latter element, the mental attitude of the owner, is important & constitutes the difference between the case of a grantee from the owner & that of a grantee from a person who does not own the property in question. In both cases the grantee enters with the intention of possessing the whole property, but in the latter case, the owner's intention to give him possession to this extent cannot be presumed & the adverse possession only operates to the extent of the actual possession of the grantee ; of course. it may extend further, if the elements necessary for the first class of cases are present. In one class of cases, the owner's constructive possession is overborne by his presumed consent, in the other by his failure to assert his possession, though to his knowledge the trespasser is treating the property as forming one unit with property which is in the trespasser's actual possession.

[13] I find support for my analysis in the following extract from *Narayan Singh* v. *Dildar Ali*, 3 Pat. 915 : (A. I. R. (12) 1925 Pat. 210) :

"Now possession, in the sense in which that term is used in jurisprudence, must be accompanied by an intention to possess, an *animus possidendi*. Now it cannot be said of a wrong-doer that there is any intention to possess that of which he has not a definite physical control. But of that of which he has a definite physical control, he is clearly in possession, provided the *animus possidendi* is established. I think this is at the bottom of the rule which lays down that a wrong doer cannot have recourse to the doctrine of constructive possession. But let us go a step further. Supposing a person without title acquires possession of part of the land & then proceeds to mark out the area of the entire land which he intends to possess. Clearly he has shown an intention to possess the entire area & he will be deemed to be in possession of the entire area though he has definite physical control only over a portion. I think that it is more correct to say that, in the absence of title, the law will raise from definite physical control of part of land a presumption of possession of that, neither more nor less, which the possessor has shown a clear & unambiguous intention to possess.

But here the defts. were in no sense wrong-doers. They were in by a document which purported to convey whatever title the vendor had in the villages conveyed. There was no dispute as to the boundaries of the village & the position is the same as if the defts. had marked out the entire area conveyed to them. It may be that the conveyance did not confer any title on them; but they were not aware of any defect in their title & there was clearly an intention to possess the entire area conveyed to them in the right of the vendor. In my opinion, the defts. were just as much in possession of the jungles & the minerals as of the tenanted portions of the villages."

[14] I have already cited above the words of Lord Cranworth L. C. in *Davis* v. *Shepherd* (1866-1 Ch. A 410 : 35 L. J. Ch. 581) *(supra)*. Mr. K. D. Chatterji has contended that that was not a case of adverse possession but merely a contest between persons let into possession of adjoining underground rights. To my mind, the nature of the case makes no difference, because we are concerned with the principle. In that case, although the pltf. & the deft. were let into possession, no lease was executed, & the question was as to the extent of their possession.

[15] Another relevant decision is *Low Moor Co.* v. *Stanley Coal Co. Ltd.* (1876) 33 L. T. 436 in appeal (1876) 34 L. T. 186 In this case Holroyd came into possession under a defective deed purporting to transfer the minerals to him. He worked the two upper seams of coat & transferred the underlying seams to the pltfs. who sunk a deep bore in the property for the purpose of testing. It was held that by his working Holroyd took possession of the whole of the seams covered by the deed in his favour & that the pltfs. subsequently acquired possession over all the seams underlying the first two seams. Amphlett, B. expressly referred to the case of *Davis* v. *Shepherd*, (1866-1 Ch. A 410 : 35 L. J. Ch. 581) & observed :

"The owner has bound himself, upon this construction of the deed to give an estate to Holroyd of all these several seams of coal ; and, therefore, when Holroyd entered into possession of one or more of these seams, he appears to me to have had constructive possession of the whole of them."

In the Ct. of Appeal, the Lord Chancellor observed :

"It is true that in cases where a man has entered upon & taken possession of one seam of coal & by lapse of time has acquired some title to it the law will not assume that his possession extends to all the other seams of coal lying under the particular one; but in the case we have before us it was beyond all doubt intended that Holroyd should have possession & take possession of all the seams."

And Mellish, C. J. observed :

"I quite agree that Holroyd obtained possession of the mines, & it is equally clear that he gave possession to the pltfs."

This distinction in favour of a trespasser claiming under a grant is recognised also in the case relied upon by Mr. De & Mr. K. D. Chatterji, *Glyn* v. *Howell*, (1909) 1 Ch. D. 666 : (78 L. J. Ch. 391), in which Eve, J. summed up the law on the subject in the following words:

"The line of authorities which Mr. Upjohn has relied upon, commencing, I think, with *Earl of Dartmouth* v. *Spittle*, (1871) 24 L. T. (N. S.) 67 & coming down to the case of *Thompson* v. *Hickman*, (1907) 1 Ch. 550 : (76 L. J. Ch. 254), seemed to me to establish that where title is founded on an adverse possession the title will be limited to that area of which actual possession has been enjoyed & that as a general rule constructive possession of a wider area will only be inferred from actual possession of the limited area, if the inference of such wider possession is necessary in order to give effect to contractual obligations or to preserve the good faith & honesty of a bargain." And "Mr. Upjohn is right when he says the decisions have proceeded upon two lines, the one being those cases where the possession of the part has been treated as possession of the whole, because the Ct. has found, either by contract or according to conscience, that possession of the whole is what the person possessed on the part was intended to have, & the other being those cases in which the Ct. finding no just reason for inferring, in favour of a person relying solely on possession of a part, a constructive possession of the whole, has refused to make such inference."

[16] The important element in possession is *animus possidendi*. Where all that trespasser intends is to remove & appropriate the minerals, he may merely get a right to the minerals removed *Ashton* v. *Stock*, (1877) 6 Ch. D. 719 : (25 W. R. 862), *Thompson* v. *Hickman*, (1907) 1 Ch. D. 550 : (76 L. J. Ch. 254), *Earl of Dartmouth* v. *Spittle*, (1871) 24 L. T. (N. S.) 67 ; see also *Lodna Colliery Co. Ltd.* v. *Bipin Behari*, 1 Pat. L. T. 84 at p. 91 : (A. I. R. (7) 1920 Pat. 383), *Pramatha Nath* v. *A. J. Meik*, 1 Pat. L. T. 360 at p. 368 : (A. I. R. (7) 1920 Pat. 542), *Gopi Ram* v. *Jagarnath Singh*, 9 Pat. 447 at p. 472 : (A. I. R. (16) 1929 Pat. 685), *Ranchi Zamindari Co. Ltd.* v. *Pratap Udainath*, 18 Pat. 215 at p. 232 : (A. I. R. (26) 1939 Pat. 209 : 40 Cr. L. J. 631). Where there is the necessary *animus possidendi*, the adverse possession will extend to the limit of possession. This possession may be confined to the area actually held; *vide*, in addition to the authorities cited above, *Bhupendra Narayan* v. *Rajeshwar Prosad*, A. I. R. (18) 1931 P. C. 162 : (59 Cal. 80), *Shashi Bhusan* v. *Ramjas*, 3 Pat. 85 at p. 114 : (A. I. R. (11) 1924 Pat. 402). The limit of possession may be increased by the manner of working showing that a larger area is intended to be appropriated than is in actual immediate possession; *vide* *Naryan Singh* v. *Dildar Ali*, 3 Pat. 915 at p. 928 : (A. I. R. (12) 1925 Pat. 210), *Gopi Ram* v. *Jagarnath*, 9 Pat. 447 at p. 472 : (A. I. R. (16) 1929 Pat. 685), *Ashton* v. *Stock*, (1877) 6 Ch. D. 719 at p. 726 : (25 W. R. 862), *Glyn* v. *Howell*, (1909) 1 Ch. D. 666 at p. 675 : (78 L. J. Ch. 391) and *Nageshwar Bux* v. *Bengal Coal Co., Ltd.*, A. I. R. (18) 1931 P. C. 186 : (10 Pat. 407). Extension may also arise, as I have indicated, by the consent of the owner when, in pursuance of a defective grant, he lets another into possession of his property.

[17] I find it difficult to apply the above principles to the present case as all the necessary facts have not been investigated. It appears to have been assumed that the settlement made by the *hukumnama* (Ex. A) had the approval of all the proprietors. From the written statement itself, we get it that *hukumnama* was granted by only two of them, Shyamlal & Brijbehari. It is alleged further that the grant was "confirmed by the other Pandes". The reference is apparently to the letters, Exs. B series, but there is nothing in either of the

judgments of the Cts. below as to whether these letters establish the confirmation of the grant by the remaining proprietors. Two of these letters are written by a receiver who seems to have been in possession of the estate of the Pandes. There is no investigation as to the duration & extent of his possession, the authority to which he owned that possession, how far that authority empowered him to act on behalf of the estate of the Pandes, & as to what is the legal effect of the acts attributed to him. In these circumstances it seems to me to be necessary to remand the appeal for rehearing in the light of the principles laid down above.

[18] There is a further point. I am not certain that the point of adverse possession arises at all. Deft. 1 claims to have entered in pursuance of a settlement made by some of the proprietors & approved by the other proprietors, & to have remained in possession thereafter. It is a point for investigation as to whether at any time there came into being a relationship of lessor & lessee between the Pandes & deft. 1, which would prevent the possession of deft. 1 from becoming adverse to the Pandes: *Nainapillai* v. *Ramanathan*, 51 I. A. 83 : (A. I. R. (11) 1924 P. C. 65).

[19] The question of the position of a person entering into & holding immovable property under a lease void for want of registration is far from easy & I do not wish to enter into a discussion of it without a finding of the Cts. below on the relevant questions of fact. Mr. R. S. Chatterji has urged that the point should not be allowed to be raised at all, that it was not taken by the pltfs. at any earlier stage & will change the nature of their case. I do not think that there is any substance in this contention. The point arises out of the defence case & is independent of the case of the pltfs. The pltfs. ask for the ejectment of the defts. on the finding that they are trespassers. The defts. resist on the plea that deft. 1 is a tenant. Having taken this position, the onus is on them to establish their right to remain on the property. It is true that they base their plea upon adverse possession, but it is for the Ct. to decide the legal effect of the facts alleged & proved by them. The pleadings of parties are confined by law to pleadings of fact. Therefore, the plea that on the facts alleged deft. 1 prescribed for the right of a permanent tenant does not preclude the Ct. from considering whether, on the facts proved, a tenancy came into being at an earlier stage & prevented the acquisition of prescriptive rights.

[20] On the above grounds, I would set aside the decree of the Addl. Dist. J. & remand the appeal for rehearing in the light of the above observations. The costs of this Ct. will follow the results of the case.

[21] I cannot part with this case without expressing our thanks to the learned counsel engaged, particularly Messrs. K. D. Chatterji, R. S. Chatterji, & Medini Prasad Singh, who have laboured ungrudgingly to help us in dealing with the several questions of law which arose for consideration.

[22] **Narayan J.**—I agree. Ever since this case opened, I was of the opinion that it could not be decided by us in this second appeal unless some necessary facts were investigated. It is regrettable that the final Ct. of fact did not apply itself properly to this case. As pointed out by my learned brother even the case of *Nageshwar Bux* v. *Bengal Coal Company*, A. I. R. (18) 1931 P. C. 186 : (10 Pat. 407) was not carefully read by the lower appellate Ct. It has been repeatedly pointed out that the Legislature has entrusted a very important duty to the first appellate Ct. It is for that Ct. to decide finally all questions of fact on which the disposal of the suit might depend, & as pointed out by Rowland, J. in *Bhagwan Singh* v. *Ujagir Singh*, A. I. R. (27) 1940 Pat. 33 the lower appellate Ct. has "to the best of his power, to weigh & balance the evidence, facts & considerations, appearing on both sides". It must appear from the judgment of the lower appellate Ct. that it has made an honest endeavour to make a proper appraisement of the merits of the cases put forward by the parties, & it should never appear to the litigant public or to the superior Ct. that it has agreed with the trial Ct. simply because it was not inclined to take much trouble over the case. Every litigant is entitled to have a decision from two Cts. on questions of law & fact, & if the lower appellate Ct. does not examine the facts & the evidence for itself & does not even mention the points which the case raises, it will be certainly failing in its duty. This case is on the whole a difficult case, & it could not so easily be decided in the manner it has been decided. Of course, the learned Addl. D. J. was so much satisfied with the judgment of the trial Ct. that it did not even like to refer to the rulings cited before it & gave a compliment to the learned Subordinate Judge that the points had been very "lucidly discussed" by him. My learned brother in his exhaustive judgment has pointed out how many different considerations arise & how many different principles have to be considered in this case. For applying the principles properly there must be further investigation of some necessary facts, & when we find that some other facts have to be investigated we have to send back the case though because of the remand the parties would be put to further harassment.

G.M.J. *Case remanded.*

A. I. R. (38) 1951 Patna 508 *[C. N. 140.]*

DAS AND NAGESHWAR PRASAD JJ.

Bansi Sah & others — *Applts.* v. *Krishna Chandra & others* — *Resps.*

A. F. A. D. Nos. 580 to 583 of 1947, D/- 25-4-1949.

(a) Civil P. C. (1908), S. 100—Finding of fact—Finding of lower Ct. not clear — Trial Ct. not considering relevant & material evidence—Finding is not binding in second appeal. [Para 4]

Anno. Civil P. C., Ss. 100-101 N. 53.

(b) Contract Act (1872), S. 73—Landlord undertaking to repair premises — Breach — Remedy of tenant—T. P. Act (1882), S. 108 (f)—Specific Relief Act (1877), S. 21 (a).

Upon the breach of a covenant to repair, committed by the landlord, the remedy of the lessee is only either by way of a deduction from the rent or by way of a claim for damages or reimbursement of money spent. There is no question of specific performance. But no relief for damages for failure to effect repairs can be claimed if it is not put forward in the pleadings : (1924) 93 L. J. K. B. 729, *Rel. on.* [Para 5]

Anno. Contract Act, S. 73 N. 23; Specific Relief Act, S. 21 N. 2; T. P. Act, S. 108 (f) N. 2.

(c) T. P. Act (1882), S. 108 (l) — Tenancy governed by T. P. Act — Tenant cannot demand assessment of fair rent — No abatement in rent can be claimed if there is no deprivation or eviction of tenant from part of premises by reason of non-repairs by landlord : (1859) 28 L. J. Q. B. 48, *Reld.*; 23 I. C. 358, *Explained.* [Paras 6 & 7]

Anno. T. P. Act, S. 108 (l) N. 1.

S. N. Basu & S. N. Banerjee — for Applts.; Rai Paras Nath — for Resps.

Das J.—These four second appeals arise out of three suits for rent & one title suit. The Cts. below dealt with the four suits, & the first appeal arising therefrom, by one judgment. We have also heard the four appeals together, as they raise a common question of law & fact, & the present judgment will govern all the four appeals.

[2] The relevant facts are the following. In the three suits for rent, the applts. were the defts. & in the title suit the applts. were the pltfs. The suits related to a pucca, one storeyed, brick-built house with the premises thereof, bearing holding No. 126 in Ward No. 3 of the Muzaffarpur Municipality. The aforesaid house & premises were leased for a term of ten years by means of registered lease dated 31-1-1928, at a monthly rental of Rs. 75. The lease was in favour of one Jagdish Chandra Mitra, who got possession, started an ice factory in the building & premises & paid the stipulated rent per month. In July 1930, Jagdish Chandra Mitra transferred his leasehold interest to the present applts. who also came in possession, & continued to work the ice factory on payment of the stipulated rent. Sometime after, they fell in arrears of rent & had some financial difficulty in running the ice factory. On 10-1-1935, they executed a mortge. bond for Rs. 4000 in favour of the resps.. a part of the consideration of which went towards the payment of arrears of rent up to December 1934. On 15-1-1934, the great earthquake of Bihar took place, & the case of the applts. was that the building suffered serious damage & part of it fell down as a result of the earthquake shock. According to the contract, as embodied in the lease of 1928, the lessor (that is, the resp.) was to make all repairs of bigger dimensions other than "petty repairs & white washing". The case of the applts. was that the lessor had failed to effect necessary repairs even after notice in 1939. It appears that after 1934 rent was not amicably paid, & the resps. had to bring suits for arrears of rent. Two such suits were brought, previous to the present suits, in which decrees were obtained by the resps. The money suits out of which three of the appeals have arisen related to three different periods from March 1939 to May 1942, for which the resps. claimed arrears of rent at Rs. 75 per month plus interest thereon. In these three suits various defences were taken by the present applts., some of which are no longer of any importance. One of the defences was that the applts. were entitled to a set off of Rs. 1268-13-0 on account of certain acts done by them, such as the filling up of some parti land by the deposit of engine ash, supply of ice, etc. Another defence was that there was a verbal agreement between the parties that the rent would be reduced to Rs. 50 a month on account of the damage done by the earthquake. A third defence was to the effect that the present applts. had suffered loss as a result of the failure to effect repairs, &, therefore, the Ct. should fix a proper rent for the building & premises. The first two defences are no longer of any importance, because of the findings arrived at by the Cts. below, and learned counsel for the applts. has frankly conceded that he is not in a position to press them at this stage. It is the third defence, embodied in a supplementary written statement, which is of importance in these appeals. As I shall have serious comments to make about the nature of this defence, I had better quote the words of the written statement, so far as the third defence is concerned :

"That after the rent-claimed building with its machinery therein was seriously damaged by the last earthquake of January 1934, & for non-repair of the said building by the pltfs. thereafter, these petnrs. could not run the ice factory & start their business of manufacture of ice when in January 1935, pltf. 1 promised to repair the said building, & further, to advance some amount for starting the business if these defts. would agree to execute a mtge. bond for consideration of Rs. 4000 including rent of the said damaged & fallen building for the period from January to December 1934, to which bait these defts. agreed, having been in a very embarrassed financial condition, but since after execution of the said bond in January 1935 the pltfs. have not effected any repair whatsoever to the rent-claimed building in spite of repeated requests with the result that these defts. have suffered much loss for not being able to make the best use of machineries for manufacture of ice due to the serious damage of the building.

That the plts. themselves verbally agreed to reduce the rent to Rs. 50 p. m., & got the same recorded in the last municipal assessment, but when this plea of reduction was taken in the Money Suit No. 86/39 this Ct. was pleased to disallow the reduction on the ground of verbal agreement, & as such these defts. submit that under S. 108, T. P. Act, the pltfs. are not entitled to any rent, but to such proper rent which the Ct. fixes after taking into consideration the circumstances stated above."

I have quoted above the supplementary written statement filed in one of the suits, *viz.* Money Suit No. 95 of 1940. In the other two suits also, there was a similar defence; for example, in Money Suit No. 140 of 1941, para. 11 of the written statement reads as follows :

"That the pltf. is not entitled to get any rent of the house under its present condition, & the defts. are ready to pay the pltf. proper rent which the Ct. fixes after taking into consideration all the circumstances set forth above."

In the title suit which the applts. had brought, they stated the above mentioned facts & then claimed the following relief :

"That it be adjudicated that the defts. are, under the circumstances set forth in the above paras. of this plaint, entitled to Rs. 10 p. m. from 16-1-1934 as fair & reasonable rent of the holding & not at the rate of Rs. 75 as they claim".

By the suit as framed the applts. did not ask for anything else, except the adjudication mentioned above which, in effect, was nothing more than an assessment of fair & reasonable rent.

[3] The learned Munsif who dealt with the four suits in the first instance came to the following findings. Firstly, he found that no such major damage was caused to the building or premises, as would require to be repaired by the lessor under the terms of the lease. Secondly, he found that assuming that there was such damage, it was not open to the applts. to ask for either reduction or abatement of rent, or assessment of fair & equitable rent. The learned Munsif pointed out that admittedly the provisions of the T. P. Act applied, & under those provisions it was not open to the applts. to ask for either reduction of rent or assessment of fair & equitable rent. On these main findings, the learned Munsif decreed the three money suits in which rent had been claimed, & dismissed the title suit of the applts. Appeals were preferred to the learned Dist. J. who was not satisfied with the finding of the learned Munsif that no major damage was done. He thought that further evidence should be taken on the point of damage, & an attempt should be made to assess the amount of damage, if any. He did not definitely express himself on the question if a reduction of rent could be given in the circumstances, but left that question to be agitated in the Ct. below. He passed an order of remand for the purpose of taking fresh evidence on the questions mentioned above. Against this order of remand, applns. in revn. were filed to this Ct. which were disposed of by Ray J. in his order dated 9-5-1946. He set aside the order of remand, & recast one of the issues, namely, issue 5; in the following way :

"Are the pltfs. of the title suit entitled to get any abatement of rent originally contracted for, &, if so, at what rate" ?

It was made clear, however, that no opinion was expressed on the question if the applts. were in law entitled to any suspension or abatement of rent. It was also made clear that no fresh evidence was to be given, & the question of the right to any abatement of rent was to be considered on the evidence already given. The cases then went back to the first Ct. of appeal, & were dealt with by the Addl. Dist. J. who, by his judgment dated 31-1-1947, affirmed the findings of the learned Munsif that no major damage was caused & further, that the applts. were not entitled to any reduction or abatement of rent.

[4] Mr. S. N. Basu appearing for the applts. has contested both the aforesaid findings. The finding that no major damage which required to be repaired by the lessor, was caused is a finding of fact binding in second appeal. Mr. Basu has contended that the final Ct. of fact has dealt with the question of damage in a very summary way, without considering all the relevant evidence in the record, & has further misdirected himself as to the real issue between the parties. He has pointed out that both the Cts. below were influenced by the fact that the ice factory continued to run in spite of the damage, & from this an unwarranted inference was drawn that no major damage was caused to the building. Mr. Basu has contended that the real point was not whether the ice factory continued in spite of the damage, but whether there was such major damage to the building as had to be repaired by the lessor under the terms of the lease, & if the failure to effect such repair had caused loss to the applts. Mr. Basu has further submitted that in the three suits for rent the applts. as defts. were entitled to claim by way of equitable set off of such compensation as they were entitled to claim for a breach of the covenant as to repairs by the lessor. He has contended that this was the real nature of the defence in the three suits for rent, & the Cts. below have missed this important aspect of the case, which has vitiated the findings arrived at by them. If one were to follow the logical process, one should first consider the question of fact if there was any such damage to the building as had to be repaired by the lessor under the terms of the lease, then would come the further question what relief, if any, would the applts. be entitled to for the failure of the lessor to effect repairs. On the

question of damage to the building learned counsel for the applts. has drawn our attention to the inspection notes of the Circle Officer of Industries, North Bihar Circle, dated 29-1-1934 (EX. A), & the local inquiry report of the Pleader Comr. in the light of the said inspection notes. The final Ct. of fact referred to the said inspection notes & said that though some damage was caused, the factory continued to run. He further expressed the view that the inspection notes of the Circle Officer had reference to the regulations laid down & the conditions to be satisfied before a factory is allowed to run under the Indian Factories Act. He then said that the extent of the damage had been exaggerated by the applts. I must say that there is no clear finding by the final Ct. of fact that no such damage had occurred which required to be repaired by the lessor under the terms of the lease. The learned Munsif dealt with this matter at greater length, & held that some slight damage was done to the building, but no major damage, & the slight damage was repaired by labourers employed by the resps. The learned Munsif did not, however, specifically consider those parts of the inspection notes which said that a portion of the southern wall & certain brick pillars had fallen down & also some walls had gone out of the plumb line. The enquiry report of the pleader Comr. supported these findings of the Circle Officer. Therefore, the finding of fact arrived at by the learned Munsif is also open to the criticism that he failed to consider relevant & material evidence in the record as to the extent of the damage to the building.

[5] This brings me to the next question which is the most important in these appeals —as to what relief, if any, the applts. are entitled to, assuming that there was such damage to the building as had to be repaired by the lessor under the terms of the lease. While dealing with this question, it would be convenient to deal with the title suit separately from the suits for rent. In an earlier part of this judgment I have quoted *in extenso* the relief which the applts. had claimed in the title suit. It seems clear to me that the title suit as framed was for an assessment of fair & equitable rent in the shape of a declaration that a fair & reasonable rent would be Rs. 10 p. m. from 16-1-1934. In my opinion, the applts. were not entitled to such a declaration even if there had been such damage to the building as had to be repaired by the lessor under the terms of the lease. Admittedly, the provisions of the T. P. Act, governed the lease, & there has been some argument before us if the lessee had any other right except that mentioned in cl. (f) of S. 108, T. P. Act. That clause says that if the lessor neglects to make within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, & deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor. Admittedly the lessee did not make any repairs himself; nor did he spend any money on such repairs. Therefore, the question of deducting the expenses of such repairs from the rent or otherwise recovering it from the lessor does not arise. Learned counsel for the resps. has contended before us that the right given under cl. (f) of S. 108 was the only right which the lessee had. Learned counsel for the applts., on the contrary, has contended that other remedies open to the lessee, for example, claiming compensation for any loss suffered as a result of a breach of contract under S. 73, Contract Act, are still available to the lessee. In *Zeebunnissa Begum* v. *Mrs. H. B. Danagher*, 59 Mad. 942 : (A. I. R. (23) 1936 Mad. 564), Varadachariar J. (as he then was) put the matter thus at p. 955 of the report:

"Before passing on to the next argument, I may also point out that in respect of the covenant to repair, no question of specific performanee can arise, see Woodfall on Landlord & Tenant, p. 769. The remedy of the tenant in the event of a breach of the covenant can only be either by way of a deduction from the rent or by way of a claim for damages or reimbursement of money spent."

In my opinion, the lessee can claim damages against the lessor for a breach of his obligations. In *Hewitt* v. *Rowlands* (1924) 93 L.J.K.B. 729, the question of assessing damages in favour of a tenant for failure of the landlord to effect repairs, which under the agreement the landlord had undertaken to do, arose, & one of the questions was if the tenant's right to recover damages depended on his expending money for doing the repairs which the landlord ought to have done. It was pointed out that there was no difference in principle between the liability of a landlord in respect of his covenant to repair & that of a tenant on his covenant to repair, & it was not a condition precedent to the tenant's right to recover damages against his landlord for breach of covenant to repair, that the tenant should have actually expended money in doing the repairs which the landlord ought to have done. There is, therefore authority for the view contended for by Mr. Basu. But the question still is—is the title suit brought by the applts. a suit claiming damages for failure to effect repairs or is it a suit for assessment of fair & equitable rent ? It seems clear to me, on a perusal of the plaint, that the applts. were not claiming damages by way of compensation for any loss which they had suffered as a result of a breach of the landlord's covenant to repair. In the plaint itself it was clearly, stated that what the applts. wanted was the determination of fair & equitable rent. A subsequent petn. for amendment of the plaint which was filed on

24-2-1942, made the position still more clear. This petn. stated :

"That the pltfs. have filed the suit for fixing Rs. 10 p. m. as fair & reasonable rent of holding No. 497 of Ward No. 2 of Muzaffarpur Municipality belonging to the defts. on the grounds that the building collapsed & very badly cracked & damaged by the last earthquake of 15-1-1934, & since then no repairs were undertaken by the defts. up to date."

Surely, a claim of this nature is not a claim for damages as contemplated under S. 73, Contract Act. I am not looking at the matter from the view of any technical rules of pleading In a case for compensation for loss or damage the pltfs. ought to say what loss, pecuniary or otherwise, they have suffered. Merely saying that there was some damage to the building which had to be repaired by the landlord. but which did not in any way interfere with the work of the ice factory, & without stating what loss, pecuniary or otherwise, the pltfs. suffered cannot, in my opinion, be the foundation for a claim for damages or even for abatement of rent by way of damages. It is obvious that the Ct. could not make a contract for the parties & fix a fair & reasonable rent from 16 1-1934. As a matter of fact, rent at the stipulated rate of Rs. 75 p. m. had been paid after 1934, either amicably or had been realised by means of suits. Under the provisions of the T. P. Act, the applts, were not entitled to the relief which they asked for in their title suit & that suit was rightly dismissed by the Cts. below, even on the assumption that there was such damage to the building as required to be repaired by the landlord. In view of the argument raised by Mr. Basu, I have examined the evidence given on behalf of the applts. There is nothing in that evidence to show what loss, pecuniary or otherwise, the applts. had suffered by reason of the failure to effect repairs by the landlord. All that the evidence sought to prove was that some damage had taken place which was not repaired by the landlords. Nothing was stated as to what loss, pecuniary or otherwise, the applts. had suffered, & the only claim which they made was for a fixation of fair & equitable rent. Such a relief was not available to the applts.

[6] Turning now to the three suits for rent, the contention of Mr. Basu is that his clients are entitled to claim compensation or damage for a breach of the landlords' covenant as to repairs, by way of an equitable set off against the claim for rent. Here, again, the trouble is that that was not the nature of the defence put forward, & I do not think it is open to the applts. to make out a different case in second appeal. I took the trouble of quoting the written statement in extenso. What was really claimed was that there was a verbal agreement for reduction of rent; but when the verbal agreement was not accepted, the plea taken was that the Ct. should fix a proper rent. There was no suggestion that the applts. were entitled to claim compensation or damages for the loss which they had suffered & that such compensation or damages should be set off, against the claim for rent. As in the title suit, so also in the suits for rent, nothing was stated about the loss, pecuniary or otherwise, which the applts. had suffered. This difficulty was realized when the applns. in revn. were heard by this Ct. against the order of remand first passed by the Dist. J. It was apparently then contended that what the applts. asked for was abatement of rent. Mr. S. N. Basu has argued before us that what his clients want is abatement of rent by way of compensation or damages. He has relied on two decisions in support of his claim that such abatement is permissible under the law. The first decision is one of the Punjab Chief Ct. in *Naidar Mal* v. *B. Borrooah & Co.*, 23 I. C. 358 : (A.I. R. (1) 1914 Lah. 186). The T. P. Act does not apply to the Punjab, & there was no discussion of the legal position in the decision referred to above. It was however, found in that case as follows :

"It is very clearly proved that as a result of this neglect serious damage occurred in the rains & at the time when the defts-resps. stopped paying rent, there were, besides the original four roofless rooms, other rooms which had fallen in or had become dangerous & otherwise useless."

Therefore, the case was really one of partial eviction or deprivation, where the lessor, by his failure to effect repairs, had failed to put the lessee in full possession of the property demised. In such a case the question of proportionate abatement of rent undoubtedly arose. The lessor is not entitled to rent unless & until he has fulfilled his obligation to put the lessee in possession of the land leased to him. If the lessor has put the lessee in possession of only a portion of the property leased, the lessee will be entitled to, in some cases, suspension of the whole rent & in some other cases to a reduction or abatement of rent. The decision in *Naidar Mal's case*, 23 I. C 358 : (A.I.R. (1) 1914 Lah. 186), therefore, proceeded on a principle different from the one which is sought to be applied in the cases before us. In the cases before us, there was no partial eviction or deprivation, as a result of the failure of the landlord to effect repairs. The applts. continued to be in possession of the whole property, & gave no evidence of any loss, pecuniary or otherwise. I fail to see how in such circumstances the applts. can have any abatement of rent. The other decision in *Bennett* v. *Ireland*, (1859) 28 L. J. Q. B. 48 : (113 R. R. 657) depended on its peculiar facts. That was a case in which there was an agreement that the deft. would pay the rent in the manner stipulated, damage by fire excepted. A fire destroyed part of the

building. Lord Campbell C. J. observed as follows :

"There must be an abatement of rent in respect of such part of the premises as, by reason of the fire the tenant can no longer enjoy, & during the time that he is deprived of the use of this part."

Therefore, that was also a case in which there was partial deprivation, that is the tenant could not enjoy a part of the building which had been destroyed by fire. In none of the cases before us was it even alleged that there was partial deprivation or eviction & the tenant could not enjoy a part of the building because of the failure to effect repairs. If, therefore, we treat the defence in the three suits for rent as a claim for abatement of rent, as appears to have been done when the applns. in revn. were heard against the order of remand, my conclusion is that the applts. were not entitled to any abatement of rent originally contracted for. Issue 5 as recast must, in my opinion, be answered in the negative.

[7] The question was also raised before us if the applts. had to pay court-fees on a claim for damages by way of an equitable set off, & furthermore, how such damages should be assessed. The question of assessing damages in favour of a tenant who has spent nothing on repairs, is not free from difficulty, as would appear from the observations made in *Hewitt* v. *Rowlands*, (1924) 93 L. J. K. B. 729. Where a lessee's covenant to deliver up the premises in good repair is broken at the end of the term, the measure of damages on strict principle should be the amount by which the value of the reversion is diminished; but as a practical measure, the reasonable cost of putting the premises into the state of repair in which they ought to have been left has sometimes been taken to be the measure of damages. In the case of a breach during the term, the measure is generally the diminution in the value of the reversion. These are, however, questions which do not call for decision by us. It is sufficient to state that the defence which the applts. had put forward in the three suits for rent was really a claim for assessment of fair & equitable rent which the applts. were not entitled to claim under the provisions of the T. P. Act. If, however, that defence is taken to be a claim for abatement of rent, then also the applts. were not entitled to any abatement of rent in the absence of any evidence that they had been deprived of the use of a portion of the premises or had suffered loss, pecuniary or otherwise, by reason of the failure of the landlords to effect such repairs as they were under the terms of the lease bound to do.

[8] This result may be unfortunate for the applts. but they are themselves to blame for this result. They brought a title suit in which they made a claim to which they were not entitled under the law. In the suits for rent they put up defences which could not be established & again made a claim for assessment of fair rent which was not open to them to claim under the provisions of the T. P. Act. If they claimed compensation or damages for a breach of the landlord's covenant as to repairs, they should have stated what loss or damage they had suffered for which they claimed compensation. This they did not do at any earlier stage, & the question has been raised for the first time in these second appeals. Even when these cases came to this Ct. on applns. in revn. against the order of remand, the claim was treated to be one for abatement of rent only. If I had held that the applts. were entitled to abatement of rent by way of damages, I might feel inclined to remand these cases again in view of the rather unsatisfactory nature of the finding arrived at by the final Ct. of fact on the question of the extent of damage caused to the building by the earthquake of 1934. But, in my judgment, the applts. are not entitled to claim abatement of rent & no useful purpose will be served by another order of remand & unless the applts. are allowed to amend their pleadings & given an opportunity of adducing fresh evidence as to the loss which they had suffered there could not be a decree in these cases for compensation or damages. It would be, I think, unfair to the resps. to allow the applts. to amend their pleadings & give them an opportunity of adducing fresh evidence. The applns. in revn. against the order of remand were heard in the presence of the parties, & the order of this Ct. refusing an opportunity to give fresh evidence is binding on the applts.

[9] For the reasons given above, I would dismiss these appeals with costs.

[10] **Nageshwar Prasad J.**—I agree.

R.G.D. *Appeals dismissed.*

A. I. R. (38) 1951 Patna 512 *[C. N. 141.]*

AGARWALA C. J.

Rameshwar Lall Rostogi — *Petnr.* v. *The King.*

Criminal Revn. No. 1286 of 1949, D/- 26-10-1949.

Essential Supplies (Temporary) Powers Act (1946), Ss. 3 (f), 4, 7 — No indication of delegation under S. 4 — Prosecution for contravention of alleged order of subordinate officer under S. 3 (f).

Where the petnr. was prosecuted under S. 7 for contravention of an alleged order under S. 3 (f) & what was relied on by the prosecution was a letter addressed to the petnr. by an officer in the Supply Dept. directing him to supply rice to holders of ration cards but there was nothing on the record to indicate that the Central Govt. had under S. 4 delegated its powers under S. 3 (f):

***Held*, that the letter was not an order under S. 3 (f) the contravention of which could constitute an offence under S. 7.** **[Para 1]**

Baldeva Sahay & H. K. Banerji — for Petnr. Standing counsel — for Opposite Party.

Order. — The petnr. has been sentenced to three months' R. I. & to pay a fine of Rs. 1000 under S. 7, Essential Supplies Act, 1946. The particular offence alleged to have been committed is the omission to sell rice to the holder of a ration card who was entitled to buy it. Section 7 penalises the contravention of an order made under S. 3 of the Act. Under S. 3 the Central Govt. is empowered to make orders for, amongst other things, requiring any person holding stock of an essential commodity to sell the whole or a specified part of the stock at such prices & to such persons or class of persons or in such circumstances, as may be specified in the order. The prosecution has not proved that the Central Govt. has made any order the contravention of which would be a breach of cl. (f) of S. 3 the purport of which I have quoted above. What they have brought on to the record is a letter addressed to the petnr's. firm by an officer in the Supply Dept. directing him to supply rice to the holders of ration-cards. That is not an order of the Central Govt. Under S. 4 of the Act, however, the Central Govt. is authorised to direct that the power which it has under S. 3 shall be exercised either by an officer or authority subordinate to the Central Govt. or by such Provincial Govt. or such officer or authority subordinate to a Provincial Govt. as may be specified in the direction. When the Central Govt. delegates this power to the Provincial Govt. it is to be done by a notified order, that is to say, by an order notified in the official Gazette. There is nothing on the record of this case to indicate that the Central Govt. has delegated its power either to an officer or to an authority subordinate to itself, or to the Provincial Govt. or to an officer or an authority subordinate to the Provincial Govt. The prosecution, therefore, have failed to prove that the letter on which they rely is an order the contravention of which constitutes an offence under S. 7 of the Act. This of course is really one of those numerous cases to which I have been continually inviting the attention of the Provincial Govt. illustrating the utter neglect with which important prosecutions are conducted. No attempt is made to bring on to the record material which is necessary for determining whether the accused has committed an offence or not.

[2] The conviction & sentence are set aside. The fine, if paid, will be refunded.

G.M.J. Conviction & sentence set aside.

A. I. R. (38) 1951 Patna 513 *[C. N. 142.]*

RAMASWAMI J.

Abdul Mian & others*—*Petnrs.* v. *The King.

Criminal Revision No. 800 of 1949, D/- 18-8-1949.

(a) Criminal P. C. (1898), S. 190—Cognizance of case—Ultimate result of trial if material.

It is not permissible to look at the ultimate result of the trial in order to examine whether the Mag. has taken legal cognizance of the case. [Para 2]

Anno. Cr. P. C., S. 190, N. 6.

(b) Criminal P. C. (1898), S. 537 — Want of sanction for prosecution — Defect not curable under S. 537.

Sanction to prosecute constitutes a condition precedent to the institution of the prosecution; the giving of the sanction confers jurisdiction on the Ct. to try the case; and where there is no valid sanction there is a defect in the jurisdiction of the Ct. which can never be cured under S. 537. [Para 2]

Anno. Criminal P. C., S. 537, N. 7.

N. N. Ray — for Petnrs.

Order. — It is necessary to state the material facts giving rise to this rule. On 12-8-1948, at about noon one Karu Dusadh found six appcts. slaughtering a bullock in an open field at a distance of about ten rasis from his house. He informed the S. I. of Police, who after investigation submitted charge-sheet under S. 295A, I. P. C. After taking cognizance, the Subdivisional Mag. transferred the case to another first class Mag. who has convicted the appcts. not under S. 295-A but under S. 298, I. P. C.

[2] The main argument is that since the prcsecution has not been sanctioned by the local Govt., the conviction of the appcts. is illegal. In my opinion, this argument is well-founded & must prevail. The lower appellate Ct. has observed that there is no defect in cognizance since the appcts. have been ultimately convicted under S. 298, I. P. C. upon the same complaint. But it is not permissible to look at the ultimate result of the trial in order to examine whether the Mag. has taken legal cognizance of the case: see *Ravanappa* v. *Reddi* v. *Emperor*, A. I. R. (19) 1932 Mad. 253: (33 Cr. L. J. 361) & *Narain Singh* v. *Emperor*, A. I. R. (12) 1925 ALL. 129 : (26 Cr. L. J. 446). In my opinion, the proceedings in the present case are wholly illegal from the start for want of sanction of the Provincial Govt. for the prosecution of the appcts. In *Gokulchand Dwarkadas* v. *The King*, 1948-1 M. L. J. 243 : (A. I. R. (35) 1948 P. C. 82 : 49 Cr. L. J. 261) the Judicial Committee observed that sanction to prosecute constitutes a condition precedent to the institution of the prosecution; the giving of the sanction confers jurisdiction on the Ct. to try the case; and where there is no valid sanction there is a defect in the jurisdiction of the Ct. which can never be cured under S. 537, Cr. P. C. Precisely the same opinion has been expressed by the F. C. in *Basdeo Agarwalla* v. *The King*, 1945 F. L. J. 45 : (A.I.R. (32) 1945 F. C. 16 : 46 Cr. L. J. 510).

[3] Upon these grounds, I would make this rule absolute & set aside the conviction & sentence imposed on all the appcts.

V.B.B. Rule made absolute.

A. I. R. (38) 1951 Patna 514 *[C. N. 143.]*

RAMASWAMI J.

Thakur Prasad — Petnr. v. *Mt. Godavari Devi — Opposite Party.*

Criminal Revn. No. 1113 of 1948, D/- 7-2-1949.

Criminal P. C. (1898), S. 488—Illegitimate child —Evidence of woman—Corroboration of.

Where the question at issue is whether a certain man is the father of a certain child, it is *prima facie* improper to accept without corroboration, the mere statement on oath of the mother who asserts the paternity. Her evidence in such a case cannot but be highly interested, and it would be unreasonable and improper for any Court to act merely on her own statement without some independent corroboration thereof. Such corroborative evidence may be circumstantial but it must be such as to corroborate the evidence of the woman that the child was born of the alleged father. The fact of improper association after the child was born would not be sufficient to corroborate her evidence. [Para 2]

Anno. Cr. P. C., S. 488 N. 25.

K. C. Sanyal & Lakshmi Narain Sinha — for Petnr.; R. S. Sinha — for Opposite Party.

Order.—This application is directed against an order of a Mag. made under S. 488, Cr P. C., directing Thakur Prasad to pay a sum of Rs. 10 per month to Ramnarain who is alleged to be his illegitimate son conceived through Mustt. Godavari. On behalf of the appct. learned Advocate submitted that the trying Mag. committed an error of law in accepting the evidence of Mustt. Godavari without it being sufficiently corroborated.

[2] In a case of this type it has been held that as a matter of prudence, if not of law, the Ct. should not accept the evidence of the woman unless it is corroborated in material particulars (vide for instance *Vedantachari* v. *Marie*, A.I.R. (13) 1926 Mad. 1130 : (27 Cr. L. J. 1095). In that case Wallace J. observed that where the question at issue was whether a certain man was the father of a certain child, it was *prima facie* improper to accept without corroboration, the mere statement on oath of the mother who asserted the paternity. Her evidence in such a case could not but be highly interested, & it would be unreasonable & improper for any Court to act merely on her own statement without some independent corroboration thereof. In the present case it is necessary, therefore, to examine whether there is sufficient corroboration of the evidence of Mustt. Godavari that Ramnarain was the child of Thakur Prasad. It is agreed that the child was born about the year 1941. A. W. 3 Musahroo Mandal stated that Thakur Prasad had kept Mustt. Godavari as his concubine for the last four or five years. The next witness A. W. 4 Kamleshri Jha stated that he found the woman in the house of Thakur Babu about two or three years back. A. W. 2 Muhadi Hussain, tamtam driver, deposed that he had taken the woman with Thakur Babu to cinema on several occasions. He admitted that he did not know what was the relationship between them. When cross-examined, he stated that he knew the woman for the last eight years. But he has not specifically deposed that he had seen the woman improperly associating with Thakur Prasad for the entire period. It is true that corroborative evidence may be circumstantial but it must be such as to corroborate the evidence of the woman that the child was born of Thakur Prasad. The fact of improper association after the child was born would not be sufficient to corroborate her evidence. There must be evidence to suggest that at or previous to the time when the child could have been begotten there were acts of familiarity between the parties. In *Cole* v. *Manning*, (1877) 2 Q. B. D. 611 : (46 L. J. M. C. 175) it was held that evidence of acts of familiarity between the woman & defendant before a time at which the child could have been begotten would be corroborative evidence under the Bastardy Laws Amendment Act, 1872. In *Thomas* v. *Jones*, (1920) 2 K. B. 399 Lord Reading observed that corroborative evidence was required in such cases in order to protect men against wicked or unfounded charges which might be so easily made if the evidence of the woman without corroborative testimony was sufficient. But it would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence was evidence which shews or tends to shew that the woman's story was true. In *Prasad Gareri* v. *Mt. Kesari*, A. I. R. (28) 1941 Pat. 444 : (42 Cr. L. J. 347) Dhavle J. held that the burden was upon the woman to establish the paternity of the child & to show that the person from whom she claimed maintenance for the child was the father of the child; that it was *prima facie* improper to accept without corroboration the mere statement on oath by the mother who asserted that the opposite party was father of the child.

[3] In the present case even assuming that A. Ws. 2, 3 & 4 have given true evidence, they do not corroborate to any appreciable extent the statement of Mustt. Godavari that Thakur Prasad was the father of the illegitimate child Ramnarain. It follows that the learned Mag. ought not to have passed an order of maintenance under S. 488, Cr. P. C.

[4] Upon these grounds I would make the rule absolute and set aside the order of the Mag. directing petnr. to pay for the maintenance of Ramnarain.

V.S.B. *Rule made absolute.*

A. I. R. (38) 1951 Patna 515 *[C. N. 144.]*

MANOHAR LALL & RAY JJ.

Rajibnath Mukherjee—Pltf. — Applt. v. *Chota Nagpur Banking Association Ltd. —Deft.—Resp.*

A. F. O. D. No. 151 of 1945, D/- 3-3-1948.

Civil P. C. (1909), S. 47 — Question relating to execution, discharge or satisfaction of decree — Execution of mtge decree — Raiyat's holding sold in contravention of prohibition in Chota Nagpur Tenancy Act — Suit by mtgor.-judgment-debtor for recovery of holding — The question whether holding was or was not liable to be sold in execution on account of prohibition in Chota Nagpur Tenancy Act, held related to execution, discharge or satisfaction of the decree & should have been raised in execution — Suit held not maintainable. [Para 7]

Anno. Civil P. C., S. 47, N. 45, Pts. 2 & 3.

G. C. Mukherjee & K. D. De — for Applt; B. C. De, J. C. Sinha & A. K. Chatterji — for Resp.

Ray J. — This is a pltf's. appeal in a suit for a declaration of his raiyati right & for recovery of possession in respect of lands appertaining to khatas Nos. 50 & 210 in village khirgaon, police-station Hazaribagh, dist. Hazaribagh, & for confirmation of possession or, in the alternative, for recovery or possession of the lands appertaining to khata No. 51 of the same village.

[2] The facts, out of which cause of action for the suit arose, are that the disputed lands appertaining to khatas 50 & 51 were recorded as raiyati in the names of Narendra Nath Mukherjee, Lokendra Nath Mukherjee, Adhendra Nath Mukherjee, Dijendra Nath Mukherjee Harendranath Mukherjee & Parendra Nath Mukherjee, all sons of late Rai Bahadur Jadunath Mukherjee, & that all the survey plots except No. 860 of khata No. 210 were all along their raiyati lands. Late Jadunath Mukherjee had acquired these lands from khas mahal by settlement. The aforesaid recorded tenants mortgaged all the raiyati lands in the aforesaid three khatas of the village along with other properties with the deft. Chotanagpur Banking Assocn. Ltd., in the year 1914. As the mtge. debts could not be liquidated, the deft. Bank enforced the mtge. in Suit No. 48 of 1925. The mortgaged properties were sold to the deft.-Bank in execution of the mtge. decree. They got delivery of possession on 1 8-1936. The deft. apprehending futility of the auction sale which was held in contravention of the provisions of S. 41, Chota Nagpur Tenancy Act, persuaded the mtgor-judgment-debtors & their heirs to surrender the lands appertaining to khata No. 50 to the khas mahal (landlord) giving them to understand that the deft. would give them receipt of acquittance of all the debts outstanding against them. The petn. for surrender filed under the persuasion, however, was rejected by the khas mahal officer. Later, on 5-9 38 another petn. of surrender was filed by the aforesaid mtgors. & their representatives excepting Parendra Nath Mukherjee, the pltf.'s father. The latter filed an objection withdrawing from the petn. of surrender already filed. The objection, however, was overruled, in disregard of the fact that the pltf.'s father had by partition become owner of the entire lands in suit. Acting upon the petn. of surrender & considering that the original tenancy had come to an end, the lands were settled with the defts. & their names were mutated instead of the recorded tenants. The deft. thereupon dispossessed the pltf. from lands appertaining to khata No. 50 & raiyati portion of khata No. 210 & claimed title in himself in lands of khata No. 51 though the latter had never been sold at the execution sale. The deft. resisted the suit on the following grounds: that the lands of original khatas Nos. 50, 51 & 210 were sold on 8-2-36 in execution case No. 96 of 1934 of the Ct. of the Addl. Subordinate Judge at Hazaribagh in the aforesaid mtge. suit; that the entire mtge. land in village khirgaon formed a compact block lying within the boundaries: north—Kachcha public road, south—bungalow of Babu Monindra Nath Mukherjee, east—municipal Road, west—lands of Chhakori Mistry, Mohan Naya & Jitu Mali; that the lands of khata No. 51 including the big tank lie within the aforesaid boundary & form the central portion of the entire land sold; that the defts. got possession through Ct. of all the lands, house & tank included in original khatas Nos. 50, 51 & 210; that the plts. as alleged, is not in possession of khata No. 51 & that the pltf. is debarred from maintaining a suit challenging the validity of the sale in favour of the deft. Bank as neither he nor his predecessor-in-interest raised the objection in execution of the decree under S. 47, C. P. C.

[3] The learned trial Judge recorded the following findings: (1) that the lands in suit were not the raiyati lands of either Rai Bahadur Jadunath Mukherjee or his heirs, but that Rai Bahadur Jadunath Mukherjee & his heirs including the pltf. had all along permanent leasehold interest in them which were heritable & transferable & that in this view the sale in execution of the decree was binding against pltf. (2) that the mutation order of the Khas Mahal Officer in favour of the deft.-Bank & settlement of 8 plots of khata No. 50 with them are valid; (3) that the pltf.'s suit was not barred by the provisions of S. 47, C. P. C.; & (4) that the sale in favour of the deft. included the lands appertaining to khata No. 51.

[4] All the above findings have been attacked by Mr. G. C. Mukherji appearing for the applt. in this Ct. His contention, in this behalf, are in the main (1) that the lands appertaining to khata No. 51 of the cadastral survey have

not been sold; (2) that the lands sold are raiyati holdings & their sale, in execution, in contravention of the statutory prohibition contained in the Chota Nagpur Tenancy Act is void & passed no title to the deft.-Bank; & (3) that the suit is not barred by the provisions of S. 47, C. P. C.

[5] In support of his first contention, Mr. Mukherji has taken us through the description of the property sold as set out in EX. F (certificate of sale in execution case No. 96 of 1934, dated 4-4-36) & EX. E (order sheet in the said execution case dated 22-12-34 to 12-9-36). The following is the description of the properties of judgment-debtors, 3 & 16 to 18. It is admitted by Mr. Mukherjee that the pltfs. represent judgment-debtor No. 3. I quote the description hereinbelow :

"I (A). One pucca tiled bungalow with orchard at Khirgaon, pargana Champa. thana & dist. Hazaribagh, thana No. 145, the boundaries of which are as follows : East Public Road. West—Jot land of the tenants Chhakouri & Mistri & others. North—Tank & the land appertaining thereto, i. e. lot No. 1 (B). South-House of Babu Mohindra Nath Mukherji, Khata No. 50, plot Nos. 856, 855, 854, 857, 858, 859, 834, 835, 836, 837, 838, 839, 849, 850, 951, 852, 853, 847, 848 & khata No. 210, plot Nos. 831, 860 area 6.19 acres at an annual rental of Rs. 5-8-0 sold at auction for Rs. 3,100.

1(B). A tank with orchard & the land appertaining to it at Khirgaon, thana & dist. Hazaribagh, thana No. 145, the boundaries of which are as follows : East Public road, West—paddy land of the tenants. North-unmettled public road. South land appertaining to the aforesaid bungalow, i. e. lot No. 1 (A), permanent right 8.93 acres Govt. compound. Khata No. 50, plots Nos. 840, 841/1983 (?), 842, 843, 844. 845 846, 825 (?), 836, 948/1920, 839/1981, 824/2061 824/2062, 819, 820, 824, 832/1964, khata No. 10, plot Nos, 828, 829/1999, 830/1990, 830/1988, 832/1987, 833/1986, 835/1985 sold at auction for Rs. 3,000."

It appears from the aforesaid description that khata Nos. 50 & 210 have been mentioned therein but not khata No. 51 nor any of the survey plots appertaining to it, & this omission is in fact the bone of Mr. Mukherji's contention. In lot 1 (A) of the aforesaid description the total area of the survey plots mentioned there is given as 6.19 & that of lot No. 1 (B) is 8.93, the total being 15.12. In the khatian, area of khata No. 50 is 11.94 & that of khata No. 210 is 3.15 (?), the total being 15.12. It is evident that there is complete omission of khata No. 51 & its plots from the document. Beside the survey khata & plot numbers, each of the two lots 1 (A) & 1 (B) has also been described by reference to the nature & boundary of the lands. Exhibit E does not go further than EX. F in favour of applts. It is contended by Mr. B. C. De on behalf of the resp. that the boundaries of the lots include the lands appertaining to khata No. 51 & omission of the khata number or the plots is a mere clerical error and would not affect his title to the lands sold. He also invited our attention to EXS. C and D which are, respectively, application for execution and the sale proclamation in execution case No. 96 of 1934 in which the lands were sold to the deft.-Bank. Execution petn. gives the following description of the properties to be sold. It reads :

"1. One bungalow with a brick-built out-house with balcony & land appertaining the bungalow & the tank & the orchard aforesaid at Khirgaon, pargana Champa, thana & dist. Hazaribagh a half share of which, i. e. eight annas share has been awarded to judgment (?) No. 3 by partition, the boundaries of which are as follows :

East. — Public road.

West. — Paddy land of Chhakouri Mistri, Mohannasa & Jinu Mali.

North. — E. B. Public road.

South. — Bungalow of Babu Monindra Nath Mukherji, thana No. 145, Municipality holding No. 1, Ward No. 5, present Ward No. 9 Govt. Compound."

Then follows khata numbers & plot numbers. The lands thus described are divided into lots 1 (A) & 1 (B). 1 (A) is described as

"One brick-built tiled bungalow with orchard at Khirgaon, pargana Champa; thana & dist. Hazaribagh, Khata (probably a mistake for thana) No. 145, the boundaries of which are as follows :

East — Public road.

West. — Jot land of the tenants Chhakouri Mistri & others.

North — Tank & the land appertaining thereto, i. e., lot No. 1 (B)."

South — House of Babu Mohindra Nath Mukherji.

Then follows the khata numbers & plot numbers. Lot No. 1 (B) similarly is specified as :

"Tank & orchard & the land appertaining thereto at Khirgaon, thana & dist. Hazaribagh, thana No. 145, the boundaries of which are as follows :

East—Public road.

West—Paddy land of the tenants.

North—High public road.

South—Land appertaining to the said bungalow, i. e. lot No. 1 (A)"."

It may be mentioned here that while describing the nature of the judgment-debtors' right in the lands aforesaid, it is stated to be "one of perpetual building lease at an annual rental of Rs. 34-9-0". Exactly the same manner of description has been followed in EX. D, the sale proclamation. Coming to the certificate of sale, the comprehensive description of the entire block of land, as mentioned in EXS. C & D, has been omitted in it, but its two sub-divisions by reference to lots 1 (A) & 1 (B) have simply been mentioned. In interpreting the sole certificate, for coming to the conclusion as to identity of properties sold, the sale certificate must be read along with the execution petn. & the sale proclamation. It is admitted that the lands appertaining to survey khata No. 51 are surrounded on all sides by the lands appertaining to khata Nos. 50 and 210 of the same survey. Mr. De pointed out to us, on reference to the survey map, that all the lands appertaining to khatas Nos. 50, 51 & 210 are included within the comprehensive description by boundaries set out in the execution petn as in the sale proclamation. The entire block of land included

within this boundary is divided into two sub-blocks described as lots 1 (A) & 1 (B). The division being roughly by a line drawn from east to west. Lot 1 (A) described as bungalow & lands appertaining thereto constitute the southern portion, while the lands described by reference to tank & orchard & the lands appertaining thereto constitute the northern block. Placing the two blocks side by side & locating the lands with reference to the boundaries, as mentioned in the sale certificate, it is abundantly clear that the two together constitute the block within the general & comprehensive boundary surrounding the bungalow, the tank & all the lands around it appertaining to survey khata Nos. 50, 51 & 210. There is a very good reason for omission of any reference to khata No. 51, that is, that after the survey, the tenants, namely, the judgment-debtors of the mtge. suit approached the khas mahal authorities, & complained against erroneous record of the survey in which all their lands had been shown as kaimi raiyati lands & thus subjected to enhancement of rent. In this complaint, they contended before the khas mahal authorities that theirs was permanent building leasehold interest which was not only heritable & transferable but also carried a permanent rent (not liable to enhancement on any ground whatsoever). The khas mahal authorities acceded to this complaint of the tenants-judgment debtors, & excepting 8 plots in khata No. 50 included all the rest in a new khata bearing No. 229 & restored the permanent rent that had been fixed at the time of original settlement. This was done in accordance with the register maintained by the khas mahal of their tenanted lands. As a result, the survey entries were completely wiped out. There remained some trace of khata No. 50, but I find on close scrutiny that all the plots of khata No. 51 were included in the building lease lands. This happened in the year 1932 at the latest. The execution proceedings were started in 1934, before which the tenants *inter se* had a partition of these lands to which there is a reference in the execution petn. a portion of which has already been quoted. It is, therefore, apparent that the decree-holder described the lands to be sold by the boundaries & other kinds of description, such as, building, tank & the lands appertaining thereto. Mr. De has shown to us that the lands appertaining to survey khata No. 51 are nothing but tank & orchard & pind of the tank drains leading water into or out of the tank, a road consisting of ·05 & one or two tanr plots bearing a total area of .69. It appears that out of the total area of 2.63 of this khata 1.43 is the tank & the rest must be its pind & the lands just adjoining it. Description of lot No. 1(B) in the sale certificate, the execution petn. & the sale proclamation open with the words "A tank with orchard & the lands appertaining to it the boundaries of which are as follows". In the circumstances, it is quite clear that though there is no reference to the survey khata No. 51, the lands appertaining thereto have in fact been sold & are included within the description inserted in the relevant documents. I shall, therefore, hold that there is no substance in this contention.

[6] Contentions 2 & 3 may conveniently be dealt with together. It appears the disputed lands were recorded in the survey as raiyati & fair rents were settled in respect of them under S. 85 (2) of the Chota Nagpur Tenancy Act, but shortly after the final publication of the survey record of rights the tenants concerned, namely the judgment-debtors approached the khas mahal authorities with a complaint that the lands were wrongly recorded as raiyati. As a result there was an arrangement as between the khas mahal (landlord) & the tenants & excepting 8 survey plots appertaining to khata No. 50, all the rest were included under khewat (Ex. X-3) bearing No. 229 as permanent lease-hold lands. The order of the Deputy Collector was passed in case No. 352 of 1917/1918 on 20-3-1918. The effect of the order was that the plots shown in the aforesaid khewat had been by mistake recorded as raiyati & hata in the 1913 survey by the Settlement Dept. & that they were taken out from the khatas & separately shown in the khewat. Mr. Mukherji for the applts. wants to contend that this order of the khas Mahal Deputy Collector cannot override the record of rights. He also takes us to the oral evidence showing that in some of the plots paddy is grown. He has also shown to us that in the record of rights some lands have been shown as paddy lands. There seems to be no substance in this contention. He is bound by the arrangement arrived at between himself & the landlord on the basis of what both of them knew to be the character of the land. Record of rights is not conclusive evidence nor does it create any title. Suppose the tenants instituted a suit challenging the correctness of the entries & a settlement was arrived at between them & the khas mahal accepting the contention of the tenants that the lands were not raiyati, could it be open to the tenants to go back upon the settlement & urge that the record of rights should prevail? The answer to this question must be in the negative. The contention, therefore, that the lands are raiyati loses its force in view of the Khas Mahal Deputy Collector's order & preparation of the new khewat. There remain the 8 plots which have still been left in the raiyati khata No. 50. With regard to these Mr. De contends that major portion of those plots is covered by Ex. H which is a lease dated 15-5-1895 granted by the D. C., Hazaribagh, to Rai

Bahadur Jadunath Mukherjee, the predecessor-in-interest of the pltf. This document shows that the lands settled under it were given on permanent lease. The document opens with the words :

"Whereas the Comr. of Chotanagpur in his letter No. 403 I./R dated 20-2-1893, sanctioned the appln. of the lessee for the settlement in perpetuity in order to enable him to construct a tank of 10 plots of land as per details below. This patta is given to the lessee, his heirs, executors, assignees & other legal representatives subject to the . . . . ."

It is not disputed that lands granted on this document cannot be ordinary raiyati kaimi lands inalienable under the Chota Nagpur Tenancy Act. To ascertain the identity of these lands, commission was issued to a civil Ct. Comr. who after proper measurement & relay on the spot came to the conclusion that 2.87—consisting of portion of 848/1980—.20, portion of 824/2061—1.23, portion of 819—.09, & portion of 824—1.35 aggregating 2.87,—appertained to the plots settled under H. That being so, it cannot be said that subsequent user of some of these lands for the purpose of growing paddy will at all detract from the permanent heritable & transferable character of the tenancy. Mr. Mukherji's contention, therefore, will not apply to the aforesaid 2.87 acres. Deducting this area from 4.61 the area of the 8 plots still outstanding in khata No. 50 of the survey, the remainder 1.74 will have to be assumed to be raiyati lands. The pltf. has only one-third share in this area, which comes to .58 of an acre. The contention of Mr. Mukherji, if it succeeds, will enable him to have declaration of title & recovery of possession in respect of this land.

[7] Mr. De, however, contends that the contention that any raiyati area was not liable to be sold relates to execution, discharge or satisfaction of the decree & should have been raised by the pltf. a judgment-debtor, as he is, in the execution proceedings under S. 47, C. P. C. In this view, he urges that the suit is not maintainable. Mr. Mukherji in this connection relies upon an F. B. decision of this Ct. in the case of *Uchit Lal Missir* v. *Raghunandan Tewari*, 15 P. L. T. 661 : (A I. R. (21) 1934 Pat. 666 F. B.). The appeal in that case was against an order passed by an executing Ct. in execution of a mtge. decree for sale. The objection attacking saleability of the mtged. property had been raised under S. 47, C. P. C. The executing Ct. held the objection to be non-maintainable on the authority of a previous decision of this Ct. in *Amrit Lal* v. *Jagat Chandra*, 7 P. L. T. 468 : (A. I. R. (13) 1926 Pat. 202). Two learned Judges of this Ct. (Macpherson & Dhavle JJ.) doubted the correctness of this latter decision, in view of the imperative prohibition against sale of such properties codified in S. 27, Santal Parganas Settlement Regulation. The F. B. held that *Amrti Lal Seal's case*, 7 P.L.T. 468 : (A.I.R. (13) 1926 Pat. 202) had been wrongly decided. The main contention in that case was that a mtge. decree having been passed & the question of inalienability of the mtge. property not having been raised in the suit, it was beyond the competence of the executing Ct. to refuse to put the decree into execution. This contention was negatived, & it was held that notwithstanding the decree, it was still open to the judgment-debtor to raise the question under S. 47 at the execution stage. On this simple ground this case can be distinguished from the case in hand. This F. B. case at least decides that the question was one which could have been raised within the purview of S. 47, of the Code in the stage of execution. Mr. Mukherji's contention, on the contrary, is that as the decree for sale did not validly authorise the executing Ct. to sell the property, & as the sale offending, as it did, the imperative provision of the statute was a void one, it was quite optional for the judgment-debtor to raise the plea in course of execution or not. His submission is that the judgment-debtor could stand by the sale & delivery of possession & could come with a separate suit for a declaration that the sale was void & for recovery of possession. Before answering this contention, I should draw attention to the basis of the F.B. decision which is contained in the following observation from the judgment of Courtney-Terrell. C. J. at p. 675 of the report :

"I now turn to the nature of the entry in the record of rights with which we are concerned in this case. It must be definitely understood that the record of rights in the Santal Parganas has a status very different from that under the Bengal Tenancy Act. S. 25 of the Regulation provides that after a period of six months from the date of the publication of the record of rights of any village such record shall be conclusive proof of the rights & customs therein recorded."

The argument is that that was a case in which it was not open to any of the parties to dispute the status of the tenant in respect of the lands in suit. Once the status is conclusively settled & definitely known, the law in S. 27 of the Regulation is a prohibition directed to the Ct. & that any Ct. passing an order in disregard of the statutory prohibition must be taken to have acted beyond jurisdiction. Such considerations, however, do not arise in the present case. Here I may refer to a decision in the case of *Bindeswari Charan* v. *Bageshwari Charan*, 63 I. A. 53 at p. 59 : (A. I. R. (23) 1936 P.C. 46). There the question arose whether the question of validity of a grant prohibited by S. 12A, Encumbered Estates Act, was barred by *res judicata*. Agarwala J. (as he then was) with whom James J. concurred held as follows:

"Reverting to the question of the operation of the doctrine of *res judicata* on the grant of 1909, the point for determination is whether the decision in the

1917 suit can render valid a transaction which subs. (3) to S. 12A declares to be void . . . . Now the third sub-section of S. 12A, declares that an alienation or charge made without the previous sanction of the Comr. is void that is to say, it is void *ab initio*. The grant of 1909 was in my opinion still born, & the decision in the suit of 1917 could not impregnate it with life, I therefore hold that we are not bound to treat the grant of 1909 as valid merely by reason of the conclusion as to its validity arrived at by the learned Subordinate Judge in the 1917 suit."

As against this their Lordships of the Judicial Committee observed as follows :

"Truly the third sub-section of S. 12A renders void any transaction to which it is applicable, but the question whether it applies to a particular transaction entitled the Ct. to consider the construction of the section, & the determination of its applicability rests with the Ct. The decision of the Ct. in the suit of 1917 determined that the section had never applied to the transaction of 1909, & it is difficult to follow the reasoning of the learned Judge which allowed him, not only to express a strong contrary view as to the applicability of the section, which he was entitled to do, if he so chose, but to try anew the issue as to its applicability—in face of the express prohibition in S. 11 of the Code."

Mr. De strenuously contends that after this decision of the P. C. the decision in the F. B. case cannot be considered to be good law. I reserve my opinion in relation to this contention, & I do not think it is at all necessary to go so far as that in the instant case. It is clear that, unlike in the case decided by the F. B. the settlement entry recording the disputed lands as raiyati kaimi was not conclusive & whether they are raiyati & whether the section prohibits their alienation at auction sale or otherwise was applicable to the facts of the present case were open for consideration either by the Ct. passing the mtge. decree or, at least, by the Ct. executing the said decree. In view of the fact that the question was open for the executing Ct. to decide & for the parties to raise & they did not do so, it should be held that the party is debarred from agitating it again in a suit. I will recall that in the execution petn. the properties sought to be sold were describad as lands held under perpetual building leases. The decree-holder, therefore, raised the question of fact while soliciting the assitance of the executing Ct. to put the property to sale for satisfaction of the decree. It was open to the judgment-debtors to refute this question of fact & to urge, as the pltf. urges now, that the lands or any part thereof not being permanent lease-hold land but only raiyati, were not liable to be sold in satisfaction of the decree. Under the circumstances it appears to me quite clear that S. 47 is a bar to the maintainability of the present suit. In support of this conclusion of mine I would rely upon a much later decision of this Ct. in the case of *Bhagwat Narain* v. *Mahadeo Prasad*, 23 P. L. T. 56 : (A. I. R. (29) 1942 Pat. 244) in which a D. B. held :

"The question as to whether the disputed property could be alienated in spite of the provision of S. 12A, Chota Nagpur Encumbered Estates Act, was essentially a question to be decided between the judgment-debtor & the decree-holder in the execution proceedings, & the judgment-debtor cannot raise the question in a separate suit even though the suit is brought not against the decree-holder but against the auction-purchaser, even though it may be assumed that the auction-purchaser is not a representative of either the decree-holder or the judgment-debtor. The suit is, therefore, not maintainable in view of S. 47, C. P. C."

In the result, the appeal fails & is dismissed with costs.

[8] **Manohar Lall J.**—I agree. The correctness of the decision in the F. B. case of *Uchit Lal Missir* v. *Raghunandan Tewari*, 15 P.L.T. 661 : (A. I. R. (21) 1934 Pat. 666 F.B.) does not arise for consideration in the present case which can be decided in accordance with that decision. In my opinion the present suit is barred under S. 47, C. P. C. so far as lands other than khata 51 lands are concerned.

R.G.D. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 519 *[C. N. 145.]*

AGARWALA C. J. & DAS J.

Gopi Krishna Prasad & others — *Pltfs.*— *Applts.* v. *Janak Prasad & another* — *Defts.* —*Resps.*

Letters Patent Appeal No. 20 of 1946, D/- 20-4-1948, from decision of Shearer J., reported in A. I. R. (34) 1947 Pat. 132.

Contract Act (1872), Ss. 23, 75—Marriage contract—Pltf. paying sum of money as tilak money to deft. in consideration of the deft. consenting to the marriage of pltf.'s minor daughter with deft.'s minor son — Pltf. breaking marriage on ground that deft.'s son was subject to epileptic fits & suing for recovery of amount paid — Pltf. held entitled to recover, even if the contract be held illegal *per se* & therefore void *ab initio*—Performance of tilak ceremony held no part of the performance of marriage. A. I. R. (36) 1949 Pat. 250, *Foll.* [Paras 2 & 3]

Anno. Contract Act, S. 23 N. 16; S. 75 N 1.

C. P. Sinha & Lala Atul Chand — for Applts.; Sarjoo Prasad & Avadesh Kumar Dutta —for Resps.

Das J. — This is an appeal under the Letters Patent by the pltf. from a decision of Shearer, J. reversing the decision of the Cts. below in a suit for recovery of money which the applt. had paid to resps. 1 & 2 in the following circumstances. The applt. had entered into an agreement with resps. 1 & 2 by which the latter had agreed that the former's daughter, who was then a minor, would be married to resp. 3, who was then the minor son of resp. 1. Resp. 2 was the adult son of resp. 1 & brother of resp. 3. The agreement was that the applt. would pay a sum of Rs. 1001 & would also give silver & brass utensils to the value of Rs. 152. The *tilak* ceremony was performed at Aurangabad, where the resps. resided, & the money was paid partly before & partly at that time.

Soon after the performance of the ceremony, resp. 3 had some sort of a fit, which led the applt. to make an enquiry with the result that it was found that the bridegroom was an epileptic subject. The applt. then broke off the marriage & demanded back the sum of Rs. 1152 which he had paid to resps. 1 & 2. The Cts. below held that the applt. was entitled to a decree for a sum of Rs. 909-6-9, excluding the amount which had been spent on the *tilak* ceremony. The final Ct. of fact modified the decree of the learned Munsif by directing that the decree would be against resps. 1 & 2 alone & not against resp. 3. Resps. 1 & 2 appealed to this Ct., & Shearer, J. allowed the appeal, holding that the agreement between the applt. & the major resps. was an agreement only, a mere *nudum pactum*, & not a contract, & further, holding that if the *tilak* was a conditional gift, then the applt. was not entitled to recovery of the money inasmuch as the marriage did not take place on account of his own default.

[2] The questions which have been urged before us were considered by a Bench of this Ct. in a very recent decision which has not yet been reported: *Dharnidhar* v. *Kanhji Sahay*, S. A. No. 1409 of 1946 : (A.I.R. (36) 1949 Pat. 250). In my opinion, that decision covers the present case & relieves us of the duty of a fresh examination of the case law on the subject. Two questions arose for decision in that case: firstly, whether an agreement to make a payment to a father in consideration of the marriage of his son or daughter is illegal & against public policy, & therefore, hit by S. 23, Contract Act, & secondly, whether the money paid under such an agreement can be recovered after the contract had been resiled from by the pltf. himself. Manohar Lall J. referred to the decisions in *Bakshi Das* v. *Nadu Das*, 1 C. L. J. 261; *Kristnayya* v. *Lakshmi Narayana*, 32 Mad. 185 : (3 I. C. 554); *Ramsumaran Prasad* v. *Gobinda Das*, 5 Pat. 646 : (A. I. R. (13) 1926 Pat. 582) & a large number of other decisions on the subject, & held that in the case before him it had not been proved that the contract was immoral or illegal. Ramaswami J. the other member of the Bench, was inclined to hold that the contract was opposed to public policy, & therefore, void. Both the Judges, however, answered the second question in the affirmative. Manohar Lall J. expressed himself as follows:

"Let me assume, however, that the contract was illegal *per se* & therefore *ab initio* void. Even on this supposition the deft. cannot retain the amount which he has received from the pltf. because the pltf. in suing to recover possession of his Rs. 2250 is not carrying out the illegal transaction but is seeking to put himself & the deft. as far as possible in the same position as they were before that transaction was determined upon, & it is the deft. who is relying upon the illegal contract & is seeking to make title to the money through & by means of it."

Reference was made to the decision in *Pethermal Chetty* v. *Muniandiservai*, 35 I. A. 98: (35 Cal. 551 P. C.) & other decisions. It was further observed that although a Ct. may not enforce an agreement to pay money to the parents or guardian of an intended bride or bridegroom on the ground that the agreement is opposed to public policy, yet a suit is maintainable for the recovery of the sum actually paid, pursuant to the agreement, if the contract is broken & the marriage does not take place. It was observed that the Ct. would read an implied condition in the contract that the money would be returned if the marriage does not take place. Ramaswami J. also considered the question & stated that when the marriage is not performed there is ample authority in support of the view that the money should be refunded. Learned counsel for the resps. had contended before us that the agreement was *ab initio* void, as it was immoral & against public policy. It is, I think, unnecessary in this appeal to decide the question whether a contract or agreement for payment of money to a father in consideration of the marriage of his son or daughter is immoral or against public policy, & therefore, hit by S. 23, Contract Act. Assuming that the agreement or contract was invalid, the question still remains whether the applt. is entitled to get back the money when the marriage has not been performed. That question has been authoritatively answered by a Bench of this Ct & it is not necessary to examine in detail the cases which have already been examined & referred to in that decision. Learned counsel for the resps. has sought to distinguish that decision on the ground that the money in that case was paid for purchasing ornaments for the bride, & therefore, the claim of the pltf. in that case could be treated as a suit for recovery of money had & received. It appears, however, from that decision that what was found was that the pltf. the father of the girl, had paid Rs. 2250 to the deft. in order that the latter might consent to the marriage of his son with the pltf.'s daughter. The decision was, therefore, based on an agreement to make a payment to the father of the bridegroom, so that he might consent to the marriage of his son with the pltf.'s daughter. On that basis it was decided that even if the contract was illegal *per se*, & therefore, *ab initio* void, the pltf. was still entitled to get back the money when the marriage was not performed. I think the same principle would apply in the present case. The payment was made by the applt. to the two major resps. in consideration of their consenting to the marriage of resp. 3 with the applt.'s daughter. The Cts. below have concurrently found that the applt. was justified in

breaking off the marriage on the ground that resp. 3 was subject to epileptic fits. The present case is even stronger than the case in *Dharanidhar* v. *Kanhji Sahay*, S. A. No. 1409 of 1946 : (A. I R. (36) 1949 Pat. 250). In that case the pltf. had disclosed no grounds why the marriage was broken off. In the case before us it has been found by the Cts. below that the applt. was justified in breaking off the marriage. That being the position, the applt. is clearly entitled to the money which had been paid to the two major resps.

[3] Learned counsel for the resps. has also contended before us that there has been a part performance of the contract, & in view of such part performance the money cannot be returned. He has relied on *Kearley* v. *Thomson*, (1890) 24 Q.B.D. 742 : (59 L. J. Q. B. 288). I am unable to appreciate this argument. The money was paid for the marriage & no marriage has been performed. It is beyond any dispute that the performance of the *tilak* ceremony is no part of the performance of a marriage. The claim of the applt. cannot, in my opinion, be resisted on the principle of part performance.

[4] For these reasons I would allow this appeal, set aside the order of the learned Judge of this Ct. & restore that of the learned Addl. Subordinate Judge. The applt. will get a decree against resps. 1 & 2 for the amount found by the learned Addl. Subordinate Judge. The applt. will be entitled to his costs from resps. 1 & 2. There was no decree against resp. 3, & the applt. must pay the costs of resp. 3 in this Ct.

[5] **Agarwala C. J.**— I agree.

R.G.D. *Appeal allowed.*

A. I. R. (38) 1951 Patna 521 *[C. N. 146.]*

JHA C. J. AND REUBEN J.

Sonabashi Kuer & others — Applts. v. *Chaudhury Ramdeo Singh—Resp.*

A. F. O. D. No. 292 of 1946, D/- 21-8-1950.

(a) Civil P. C. (1908), O. 8, R. 5 - Claim to pre-empt — Custom—Absence of its existence in written statement — Muhammadan Law—Pre-emption.

As a matter of custom, the right of pre-emption in accordance with Hanafi law exists between Hindus in Bihar. The claim in plaint to pre-empt, by necessary implication pleads the existence of such a custom, & the absence of a pleading of its non-existence in the written statement amounts to an admission of its existence. [Para 4]

Anno : C. P. C., O. 8, R. 5, N. 2.

(b) Muhammadan Law—Pre-emption — Talabs — Who can make.

The demand may be made by the pre-emptor himself or his agent. When the pre-emptor is a minor the demand made by his *de facto* guardian is valid. [Para 6]

(c) Muhammadan Law — Pre-emption—Talabs — Formalities — Specification of property.

Not much importance is attached to the form in which the *talab-i-mowusibat* is expressed. The important thing is that it must be made immediately on receipt of information of the sale & its meaning must be clear. But the *talabi-ishtish-had* must be performed on the property, or to the vendor, or the vendee, as the case may be, & it must be in the presence of witnesses. It is necessary also that the witnesses should be called on to bear witness to the performance of the *talabs*. There is no particular set form, but the property in respect of which the demand is being made should be specified. No such requirement is mentioned in respect of the *talab-i-mowasibat*. However in the *talab-i-ishtish-had* full details of the property need not be given. There would be a sufficient specification of the property, if the *talab* contains a description which makes the property identifiable. [Paras 10, 11]

(d) Civil P. C. (1908), O. 41, R. 22 — Omission to file cross-objection or appeal.

Where the alternative relief claimed by the pltf. was based on a different cause of action from the other relief & was refused & no appeal or cross-objection had been filed by the pltf. the pltf. cannot raise the point in the appeal filed by the deft. [Para 18]

Anno. C. P. C., O. 41, R. 22, N. 5.

Ganesh Sharma, Medni Prasad Singh & Braj Kishore Narain Singh — for Applts ; Mahabir Prasad, D. N. Varma, Bhagirath Rai & Radhika Raman Prasad — for Resp.

Reuben J. — This appeal by the defts. is directed against a decree for pre-emption granted by the Addl. Subordinate Judge at Arrah.

[2] It arises out of a suit for specific performance of a contract for the sale of two annas share in *milkiat* property in mauza Kurasan, bearing tauzi No. 14290, in pursuance of a deed of contract executed by the deft. first party in favour of the pltf. It was alleged in the plaint that, despite this contract the deft. first party, on 12-6-1943, sold this property to the defts'. second party. The pltf., as an alternative to the prayar for specific performance, claimed pre-emption as being a co-sharer proprietor in respect of eight annas share in tauzi No. 14290. The learned Subordinate Judge found that there was a contract to sell as alleged, & that the defts'. second party purchased the property with knowledge of the contract to sell but he refused specific performance on the ground that the pltf. is a minor & the contract was unenforceable for want of mutuality. Only the defts. have appealed.

[3] Two points were urged on behalf of the applts. : (1) that pre-emption between Hindus in Bihar applies as a matter of custom, & the pltf. must fail in this case, because he has not pleaded the custom of pre-emption and (2) that the claim to pre-emption must fail on the ground that the demands *(talabs)* necessary to establish the right to pre-emption have not been properly performed.

[4] It is now well established that, as a matter of custom, the right of pre-emption in accordance with Hanafi law exists between Hindus in Bihar, & it is hardly necessary to enumerate reported decisions in which the existence of such a custom has been recognised. So well recognised, apparently, is this custom that the pltf. in this case did not think it necessary expressly to plead its existence. The claim to pre-empt, however, by necessary implication, pleaded the existence of such a custom, & the absence of a pleading of its non-existence in the written statement amounts to an admission of its existence. It is clear from the record that the parties proceeded on the basis that such a custom exists, & no issue on the point was

raised. It is too late to raise the point in appeal. A sufficient reply is contained in the observation with which the Judicial Committee dismissed a similar objection in *Jadu Lal* v. *Janki Koer*, 39 I. A. 101: (39 Cal. 915 P. C.) :

"In the case of *Fakir Rawat* v. *Emambaksh*, Beng. L. R. Sup. Vol. 35 : (1863 W. R. 143 F. B.) an F. B. of the H. C. of Bengal gave judicial recognition to the existence of the right of pre-emption among the Hindus of Bihar . . . . .

In their Lordships' judgment the decision in *Fakir Rawat's case*, (Beng. L. R. Sup. Vol. 35: 1863 W. R. 143 F. B.) is conclusive on the point raised on behalf of the defts. Their abstention from taking the objection in a definite & distinct form at the earliest stage of the case was, it may fairly be presumed, due to the explicit enunciation of the law in the ruling referred to."

[5] This brings me to the second point. It is well recognised that the right of pre-emption is a very feeble one, & that it will be defeated by any failure to comply with the strict requirements of the Muhammadan law relating to the performance of the demands (*talabs*). There are two such demands, *talab-i mowasibat* which must follow immediately the receipt of information of the sale which gives rise to the right to pre-empt, & *talab-i-ishtish* which the pre-emptor is required to perform with as little delay as possible in the presence of witnesses, either on the premises in dispute or in the presence of the vendor or of the vendee. The Subordinate Judge has accepted the evidence of the pltf's witnesses regarding the performance of the two demands, & no sufficient reason has been shown to us why we should differ from him as regards the reliability of these witnesses & the weight to be attached to the evidence given by them. It is contended, however, that the demands as performed according to the evidence are defective on several grounds: (a) that they were performed by Chaudhury Mahadeo Singh, who is neither the legal guardian nor the agent of the minor pltf. ; (b) that knowledge of the sale of the property by the deft. first party to the defts'. second party was received by Shyam Sunder Lal, an agent of the pltf., on 12-6-1943 at about noon, but the first demand was performed much later by Chaudhury Mahadeo Singh on getting information of the sale from Shyam Sunder Lal, and (c) that the performance of both the demands was defective because no specification was given of the property in respect of which the demands were being made; in fact, it is not even clear that Chaudhury Mahadeo Singh knew that property had been sold by the deft. first party to the defts'. second party.

[6] There is no substance in the first two grounds. The pltf. is the son of Chaudhury Mahadeo Singh's brother, who is an Advocate practising at Benares. The family is joint, & Chaudhury Mahadeo Singh, who is the elder brother is the managing member. It is admitted also that he looks after the separate property of the minor pltf. which includes the eight annas share in tauzi No. 14290 in village Kurasan. In fact Chaudhury Mahadeo Singh is the *de facto* guardian of the minor in respect of this property. Shyam Sundar Lal is merely subordinate servant. It was not for him to decide whether or not his master would exercise his right of pre-emption. All that he could do, & the evidence is that he did, was to inform as soon as he reasonably could, Chaudhury Mahadeo Singh, who was acting as the guardian of the minor. The demand (*talab*) may be made either by the pre-emptor himself or by his agent. In the circumstances of this case, there can be no doubt that Chaudhury Mahadeo Singh had the authority to make the demand on behalf of the minor, & according to the evidence, he made the demands as soon as he got information of the sale from Shyam Sunder Lal. The demands therefore, are not invalidated on either of the two grounds put forward.

[7] With regard to the third ground, it is necessary, first of all, to see what the text books say about the essentials necessary for the proper performance of the demands.

[8] I cite below the relevant passages from Book XXXVIII, Chap. II, of Hamilton's Hedaya :

"Claims to *Shaffa* are of three kinds. — The first of these is termed *Talb Mawasibat*, or *immediate* claim, where the *Shafee* prefers his claim the moment he is apprised of the sale being concluded; and this it is necessary that he should do, insomuch that if he makes any delay his right is thereby invalidated; . . . . .

It is not material in what words the claim is preferred; it being sufficient that they imply *a claim*. Thus if a person say 'I *have claimed my Shaffa*', or 'I *shall* claim my *Shaffa*, or 'I *do* claim my *Shaffa*,' all these are good; for it is the *meaning*, & not the *style* or *mode* of *expression*, which is here considered.

* * * * *

The second mode of claim to *Shaffa* is termed the *Talb Takreer wa-Ish-had*, or claim by affirmation & taking to witness; and this also is requisite; because evidence is wanted in order to establish proof before the Magistrates; and it is probable that the claimant cannot have witnesses to the *Talb Mawasibat*, as that is expressed immediately on intimation being received of the sale. It is therefore necessary afterwards to make the *Talb Ish had wa Takreer*, which is done by the *Shafee* taking some person to witness either against the seller, if the ground sold be still in his possession, or against the purchaser, or upon the spot regarding which the dispute has arisen; and upon the *Shafee* thus taking some person to witness, his right of *Shaffa* is fully established & confirmed.

* * * * *

The manner of claim by affirmation & taking to witness is, the claimant saying, '*Such a person has bought such a house, of which I am the Shafee; I have already claimed my privilege of Shaffa, & now again claim it: be therefore witness thereof.* '(*It is reported from Aboo Yoosaf that it is requisite that the name of the thing sold, & its particular boundaries, be specified because a claim is not valid unless the thing demanded be precisely known.*)

* * * * *

The third mode of claim to *Shaffa* is termed *Talb Khasoomat*, or claim by litigation.—which is performed by the *Shafee* petitioning the Kazee to command the purchaser to surrender up the ground to him; the method of doing which will hereafter be particularly explained.

* * * * *

When the *Shafee* goes to the Kazee & claims his right, alleging that 'such a person has purchased a house, in

which he has the right to *Shaffa*,' the *Kazee* must first question the purchaser (the deft. in the cause) concerning the property on which the *Shafee* grounds his right of *Shaffa*; and if he acknowledge it, this is sufficient ground for the *Kazee* passing a decree; but if he deny it, the *Kazee* must then order the *Shafee* to bring witnesses to prove his property; for the possession, which is apparent, may be owing to other causes than property; and a thing which is thus doubtful cannot be admitted as a proof to the detriment of another. *Kadooree alleges that the Kazee, before he applies to the deft. ought to ask the pltf. regarding the situation of the house & its boundaries; because if a man sue for the property of a house, it is requisite that he describes its situation & boundaries; and therefore he must do the same in claiming his right of Shaffa.*"

I have placed in italics the two passages which, in my opinion, are directly relevant to the present controversy.

[9] In Baillie's Digest (1865), Part I, we find a similar observation as regards *talab-i-mowasibat*.

"There is some difference as to the words in which the demand should be expressed; but the correct opinion is that it is lawful in any words that intelligibly express the demand."

As regards *talab-i-ishtish-had*, the learned author says:

"To give validity to the *talab-ishtish-had*, it is required that it be made in the presence of the purchaser, or seller, or on the premises which are the subject of sale. And the person claiming the right of pre-emption should say, in the presence of one or other of these, "*Such a one has purchased this mansion (specifying its boundaries)*, & I have demanded the pre-emption, & now do demand it; bear ye witness to this."

[10] To the same effect are the following passages from Ameer Ali's Muhammadan Law, Edn. 4 :

"A person who intends to advance a claim based on the right of pre-emption in respect of property which has been sold to another must immediately on receiving information of the sale, express in explicit terms his intention to claim the property. *The intention must be formulated in the shape of a demand.* No express formula is necessary so long as the assertion of the right, or what is called a demand is expressed in unequivocal language; this is called *talab-i-mowasibat* or *immediate demand.*

* * * * *

For the performance of the ceremony of *Talab-i-ishtish-had* the pre-emptor must take some witnesses with him to the vendor, if the property sold be still in his possession, or to the vendee or to the property which is the subject-matter of the claim. And there, in the presence of the witnesses, he must say to the following effect: "*such a person bought such a property (sufficiently indicating the same)* of which I am the *shafi*; I have already claimed my right of *shufa* & now again claim it, be therefore witness thereof." (The italics are mine.)

From the above extracts, it is clear that not much importance is attached to the form in which the *talab-i-mowasibat* is expressed. The important thing is that it must be made immediately on receipt of information of the sale & its meaning must be clear. The essence of this demand is that it must be immediate. According to Baillie, *mowasibat* means "jumping up." If a person is to act on the spur of the moment, he cannot be expected to express himself in a set form.

[11] Conditions are different when we come to the *talab-i-ishtish-had*. This is a formal claim, provided for, as we are told by the Hedaya, because evidence is wanted to prove the making of the demand when the matter goes to Ct. & it is possible that there may be no witnesses present at the time the *talab-i mowasibat* is performed. It is provided that the *talab-i-ishtish-had* must be performed on the property, or to the vendor, or the vendee, as the case may be, & that it must be in the presence of witnesses. It is necessary also that the witnesses should be called on to bear witness to the performance of the *talabs*: *Medni Prashad* v. *Suresh Chandra*, 21 Pat. 799 : (A.I.R. (30) 1943 Pat. 96). Here, again, we do not find any particular set form, but the authorities I have cited above require that the property in respect of which the demand is being made should be specified. No such requirement is mentioned in respect of the *talab-i-mowasibat*. The reason for this difference appears to me to lie in the different circumstances & the different purposes intended to be served by them. The *talab-i-mowasibat* follows immediately the receipt of the information of the sale. This circumstance is by itself sufficient to show that the *talab* is performed in respect of the property covered by the sale. This *talab* is meant to give expression at once to the decision of the pre-emptor to pre-empt. The second demand comes at a later stage & is for the purpose of providing evidence that the demand has been made. The witnesses must be in a position to say what property the *talab* related to. Unless some specification of the property is made, they will not know what the demand is for. It has been objected on behalf of the resps. that it would be absurd to expect the pre-emptor to give in detail particulars of the property which he intends to pre-empt, it being quite possible that the property consists of a hundred different plots of land. I do not think that it is contemplated that in the *talab-i-ishtish-had* full details of the property should be given. This is indicated by the form of description suggested by the different authorities. See, for instance, the passages cited from Ameer Ali's Muhammadan Law and Baillie's Digest. I think there would be a sufficient specification of the property, if the *talab* contains a description which makes the property identifiable; for instance, if the pre emptor, giving a general description of the property, mentions that it has been sold by such & such person to such other person & states that he claims it by right of pre-emption & has already made his first demand. Of course, it will depend upon the circumstances of each case whether the description is sufficient for this purpose. See, for instance, the decision of Sinha J. (Ramaswami J. agreeing) in *Gajadhar Singh* v. *Radha Prasad Singh*, First Appeal No. 116 of 1947, D/- 8-4-1949, where his Lordship observed :

"It would appear that it is essential to the performance of the ceremonies connected with pre-emption that the pre-emptor while performing the ceremony of talab-i-ishtish-had should specify the property in respect of which he is proclaiming his right of pre-emption. Simply his saying that he was demanding pre-emption of what-

ever properties have been purchased by the deft. will not be enough compliance with the requirements of the law."

The description was found insufficient by his Lordship in the peculiar circumstances of the case with which he was dealing, the right of pre-emption being claimed only in respect of a portion of the property sold. In his Lordship's opinion, the form of description deposed to by the witnesses to the *talab-i-ishtish-had* was a vague formula evolved by the pltf. & his witnesses to meet the difficulties arising out of the case.

[12] Let us now look at the evidence in the light of the above remarks. The share of the deft. first party in tauzi No. 14290 in village Kurasan is eight annas. The subject-matter of the contract for sale between the pltf. & the deft. first party was two annas out of this eight annas. The sale by the deft. first party in favour of the defts. second party is two annas for a consideration stated in the sale deed to be Rs. 5,500.

[13] Shyam Sunder Lal (P. W. 3) deposes that he learnt about the proposed sale in favour of the defts'. second party when the deft. first party was going to Bhabua to execute the sale deed. He, thereupon, went with the consideration money & asked the deft. first party to complete the sale in favour of his master in accordance with the contract for sale. At the same time, he informed the defts'. second party about the contract. This happened at Bhabua. The defts. nevertheless, persisted & after filing protest petns. in the offices of the Sub-Registrar & the Sub-Divisional Officer at Bhabua, the witness informed Chaudhury Mahadeo Singh, who immediately made his first demand. It is not clear from the deposition of this witness, or from the plaint or from the two petns. filed by him that day, whether he knew that the sale in favour of the defts'. second party related to a two anna share & not to the entire share of the deft. first party. As such, the sale did not affect the contract for sale between the deft. first party & the pltf. Apparently, however, the witness & Chaudhury Mahadeo Singh regarded it as so interfering. It is not impossible, therefore, that the witness & also Chaudhury Mahadeo Singh were under the impression that the sale in favour of the defts. second party related to the entire eight annas interest of the deft. first party. I am prepared, however, to take it that they knew that the sale related to two annas only. This is not inconsistent with their feeling that it affected the contract for sale, because, being local people & aware of the circumstances of the deft. first party, they may have known that the intention of the deft. first party was to sell only two annas share & not more, so that the sale in favour of the defts. second party necessarily meant that she would be unwilling to complete the sale in favour of the pltf.

[14] Ram Saroop Singh (P. W. 5) & Chaudhury Mahadeo Singh (P. W. 9) are the other witnesses regarding the first demand. From their deposition, it appears that it was made immediately information of the sale being given to Chaudhury Mahadeo Singh by Shyam Sunder Lal. In these circumstances, there can be no doubt as to the property in respect of which the demand was made, & there would seem to be no defect in the first demand.

[15] The second demand is said to have been made at the spot on the next day. [After giving the evidence of the witnesses relating to this demand his Lordship proceeded.]

[16] If we accept this evidence at its face value, it proves that Chaudhury Mahadeo Singh & Shyam Sunder Lal went to Kurasan in the morning. They proceeded direct to the spot, Chaudhury Mahadeo Singh made the demand on the *bakasht* land west of the pokhar & then the two of them returned to their *chowni*. Apparently, till they came to the *chowni* they did not talk to anybody apart from citing the witnesses Hira & Bechan on the spot. These two men were chance witnesses. In the course of the demand, no description was given of the property, the utmost that happened being that Chaudhury Mahadeo Singh, pointing to the land, stated that Ramdeo Singh, the pltf. had a right of pre-emption over the property, & he (Chaudhury Mahadeo Singh) was making the second demand on his behalf. As has been stated, the property sold was a two annas share in the milkiat property. Mere pointing at the *bakasht* land would not be sufficient to indicate to the witnesses that the demand was being made in respect of this share. In fact, it would give them (the witnesses) practically no information as to what the demand was about. Much stress has been laid on the statement with which Bechan Singh began his deposition, namely, that "Sonabasi (deft. first party) sold her share to Lallan & Mangal" (defts'. second party). It is sufficient, it is stated, that the witnesses should know what property the demand was for; it is not necessary that the property should be actually described. Even if we accept this proposition, I do not think that this statement of the witness means that he knew what property the demand related to. The statement on which reliance is placed was made by the witness in 1946, three years after the second demand. The second demand took place the day after the sale by the deft. first party in favour of the defts'. second party. There is nothing to show that on the day of the demand the witness knew about the sale in question & had reason to connect that sale with the demand made by Chaudhury Mahadeo Singh at the spot.

[17] On the above grounds, I am satisfied that the second demand was defective inasmuch as the property in respect of which it was being made was not identifiably specified. Therefore, the decree of the learned Subordinate Judge cannot stand.

[18] On behalf of the pltf.-resp. it has been urged that even if the decree for pre-emption be set aside, the pltf. should be given a decree for specific performance. It is pointed out that the Subordinate Judge has found in his favour both as regards the existence of the contract for sale & as regards notice to the defts'. second party. It is urged that the well-known case of *Mir Sarwarjan* v. *Fakhruddin*, 39 I. A. 1 : (39 Cal. 232 P. C.) on which reliance was placed by the learned Subordinate Judge, is distinguishable, because, whereas that case related to a Mahomedan minor, we are concerned with a contract entered into by the *karta* of a joint family, to which the minor, a Hindu, belongs, that *karta* being also the guardian of the minor as regards his separate property. The alternative relief for a decree for specific performance asked for by the pltf. was based on a different cause of action from the relief for pre-emption. It was refused by the learned Subordinate Judge, & no appeal or cross-objection has been filed in respect thereto. As held in *Anath Nath* v. *Dwarka Nath*, 20 P. L. T. 359 : (A. I. R. (26) 1939 P. C 86), it is not open to the pltf. to raise the point now. On the merits, also, I do not think that the pltf. would be entitled to succeed (*vide Rambilas* v. *Lokenath*, 27 Pat. 143 : (A. I. R. (36) 1949 Pat. 405).)

[19] In the result, I would allow this appeal, set aside the decree of the Subordinate Judge & dismiss the suit with costs throughout.

[20] **Jha C. J.** — I agree.

D.H. *Appeal allowed.*

A. I. R. (38) 1951 Patna 525 *[C. N. 147.]*

MANOHAR LALL AND MAHABIR PRASAD JJ.

Jagadish Chandra Deo Dhabal Deb — *Applt.*

v. *Kanai Lal Nandi & another* — *Resps.*

A. F. A. D. No. 980 of 1946, D/- 31-1-1949.

Tenancy Laws — Chota Nagpur Tenancy Act (VI [6] of 1908), S. 21, as amended by Act XXV [25] of 1947 — Raiyat digging out land from his holding for improving it—Manufacture of bricks from earth dug —Liability — Injunction — Grant of — Specific Relief Act (1877), S. 54.

A raiyat dug out earth from his holding for the purpose of improvement but instead of allowing it to remain there, he manufactured bricks not for his own purposes but for commercial purposes & thereby made a profit out of it. The landlord brought a suit for permanent injunction restraining the raiyat from manufacturing bricks from the earth of the land & also for damages for the earth removed.

Held* that the deft. was not entitled to manufacture bricks for the purpose of selling by virtue of S. 21 & therefore he was liable to pay for the value of the earth removed : A. I. R. (30) 1943 Pat. 31 and A. I. R. (28) 1941 Pat. 13, *Rel. on. [Paras 3, 4, 5]

***Held further* that as the deft. had committed no wrong in digging out the land for improving the holding no permanent injunction could be granted in this case. If the deft. at any time is found to be misusing the land in that case a proper case for injunction besides damages may arise.** [Para 6]

Anno. Specific Relief Act, S. 54, N. 11.

B. C. De & S. K. Mazumdar — for Applt. ; G. C. Mukharji & R. K. Bagchi—for Resps.

Manohar Lall J. — This is an appeal by the pltf. who is aggrieved by the decision of the learned Special Subordinate Judge of Chaibassa, dated 27-2-1946, by which he has dismissed the pltf's. suit which was instituted for a permanent injunction restraining the deft. 1 from manufacturing bricks from the earth of the land described in Sch. A & also for recovery of Rs. 61-8-0 as damages against the deft. for removing the earth in the form of bricks.

[2] The facts found by the Cts. below are that the pltf. is a landlord & he let out survey plot No. 132 in village Galudih to deft. 1 as a raiyat. The deft. 1 dug out the earth from the surface of this holding & instead of allowing it to remain there, he manufactured bricks not for his own purposes but for commercial purposes ; thereby he made profit out of which the pltf. claimed Rs. 42-8-0 being royalty at the rate of Rs. 20-8-0 for one lakh of the bricks sold.

[3] Upon these findings, it is clear to us that in accordance with the provisions of S. 21, Chota Nagpur Tenancy Act, as amended by Act XXV [25] of 1947, the deft. had no right whatsoever to manufacture the bricks which were not required for the domestic or agricultural purposes of the raiyat & his family.

[4] Mr. G. C. Mukharji on behalf of the resps. contends that as the landlord had made no arrangement in this village to receive the earth so removed, the tenant is not obliged to keep the earth on the holding & that he can even throw it away. Assuming that this argument is correct, in the present case it has been found that the tenant did not throw away the earth but he sold it in the form of bricks to strangers. This certainly he is not entitled to do: see *Purnendu Narayan Singh* v. *Narendra Nath*, 23 P. L. T. 662 : (A.I.R. (30) 1943 Pat. 31); nor is the tenant entitled to sell even the loose stones lying on the surface: see *Kusum Kamini* v. *Jagdish Chandra*, 20 Pat. 96: (A. I. R. (28) 1941 Pat. 13).

[5] The pltf. therefore, in our opinion, is entitled to the value of the earth which has been used in the bricks, & the finding of the trial Ct. that the damage suffered by the pltf. is Rs. 42-8-0 was not challenged in the first appeal to the appellate Ct.

[6] Mr. B. C. De on behalf of the applt. contends that there should also be an injunction against the deft. restraining him from selling bricks which he manufactures on the land. His submission is that this is a continuing wrong, & the deft. should be restrained from indulging in this wrong continuously for all times. We do not agree with this contention because the deft. has committed no wrong in digging the earth because the finding is that he dug the land for the purposes of improvement. If the deft. at any time is found to be misusing the land in that case a proper case for injunction besides damages may arise. How

can we restrain the tenant from digging the earth & then for disposing of that earth when the pltf. has not asked the deft. to deliver that earth to him or when he has not made any arrangement for delivery of that earth? In any case we are not satisfied that this Ct. should exercise the power of restraining the deft. from digging the earth on the land if he digs it for the purposes of improving the holding.

[7] The result is that the appeal is allowed, the decision of the learned Subordinate Judge is set aside & the pltf's. suit decreed for recovery of Rs. 42-8-0 which will carry interest at 6 per cent from the date of the decree of the trial Ct. Each party will bear his own costs in all the Cts. in the special circumstances of this case.

[8] **Mahabir Prasad J.** — I agree.

K.S. *Appeal allowed.*

A. I. R. (38) 1951 Patna 526 *[C. N. 148.]*

DAS & NAGESHWAR PRASAD JJ.

Tejpal Saraogi & others — Petnrs. v. *Mahadeo Lal & others — Opposite Party.*

Civil Revn. No. 102 of 1949, D/- 26-4-1949.

Court-Fees Act (1870), S. 7 (iv) (c), Sch. II, Art. 17 (vi)—Suit for title in guise of partition suit—Stranger alienees impleaded—Court-fee.

In a suit for partition of two houses, by the pltfs. the plaint alleged that they had 12 annas share in the property & the deft. had 4 annas share, that the deft. executed a sale deed in respect of his four annas share in favour of strangers; & that therefore the pltfs. desired partition & separation of their 12 annas share. Some of the alienees were strangers to the family of the pltfs. & the deft. & were not cosharers or co-owners against whom partition could be claimed :

Held that it could not be said that any incidental finding of fact was necessary in order to give the main relief which the pltfs. claimed so far as the stranger-alienees were concerned. Either the pltfs. were claiming no adjudication against the stranger-alienees or they were claiming an adjudication to displace their title. As there could be no relief of partition against the strangers, the only relief claimed against them was the displacement of their title based on the transfers made in their favour. That would undoubtedly be an independent declaration of title not necessarily connected with the relief of partition. If no relief was claimed against the strangers, then they should not have been made parties to the litigation. Hence so far as the stranger-defts. were concerned, the suit was in substance, a suit for a declaration of title, in the guise of a partition suit. In such circumstances *ad valorem* court-fee was payable. [Para 7]

Anno. Court-fees Act, S. 7 (iv) (c) N. 3, Sch. II, Art. 17 (vi), N. 1.

Sarjoo Prasad & Krishna Prakash Sinha — for Petnrs; Govt. Pleader, Shambhu Prasad Singh, Thakur A. D. Sinha, Balram K. Sinha & Rameshwar Prasad Sinha — for Opposite Party.

Das J. — This appln. in revn. raises the question of court-fees payable on the plaint—namely, if court-fees are payable under Art. 17 (vi) of Sch. II, Court-fees Act, as in a simple suit for partition, or *ad valorem* court-fees as in a suit for title, where a declaration of title with a consequential relief is asked for.

[2] The petnrs. before us were the pltfs. in the Ct. below. The facts giving rise to the appln. are the following. The petnrs. brought the suit, which was in form a suit for partition only, in respect of two houses situate in the town of Siwan. The petnrs. alleged that their share of the two houses was to the extent of 12 annas & the share of deft. 1, who was the *karta* of the joint family of defts. 1 to 8, was to the extent of 4 annas only. In para. 8 of the plaint the petnrs. stated that

"deft. 1, with an ulterior motive, executed a fictitious sale-deed in favour of deft. 8, his wife, without receipt of any consideration, & later got a colourable sale-deed in favour of deft. 9 & a colourable zarpeshgi deed in favour of deft. 10 & another colourable sale-deed in favour of deft. 11—all without any consideration—executed either by deft. 8 or by deft. 1 or by both."

It was further averred that the aforesaid sale deeds & zarpeshgi deed executed by defts. 1 & 8 in favour of defts. 9 to 11 were without consideration & of the nature of sham transactions. It may be observed here that defts. 9 to 11 were strangers to both families & were not co-sharers or co-owners against whom partition could be claimed. In para. 9 the petnrs. stated that they did not want to keep the two houses joint & requested the defts. to partition the two houses. The defts. did not agree thereupon, the petnrs. brought the suit, & the main relief which the petnrs. claimed was put in the following form :

"A decree for partition & separation of pltf's. three-fourth share in the properties described below & separate possession over the same be passed in favour of the pltfs."

[3] The question that arose for consideration by the learned Subordinate Judge, in whose Ct. the suit was instituted by the aforesaid plaint, was the true nature of the suit : that is, whether the suit was a pure & simple suit for partition of the two houses as between co-owners, or a suit for a declaration of title as against strangers in the guise of a suit for partition. The learned Subordinate Judge held, on a consideration of the plaint, that so far as the strangers were concerned, the suit was really a suit for title, namely, a suit for a declaration of title & possession. In that view of the matter he directed the petnrs. to pay *ad valorem* court-fees. It is against this order of the learned Subordinate Judge that the present appln. in revn. is directed.

[4] Mr. Sarjoo Prasad appearing for the petnrs. has contended before us that the suit was really a suit for partition, pure & simple; because if one co-owner made certain alienations, those alienations were not binding on the petnrs. & the petnrs. could get the only relief which they had asked for, namely, partition, without any adjudication as to whether the transfers in favour of the strangers made by one of the co-owners were genuine or not. In the alternative he has contended that in order to get the relief of partition, a finding as to the transfers in favour of the strangers might be incidentally necessary, but such a finding cannot be called a relief by way of a declara-

tion in its true sense. Learned counsel has taken us through a large number of decisions. In the F. B. decision of this Ct. of *Ramkhelawan Sahu* v. *Surendra Sahi*, 16 Pat. 766 : (A. I. R. (25) 1938 Pat. 22 F. B.) what is really meant by a "declaration" in its true sense has been explained, & it is pointed out that a mere finding which may be necessary in order to give relief to a party is not necessary a declaration in its true sense. Mr. Sarjoo Prasad has drawn pointed attention to the observations made at the bottom of p. 783, pp. 784 & 785 of the report, particularly the following observations occurring at p. 784 of the report:

"The distinction between the remedy sought & the finding of fact necessary to justify the granting of that remedy may be simply tested by considering whether the pltf obtaining an order for possession but having been refused a formal 'declaration' in the decree could come to the appellate Ct. with a complaint that he had not received the whole of the remedy for which he had asked. . . . In every suit for possession the pltf. cannot succeed unless he proves the facts necessary to establish his title, but the real remedy which he seeks is a decree for delivery of possession."

Reference has also been made to the D. B. decision in *Ramautar* v. *Ram Gobind*, 20 Pat. 780 : (A. I. R. (29) 1942 Pat. 60), where the following principles were laid down : (1) So far as a suit purporting to be for partition is actually in the nature of a title suit, *ad valorem* court-fees are payable, whether the suit is regarded as governed by S. 7 (iv) (c), 7 (iii) or 7 (v), Court-fees Act, 1870; (2) caution must be observed, however, so as not to import into the plaint anything which it does not really contain either actually or by necessary implication ; in construing a plaint the Court must take it as it is not as it ought to have been; a relief not asked for cannot be imported so as to charge court-fee thereon ; (3) a distinction must be drawn between cases where it is necessary for the pltf. to get a document declared void and cancelled before he can get relief, and cases where the pltf. can obtain his relief without any such declaration and cancellation, upon a mere finding that the document does not affect him ; that is to say, the Court must distinguish between voidable documents wholly void documents. and between declarations in the true sense and declarations so called, which are merely the findings of fact necessary to give the pltf. relief.

[5] Applying the aforesaid principles, the contention of Mr. Sarjoo Prasad is that the suit which the petnrs. had brought was, in substance, a suit for partition only, and in order to give the relief of partition, which was nothing more than a change in the mode of enjoyment of the two houses, it was not necessary for the petnrs. to obtain any declaration as to the transfers alleged to have been made by one of the co-owners. It is pointed out that the same principles have been reiterated in the latest F. B. decision of this Court in *Mt. Rupia* v. *Bhatu Mahton*, 22 Pat. 783 : (A. I. R. (31) 1944 Pat. 17 F. B.). Mr. Sarjoo Prasad has also drawn our attention to a decision of their Lordships of the Judicial Committee in *Bijoy Gopal* v. *Krishna Mahishi Debi*, 34 Cal. 329 : (34 I. A. 87 P. C.), which was a suit by a reversioner on the death of a Hindu widow to recover immovable property of her husband, of which she was in possession for a widow's estate as his heir and of which she had granted a lease for term extending beyond her own life. It was there pointed out that the allegation made by the widow was voidable at the election of the reversionary heir who might affirm it or treat it as a nullity without the intervention of any Court there being nothing to set aside or cancel as a condition precedent to his right of action.

[6] The principles laid down in the aforesaid decisions are not disputed by Mr. Lalnarain Sinha, Govt. Pleader, appearing on behalf of Govt. He contends, however, that those principles do not apply in the present case. Mr. Lalnarain Sinha contends that the suit which the petnrs. had brought might have been a suit for partition, pure and simple, if the stranger-alienees had not been made parties, and if the petnrs. had not asked for an adjudication to displace the title based on the transfers made in their favour.

[7] So far as the stranger-alienees are concerned, it is clear that the petnrs. do not accept them as co-owners or co-sharers against whom the relief of partition can be claimed. It cannot, therefore, be said that any incidental finding of fact is necessary in order to give the main relief which the petnrs. claim, so far as the stranger-alienees are concerned. Either the petnrs. are claiming no adjudication against the stranger-alienees or they are claiming an adjudication to displace their title. As there can be no relief of partition against the strangers, the only relief claimed against them is the displacement of their title based on the transfers made in their favour. That would undoubtedly be an independent declaration of title not necessarily connected with the relief of partition. If no relief is claimed against the strangers, then they should not have been made parties to the litigation. It seems to me that so far as the stranger-defts. are concerned, the suit is, in substance, a suit for a declaration of title, & the learned Subordinate Judge rightly held that the suit was a suit for title in the guise of a partition suit. Mr. Sarjoo Prasad has placed great reliance on the F. B. decision of the Madras High Court in *Ramaswami* v. *Rangachariar*, I. L. R. (1940) Mad. 259 : (A. I. R. (27) 1940 Mad. 113 F. B.). That was a case in which the pltf. a Hindu minor, sued through his mother as next friend for partition of the properties of the joint family consisting of himself, his father and his three brothers and for possession of his one-fifth share therein ; besides his father and his three brothers, the pltf. joined as defts. several other persons (strangers to the family) either as alienees of family properties or as creditors of the family. The pltf., stated that his father's transactions

were not binding on the family, but he did not in terms ask for the setting aside of the alienations of family properties, or for declarations that his father's other transactions were unenforceable against the estate. His prayers were for : (i) an account of the movable and immovable joint family properties, (ii) partition by metes and bounds of his one-fifth share, (iii) appointment of a receiver to manage the properties and collect the rents and income till the disposal of the suit, (iv) costs of the suit, and (v) such further and necessary reliefs as in the circumstances might be considered necessary and proper. It was held by the F. B. that in respect of the general relief for partition the provision which applied was Art. 17-B of Sch. II, Court-fees Act, as amended in Madras (corresponding to Art. 17 (vi), Court-fees Act as applied in Bihar). In respect of the alienations, it was held that the suit was one for possession and S. 7 (v), Court-fees Act applied, inasmuch as possession had passed to the alienees. In respect of certain decrees passed against the pltf. in suits in which he had been impleaded as a party, it was held that the fee prescribed by S. 7 (iv-A), Court-fees Act as amended in Madras was payable. In regard to the other transactions of the father impugned by the pltf., it was held by the majority of Judges, Abdur Rahman J. dissenting, that the pltf. could not be required to pay a separate court-fee as regards any of them, even though he had impleaded the several creditors or alienees, and even if the plaint had contained prayers for declarations or cancellations in respect of the said transactions. It was observed that the Court was bound as between the members of the family to decide which were the debts binding on the family before directing a division, whether the several persons interested in supporting the transactions were before the Court or not. It was observed that the fact that the pltf. impleaded them would not alter the position. Relying on the aforesaid decision, Mr. Sarjoo Prasad has contended that the petnrs. having alleged in the plaint that the co-owners were in possession in spite of the alienations, there could be no question of paying court-fees for setting aside the alienations because it was not necessary for the petnrs. to ask for, nor did they actually ask for, setting aside those alienations. It is further argued that the mere fact that the stranger alienees have been made parties would not alter the position, as was held in the case which their Lordships had before them in *Ramaswami's case*, (I. L. R. (1940) Mad. 259 : A. I. R. (27) 1940 Mad. 113 F. B.). The distinction, however, between the case which their Lordships had before them and the case before us is this in the case which their Lordships had before them it was observed that whether the strangers were before the Court or not, the Court was bound as between the members of the family to decide which were the debts binding on the family before directing a division. Therefore, it was pointed out that under the provisions of O. 1, R. 10 (2), Civil P. C., the strangers could be added to the suit in order to enable the Court to adjudicate effectually and completely upon and settle all questions involved in the suit. In the case before us if the petnrs. had brought a simple suit for partition, it would have been unnecessary to determine the validity or otherwise of the transfers alleged to have been made by one of the co-owners, and the strangers could not have been added as parties under O. 1, R. 10 (2), Civil P. C. The petnrs., however, have not only added those strangers as parties, but have really claimed in the plaint that an adjudication should be made to the effect that the transfers made in favour of the strangers were transfers without consideration and of a sham character. I do not think that the principle laid down in the decision of *Ramaswami's case*, (I. L .R. (1940) Mad. 259 : A. I. R. (27) 1940 Mad. 113 F. B.) will apply to the present case. The suit which the petnrs. had brought was really of a composite nature : so far as the co-owners were concerned, it was a suit for partition ; but so far as the strangers were concerned, the suit was really a suit for title in which it was claimed that the transfers made in favour of the strangers by some of the co-owners were without consideration, and, therefore, of a sham nature. That being the position, I do not think the learned Subordinate Judge was wrong in his view that the suit was really a suit for title in the guise of a partition suit in respect of the two houses in question. The decisions on which Mr. Sarjoo Prasad has relied, in which a distinction was drawn between a finding of fact necessary to give relief to a party and a declaration in its true and proper sense, do not seem to me to be applicable to this case where as against strangers to the family, the only relief that can be and is claimed, is an adjudication displacing their title to the houses. At the risk of repetition, I must again observe that as against the strangers no partition could be claimed. What is termed a "finding of fact" is really the main relief of title claimed against the strangers. In that view of the matter, I am of the opinion that the learned Subordinate Judge was right in his view that the suit was a suit for which *ad valorem* court-fees had to be paid.

[8] There is a small inaccuracy in the calculation made by the stamp reporter to which, I think, the attention of the learned Subordinate Judge must be drawn. The stamp reporter had made a calculation on the basis that the petnrs. claimed two-thirds interest in the two houses. As a matter of fact, the petnrs. were claiming three-fourths interest in the two houses.

[9] I must also make it clear that it is open to the petnrs. to amend the pleadings and strike out such parties as may be considered unnecessary in a suit for partition, pure and simple. If the petnrs. amend their pleadings and strike out un-

necessary parties, the learned Subordinate Judge will have to consider the question of court-fees afresh.

[10] For the reasons given above, I do not think there are any grounds for interference, and the application must be dismissed with costs. Hearing fee, two gold mohurs.

[11] **Nageshwar Prasad J.**—I agree.

R.G.D. *Revision dismissed.*

A. I. R. (38) 1951 Patna 529 *[C. N. 149.]*

B. P. SINHA & C. P. SINHA JJ.

Baijnath Sao — Applt. v. Ram Prasad — Resp.

A. F. A. D. No. 569 of 1948, D/- 19-2-1951.

(a) Houses & Rents—Bihar Buildings (Lease Rent & Eviction) Control Act (III [3] of 1947), S. 18—Jurisdiction of Civil Ct.—Civil P. C. (1908), S. 9.

In spite of the bar under S. 18, if the House Controller or the Comr. acts without jurisdiction or in excess of the jurisdiction as given to them under the Act, the civil Ct. has jurisdiction to determine whether or not an order passed by the House Controller or the Comr. is without jurisdiction or in excess of the jurisdiction conferred upon them by the Act. [Para 7]

Anno. C. P. C., S. 9 N. 53.

(b) Houses & Rents—Bihar Buildings (Lease, Rent & Eviction) Control Act (III [3] of 1947), S. 18—Jurisdiction of House Controller & Comr.—Civil P. C. (1908), S. 9.

If a Ct. or a tribunal with limited jurisdiction is given authority under law to decide a particular matter, but the decision of that particular matter depends upon certain preliminary findings of fact, that tribunal must have jurisdiction to decide those preliminary points of fact, & the civil Ct. will have no jurisdiction to go into the correctness or otherwise of the findings of the tribunal in regard to those preliminary questions of fact. When an appln. for eviction is made under the Act, the House Controller or the Comr., as the case might be, has jurisdiction to find out whether the parties stand in the relation of landlord & tenant : A. I. R. (13) 1926 Cal. 1101, A. I. R. (36) 1949 Mad. 780 & A. I. R. (27) 1940 Pat. 161, *Rel. on.* [Para 9]

Anno. C. P. C., S. 9 N. 53.

(c) Houses & Rents—Bihar Buildings (Lease, Rent & Eviction) Control Act (III [3] of 1947), S. 18—Wrong decision of House Controller or Comr.—Civil P. C. (1908), S. 9.

Where the House Controller & the Comr. had jurisdiction to decide the question of eviction under the Act, their decision, either on law or on fact right or wrong is final under that Act & even if the decision was opposed to law, the civil Ct. can have no jurisdiction to go into that decision in a collateral proceeding. [Para 10a]

Anno. C. P. C., S. 9 N. 53.

(d) T. P. Act (1882), S. 111—Applicability— Houses & Rents—Bihar Buildings (Lease, Rent & Eviction) Control Act (III [3] of 1947), S. 11.

Section 111, T. P Act, has no application to the proceeding for eviction under the Bihar Buildings (Lease, Rent & Eviction) Control Act : A.I.R. (36) 1949 Mad. 780, *Rel. on.* [Para 11]

Anno. T. P. Act, S. 111. N. 1.

K. C. Sanyal; Gaurishankar Pd. & Baidyanath Pd. II—for Applt.; R. S. Chaterji & A. N. Chatterji — for Resp.

C. P. Sinha J.—This is a deft's. appeal which arises out of a suit filed by the pltf. for a declaration that the order of eviction by the Comr. of the Patna Division, dated 29-8-1947, passed under the Bihar Buildings Control Act, 1947, is *ultra vires*, null & void, without jurisdiction & not binding on the pltf.; the pltf has also prayed for the issue of a permanent injunction restraining the deft. from ousting the pltf. from any portion of holding No. 23, circle No. 16 ward No. 8, situate in mahalla Sabzibagh of Bankipur.

[2] The first Ct. dismissed the suit, but it has been decreed on appeal by Mr. K. K. Dutta, Addl. Subordinate Judge, 2nd Ct. Patna, by his judgment dated 23-2-1948.

[3] The pltf.'s case is that the entire holding No. 23 as well as holding No. 22, which is adjacent north of it, belonged to Messrs. T. C. Palit & S. C. Palit, that out of these two holdings, holding No. 22 was the tenancy of the deft. applt. & the northern portion of holding No. 23 was in the tenancy of one Lachhmi Mistry & the southern portion of holding No. 23, which is the portion in dispute, has been in the tenancy of the pltf.'s family since several generations & the pltf. holds a shop & also lives in it with his family. It is alleged by the pltf. that the deft. took a permanent settlement of holding No. 22 as well as the northern portion of holding No. 23 from the proprietors by a deed dated 6-8-1946, & thereafter the deft. applied to the House Controller, Patna for evicting the pltf. on the allegation that he had purchased both the holdings Nos. 22 & 23. The House Controller had rejected the appln. of the deft. but on appeal, the Comr. has ordered the eviction of the pltf. The pltf. alleges that he is a permanent tenant of the holding & that there is no relationship of landlord & tenant between the deft. & the pltf. & therefore, according to him, the Bihar Buildings Control Act, 1947, had no application & consequently, the order of the Comr. under that Act is without jurisdiction.

[4] The deft. denied that the pltf. had a permanent tenancy in the disputed katra & also alleged that by the aforesaid deed the deft. has acquired interest in the entire holding No. 23 including the katra in the possession of the pltf. except to the extent of 3 feet out of that katra which is in the pltf.'s occupation. The deft. pleaded further that the order passed by the Comr. was a valid order within his jurisdiction &, as such, the suit was barred under the provisions of the Act.

[5] The learned lower appellate Ct. has come to the following findings : that the civil Ct. in spite of the provisions contained in S. 18, cl. (3), Bihar Buildings Control Act, has the jurisdiction to go into the question whether the Comr.'s order has been passed against the provisions of this Act or in violation of the fundamental principles of judicial procedure & the civil Ct. has jurisdiction to consider whether the order of the Comr. under that Act is *ultra vires* upon any of those grounds. It has been found further that the pltf. has failed to prove that he had a permanent tenancy in the disputed katra. The Ct. below has also found that

the disputed katra comprises the southern portion of municipal holding No. 23. The deft. had admitted that the proprietors, namely, the Palit brothers, had made a permanent settlement in favour of the deft. by virtue of the deed, Ex. A, dated 6-8-46. The Ct below, upon a comparison of the boundaries & upon the construction of the deed (Ex. A) has found that the permanent settlement with the deft. includes the whole of the disputed katra excepting an area of 5½ feet towards the south He has found further that there is no relationship of landlord & tenant between the deft. & the pltf. with respect to that part of the disputed katra, namely, the southern portion up to a length of 5½ feet, & upon that finding, he has held that the order of the Comr. evicting the pltf. is evidently without jurisdiction on that ground alone so far at least as that portion of the katra is concerned. According to the Ct below, the entire katra constitutes only one room & it is not possible to evict the pltf. from any particular portion of it without evicting him from the whole, & in that view of the matter, he has decreed the suit, holding that, as the deft had interest with respect to only a part of the katra & because the Palit brothers, to whom the rest of the katra belonged, did not join in the appln. for eviction, the appln. was not on behalf of the landlords of the entire katra &, therefore, there was no valid appln. under S. 11, cl. (3) of the Act &, consequently, the Comr. had no jurisdiction to pass any order of eviction on such an appln.

[6] It has been contended on behalf of the applt. that the civil Ct. has no jurisdiction to set aside the order of the Comr. under the Bihar Buildings Control Act, 1947, on the findings arrived at by the Ct below. It is also contended that the katra is only a sort of a verandah which is enclosed by shutters & that there is no difficulty in evicting the pltf. from that portion of the katra of which the deft. had taken settlement & further that the deft. is the sole landlord so far as that portion of the katra is concerned & it is not a case of joint landlords.

[7] The Bihar Buildings Control Act, 1947, is a special Act which the Legislature has enacted to meet the emergency created by the scarcity of house accommodation & to prevent, as far as possible, the spiral rise in the rent of houses. The statute is self-contained & has created a special tribunal for deciding the rights & liabilities of the parties under that Act & has also provided for appeal against orders passed by the House Controller. This Act has barred the jurisdiction of the Civil Cts. under S. 18 of the Act. But it must be conceded, in spite of such a bar, that, if the House Controller or the Comr. acts without jurisdiction or in excess of the jurisdiction as given to them under the Act, the civil Ct. has jurisdiction to determine whether or not an order passed by the House Controller or the Comr. is without jurisdiction or in excess of the jurisdiction conferred upon them by the Act. Where the liability is statutory, the party must adopt the remedy given to him by the statute. In the light of these observations, I would now address myself to the consideration of the question whether the Comr. in this case has acted without jurisdiction or in excess of the jurisdiction as given to him under the Act.

[8] Before I consider that question I would like to clear the ground of fact. Upon the finding of the Ct. below, the deft. has acquired a permanent right under his deed (Ex. A) to the extent of 64½ feet in holding No. 23 & that the remaining area to the extent of 5½ feet in that holding towards the south does not belong to him. The Palit brothers, the proprietors, therefore, have no interest in the said holding No. 23 except to the extent of 5½ feet. The katra as appears from its very nature, can be held by different persons in specified parts without disturbing the possession of the respective holders of the other parts.

[9] When an appln. for eviction is made under the Act, the House Controller or the Comr., as the case might be, has, to find out whether the parties stand in the relation of landlord & tenant. That would be the first question to decide before any action is taken under that Act. In the present case, it was not disputed before the House Controller or the Comr. that the pltf. was not the tenant of the deft. & in that view, the House Controller & the Comr. had had no necessity of coming to an express finding on that point. The parties before the House Controller proceeded on the footing that they answered the definition of "tenant" & "landlord" as given in that Act & that there existed a relationship of landlord & tenant between them. But supposing this question had been raised before them, was it open to those authorities to come to a finding on that point to enable them to apply the provisions of the Bihar Buildings Control Act? If the answer is in the affirmative, it must be held that the House Control authorities had jurisdiction to decide that question of fact. If that be so, can it be said that the tribunal has exceeded its jurisdiction as given under the Act or that it had no jurisdiction to decide that matter. In my view, if a Ct. or a tribunal with limited jurisdiction is given authority under law to decide a particular matter, but the decision of that particular matter depends upon certain preliminary findings of fact, that tribunal must have jurisdiction to decide those preliminary points of fact & the civil Ct. will have no jurisdiction to go into the correctness or otherwise of the findings of the tribunal in regard to those preliminary questions of fact.

[10] I would now consider the cases which have been cited at the Bar on the question of the jurisdiction of civil Cts. to review or revise the decision of a tribunal of limited jurisdiction. In the case of *Ishan Chandra* v. *Moomraj Khan*,

A. I. R. (13) 1926 Cal. 1101 : (97 I. C. 770) the following observations of Ghose J., are very much apposite to the question before this Ct.

"There cannot be any question that a decree passed without jurisdiction is a nullity. But the expression 'jurisdiction' has not unoften been used with ambiguity, & the distinction between a judgment where jurisdiction is assumed by the Ct. where there is absolute want of it & where the Ct. in the exercise of its jurisdiction acted wrongly in disregard of the law has not always been borne in mind. This want of discrimination in the use of the term has resulted in a good deal of confusion. The distinction between a defect of jurisdiction & an error or irregularity in procedure is pointed out in Hawes on the Jurisdiction of Courts thus : 'In the former case, the whole proceeding is *corum non judice* & void, in the latter the proceeding cannot be impugned in a collateral action, even though it be erroneous upon its face, & even though it relates to a fact which in a former stage of the proceeding might have been essential to confer jurisdiction. It is examinable only on a direct proceeding as by an appeal or by a proceeding in the nature of an appeal, & where there is no remedy of that kind, it concludes for ever."

The aforesaid observations of Ghose, J. & the question (quotation?) from Hawes on the Jurisdiction of Courts, in my opinion, must conclude the matter. This case has been followed. in *R. Krishnamurthy* v. *S. Parthasarathy*, A. I. R. (36) 1949 Mad. 780 : (1949-1 M. L. J. 412). In this case a similar question had arisen for decision namely whether the Civil Ct. can entertain a suit to set aside an order passed under the Madras Buildings (Lease & Rent Control) Act (XV [15] of 1946). The question raised in that case was that under the Madras Act the decision of the tribunal was without jurisdiction because notice to quit had not been given before action was taken under that Act for the eviction of the tenant & it was contended that, in the absence of a notice to quit, the Rent Controller under the Madras Act had no jurisdiction to deal with the appln. for eviction of the tenant, & upon a review of several cases of different H. Ct. it was held in that case that

"if the question which is alleged to create the want of jurisdiction is one which the Ct. is bound to decide, the matter is not one relating to jurisdiction; if there is any error in the decision, it can only be remedied by an appeal or other proceeding known to law."

In *Mangtu Lal* v. *Secretary of State*, 18 Pat. 854 : (A. I. R. (27) 1940 Pat. 161) a similar view was taken though the facts were different. The question in that case was as to whether a civil Ct. was entitled to entertain a suit to set aside the decision of the Revenue Ct. under S. 45, Bengal Cess Act (IX [9] of 1880) to the effect that cess was recoverable, & his Lordship Fazl Ali J. with whom Harries C. J. agreed, made the following observations :

"The question whether cess was recoverable in this case under S. 45 of the Act was one to be decided by the Revenue Ct. which issued the certificate & if that Ct. has decided, rightly or wrongly, that the cess was recoverable and the claim made for the recovery was not barred by limitation, a suit cannot be entertained in a civil Ct. to set aside that decision. A Civil Ct. can entertain a suit only if the order of the Revenue Ct. is without jurisdiction & not because the decision pronounced by the Ct. is not correct."

Mr. Chatterji, the learned counsel on behalf of the resp. had himself cited the case in *Krishnamurthy* v. *S. Parthasarathy*, A. I. R. (36) 1949 Mad. 780 : (1949-1 M. L. J. 412), on another point which I will consider later, but that case is against him on the question of jurisdiction, as I have already indicated. He also cited the case of *Secretary of State* v. *Mask & Co.*, A. I. R. (27) 1940 P. C. 105 : (I. L. R. (1940) Mad. 599) & relied upon a passage at p. 110 which reads as follows :

"It is settled law that the exclusion of the jurisdiction of the Civil Cts. is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Cts. have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

In my judgment, this case does not differ in principle from the other cases cited above in this connection In the present Act with which we are concerned here the jurisdiction of the civil Ct. is excluded in the following terms which are to be found in S. 18 (3) of the Act :

"The decision of the Comr. & subject only to such decision, an order of the Controller shall be final, & shall not be liable to be questioned in any Ct. of law whether in a suit or other proceeding by way of appeal or revn."

I would, therefore, hold that the civil Ct. had no jurisdiction to override the decision of the Comr. under the Bihar Act of 1947. But the decision of the Comr. can be final only to the extent of the deft's portion of holding No. 23. On the finding of the Ct. below, the deft. had no interest in the 5½ feet of the holding to the south of it & therefore, it was beyond the subject-matter of the decision of the Comr. & as I have said above, this 5½ feet of holding No. 23 is severable from the rest & there is no difficulty in giving relief to the pltf. to the extent of that portion.

[10a] Mr. Chatterji on behalf of the resp. has contended that the jurisdiction of the House Controller & the Comr, was ousted from another point of veiw, namely, that the Palit brothers & the deft. being the joint lessors, no order of eviction could have been passed in law upon the appln. of only one of the joint lessors, namely, the deft. & has relied upon a number of authorities namely *Baraboni Coal Concern Ltd.* v. *Gokulananda*, 61 Cal. 313 : (A. I. R. (21) 1934 P. C. 58) *Satyesh Chandra* v. *Jillar Rahman*, 27 C. L. J. 438 : (A.I,R. (6) 1919 Cal. 997), *Jagdishwar Dayal Singh* v. *Dwarka Singh*, 12 Pat. 626 : (A. I, R. (20) 1933 P. C. 122) and *Gopal Ram* v. *Dhakeshwar Pershad*, 35 Cal. 807 : (7 C. L. J. 483) & the definition of 'landlord' and 'tenant' as given in the Act. There are two answers to this contention. One is that the Palit brothers & the deft, were not the joint lessors inasmuch as by the settlement as embodied in Ex. A the Palit brothers had made a permanent settlement of holding No. 22, & the major part of holding No. 23 with the deft. & therefore, the deft. was the sole

landlord of the pltf. so far as that portion was concerned. Therefore in terms those authorities have no application. The other answer is that if as I have held above the House Controller & the Comr. had jurisdiction to decide the question of eviction under the Act, their decision, either on law or on fact right or wrong was declared to be final under that Act & even if the decision was opposed to law, the Civil Ct. can have no jurisdiction to go into that decision in a collateral proceeding. If the party feels aggrieved he must find his remedy within the four corners of that Act, & if no second appeal was provided under that Act, he can have no other remedy which is barred under S. 18 (3) of the Act.

[11] Mr. Chatterji has also faintly argued that the provisions of S. 111, T. P. Act, have not been abrogated by the Bihar Buildings Control Act. He contends that the tenancy of the deft. has not been determined in this case in accordance with the provisions of the T. P. Act. The short answer to this contention is that S. 11, Bihar Buildings Control Act, says in S. 11 (1) that

"Notwithstanding anything contained in any agreement or law to the contrary & subject to the provisions of S. 12 where a tenant is in possession of a building he shall not be liable to be evicted therefrom whether in execution of a decree or otherwise except . . . ."

upon certain specified conditions mentioned in that section. This Act is a self-contained Act. It has provided the conditions of ejectment of a tenant. It has made provision for deposit of rent & for obtaining receipt by the tenant on payment of rent, provided the forum & has also provided for appeal from the order of the House Controller. Mr. Chatterji has relied upon the case of *Parthasarathy* v. *Krishnamoorthy*, A. I. R. (36) 1949 Mad. 387 : (1948-2 M. L. J. 391) where the question was whether a notice to quit was necessary to give jurisdiction to the Rent Controller under the Madras Buildings Act to order eviction under S. 7 of that Act. Subba Rao J. held that the Rent Controller had no jurisdiction to order eviction under that section where there had been no previous or antecedent determination of the tenancy in accordance with the provisions of the T. P. Act. This decision was set aside in the Letters Patent appeal against that judgment & it was held that S. 111 (h), T. P. Act, had no place in the scheme of the procedure laid down in S. 7 & that an appln. for eviction can be made to the Rent Controller before the tenancy has been determined by notice to quit. The relevant extract of S. 7 of the Madras Act (The Madras Buildings (Lease & Rent Control) Act XV [15] of 1946 reads as follows:

"A tenant in possession of a building shall not be evicted therefrom . . . . before . . . . the termination of the tenancy except in accordance with the provisions of this section."

The Bihar Act (S. 11) is couched in somewhat similar terms. It has laid down the condition or conditions on which a tenant could be evicted from a building & I do not see any reason to differ from the decision of the Madras Ct. on this point & I hold that S. 111, T. P. Act, has no application to the proceeding for eviction under the Bihar Buildings Control Act. Mr. Chatterji had also a cited case reported in *Balmukund* v. *Harinarain*, 27 Pat. 273 : (A. I. R. (36) 1949 Pat. 31) but, in my judgment, it has got no relevancy so far as the present case is concerned. That was a case which has interpreted the word "Occupation" occurring in sub-s. (3) of S. 11, Bihar Buildings Control Act. No other points were raised before this Ct. by any of the parties.

[12] I would accordingly hold that the order of the Comr. so far as the deft's. portion of the holding No. 23 is concerned was a final order & that the Civil Ct. had no jurisdiction to go into that matter. The result is that the judgment of the Ct. below is set aside & the suit is dismissed in respect of the deft's. portion in holding No. 23 namely the whole of holding no. 23 excepting an area of $5\frac{1}{2}$ feet in length towards the southern portion of holding No. 23. The deft. will be entitled to his costs in proportion to his success throughout, that is, three-fourths of the costs.

[13] **B. P. Sinha J.**— I agree.

D.H. *Order accordingly.*

A. I. R. (38) 1951 Patna 532 *[C. N. 150.]*

RAMASWAMI AND RAI JJ.

Sm. Radha Peary Kuer & another — *Applts.*
v. *Gopal Saran & others* — *Resps.*

A. F. A. D. No. 594 of 1946, D/- 17-1-1951.

Sales Tax—Bengal Land Revenue Sales Act (1859), S. 37 — Annulment of interest in portion of touzi — S. A. No. 829 of 1940, OVERRULED.

Section 37 was intended to protect the interest of the auction purchaser & not the interest of an encumbrancer or a tenure holder.

Where under the Estates Partition Act (V [5] of 1897) the original touzi is partitioned & different touzies are carved out & one of the newly formed touzies falls in arrears of revenue resulting in sale & purchase by the pltf. the pltf. is entitled to claim annulment of that mokarrari or mtge. interest which is confined within such newly carved touzi & it is not necessary for him to implead in the suit the proprietors or tenure-holders of the remaining touzies. It is, however, incumbent upon the pltf. to seek annulment of the entire mokarrari & mtge. interest within the newly formed touzi. He cannot claim annulment in respect of the mokarrari & mtge. interest extending over a portion of such touzi only. S. A. No. 829 of 1940, OVERRULED; A.I.R. (30) 1943 Cal. 345 (F.B.) and 5 C. L. J. 264, *Rel. on.* [Paras 10, 11, 12]

Lalnarain Sinha & Lakshmi Saran Sinha — for Applts.; Mahabir Prasad, M. M. Prasad, R. N. Prasad, A. C. Mitra & Balram Kumar Sinha — for Resps.

Rai J. — This is an appeal by defts. 1 & 5 against the judgment & the decree passed by the third Addl. Subordinate Judge of Gaya reversing those of the Munsif of Jehanabad.

[2] The pltfs. filed the suit for a declaration that the Mokarrari & usufructuary mtge. interest relating to the said Mokarrari interest or any other encumbrance as alleged by the defts. against them who were the purchasers at a revenue sale

be annulled. They further prayed for recovery of sir possession over eight annas share of tauzi No. 4060 by annulling & avoiding all encumbrances of all sorts over the same. They further claimed past & future mesne profits from the date of the suit till the recovery of possession as also the costs of the suit.

[3] The case of the pltfs. as set out in the plaint was that village Sarthua Ratanpore *alias* Birpore original tauzi No. 4060 was partitioned under the Estate Partition Act in the year 1919 by which ten separate tauzies were carved out of the parent tauzi. One of the newly carved out tauzies retained the original tauzi No. 4060. The newly formed tauzi No. 4060 fell in arrears of revenue which resulted in its sale and purchase by the pltfs. by an auction sale held in June, 1937. The purchase was made in the name of pltf. 1 as the Karta of the joint family of the pltfs. The revenue sale was confirmed on 18-8-1937. The auction purchaser after obtaining the sale certificate got delivery of possession on 23-12-1937. The case of the pltfs. further was that when they wanted to take sir possession of the tauzi they were resisted by the defts. from realizing rent from the raiyats to the extent of eight annas share on the ground that the latter were mokarraridars in respect of the said eight annas share since long before the date of the revenue sale. The defts. claimed their interest in the property as permanent mokarraridars as well as usufructuary mtgees. of the interest of some of the Mokarraridars. The pltfs. further alleged that by virtue of the revenue sale they acquired interest in the entire tauzi No. 4060 free from all encumbrances. They impleaded in the action persons interested in the said eight annas Mokarrari interest & their mtgees.

[4] Three sets of written statement were filed in the suit, one by deft. 1, another by deft. 6 & the third by deft. 7. In her written statement deft. 1 pleaded *inter alia* that the suit was bad for misjoinder & non-joinder of parties. According to her, unless all the proprietors of the old parent tauzi No. 4060 or their representatives in interest & the sixteen annas mokarraridars be impleaded in the action, the same was liable to fail. She further contended that defts. 2 to 4 & deft. 7 had no interest in the suit property & as such they should not have been impleaded as party defts. in the action. She further claimed that she had exclusively inherited six annas of the Mokarrari interest which belonged to her maternal grand mother. She further pleaded that the revenue sale was without jurisdiction. Another plea taken by her was that the Mokarrari interest as created in the original tauzi No. 4060 was spread over the entire ten tauzies formed by the collectorate partition & therefore, the pltfs. were not entitled to bring the present action for annulment of a portion of the Mokarrari interest. She, on these & other allegations, claimed that the suit was fit to be dismissed.

[5] Defendant 6 disclaimed all interest in the properties in dispute. According to him, deft. 7 in fact was the owner of two annas Mokarrari interest out of eight annas share in dispute.

[6] Defendant 7 on her part resisted the suit of the pltf. on all the grounds taken by deft. 1. She further contended that she was the owner of the two annas Mokarrari interest & that deft. 6 had nothing to do with it.

[7] The trial Ct. came to the conclusion that the Mokarrari interest had in fact been created long before the collectorate partition of original tauzi No. 4060 as was the case of the contesting defts. It further held that the present suit as framed was not maintainable as the pltfs. were not entitled to claim avoidance of a portion of the old Mokarrari interest. On these & other findings the trial Ct. dismissed the suit with costs.

[8] On appeal the lower appellate Ct. accepted the case of the defts. regarding the existence of the Mokarrari interest. It also accepted the case of the defts. that the Mokarrari interest as originally created had not been split up by the collectorate partition. On the question of maintainability of the suit, however, it came to a different conclusion than that arrived at by the trial Ct. Relying upon the F. B. decision of the Calcutta H. C. in the case of *Khamankari Dasi* v. *Harsha Mukhi Dasi*, 47 C. W. N. 582 : (A. I. R. (30) 1943 Cal. 345 F. B.) it held that the pltfs. were entitled to annul the Mokarrari interest that fell within the new tauzi No. 4060 & it was not necessary for them to implead in the action the proprietors of other tauzis; nor was it necessary for them to implead the mokarraridars who were interested in the Mokarrari interest of the tauzis other than the one in suit. On these findings, the suit of the pltfs. was decreed by the lower appellate Ct. with costs. Hence, the above mentioned second appeal.

[9] It may be mentioned at this stage that during the pendency of the second appeal, Sm. Radha Peary Kuer one of the original applts. died & in her place her minor son Dhurup Narain Singh has been substituted.

[10] Mr. Lalnarain Sinha learned counsel for the applts. has contended before us that S. 37, Bengal Land Revenue Sales Act, 1859 (Act XI [11] of 1859) as quoted below does not authorise the pltfs. to claim annulment of a portion of the Mokarrari interest :

"The purchaser of an entire estate in the permanently-settled districts of Bengal, Bihar & Orissa, sold under this Act for the recovery of arrears due on account of the same shall acquire the estate free from all encumbrance which may have been imposed upon it after the time of settlement; & shall be entitled to avoid & annul all under-tenures & forthwith to eject all under-tenants, with the following exceptions :

First : Istimrari or mukarrari tenures which have been held at a fixed rent from the time of the permanent settlement.

Secondly : Tenures existing at the time of settlement which have not been held at a fixed rent :

Provided always that the rents of such tenures shall be liable to enhancement under any law for the time

being in force for the enhaneement of the rent of such tenures.

Thirdly—Talukdari & other similar tenures created since the time of settlement & held immediately of the proprietors of estate & farms for terms of years so held, when such tenures & farms have been duly registered under the provisions of this Act.

Fourthly – Lease of lands whereon dwelling houses, manufactories, or other permanent buildings have been erected or whereon gardens, plantations, tanks, wells, canals, places of worship or burning or burying grounds have been made or wherein mines have been sunk.

And such a purchaser as is aforesaid shall be entitled to proceed in the manner prescribed by any law for the time being in force for the enhancement of the rent of any land coming within the fourth class of exceptions above made, if he can prove the same to have been held at what was originally an unfair rent, & if the same shall not have been held at a fixed rent, equal to the rent of good arable land for a term exceeding twelve years, but not otherwise:

Provided always that nothing in this section contained shall be construed to entitle any such purchaser as aforesaid to eject any raiyat, having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such raiyat otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do."

He has further contended that on the findings, of the Cts. below an impossible position will be created if the pltf.'s suit were to be decreed, because it will not be possible to split up the Mokarrari rent of the remaining unannulled share. He has further contended that we should prefer to follow the decision of a single Judge of this Ct. in an unreported case, namely, *Mahbub Ali* v. *Radha Peary Kuer*, S. A. No. 829 of 1940, D/- 25-11-1941, where the learned Judge had followed the decisions of the Calcutta H. C. reported in *Sooharam Barma* v. *Doorga Charan*, 5 C. L. J. 264 and *Ashamoyee Basu* v. *Baranagore Jute Factory Co. Ltd.*, 70 C. L. J. 34. He has contended that the F. B. decision of *Khamankari* v. *Harsha Mukhi*, 47 C. W. N. 582: (A. I. R. (30) 1943 Cal. 345 F. B.) had not been correctly decided in so far as it overruled the decision reported in *Ashamoyee Basu* v. *Baranagore Jute Factory Co. Ltd.*, 70 C. L. J. 34. I am afraid I am not in agreement with the learned counsel for the applts. The learned Judges who decided the case of *Khamankari*, (47 C. W. N. 582: A. I. R. (30) 1943 Cal. 345 F.B.) *(Supra)* had correctly held that S. 37 of Act XI [11] of 1859 was intended to protect the interest of the auction-purchaser & not the interest of an encumbrancer or a tenure-holder. I respectfully agree with the following observation made during the course of their judgment:

"It is no doubt true that when we speak of a tenure, we usually mean the tenure in its integrity; but where a tenure extends over more than one estate, that part of it which is under one of the estates may without undue straining of language, be called an under-tenure in that estate, if the context so requires. To insist that an under-tenure to be voidable under S. 37, must be wholly & exclusively within the defaulting estate would be parity of reasoning require that an encumbrance, if it is not to survive the revenue sale, must be wholly & exclusively upon the estate so that a mortgage extending over more than one estate would remain intact, even as to the portion within the estate. We cannot hold that such was the intention of the Legislature."

[11] In my view, the F. B. of the Calcutta H. C. has correctly declared that the case of *Ashamoyee Basu* v. *Baranagore Jute Factory Co. Ltd.*, 70 C. L. J. 34 had not been correctly decided. In that view of the matter, the principle of law as enunciated in the case of *Mahbub Ali* v. *Radha Peary Kuer*, S. A. No. 829 of 1940 must also be overruled. Thus, the pltfs. are entitled to claim annulment of that Mokarrari or mtge. interest which is confined within the newly carved out tauzi No. 4060 & it is not necessary for them to implead in the present suit the proprietors or tenure-holders of the remaining nine tauzis which were carved out by the Collectorate partition out of the original tauzi No. 4060.

[12] But there is a fatal defect in the frame of the present suit. As was held in the case of *Khamankari*, (47 C. W. N. 582: A. I. R. (30) 1943 Cal. 345 F. B.) *(Supra)*, it was incumbent upon the pltfs to seek annulment of the entire Mokarrari interest within the newly carved out tauzi No. 4060. They have on the contrary, claimed annulment in respect of the Mokarrari and mtge. interest extending over eight annas share of tauzi No. 4060 only. From para. 10 of the plaint it is clear that the tenure-holders interested in the remaining eight annas mokarrari interest of the newly formed tauzi No. 4060 have not even been impleaded as party-defts. to the action. From the trend of the statements in the plaint it appears that in the present action the pltfs. were concerned with seeking sir possession over the eight annas share of tauzi No. 4060 only. The annulment claimed in this action, therefore did not relate to the entire tenure within this tauzi & the suit on that ground was liable to fail as was contended by the learned counsel for the applts. At this stage it is necessary to mention that after the creation of the original mokarrari the mokarraridars created a darmokarrari in respect of the eight annas share of the mokarrari interest in favour of the proprietors of the original tauzi No. 4060. After this, the original mokarraridars were in sir possession of the eight annas share of the tauzi as mokarraridars & were entitled to get rent from the darmokarraridars in respect of the remaining share, the latter, being in sir possession of the darmokarrari interest extending over the eight annas share of the tauzi. The pltf.s' case as made out in the plaint is that the darmokarraridars did not resist the claim of the pltfs. to sir possession over the eight annas interest of the newly formed tauzi No. 4060 but, it were the defts. 1 to 7 alone who interfered with their possession.

[13] The Advocate-General who appeared for the pltfs.-resp. contended that it was unnecessary for his clients to have brought an action in respect of the sixteen annas mokarrari share of the newly formed tauzi No. 4060, as they were not resisted in

their sir possession in respect of the eight annas share, but I do not think that his contention is sound. The khas possession of the pltfs. with respect to that eight annas share of the tauzi which was in direct possession of the darmokarraridars might not have been resisted, but that does not entitle the pltfs. not to claim annulment of the entire mokarrari interest within the newly formed tauzi No. 4060. The interest of the Mokarraridars was quite distinct from that of the darmokarraridars. The mokarraridars of the remaining eight annas share may not be in sir possession of that eight annas share, but they were certainly entitled to claim rent from the darmokarraridars. Under the provisions of S. 37 of the Act XI [11] of 1859 the pltfs. could claim annulment of the entire interest of the tenure-holder in the newly formed tauzi No. 4060 & not only a portion of that interest.

[14] The Advocate-General further contended that it was unnecessary for the pltfs.-auction purchasers to have filed any suit for annulling the tenure; they were justified in treating the interest of the tenure holders as void. But I am afraid I am not inclined to accept this submission of the learned counsel for the pltfs. resps. In the case of *Turner Morrison & Co. Ltd.* v. *Monmohan Chaudhury*, 58 I. A. 440: (A. I. R. (18) 1931 P. C. 314) their Lordships of the Judicial Committee have clearly laid down that S. 37 of Act XI [11] of 1859 makes it incumbent upon the auction purchaser to avoid & annul "under tenures" which term includes also "Tenures". Thus; if the present pltfs. thought it necessary to bring an action for avoiding & annulling the mokarrari interest, it was incumbent upon them to have sought avoidance & annulment of the entire mokarrari interest within the newly formed tauzi No. 4060 & impleaded as defts. the tenure-holders interested in the remaining eight annas share of the tauzi also. Having not done so, in my opinion, their suit is bound to fail.

[15] The result is that the appeal succeeds & the suit of the pltfs. is hereby dismissed. The applts. are entitled to their costs of all the Cts. against the pltfs.-resps.

[16] **Ramaswami J.**—In my opinion, the decision of the learned single Judge in S. A. No. 829 of 1940 must be overruled since the case of *Sm. Ashamoyee Basu* v. *Baranagore Jute Factory Co. Ltd.*, 70 C. L. J. 34 upon which it is based, is no longer good law in view of the subsequent F. B. case, *Khamankari Dasi* v. *Harsha Mukhi Dasi*, 47 C. W. N. 582 : (A. I. R. (30) 1943 Cal 345 F. B.).

[17] In *Ashamoyee Basu* v. *Baranagore Jute Factory Co. Ltd.*, 70 C. L. J. 34 there were five tauzis which jointly held the lands comprised therein & each tauzi had an undivided fractional share in all the lands. A tenure was held under all these five tauzis, & one of the tauzis, *viz.*, tauzi No. 166 having been sold for arrears of revenue, the purchaser sought to annul the under tenure so far as it related to that estate & recover possession of a corresponding share of the land. The Ct. of appeal dismissed the pltf.s' suit on the ground that the proprietor of the other five tauzis were in the position of joint landlords with the pltfs. & S 37 would not allow annulment of a portion of an under-tenure. This view was affirmed in appeal by a Bench of the H. C. who relying upon two earlier decisions held that taking the words of s. 37 of Act XI [11] of 1859, as they stood, the auction-purchaser was entitled to eject all under-tenants who held their lands entirely within his estate, but was not entitled to eject an under-tenant who held an under tenure partly within his estate & partly within other estates.

[18] In *Khemankari Dasi* v. *Harsha Mukhi Dasi*, 47 C. W. N. 582 : (A. I. R. (30) 1943 Cal. 345 F. B.) the question at issue was as to whether the pltfs. could obtain a declaration that their Patni interest under tauzi No. 335 which was the estate sold, was not in any way affected by the Revenue sale & could not be annulled. The pltfs. alleged that as their patni was one indivisible tenure under three estates of which only one was sold it could not be annulled under S. 37 of the Revenue Sales Laws. The suit was contested by deft. 1, who urged that the Patni held by the pltfs. was separable & even if it did include the lands of the other two estates, there was nothing in law which stood in the way of the purchaser's annulling it, to the extent that it was under estate No. 335. The trial Judge decreed the suit & the decree was affirmed by the Dist. J. in appeal. It was argued in the H. C. that the Patni held by the pltfs. being one integral patni under three estates could not be annulled in part by deft. 1 who was the purchaser of one of the estates. In support of the pltfs. reliance was placed in *Ashamoyee* v. *Baranagore Jute Factory Ltd.*, 70 C. L. J. 34. But the F. B. held that the decision was not correct; that it was unsound in principle & that it was not supported by the decisions upon which it purported to rely. The F. B., therefore, overruled that case holding that a purchaser of an entire estate sold for arrears of revenue due on account of same, can annul an under-tenure created under the said estate as well as other estates so far as it lies within the estate sold. At p. 598 the report states :

> "It is no doubt true that when we speak of a tenure, we usually mean the tenure in its integrity; but where a tenure extends over more than one estate, that part of it which is under one of the estates may, without undue straining of the language be called an under-tenure in that estate, if the context so requires. To insist that an under-tenure to be voidable under S. 37, must be wholly & exclusively within the defaulting estate would by parity of reasoning require that an encumbrance, if it is not to survive the revenue sale, must be wholly & exclusively upon the estate, so that a mtge extending over more than one estate would remain intact, even as to the portion within the estate. We cannot hold that such was the intention of the Legislature."

[19] The interpretation of S. 37 adopted in the F. B. case is consistent with the principle enunciated by the Judicial Committee in *Forbes* v. *Meer Mahammad*, 20 W. R. 44 : (12 Beng. L. R. 210 P. C.).

"The statutory title which the law gives to an auction purchaser is that for the protection of the revenue & in order to ensure its due payment by him & to avoid the necessity of repeated sales of the property, he is remitted to all those rights which the original settlor at the date of the perpetual settlement had; & may in consequence of that, sweep away or get rid of all the intermediate tenures & incumbrances created by proceeding Zamindars since that date."

If it was the intention of the Legislature that the estate might always remain adequate security for Govt. revenue, it is necessary that the purchaser should get the estate in a condition that he might be able to pay the Govt. Revenue assessed thereon & that no act done by the proprietor after the settlement, by which the estate became determined, or rendered incapable of yielding the revenue, should be allowed to affect him. As stated by Sir James Colvile in the case referred to, the auction purchaser is entitled to a presumption founded upon the principle that every bigha of land is bound to pay & contribute to the public revenue unless it could be brought within certain exceptions recognised in the Act itself.

[20] I am, therefore, of the opinion that the decision of Agarwala J. in S. A. No. 829 of 1940 should be overruled. But the pltfs. are not entitled to a decree in the present case since they have not claimed annulment in respect of the entire mokarrari interest within the newly carved out tauzi No. 4060. From para. 10 of the plaint it is apparent that the tenure holders interested in the remaining eight annas Mokarrari share in tauzi No. 4060 have not been impleaded. The present case, therefore, falls within the ambit of the decision reported in *Soohram Barma* v. *Doorga Charan*, 5 C. L. J. 264, which was distinguished & not overruled in the F. B. case. In *Soohram Barma* v. *Doorga Charan Das*, 5 C. L. J. 264, the pltf. was the holder of a taluka potta under the auction-purchaser of an estate with regard to a portion of the lands only which were comprised in the estate. He sued to evict an under-tenure holder who had a tenure in respect of the lands in suit & certain other lands within the same tauzi, but not included in the pltf.'s potta. It was held that the pltf. could not annul the under-tenure in part in this manner. The tenure could be set aside as to all the lands belonging to it, & this could be done either by the purchaser of the entire mahal or by some person to whom he had transferred, either the whole mahal or all those lands of the mahal which were included in the Taluka potta of the defts. Here the lands of an under-tenure were all within the tauzi that was sold, & the H. C held that the purchaser or any person claiming from him could not evict the defts. from a portion of the lands. The reason is that there will be hardship to the tenure holder who will be subjected to multiplicity of suits at the instance of different purchasers. Applying this principle to the present case it is manifest that the pltfs. were not entitled to the reliefs they have claimed.

[21] For these reasons I agree that the suit should be dismissed & the appeal should be allowed with costs throughout.

D.H. *Appeal allowed.*

A. I. R. (38) 1951 Patna 536 *[C. N. 151.]*

MANOHAR LALL & MAHABIR PRASAD JJ.

Ram Chor Prasad — Applt. v. *Bakshi Ram Krishna Sinha — Resp.*

A. F. A. D. No. 2316 of 1946, D/- 14-2-1949.

(a) Municipalities—Bihar and Orissa Municipal Act (VII [7] of 1922), S. 119—Finding as to additions or alterations in—Holding in leading to increase in value—Jurisdiction of civil Ct. to question.

The jurisdiction of the municipality to revalue or reassess any holding on the ground of an increase in the value by reason of additions or alterations must depend upon the correctness of the finding whether there has been any addition or alteration. The extent of the additions or alterations cannot be questioned in the civil Ct. but the fact whether there has been any addition or alteration must be liable to be reviewed by the civil Ct. : A. I. R. (32) 1945 Pat. 153, *Rel. on.* [Para 7]

(b) Municipalities—Bihar and Orissa Municipal Act (VII [7] of 1922), S. 116 — Ultra vires assessment — Objection under S. 116 does not bar civil suit.

When the assessment itself is *ultra vires* & the person aggrieved could have at once brought a civil suit, without filing any objection under S. 116, the fact that the person aggrieved had filed an objection which he need not have filed, cannot place him in a worse position & does not operate as a waiver of his right to come to civil Ct. [Para 8]

Girjanandan Prasad — for Applt. ; Jadunandan Prasad & T. K. Prasad—for Resp.

Manohar Lall J. — This is an appeal by the Patna Municipality who was the deft. in a suit instituted by the resp. on 11-4-1942 for a declaration that an additional assessment made on a certain holding in occupation of the pltf. was *ultra vires* of the municipality.

[2] The suit was decreed by the Cts. below on a finding that there had been no additions & alteration in the holding in question, & therefore, no increase in the valuation of the holding had been made to justify the additional assessment.

[3] The facts are these : The holding in question belongs to the pltf. who had let it out to the Regent Cinema along with some building contiguous thereto. In 1935-36, the tax payable for the holding was assessed at Rs. 41-13-6 per quarter, & this assessment continued up to 11-3-1939. On 8-3-1939, the pltf. received a notice from the Municipality in which they proposed to fix the municipal tax at Rs. 191-3-0 a quarter on the ground that the valuation had increased by reason of additions & alteration made thereto. The pltf. preferred an objection which was heard by the Appeal Committee consisting of three Comrs.

which rejected the objection ignoring the report of the vice-chairman that there had been no additions & alterations in the holding. After the objection was overruled, the order for enhancement was passed on 19-12-1939. This was the cause of action for the suit.

[4] The main defence of the applt. was that there had been an increase in the valuation of the holding on a count of additions & alterations, & secondly, that by reason of S. 119, Bihar and Orissa Municipal Act, (hereinafter referred to as the Act) the civil Ct. has no jurisdiction to question the validity of the assessment.

[5] The Cts. below have concurrently come to the conclusion on the question of fact against the applt. as stated already. That finding is binding in second appeal.

[6] Mr. Girijanandan Prasad argued that the civil Ct. has no jurisdiction to question the validity of the assessment & that the only remedy of the pltf. was to appeal to the Assessment Committee which he did & as he failed there, his remedies are exhausted. On the other hand, it was argued by Mr. Jadunandan Prasad on behalf of the resp. that if the provisions of the Act are carefully considered, it will appear that the jurisdiction of the civil Ct. is barred only in that instance where the Act specifically declares that on the satisfaction of the Comrs. certain consequences ensue but where no such words are to be found then the action of Municipality can be challenged in the civil Ct. if the conditions giving the Municipality jurisdiction do not exist in fact. This distinction appears to be correct. (See Ss. 82 & 107 on the one hand & contrast with Ss. 145 & 148).

[7] The ambit of the jurisdiction of the civil Ct. was examined by Mukherjee J. in the leading case of the *Chairman of Giridi Municipality* v. *Suresh Chandra*, 35 Cal. 859 : (7 C. L. J. 631). The case law was examined by me at length sitting with Beevor J. in *Comrs. of Darbhanga Municipality* v. *Jyotindra Nath*, 23 Pat. 862 : (A. I. R. (32) 1945 Pat. 153), where I pointed out that the civil Ct. has jurisdiction to enquire whether a person is an occupier of a holding within the municipality, as the jurisdiction of a municipality to assess a person depends upon whether he is an occupier, & the comrs. cannot give themselves jurisdiction to assess a person who is not an occupier by a wrong decision of facts. I also observed that the remedy provided to an assessee under S. 116 of the Act is an alternative one, & the finality given in S. 117 (3) to a decision of the Committee is the finality between the assessee & the Comrs. In my opinion, the same principle must apply when considering S. 107 (d) & other sub-clauses in that section. Take for instance S. 107 (1) (b): if the municipality substitute for the name of the owner or occupier of any holding the name of any other person who has not succeeded by transfer or otherwise to the ownership or occupation of the holding, the aggrieved party has a right to get his title declared in the civil Ct. & then, the order of the municipality, if found to be wrong, would be altered. Same observations apply to sub-cl. (a). It seems to me, therefore, that the jurisdiction of the municipality to revalue or re-assess any holding on the ground of an increase in the value by reason of additions & alterations must depend upon the correctness of the finding whether there has been any addition or alteration. The extent of the additions & alterations cannot be questioned in the civil Ct. but the fact whether there has been any addition or alteration must be liable to be reviewed by the civil Ct.

[8] It was then argued on behalf of the applt. that as the pltf. did take recourse to file an objection under S. 116 of the Act & appealed to the Assessment Committee, he chose to waive his rights to come to the civil Ct. The short answer to this argument is that given by a D. B. of this Ct. in the case of *Shiva Prasad* v. *Comr. of Darbhanga Municipality*, A. I. R. (29) 1942 Pat. 81 : (196 I. C. 370), where it was observed :

"No doubt in this case the pltf. did file an objection under S. 116 of the Act, but having regard to the fact that the assessment itself was *ultra vires* need not have done so & could have at once brought a suit in the civil Ct. The pltf. cannot be in a worse position than if he had filed no objection at all under S. 116 of the Act."

The learned Judges thus distinguished the case of the *Chairman of Arrah Municipality* v. *Ramkumar*, 16 Pat. 662 : (A. I. R (25) 1938 Pat. 177); but that question does not arise for decision in the present case, & I prefer to express no opinion upon the correctness of that decision.

[9] The result is that the appeal must be dismissed with costs.

[10] **Mahabir Prasad J.** — I agree.

G.B.S. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 537 *[C. N. 152.]*

MANOHAR LALL AND RAMASWAMI JJ.

Bhudeo Pandey — Applt. v. *Gupteshwar Missir & others — Resps.*

A. F. A. D. No. 2268 of 1946, D/- 18-8-1949.

(a) Civil P. C. (1908), S. 11, O 22, R. 5 — Matters collaterally in issue—Question whether certain person is legal representative of deceased plaintiff under O. 22, R. 5—Question if can operate as res judicata.

A decision of the question under O. 22. R. 5 whether a certain person is or is not the legal representative of a deceased plaintiff is not an issue arising in the suit itself but it is really a matter collateral to the suit and one that has to be decided before the suit itself can be proceeded with. The rule empowers the Court in a case where a dispute arises as to who is the legal representative of a deceased plaintiff to appoint a legal representative for the purpose of prosecuting the suit. But the appointment of such legal representative is not the determination of any issue which is properly raised in the suit itself, and cannot operate as *res judicata* : *Case law Ref.* [Para 3]

Anno. C. P. C., S. 11 N. 13 pt. 5.

(b) Civil P. C. (1908), S. 11 — Res judicata between co-plaintiffs.

The rule of *res judicata* as between co-plaintiffs will not apply unless there is a conflict of interest among the co-plaintiffs, and a judgment defining the real rights and

obligations of the co-plaintiffs *inter se*. Further. the adjudication *inter se* between the co-plaintiffs should have been necessary to give appropriate relief to the defendants : *Case law Ref.* [Para 4]

Anno. C. P. C., S. 11 N. 47.

A. N. Lal—for Applt.; *K. N. Varma & S. Hoda—for Resps.*

Ramaswami J.—It is advisable at the outset to set out the material facts which have led to the prosecution of this appeal. Janki Pandey and Foujdar Mahton had obtained a preliminary mortgage decree against which the judgment-debtor preferred appeal to the High Court. While the appeal was pending, Janki Pandey died and in his place plaintiff and defendant 1 were substituted. After the appeal was dismissed, final decree was prepared in favour of plaintiff and defendant 1. The plaintiff brought this present suit for a declaration that he was the daughters' son of deceased Janki and being his sole heir was entitled to the entire money due on the mortgage decree. The plaintiff also asked for a temporary injunction restraining defendant 1 from withdrawing his share of the amount due on the mortgage decree. The main ground of defence was that plaintiff was not the grandson of Janki, that the suit was in any case barred by *res judicata*. The learned Munsif held that plaintiff was the sole heir of the deceased Janki, but he dismissed the suit on the ground that the rule of *res judicata* applied. In appeal the learned Subordinate Judge reversed the judgment of the Munsif holding that plaintiff was entitled to decree.

[2] The main question to be determined in this appeal is whether the claim of the plaintiff is barred by *res judicata*.

[3] It is manifest that a decision of the question under O. 22, R. 5 whether a certain person is or is not the legal representative of a deceased plaintiff is not an issue arising in the suit itself but it is really a matter collateral to the suit and one that has to be decided before the suit itself can be proceeded with. The rule empowers the Court in a case where a dispute arises as to who is the legal representative of a deceased plaintiff to appoint a legal representative for the purpose of prosecuting the suit. But the appointment of such legal representative is not the determination of any issue which is properly raised in the suit itself, *and cannot operate as res judicata*. This opinion is supported by a *catena* of authorities. In *Antu Rai* v. *Ram Kinkar Rai*, 58 ALL. 794 : (A. I. R. (23) 1936 ALL. 412) the Allahabad High Court held that a decision under O. 22. R. 5, Civil P. C., of a dispute as to which of several persons was the heir and legal representative of a deceased appellant was a decision in a summary proceeding for the purpose of continuance of the appeal and cannot operate as *res judicata* in a subsequent suit between the same persons regarding succession to the property of the deceased person, which property was not in suit in the earlier suit. The learned Judges dissented from *Raj Bahadur* v. *Narayan Prasad*, 48 ALL. 422 : (A. I. R. (13) 1926 ALL. 439) and expressly followed an earlier decision of the same High Court, *Parsotam Rao* v. *Janki Bai*, 28 ALL. 109 : (1905 A. W. N. 206). Similarly in *Samsarivsa Sarvathi* v. *Pathnmma*, 20 I. C. 950 : (25 M. L. J. 279) the Madras High Court held that the question whether a person should be admitted as the legal representative of a deceased plaintiff to continue a suit could not be regarded as one of the questions arising for decision in the suit itself, and that it was a matter to be decided at a preliminary stage before the suit itself can be proceeded with. In *Bala Bai* v. *Ganesh*, 27 Bom. 162 : (4 Bom. L. R. 980) the Bombay High Court expressed the same view. In *Chiragh Din* v. *Dilawar Khan*, 154 I. C. 985 : (A. I. R. (21) 1934 Lah. 465) the Lahore High Court held that a decision of a proceeding under O. 22, R. 5, did not bar the reagitating of the same question in a separate suit and the rule of *res judicata* did not apply in such a case. *Zalim* v. *Tirlochan Pd. Singh*, 166 I. C. 393 : (A. I. R. (24) 1937 Oudh 220 F. B.) a Full Bench of the Oudh Chief Court reached the same conclusion.

[4] Learned advocate for the appellant stressed the argument that the rule of *res judicata* as between co-plaintiffs will be applicable. But the argument is invalid. On principle the rule of *res judicata* will not apply unless there is a conflict of interest among the co-plaintiffs, and a judgment defining the real rights and obligations of the co-plaintiffs *inter se*. Further the adjudication *inter se* between the co-plaintiffs should have been necessary to give appropriate relief to the defendants (*Cf.* Wigram V. C. in *Cottingham* v. *Earl of Shrewsbury*, (1846) 15 L J. Ch. 441: (3 Hare 627).)

[5] In the last case (which deals with the cognate rule as to co-defendants) the Vice Chancellor states

"But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

[6] In *Rukhmini* v. *Dhondo Mahadu*, 36 Bom. 207 : (14 I. C. 466) it was pointed out that a finding to become *res judicata* as between co-plaintiffs must have been essential for the purpose of giving relief against the defendants. In that case the plaintiff *D* and his step-mother *R* brought a suit against *C* to recover possession of certain ornaments which formed part of the estate of *M*, the father of *D* and husband of *R*. It was held by the Court of first instance that *R* was entitled to the ornaments, because they were her stridhan, but the appellate Court held that she was entitled to them not because they were her stridhan, but because she was the absolute owner of the property. *D* then sued *R* for a declaration that he, as son and heir to *M*, was entitled to hold the decree. The defendant in reply contended *inter alia* that the suit was barred by *res judicata*. The learned Judges held that the bar of *res judi-*

cata did not apply, in asmuch as there was no final adjudication as between *R* and *D*, and in the first suit it was a matter of no consequence to the defendant therein for the purposes of the relief to be given against him whether *R* succeeded or whether *D* succeeded. The Court ought not to hold a point to be *res judicata* unless it is clear from the pleadings and the findings in the previous suit. The learned Judges referred to *Attorney-General for Trinidad and Tobago* v. *Eriche*, (1893) A. C. 518 : (63 L. J. P. C. 6) in which it was held that no Court ought to infer *res judicata* by mere arguments from a judgment in a previous suit.

[7] In *Ashgar Reza Khan* v. *Mahomed Mehdi Hossain Khan*, 30 Cal. 556 : (30 I. A. 71 P. C.) the Judicial Committee had the same question before them. The right to the profit rental of a bazar had been decided in the plaintiff's favour in a suit between rival zamindars. In the subsequent litigation all the parties claimed under the former plaintiff, and the matter in litigation was the right to possession of a share in the bazar. The Judicial Committee held that the rule of *res judicata* was not applicable, and decided the case on the construction of the conveyances and sale certificate. Lord Lindley observed :

"Under these circumstances the plea of *res judicata* might well be a defence to a hostile claim by persons asserting a title under Ahmed Reza's former opponent against those who claim under him. But their Lordships are at a loss to understand its applicability in a dispute between persons all of whom claim under Ahmed Reza himself, as the plaintiffs and the defendants in this case do. The claim under the Statute of Limitations being negatived, the present dispute must turn on the construction of the conveyance under which the parties respectively claim."

[8] In *Pratap Udainath* v. *Ganesh Narain*, A. I. R. (8) 1921 Pat. 218 : (70 I. C. 232) Sir Dawson-Miller C. J. and Jwala Prasad J., in dealing with the question of *res judicata* as between co-plaintiffs observed as follows :

"There was no dispute between the plaintiffs in that suit as to the Maharaja's right to resume or the fact that the tenure had come to an end on the death of Lachmi Nath. The principle laid down in *Cottingham* v. *Shrewsbury*, (1846) 15 L. J. Ch. 411 : (3 Hare 627) can therefore have no application. There was no conflict of interest between the co-plaintiffs and the decision cannot, in my opinion, be held binding as *res judicata* on their successors, *vide Ramachandra Narayan* v. *Narayan Mahadev*, 11 Bom. 216."

[9] Upon this review of the authorities, it is manifest that if the bar of *res judicata* is to apply, the first requisite is that there should have been active controversy *inter se* between the parties arrayed on the same side. In the second place, the adjudication *inter se* between the co-plaintiffs should have been necessary to give the appropriate relief to the defendants.

[10] Applying these principles to the present case I hold that the suit is not barred by *res judicata*, and that the lower appellate Court rightly granted a decree to the plaintiff.

[11] I should accordingly dismiss this appeal with costs.

[12] **Manohar Lall J.** — I have also come to the same conclusion that in the circumstances of the present case the principle of *res judicata* has no application. As far as 1878, their Lordships of the Privy Council pointed out in *Sheo Singh* v. *Dakho*, 5 I. A. 87 at p. 115 : (1 ALL. 688 P. C.) :

"The Court, indeed, could not properly make a binding declaration as between the adoptive mother and the adopted son, both being plaintiffs. It is no doubt, on this account that the decree, whilst it declares the right of the widow to present possession as against the defendant, is framed in a form which avoids prejudice to the rights of the plaintiffs *inter se*."

In this case the suit was to establish a Jain widow's right of inheritance to her husband's estate, and to uphold her adoption of her daughter's son, as well as his right to succeed her after her death, by avoiding the pretensions of the defendant who claimed under some title. The underlying principle has been so often stated that it is unnecessary to do more than make references to the well-known decisions of the Privy Council where they have adopted the observations of Wigram V. C. in *Cottingham* v. *Earl of Shrewsbury*, (1846) 15 L. J. Ch. 441 : (3 Hare 627) the leading case on the subject :

"If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound; but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

This rule governs the cases of co-plaintiffs also because on principle there is no distinction whether the persons are arrayed as co-plaintiffs or as co-defendants. In either case the rule of *res judicata* will apply if it was essential to decide the matter between the co-plaintiffs in order to give relief against the defendants and the matter had in fact been decided. See *Munni Bibi* v. *Tirloki Nath*, 58 I. A. 158 : (A. I. R. (18) 1931 P. C. 114), *Maung Sein Done* v. *Ma Pan Nyun*, 59 I. A. 247 : (A. I. R. (19) 1932 P. C. 161), and *Kedar Nath* v. *Ram Narain Lal*, 62 I. A. 224 : (A. I. R. (22) 1935 P. C. 139). In the case of *Rukhmini* v. *Dhondo Mahadu*, 36 Bom. 207 : (14 I. C. 466), an identical question came for decision, and it was held that a subsequent suit was maintainable by one of the co plaintiffs for a declaration that he, and not a co-plaintiff, was entitled to hold the decree. This is exactly the situation in the present case. For these reasons, I agree that the appeal should be dismissed with costs.

D.H. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 539 *[C. N. 153.]*

B. P. SINGH AND NARAYAN JJ.

Sant Prasad Singh & another — Defts. — Applts v. *Charitar Singh, Pltf. & others, Defts. — Resps.*

A. F. O. D. No. 144 of 1945, D/- 18-7-1949.

(a) Hindu law — Widow — Transferee from — Position of.

A transferee from a Hindu widow has an exceptional & onerous position & he does not occupy the same position as any other transferee in whose favour certain presumptions will be raised under ordinary circumetances. [Para 7]

(b) Specific Relief Act (1877), S. 42—Deed executed by widow binding on reversioner — Declaration that pltf is next reversioner, if can be granted—Hindu law —Reversioners.

Where a suit is instituted by a person presumptively entitled as the heir of a Hindu widow after her death for a declaration that he is the nearest reversionary heir & that *mukarrari* deed executed by her is fraudulent & without consideration & legal necessity & not binding on the reversioner, no declaration to the effect that the pltf. is the next reversionary heir of the widow's husband can be made if the pltf. fails to show that the document was not for consideration & legal necessity and not binding on the reversion. [Paras 10, 11]

Anno : Sp. Re. Act, S. 42, N. 3.

(c) Civil P. C. (1908), O. 41, R. 22—Cross-objection against co-resp.

In a suit for a declaration that the pltf. was the nearest reversionary heir of a person & that a *mukarrari* deed executed by the widow of that person was a collusive & fraudulent document & not binding on the pltf. the Ct. passed a decree that the pltf. was the nearest reversionary heir but held that the document was a genuine & valid document & was binding on the reversion. Some of the defts. who felt aggrieved by the decree appealed. The pltf. & the widow who were resps. filed cross-objections. The pltf.'s cross-objection was directed against the finding that the *mukarrari* deed was a document binding on the reversioner & the cross-objection of the widow was directed against the finding that the deed was a genuine & valid document :

Held, that, so far as the question whether the document was executed for the benefit of the estate or for legal necessity & was binding on the reversion was concerned, the cross objections of the pltf. & the widow were maintainable. [Para 14]

Anno. C. P. C., O. 41, R. 22, N 2.

(d) Hindu law — Widow — Alienation—Power to grant permanent lease so as to bind reversion.

A widow or limited heir has no power to grant a permanent lease, or a lease for a long term. so as to bind the reversion, unless it is justified by legal necessity, or it is for the benefit of the estate, or made with the consent of the next reversioners & the fact that a permanent lease was granted because some lands were lying barren & uncultivated can be of no avail. [Para 15]

B. C. De, Tarkeshwar Nath & A. K. Prasad — for Applts.; Sarjoo Prasad, D. N. Varma, M. Rahman, Gorakh Nath Singh, Chandra Sekhar Prasad & Kanhaiyaji — for Resps.

Narayan J. — This is a defts.' appeal, & it arises out of a suit for a declaration that the pltf. is the nearest reversionary heir of one Bhagwati Prasad Singh, & that a mukarrari deed executed by the widow of the said Bhagwati Prasad Singh is a collusive & fraudulent document, & not binding on the pltf. Bhagwati had a brother named Kailashpati who died in a state of jointness with him leaving a widow. Mt. Parbati Kuer, &, according to the pltf's. case, a daughter, Lachhmina Kuer, & a daughter's son, Mahabir Singh. After the death of Bhagwati Prasad Singh, Parbati Kuer, the widow of Kailashpati, applied for the registration of her name in the Land Registration Dept. with regard to one half share in the zamindari properties which had belonged to Bhagwati Prasad Singh & Kailashpati Singh; but her appln. was contested by Mt. Deomurat Kuer, the widow of Bhagwati Prasad Singh, & was ultimately rejected. The properties left by Bhagwati Prasad Singh had come into possession of the deft. 1, Mt. Deomurat Kuer, as his widow, & the pltf's. allegation is that Sant Prasad Singh, the son-in-law of Kailashpati Singh, & Mahabir Singh, Kailashpati Singh's daughter's son, began to manage the properties of the lady. Sant Prasad Singh & Mahabir Singh have been impleaded as defts. in this suit, & it is said that they in collusion & concert with one Babu Amirchand Lal, the husband of Deokumari Devi (deft. 4), & the father of Brijnandan Sahay (deft 5) got the mukarrari deed in question executed with regard to 240 bighas of land at a nominal jama of Re. 1 per bigha. The consideration mentioned in the document is Rs. 8000 which is the amount of nazrana; but it is alleged that this amount was never paid, & that the recitals in the document about the payment of consideration are all wrong.

[2] Sant Prasad Singh, Mahabir Singh, Deokumari Devi & Brijanandan Sahay contested the suit, & their contention was that the pltf. was not the reversionary heir of Bhagwati Prasad Singh, having never any connection with this family; that the deft. 3, Mahabir Singh, was Bhagwati Prasad Singh's daughter's son & hence his nearest reversionary heir; & that the mukarrari deed was a genuine & valid document executed for legal necessity & binding on the reversioner.

[3] The learned Subordinate Judge held that the pltf. was the nearest reversionary heir of Bhagwati Prasad Singh, & that Mahabir was not his daughter's son. But the mukarrari deed in question was held by the learned Subordinate Judge to be a genuine document binding on the reversion. The suit was accordingly decreed in part by the Ct. below.

[4] The applts. before this Ct. are Sant Prasad Singh & Mahabir Singh, the defts. 2 & 3 respectively, & the pltf. Charitar Singh & deft. 1, Mt. Deomurat Kuer, have filed cross-objections.

[5] The contention of the applts. is that the Ct. below was wrong in holding that the pltf. was the nearest reversionary heir of Bhagwati Prasad Singh & in overruling the plea of the defts. that Mahabir Singh was his daughter's son. The pltf.'s cross-objection is directed against the finding of the learned Subordinate Judge that the mukarrari deed is a document binding on the reversioner & the cross-objection by defendant 1 is directed against the finding of the learned Subordinate Judge that the pltf. is the nearest reversionary heir of Bhagwati Prasad Singh & also against his finding that the mukarrari deed is a genuine & valid document. This lady, Mt. Deomurat Kuer, has instituted a suit for a declaration that the mukarrari deed in question be declared null & void as this document was obtained from her after practising fraud upon her. This suit is still pending in the Ct. of the Subordinate Judge of Shahabad.

[6] Mr. D. N. Varma for the resp. 3 in whose name the mukarrari document stands argued before us that under the law the cross-objection filed by the pltf. & the lady Mt. Deomurat Kuer could not be entertained by this Ct.

[7] The most vital point in this case is whether the pltf. resp. Charitar Singh is the nearest reversionary heir of the late Bhagwati Prasad Singh, & for the determination of this point findings are required on two important questions of fact which are (1) whether the applt. 2 Mahabir Singh is the daughter's son of the late Bhagwati Prasad Singh, & (2) whether the pltf. is an agnatic relation of late Bhagwati Prasad Singh & is related to him in the manner alleged. If the applt. 2 is held to be Bhagwati's daughter's son, he would exclude the plft. even if the pltf. is held to be the nearest surviving agnatic relation of Bhagwati. Both these questions have been very elaborately discussed in the judgment of the Ct. below & a very careful appraisement of the evidence has been made by the learned Subordinate Judge. But as a Ct. of first appeal, we were bound to examine the entire evidence & we have done that with meticulous care. The only lacuna which existed in the evidence has been filled up by the examination of the lady, Mt. Deomurat Kuer, as a Ct witness in this Ct. We considered it essential to examine the lady because the question raised was whether Mahabir Singh was her daughter's son or a daughter's son of Parbati & Kailashpati Singh, the brother of Bhagwati Prasad Singh. Unfortunately, the lady had not even filed a written statement in the suit, & neither party had cared to examine her as a witness in the Ct. below, though the pltf. was anxious to show that she had never any child & the contesting defts. were anxious to show that Mahabir was her daughter's son. The defts. probably thought that they stood fortified by the recitals in the mukarrari deed executed by the lady wherein she bad described Mahabir Singh as her nati (grandson) & also by the recitals in certain letters said to have been addressed by the lady to Mahabir. But at least deft. 4, Mt. Deokumari Devi, in whose name the mukarrari document stands & her husband Mr. Amirchand Lal who, it appears, is mainly responsible for the execution of this document, should have realized that in view of the allegations made by the pltf. they had to show that they had acted in good faith in their dealings with the lady. It is needless to say that a transferee from a Hindu widow has an exceptional & onerous position & he does not occupy the same position as any other transferee in whose favour certain presumptions will be raised under ordinary circumstances. This lady has already instituted a suit for a declaration that the mukarrari deed was brought into existence by practising fraud upon her, & she has made very serious allegations against Sant Prasad Singh & Mahabir Singh & against Amirchand Lal & his wife. The distinct case which she has made out is that she did not "receive a single farthing out of the *nazarana* money mentioned in the mukarrari patta" & that:

"Sant Prasad Singh & Mahabir Prasad Singh, in collusion & concert with the defts. (meaning the defts. Deokumari Devi, wife of Amirchand Lal, & Brijanandan Sahay, minor son of Amirchand Lal), deceived her, & fraudulently got the mukarrari deed executed by her for their own benefit in favour of their creature."

Because the suit instituted by the lady is still pending, we would avoid making any observation which might prejudice the parties in that litigation or which might embarrass the Subordinate Judge in the trial of that suit; but, in view of the submission of Mr. B. C. De for the applts. before us that the lady would not have called Mahabir as her nati in this mukarrari document if he would not have been her daughter's son, it is a perfectly relevant consideration in this case whether any value should be attached to that recital in the document or not. If we find that this recital is wrong, we should not hesitate to say that, & we are bound to take into consideration in what circumstances this document had come into existence. If the contesting defts. of this suit are determined to take advantage of the recitals in the mukarrari deed & the recitals in certain letters said to have been written by, or on behalf of the lady, it will be perfectly legitimate for the lady & the pltf. to show in this litigation that the mukarrari document was obtained after practising fraud upon the lady, & that the letters were not actually sent by, or under instructions from, her. Admittedly, the lady is a purdanashin lady, & to quote the language used by the Judicial Committee in a very recent decision *Atmaram Maneklal* v. *Bai Hira*, 75 I. A. 108:(A.I.R. (35) 1948 P. C. 111)

"the law has accorded to persons in the position of the lady a high degree of protection in their dealings with persons with whom they contract."

Their Lordships cited an earlier decision of the Board in *Hem Chandra* v. *Suradhani Debya*, 67 I. A. 309 : (A. I. R. (27) 1940 P. C. 134) in which it had been held that

"a purdanashin woman of considerable business capacity was not bound by a mtge. agreement which was read but not explained to her before she signed it, because she did not understand that she was making herself personally bound to repay the borrowed money."

In this case the principle was laid down that, if the relation between the lady executant & the beneficiary is intimate, the onus on the beneficiary becomes heavier. The evidence in this case unmistakably goes to show that the lady was completely under the influence of Sant Prasad Singh, Mahabir Singh, Amirchand Lal & Amirchand Lal's wife when the document came to be executed, &, if she was completely under their influence at the time of the execution of the document, it was very easy for them to have such recitals made in the document as would be of distinct advantage to them (His Lordship discussed the evidence & concluded.)

[8] My conclusion, therefore, in agreement with the learned Subordinate Judge, is that it is well

established that Bhagwati Singh & deft. 1 had no daughter, & that Mahabir is not their daughter's son.

[9] The next question is whether this pltf. is the next reversionary heir of the late Bhagwati Prasad Singh. [After discussing the evidence his Lordship held that the pltf. was the nearest male agnatic relation of Bhagwati Prasad Singh & hence his reversionary heir. His Lordship then proceeded.]

[10-11] On the merits, therefore, the appeal of Sant Prasad Singh & Mahabir Prasad Singh is not fit to succeed ; but the decree of the learned Subordinate Judge cannot be sustained, as he has merely granted a declaration to the pltf. that he is the nearest reversionary heir of the husband of deft. 1, & has refused to him the main relief. The relief sought is described as follows :

"On adjudication of the above fact, it may be held that the mukarrari deed dated 19-5-1941 is collusive, fraudulent, without consideration & legal necessities, that it is not genuine & that it is not binding upon the pltf., the next reversioner."

One of the pleas taken by the defts. was that, because of S. 42, Specific Relief Act, the pltf's. claim was not fit to succeed, & the learned Subordinate Judge, therefore, framed the following issue: "Is the suit barred by S. 42, Specific Relief Act?" The issue was, however, answered in the negative, & the learned Subordinate Judge was of the opinion that, even if the declaration sought by the pltf. with regard to the mukarrari document could not be granted to him, he was entitled to the declaration that he was the nearest male agnate & the reversionary heir of the husband of deft. 1. But, in my opinion, the view taken by the learned Subordinate Judge is erroneous, & he was wrong in not following the decision of the Judicial Committee in *Janaki Ammal* v. *Narayanasami Aiyar*, 43 I. A. 207 : (A. I. R. (3) 1916 P. C. 117). He has tried to distinguish the P. C. case, but I am not quite able to understand his reasoning in support of his view that the facts of the P. C. case are so much distinguishable from the facts of this present case, that the principle laid down by their Lordships cannot be applied in this case. What their Lordships of the Judicial Committee held in *Janaki Ammal* v. *Narayanasami Aiyar*, 43 I. A 207 : (A. I. R. (3) 1916 P. C. 117) has been explained & summarized by their Lordships themselves in a subsequent decision, *Saudagar Singh* v. *Pardip Narayan Singh*, 45 I. A. 21 : (A. I. R. (4) 1917 P. C. 196). Their Lordships say that the point of that case is this :

"There was a Hindu widow entitled to an estate, & a suit was brought by a person, presumptively entitled as heir after her death, to prevent waste. It was held that there was no waste at all, & the question arose whether, under those circumstances, it was proper to give the persons presumptively entitled a declaration of their title as presumptive, or, as sometimes called reversionary heirs, & it was held by this Board, that no such declaration ought to be made."

In this case also, there is a Hindu widow entitled to an estate, & a suit has been instituted by a person presumptively entitled as her heir after her death for a declaration that a mukarrari deed executed by her is fraudulent & without consideration & legal necessity & not binding on the reversion. In the P. C. case, it was held that there was no waste at all, & in this case it has been held that the mukarrari document is neither fraudulent nor without consideration & legal necessity, & that it is binding on the reversion & the pltf. as the reversionary heir. Their Lordships of the Judicial Committee held that, no waste having been proved, the title of the pltf. as presumptive heir could not be declared. This case is certainly analogous to the case before their Lordships, inasmuch as the question in this case also arises as to whether, after the finding that the document was for consideration & legal necessity & binding on the reversion, it could be merely declared that the pltf. was the next reversionary heir of the husband of deft. 1. I feel no hesitation in holding that the principle of *Janaki Ammal* v. *Narayanasami Aiyar*, 43 I. A. 207 : (A. I. R. (3) 1916 P. C. 117) is applicable to this case & that no declaration to the effect that the pltf. was the next reversionary heir of the husband of deft. 1 could have been made in this case, if the pltf. had failed to show that the document was not for consideration & legal necessity & not binding on the reversion. In *Saudagar Singh's case*, 45 I. A. 21 : (A. I. R. (4) 1917 P. C. 196), their Lordships of the Judicial Committee referred to S. 42, Specific Relief Act, & also made mention of the following illustration given in that section :

"The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity & was therefore void beyond the widow's lifetime."

This illustration & the decision of the Judicial Committee in *Janaki Ammal's case*, (43 I. A. 207: A. I. R. (3) 1916 P. C. 117) as explained by their Lordships in *Saudagar Singh's case*, (45 I A 21 : A. I. R. (4) 1917 P. C. 196) appear to be a settler on the point, &, in my opinion, the learned Subordinate Judge, after he had refused to set aside the alienation should not have granted a declaration only to this effect that the pltf. was the presumptive heir of the late Bhagwati Prasad Singh, the husband of deft. 1. The applts., therefore, were right in submitting that, the mukarrari deed in question having been held to be a document binding on the reversion, the Ct. below had erred in granting a declaration to the pltf. that he was the nearest reversionary heir of the late Bhagwati Prasad Singh.

[12] The pltf., as I have already stated, has filed a cross-objection in this case, & his cross-objection is directed against the finding of the learned Subordinate Judge that the mukarrari document is binding on him. Mr. D. N. Varma on behalf of the defts. has strenuously argued before us that neither the cross-objection of the pltf. nor the

cross-objection of the lady Mt. Deomurat Kuer is entertainable. So far as the cross-objection of the lady is concerned, it raises the following three points: (1) That the Ct. below was wrong in holding that the plaintiff was the nearest agnatic relation of her husband & hence his reversionary heir. (2) That the Ct. below should have held that the mukarrari deed was not a valid document, & had been executed after practising fraud upon her. (3) That the Ct. below should have held that the mukarrari deed was not executed for the benefit of the estate, & should have rejected the evidence adduced by the defts. for proving that it was a document executed for legal necessity.

[13] The first contention fails in view of my finding that the pltf. is the nearest male agnate & the reversionary heir of the late Bhagwati Prasad Singh, & the second contention is beyond the scope of this suit. As already stated, a suit has been instituted by the lady for setting aside the mukarrari deed on the ground of fraud, & the issue that has to be decided in that suit cannot be decided by us in this present suit. The third point has been raised by the pltf. as well in his cross-objection, &, if the pltf's. cross objection is maintainable, the cross-objection of the lady also on this point can be entertained. The real question, therefore, is whether the cross-objection filed by the pltf. is maintainable. The contention of Mr. Varma, who appeared for resp. 3, Dulhin Deokumari Davi, wife of Amirchand Lal, in whose name the mukarrari document stands, was that neither the cross objection of the pltf. nor the cross-objection of the lady could be entertained, because the provisions of O. 41, R. 22, Civil P. C., do not enable the resp. as a matter of right, to urge cross-objection against a co-resp. Mr. Varma has relied on certain decisions of this Ct. & other High Courts, & he thinks that it is now a settled law that where cross-objections filed by a resp. are directed solely against a co-resp. whose case has nothing in common with that of the applt. they are not maintainable. The important decisions of this Ct. which have been relied on by Mr. Varma are those reported in *Mt. Chanda Bibi* v. *Mohanram Sahu*, 13 Pat. 200: (A I.R. (21) 1934 Pat. 134) & *Deo Narain* v. *Ganesh Ram*, A.I R. (23) 1936 Pat. 604: (135 I. C. 936). In the former case, Dhavle J. with whom Saunders J. agreed, held as follows:

"A cross-objection against the applt. stands on a different footing from an objection against a co-resp. the former comes from a party who is content with the decree of the lower Ct. provided his opponent does not appeal, while the resp. who wishes to urge an objection against a co-resp. is, as a general rule, merely availing himself of an appeal by another party relating to other matters to urge at a late stage what he could & should have urged by way of appeal earlier. There is little reason to drive the former to file an unnecessary appeal as there is to let the latter act beyond the period of limitation prescribed for appeals; & yet these would be the results if cross-objections were not permitted against the applt. or objections were permitted as a general rule between co-resps. I would, therefore, hold that the pltfs. resps. are not entitled, as a matter of right, to urge their so-called cross-objection against those resps. who were defts. 2 to 6 in suit No. 57 below. But objections of this kind, not coming under O. 41, R. 22, have been entertained under O. 41, R. 33, in cases of an exceptional kind."

It is to be noted that his Lordship was careful enough to point out that the pltfs.-resps. were not, as a matter of right, entitled to urge cross-objections against the resps. who were defts. 2 to 6. His Lordship further pointed out that an objection of this kind, even if it does not come under O. 41, R. 22 can be entertained under O. 41, R. 33. This case cannot be regarded as an authority for the proposition that in no case can a cross-objection filed by a resp. as directed solely against a co-resp. whose case has nothing in common with that of the applt. be entertained. In the other case (*Deo Narain* v. *Ganesh Ram*), (A I. R. (23) 1936 Pat. 604: 165 I. C. 936) the cross-objection in question was found to be nothing more than an old appeal which had been dismissed as time-barred. The outstanding fact of this case was that an applt. who had filed an appeal beyond time, had attempted to take the same points which he had taken in his memorandum of appeal in a cross-objection. The last para of the judgment of Wort J. runs as follows:

"In my judgment, as I have already stated, the cross-objection in the present case is nothing more than the old appeal which was dismissed & therefore in my opinion does not lie. The cross-objection is therefore dismissed."

The fact which weighed very much with his Lordship, therefore, was that the cross-objection was nothing more than an old appeal which had been dismissed as-time-barred. On the other hand, there are certain other decisions which have definitely laid down, on a consideration of the provisions of R. 22 of O. 41 that it is open to a deft. resp. to file a cross-objection against a co-resp. & these decisions are *Munisamy Mudaly* v. *Abbu Reddy*, 38 Mad. 705: (A. I. R. (2) 1915 Mad. 648 F. B) & *Vankata Rao* v. *Satyanarayanamurthy*, A. I. R. (30) 1943 Mad. 698: (I. L. R. (1944) Mad. 147 F. B.). Both are F. B. decisions, & the question raised before us has been elaborately discussed by Leach C. J. & Krishnaswami Ayyangar, J. in the latter case. I would quote the following passage from the judgment of Krishnaswami Ayyangar J.:

"Where there is a decree for a part only of a claim, it means that it is party in favour of the pltf. & partly in favour of the deft. & when the resp. is given liberty by the rule to support the decree it is to enable him to support that part of the decree which is really in his favour. In doing so, he is not attacking the decree in so far as it is in favour of the pltf. nor is he supporting it; for obviously he is not interested in supporting it at all. In fact, he is only attempting to prevent the pltf. from increasing the burden of the liability beyond the limit fixed by the decree appealed against. The word "decree" in this rule may be taken to mean decision as held in *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar*, 50 Mad. 866: (A.I.R. (14) 1927 Mad. 801) but that does not solve the difficulty. What is necessary to bear in mind is that the principle which is applicable to a simple case where a claim is wholly decreed or wholly dismissed, is equally applicable to a case where the claim is allowed in part & dismissed as regards the rest. In the latter class of cases,

namely, where there is a decree for a part only of a larger claim, the decision is to be understood as comprising a decree in favour of the resp. to the extent to which the Ct. below had disallowed the claim of the applt. So understanding it, there is no difficulty whatever. It is by an omission to see clearly this double aspect when there is a decree for a part only of a claim, that errors are likely to occur."

[14] In the present case also, we find that the suit was decreed in part, & to quote the language of Krishnaswami Ayyangar J., we have in reality what may be described as a double or composite decree. In fact, there is something more in this case, & it is this that the decree passed by the learned Subordinate Judge in favour of the pltf. is an infructuous & an invalid decree, inasmuch as it was passed in contravention of the provisions of S. 42, Specific Relief Act. After the finding that the mukarrari document was a document binding on the reversion, the Ct. below could not grant a decree to the pltf. resp. that he was the nearest reversionary heir of the husband of deft. &, therefore, the pltf. was bound to urge by way of cross-objection in this case that the view taken by the learned Subordinate Judge was wrong, & that the decree which had been passed in his favour did not mean anything, unless it was declared that the mukarrari document was a document not binding on the reversion. It is therefore that the language of R. 22 of O. 41 & of R. 33 of O. 41 has been made very wide. Rule 22 says that any resp. though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Ct. below but take any cross objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate Ct. within the time prescribed. This pltf.-resp. has the right to support the decree on the grounds decided against him by the Ct. below, which are that the mukarrari document is a document binding on the reversion, &, if he can support the decree on these grounds, he can certainly file a cross-objection embodying the grounds on which he wants to support the decree. This decree was insupportable without a declaration that the mukarrari document was not binding on the reversion, &, therefore, it was quite open to the pltf.-resp. to urge that the document had been executed without any legal necessity & did not confer any benefit upon the estate, & was consequently not binding on him as the reversioner. In fact, the facts of this present case are somewhat peculiar & quite dissimilar to the facts of the other cases which had to consider the meaning & the effect of R. 22 of O. 41 & for the simple reason that the decree passed in this suit, was unsustainable in absence of a declaration that the mukarrari document was not binding on the reversion, I think it was quite open to the pltf.-resp. to support this decree on the ground that the mukarrari document had not been executed for the benefit of the estate, & was consequently not binding on the reversion. I have already pointed out with reference to the relief portion of the plaint that it was the mukarrari document which was sought to be set aside. The learned Subordinate Judge misdirected himself when he granted a declaration to the pltf. that he was the nearest reversionary heir of Bhagwati Prasad Singh without granting the declaration that had been sought with regard to the mukarrari document. The pltf.-resp. is certainly entitled to show, that the decree is erroneous on this account, &, under the provisions of R. 22 of O. 41 he is entitled to ask this Ct. to rectify the error committed by the learned Ct. below & to pass a proper & legal decree. In this view, I am of the opinion that the cross-objection of the pltf. is maintainable. It is needless to point out that R. 33 of O. 41 has given even wider powers to the Ct. Under this rule, the Ct. has power to make a proper decree, & such power can be exercised in favour of all or any of the parties even though they may not have filed an appeal or objection. We cannot conceive of a better case in which we can act according to the provisions of R. 33 of O. 41. Here, on account of an erroneous view having been taken by the Ct. below an invalid or an infructuous decree has been passed, & we cannot refuse to hear the pltf.-resp. if he says that the decree passed by the Ct. below is erroneous, & that it should be corrected or amended in the manner urged by him. If the cross-objection filed by the pltf. resp. is entertainable, as, in my opinion, it is in so far as it seeks to have the mukarrari document set aside for want of necessity & benefit to the estate, then the cross-objection of the lady Mt. Deomurat Kuer as well, in so far as it relates to this point only, is entertainable. I was not able to understand the argument of Mr. Varma in this case that the lady's cross-objection is not maintainable, because she cannot derogate from her own grant. There is no bar to the lady showing that the document which she had executed was a fraudulent document, & that there was no necessity for it. The question whether it is a fraudulent document or not will be properly decided in the pending suit to which reference has already been made; but the question whether the document is for legal necessity or for the benefit of the estate is a question which can be properly decided only in this present suit. I, therefore, hold that, so far as the question whether the document was executed for the benefit of the estate or for legal necessity & is binding on the reversion is concerned, the cross-objection of the pltf. as well as the cross-objection of Mt. Deomurat Kuer are maintainable.

[15] The only other point to be decided is whether the mukarrari document is a document which can bind the reversion. As already pointed out, the document in question is a perpetual mukarrari patta with regard to 152.76 acres of land equivalent to about 244 bighas, & it was executed on 19-5-1941, for a consideration of Rs. 8000. The

total rent payable by the mukarraridar is Rs. 240 including cesses. By the execution of this document, two rehan bonds (Exs. D 3 & D-4) executed by deft. 1 herself in favour of defts. 4 & 5 on 22 12-1939, for a consideration of Rs. 3000 each were redeemed. There was further a redemption of a rehan bond executed by Jadunandan Singh, the father of Bhagwati Prasad Singh, of the value of Rs. 799. Exhibits D (3) & D (4) had been executed by the lady for satisfying another rehan bond executed by Jadunandan Singh & a rehan bond executed by Bhagwati Prasad Singh. Rupees four thousand was required for the redemption of the rehan bond executed by Jadunandan Singh in favour of Tirlok Singh & Aslok Singh, & Rs. 700 was required for the redemption of the rehan bond executed by Bhagwati Prasad Singh in favour of Ghagh Singh. Besides these two documents, the lady herself had executed a rehan bond in favour of Sant Mahto for a consideration of Rs. 400, & this rehan bond was also satisfied after the execution of Exs. D (3) & D (4), the consideration of Exs. D (3) & D (4) being Rs. 6000. Some petty amounts had been required for meeting the expenses of certain cases, & Rs. 644 had been taken for repairing a portion of the residential house. From a perusal of the mukarrari document, also it appears that about Rs. 700 was required for reconstructing a portion of the residential house, & Rs. 500 was required for satisfying petty loans which had been incurred for the treatment & the sradh expenses of Kailashpati Singh's wife & for repaying a loan of Rs. 100 which had been incurred for the treatment of Mahabir Singh & for performing the sataisa ceremony of his son The area mortgaged under the document Ex D (3) was 19.72 acres, & the area mortgaged under the document Ex. D (4) was 24.89 acres. The total is 44.61 acres corresponding to 72 bighas. Besides this, 12 bighas had been mortgaged by virtue of the document Ex. D (1) which had been executed by Jadunandan Singh in favour of Tirlok Singh & Aslok Singh on 20-10-1896. The areas mortgaged under the rehan bond of 1891 executed by Jadunandan Singh, under the rehan bond executed by Bhagwati Singh in favour of Ghagh Singh, & under the rehan bond executed by the lady herself in favour of Sant Singh were 50 bighas, 4 bighas 11 kathas, & 4 bighas, respectively. Thus, the total area which had been mortgaged under these documents was only 59 bighas. For satisfying these rehan documents & for payment of certain petty loans & also for certain necessary expenses the lady has executed a permanent mukarrari patta with regard to 244 bighas of lands at a rent which has been fixed for all time. If the intention was merely to redeem the rehan with regard to 50 bighas executed by Jadunandan in favour of Tirlok & Aslok, the rehan with regard to 4 bighas 11 kathas executed by Bhagwati Singh in favour of Ghagh Singh, & the rehan with regard to 12 bighas executed by Jadunandan Singh in favour of Tirlok Singh & Aslok Singh, it was not at all necessary to part with such a vast area of land belonging to the estate. Assuming that the lady had executed the documents dated 22-12-1939, for legal necessity, & required money for redeeming the rehan bond of 1896, & also required Rs. 500 for repayment of the petty loans incurred for treatment, sradh & sataisa expenses, & Rs. 685 for reconstructing a portion of the house, it was not at all necessary to transfer 244 bighas of land permanently. The learned Subordinate Judge was very much influenced by the consideration that by executing the mukarrari document, the lady made 160 bighas of barren & unculturable lands a source of permanent income to the estate. & redeemed rehans with regard to 84 bighas of lands, & thus added them to the corpus of the estate. It is impossible to agree with the learned Subordinate Judge that 84 bighas of lands, that is the lands covered by documents Exs. D (3), D (4) & D (1), had been added to the corpus of the estate. These lands have rather been lost to the estate for ever, & even if the lady wanted to redeem the old rehans, she could have done that by executing other rehan decuments. I find no justification for a complete alienation of these 84 bighas of lands which can never come back to the estate now, if the mukarrari document is held to be a document binding on the reversion, & it is not at all a sound argument to urge that about 169 bighas of barren & unculturable lands have become a source of income to the estate because of the execution of the mukarrari deed. A widow or limited heir has no power to grant a permanent lease, or a lease for a long term, so as to bind the reversion, unless it is justified by legal necessity, or it is for the benefit of the estate, or made with the consent of the next reversioners, & the argument that a permanent lease was granted because some lands were lying barren & uncultivated can be of no avail. The Judicial Committe has laid down that, if there is no necessity, benefit or consent, a limited owner cannot create a new & fixed rent for all time, though such rent be adequate at the time of fixing it. In *Shibessuree Debia* v. *Mothoora Nath*, 13 M. I. A. 270 : (2 Sar. 528 P.C.), their Lordships of the Judicial Committee laid down as follows :

> "To create a new & fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent, from time to time, would be a breach of duty in a sebait, & is not, therefore, presumable."

It is not necessary to say that the power of a limited owner to alienate a property in her possession is analogous to that of a shebait or mahanth to alienate debottar properties or to that of a manager of an infant heir as defined by the Judicial Committee in *Hunoomanpersaud* v. *Mt. Babooee Munraj*, 6 M. I. A. 393 : (1 Sar. 552 P. C.). In *Abhiram* v. *Shyama Charan*, 26 I. A. 148 : (36 Cal. 1003 P. C.), their Lordships observed as follows :

"The second question is whether, this being so, the mohunt had power to grant a mokarrari pottah of the mouzah. It is well settled law that the power of the mohunt to alienate debottar property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity : *Prosunno Kumari* v. *Golab Chand*, 2 I. A. 145 : (14 Beng. L. R. 450 P. C.). In the case of *Kanwar Doorganath* v. *Ram Chunder*, 4 I. A. 52 : (2 Cal. 341 P. C.) a mokarrari Pottah of dewattar lands was supported on the ground that it was granted in consideration of money said to be required for the repair & completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of *Shibessuree Debia* v. *Mothooranath*, 13 M. I. A. 270 : (2 Sar. 528 P. C.), that apart from such necessity to create a new & fixed rent for all time, though adequate at the time, in lieu of giving the endowment benefit of an augmentation of a variable rent from time to time, would be a breach of duty, in the mohunt. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the pottah of 1860."

[16] In this case also, it cannot be said that there were any special circumstances of necessity to justify a grant of 244 bighas of lands by the patta of 1941. It need hardly be said that the prices of lands have considerably gone up since the date of the execution of the patta, & the obvious result is that properties which could have been regarded very valuable even at the present time, that is, in the year 1949, were parted with permanently in the year 1941 for a consideration of Rs. 8000 only. It really shocks one's conscience to find that 244 bighas should have been transferred for a consideration of Rs. 8000 only & at an annual rent of Rs. 240. In *Palaniappa Chetty* v. *Deivasikamony Pandara Sannadhi*, 44 I. A. 147 : (A. I. R. (4) 1917 P. C. 33), their Lordships relied on the two decisions mentioned above, & observed as follows :

"Three authorities have been cited which established that it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a fixed rent, however, adequate that rent may be at the time of granting, by reason of the fact that by this means the debottar estate is deprived of the chance it would have, if the rent were variable, of depriving benefit from the enhancement in value in the future of the lands leased. These authorities are *Shibessouree Debia* v. *Mothooranath*, 13 M.I.A. 270 at p. 275 : (2 Sar. 528 P. C.), *Seena Peena Reena Mayandi* v. *Chokkalingam*, 31 I. A. 83 at p 88 : (27 Mad. 291 P. C.) & *Abhiram* v. *Shyama Charan*, 36 I. A. 148 at p. 165 : (36 Cal. 1003 P. C.).

No doubt these cases dealt with agricultural lands, but no reason can be suggested why the principles they establish should not apply to a building site situate in the street of a village, as is the site in the present case. It may appreciate in value just as the land may. Moreover, if for the reasons above mentioned the grant of a lease in perpetuity of debottar lands at a fixed rent requires to be justified by unavoidable necessity, it is difficult to see why an absolute alienation in perpetuity of the same kind of land in consideration of a premium should not equally require to be justified by the same kind of necessity, since it brings about quite as completely the same prejudicial results."

There can be no doubt that these lands have very much appreciated in value, & if the prices of the lands are fixed on the basis of selling rates prevailing at present, the conclusion is irresistible that the estate has suffered a very great loss by the execution of this document. Even the learned Subordinate Judge says that it is obvious from the statements of Mr. Amirchand Lal that he has made a good bargain out of this transaction. But learned Subordinate Judge thinks that he has no reasons to suspect that Mr. Amirchand Lal has made an unconscionable bargain. As already pointed out, it was a clear breach of duty on the part of a lady to grant a mukarrari patta at a fixed rent, & nobody can dispute that the lands have now so much appreciated in value that, if they are disposed of at present, they may fetch a very high price, & probably ten times more than Rs 8000, which is the consideration of this document. This was, therefore, an absolutely imprudent transaction entered into by the lady who, as I have already said, was completely under the influence of Sant Mahabir, Amirchand Lal & Amirchand Lal's wife. This is the glaring instance of a case in which a lady of a very respectable family has, under evil influences, parted with a very valuable property for a nominal consideration, & the way in which this particular lady has acted shows that the spirit of the Hindu law not to give undue liberty to a woman, whatever be her age or condition in life, should still be maintained.

[17] The cross-objection of the pltf., therefore, succeeds, & it is held that the permanent lease granted by the lady was not justified by legal necessity, & was not for the benefit of the estate. The mukarrari deed is not binding on the reversion & on the pltf. as the nearest reversionary heir of the husband of deft. 1. The cross objection of the lady succeeds only in part, that is, only in so far as it urges that the Ct. below should have held that the mukarrari deed was not executed for the benefit of the estate.

[18] The appeal is dismissed with costs to the pltf.-resp. The cross objection of the pltf.-resp. is allowed with costs to be realized from the applts. & the resps. other than Mt. Deomurat Kuer, & the decree of the Ct. below is varied to this extent that it is further declared that the mukarrari deed in question is not binding on the reversion & on the pltf. as the reversionary heir. The pltf.-resp. would get full costs of the Ct. below which would be realized from the defts. other than deft. 1. The cross-objection of the lady Mt. Deomurat Kuer is allowed in part, as indicated above; but she will not be entitled to any costs.

[19] **Sinha J.** — I agree.

V.R.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 546 *[C. N. 154.]*

SARJOO PRASAD J.

Joynarain Sarogi—Petnr. v. *Brojendra Nath Misra & others — Opposite Party.*

Civil Revn. No. 614 of 1950, D/- 17-11-1950.

Civil P. C. (1908), O. 39, Rr. 1, 2 — Injunction in mandatory form.

In a suit for permanent injunction the trial Ct. granted an ad interim injunction restraining the deft. from constructing a building. Eventually after hearing parties the Ct. dissolved the injunction on 1-3-1950. Against this order the pltf. filed an appeal on 7-3-1950 & the appellate Ct. also granted an ad interim injunction. In the meantime the deft. taking advantage of the order of the trial Ct. vacating the order of ad interim injunction & the delay in filing appeal hastened with the construction.

***Held* that by the conduct of the deft. he was trying to defeat any appeal which might eventually be filed by the pltf. & the order which might be passed in his favour. Hence that part of the construction which was made by the deft. between 1-3-1950 & 7-3-1950 should be demolished.** [Para 6]

Anno. C. P. C., O. 39, R. 2, N. 7.

B. C. De & S. K. Sarkar —for Petnr. ; *S. K. Mazumdar — for Opposite Party.*

Order. — This petn. in revn. has been filed by the pltf. against an order of the learned Munsif of Purulia dated 29-5-1950 in Title Suit No. 47 of 1950.

[2] The facts leading to this appln. may be briefly stated as follows :

[3] The pltf. instituted the suit in question for a permanent injunction against the principal defts. who are the opposite party here restraining them from causing obstruction to a certain latrine by making constructions so as to prevent the *methar* from servicing the latrine in question & also for removal of the construction. The pltf.'s case is that he purchased a house belonging to one Hamidunnisa on 10-8 1948. He has been making certain construction and has also constructed a latrine by the side of the privy in the house of Hamidunnisa. He alleges that the defts. have their residential house contiguous east of the pltf.'s land & building, that the latrine in the pltf.'s house used to be serviced through a galli from a very long time & that the defts. commenced constructing a gate & a door over the said galli near the trap-door of the pltf 's latrine & thereby the pltf. apprehended that the defts. by such a construction would stop the servicing of the pltf 's latrine through the galli. He, therefore, instituted the suit with the prayers aforesaid. The day when the suit was instituted, that is, on 4-2-1950 the pltf. also filed an appln for ad interim injunction restraining the defts. from constructing the building so as to block the passage in question & the learned Munsif, before whom the suit was filed, granted an ad interim injunction & issued notice upon the defts. opposite party to show cause against this order. Eventually after hearing the parties the learned Munsif on 1-3-1950, dissolved the injunction. Against this order the petnr. preferred an appeal to the learned Dist. J. of Manbhum-Singbhum on 7-3-1950. He could not prefer the appeal earlier because the Holi holidays intervened & the learned Dist. J., after hearing the parties, on 11-5-1950, allowed the appeal. The learned Dist. J, in doing so ordered that the ad interim order of injunction passed by the learned Munsif should be made absolute till the disposal of the suit. I should have stated that on the day the appeal was filed the appellate Ct. also had granted an ad interim injunction order. In the meantime it appears the defts opposite party taking advantage of the order of the learned Munsif vacating the order of ad interim injunction on 1-3-1950 & the delay, which was very natural, in filing the appeal on 7-3-1950, hastened on with the construction. The petnr. moved the learned Munsif for directing the opposite party to remove the construction which had been made during this period, that is, between the date of the vacating of the ad interim order by the learned Munsif on 1-3-1950 & the date of filing of the appeal & the ad interim injunction order by the appellate Ct. on 7-3-1950. The learned Munsif by his order dated 29-5-1950 refused to interfere & hence the present appln. The Munsif observed in his order that the construction by the defts. during the period was legally authorised because there was nothing to prevent the deft.-petnrs. from doing so.

[4] It is contended by Mr. B. C. De on behalf of the petnr. that by virtue of the appellate order of the learned Dist J. he was relegated to the same position as he occupied when the ad interim order was passed by the learned Munsif on 1-3-1950, & any construction made with indecent haste by the defts. opposite party during the period in question should have been ordered to be demolished because the conduct of the opposite party really amounted to over-reaching the Ct. knowing as they did not (that?) an appeal against the order of the learned Munsif would be filed by the petnr. without any unreasonable delay. In support of his contention he relies upon several English & Indian authorities. He refers to a decision in *Daniel* v. *Ferguson*, (1891) 2 Ch. D. 27 : (39 W. R. 599). In that case the deft. in an action to restrain from building so as to darken the pltf.'s lights, upon receiving notice of motion for injunction put on a number of extra men & by working night & day ran up his wall to a height of nearly 40 feet before receiving notice that an *ex parte* interim injunction had been granted. It was held that the deft. had endeavoured to anticipate the action of the Ct by hurrying on his building & that what he had erected ought, therefore, to be at once pulled down, without regard to the ultimate result of the action. In the present case, which stands on a stronger footing, ad interim order of injunction had already been passed by the learned Munsif but later he had vacated the order though immediately an appeal was preferred & a fresh ad interim order obtained by the petnr. & finally the learned Dist. J. in allowing his appeal restored & made absolute the ad interim order passed by the learned Munsif. The other case to which reference has been made is a decision in *Von Joel* v. *Hornsey*, (1895) 2 Ch. D. 774 : (65 L. J. Ch. 102). In that case the deft. was erecting a building near the pltf.'s house. The pltf. warned the deft. that if he proceeded in building the house he would sue to restrain him on account of obstruction to

pltf.'s lights. The pltf. ultimately filed a suit but the deft. evaded service of writ for several days & in the mean time continued the building till substituted service had to be effected on him. It was held, following the decision in *Daniel's case*, (1891-2 Ch. D 27 : 39 W. R. 599), that the pltf. was entitled to an interlocutory mandatory injunction directing the deft. to pull down so much of the building as had been erected after the pltf. had warned the deft. that he intended to bring an action. The cases referred to above have been followed in the various H. Cts. in India, viz , *Israil* v. *Shamser Rahman*, 41 Cal. 436 : (A.I.R. (1) 1914 Cal. 362), *Kandaswami Chetty* v. *Subramania Chetty*, 41 Mad 208 : (A. I. R (5) 1918 Mad. 588) & *Gopayya* v. *Ankayya*, A. I. R (14) 1927 Mad. 210 : (99 I. C. 566). The decision in *Israil* v. *Shamser Rahman*, 41 Cal 436 : (A. I. R (1) 1914 Cal. 362) is by Mukherji & Beachcroft JJ. & although the facts in that case were different, their Lordships after a review of various authorities, observed as follows :

"In the case before us, therefore, *prima facie*, the defts. should not be allowed to proceed to complete the building which they have erected. But the case for the pltfs. is materially strengthened when we bear in mind the conduct of the defts. The Ct. of first instance found that there was good reason to hold that a substantial portion of the building had been erected after the defts. had become aware of the institution of this suit & of the appln. for temporary injunction. In case of this description, the Ct. would, if necessary, proceed not only to grant a temporary injunction restraining the further erection of the building but also to direct that the building already erected be taken down."

[5] Here it is not disputed that after the ad interim order had been vacated by the learned Munsif & the appeal came to be filed by the petnr. against that order the deft. opposite party continued the progress of the construction regardless of these circumstances & their conduct quite clearly shows that they were trying to defeat any appeal which may eventually be filed by the petnr. & any order which may happen to be passed in his favour. In these circumstances the learned Munsif completely misdirected himself in assuming that there was nothing wrong on the part of the defts. in proceeding with the construction and the order which has been passed by him is, therefore, materially illegal & irregular & has the effect of nullifying the order which was passed by the learned Dist. J. on appeal vacating the previous order of the Munsif.

[6] At one stage I was inclined to think that in spite of the irregularity of the order I should refuse to interfere. I was impressed with the argument on behalf of the opposite party that the pltf.'s house was not in occupation & that the privy in question for the obstruction of which this injunction was claimed was not in use by the pltf. In fact it was on this basis that the learned Munsif passed his order dated 1-3-1950. The appellate Ct. in setting aside the order did not specifically deal with the position. I find, however, from a subsequent order passed by the same learned Munsif that he practically assumes that even though the pltf.-petnr. is in occupation of the house & has been using the latrine, his suffering caused by the obstruction of the passage is self-invited. In view of this I am prepared to assume the correctness of the contention of Mr. De that probably the house & the latrine are being used by the pltf. For these reasons I think that the decision of the learned Munsif must be set aside & the appln. be allowed with costs to the petnr.; hearing-fee two gold muhars. I direct that that part of the construction which was made by the deft.-petnrs. within the two dates, that is, 1-3 1950 & 7-3 1950, should be demolished.

D.H. *Revision allowed.*

A. I. R. (38) 1951 Patna 548 *[C. N. 155.]*

REUBEN AND JAMUAR JJ.

Mahadeo Choudhary & others — Petnrs. v. *Sm. Parbati Devi & others — Opposite Party.*

Appeal No. 85 of 1948, D/- 1-2-1950, for leave to appeal to Federal Court (Supreme Court) againt order of Reuben J., in Civil Revn. No. 891 of 1945.

Letters Patent (Pat), Cl. 31—Appeal from order in revn. of Single Judge — Civil P. C. (1908), S. 111.

Clause 31 is governed by S. 111, Civil P. C., & therefore no appeal shall lie under the clause to the F. C. (S. C.) from an order in revn. of a Single Judge. The word "otherwise" in the clause does not include an order passed in the exercise of revisional jurisdiction.

[Paras 3, 4 and 6]

Anno. C. P. C., S. 109, N. 5, Pt. 18 ; S. 111, N. 3 Pt. 1.

J. N. Sahay—for Petnrs.; Guneswar Prasad & R. P Srivastab—for Opposite Party.

Reuben J. — This petn. for leave to appeal to the F. C., now the Supreme Ct. is directed against an order passed by me, sitting singly. in Civ. Revn. No. 891 of 1945. It must be rejected on the preliminary ground that such a petn. is not maintainable.

[2] I reproduce below the relevant provisions of the Civil P. C. & the Letters Patent of the Patna H. C. :

S. 109, C. P. C. — "Subject to such rules as may from time, be made by His Majesty in Council . . . . & to the provisions hereinafter contained an appeal shall lie to His Majesty in Council—

(a) from any decree or final order passed on appeal by a H. C..... ..

(b) from any decree or final order passed by a H. C. in the exercise of original civil jurisdiction ; &

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council."

S. 110, C. P. C. — "In each of the cases mentioned in Cls. (a) & (b) of S. 109, the amount or value of the subject-matter of the suit in the Ct. of the first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Ct. immediately below the Ct. passing

such decree or final order, the appeal must involve some substantial question of law."

S. 111, C. P. C. — "Notwithstanding anything contained in S. 109, no appeal shall lie to His Majesty in Council —

(a) from the decree or order of one Judge of a H. C. constituted by His Majesty by Letters Patent or of one Judge of a Division Ct....."

S. 112, C. P. C. — "(1) Nothing contained in this Code, shall be deemed —

(a) to bar the full & unqualified of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the P. C., & for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee....."

Cl. 10, Letters Patent. — "And we do further ordain that an appeal shall lie to said the H. C. of Judicature at Patna from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction ....., & not being an order made in the exercise of revisional jurisdiction, & not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S. 107, Govt. of India Act, or in the exercise of criminal jurisdiction) of *one Judge* of the of the said H. C. or *one Judge* of any Division Ct. pursuant to S. 108, Govt of India Act, & that notwithstanding anything hereinbefore provided an Appeal shall lie to the said H. C. from a judgment of *one Judge* said H. C. or *one Judge* of any Division Ct. pursuant to S. 108, Govt. of India Act ..in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Ct. subject to the superintendence of the said H. C. where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from *other judgments of Judges* of the said H. C. or of such Division Ct. shall be to us.....as hereinafter provided."

Cl. 31, Letters Patent. — "And we do further ordain that any person or persons may appeal to us,.....in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the H. C. of Judicature at Patna made on *appeal*, & from any final judgment, decree or order made in the exercise of *original jurisdiction by Judges* of the said H. C. or of any Division Ct. from which an appeal does not lie to the said H. C. under the provisions contained in Cl. 10 of these presents; provided, in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees ; or from any other final judgment, decree or order made either *on appeal or otherwise as aforesaid*, when the said H. C. declares that the case is a fit one for appeal to us,....."

Cl. 41 Letters Patent.—"And we do further ordain & declare that all the provisions of these Our Letters Patent are *subject to the Legislative powers* of the Governor General in Legislative Council ....."

[3] The right of appeal with special leave is reserved by S. 112 of the Code. Subject to this, it will be observed, S. 111 forbids an appeal from the decision of a single Judge. Mr. Das, appearing for the petnrs. contends that an appeal lies in the present case under the provision contained in the latter portion of Cl. 31, Letters Patent, which, according to him, is not governed by S. 111. It has been held that Cl. 39, Letters Patent of the Presidency H. Cs., which corresponds to Cl. 31 of our Letters Patent, is governed by S. 111, *Hanmant Shriniwas* v. *Shriniwas Lakshmipati*, A. I. R. (18) 1931 Bom. 503 : (134 I. C 1164), *Satyanarayana Varaprasada Rao* v. *Venkata Bhashyakarla Rao*, 46 Mad. 958 : (A. I. R. (11) 1924 Mad. 399) and *Sadar Ali* v. *Dalimuddin*, 56 Cal. 512 : (A. I. R. (15) 1928 Cal. 640 F.B.). Mr. Das seeks to distinguish these cases on the ground that the Letters of the Presidency Cts. were made Patent before the enactment of the Civil P. C. of 1908, whereas the Letters of this Ct. were made Patent after that date. He argues that Cl. 41 of our Letters Patent & the corresponding Cl. 44, Letters Patent of the Presidency Cts. make the Letters Patent subject, not to existing Indian legislation, but to Indian legislation enacted subsequent to the date of the Letters Patent. There is a decision of this Ct. against Mr. Das, reported in *Parmeshwar Dayal* v. *Brindaban Chandra*, 17 P. L. T. 173 : (A. I. R. (23) 1936 Pat. 106). This, however, was a case in which leave was asked for to appeal against a decision of a single Judge in second appeal, & the point which Mr. Das urges before us was not raised. Mr. Das points out that in such a case the provisions of Cl. 31 itself bar an appeal to His Majesty in Council, because Cl. 10, Letters Patent, provides for an appeal to the H. C. against a decision of a single Judge in second appeal, a line of reasoning which was folld. in *Lutu Bapu* v. *Patiram Atmaram*, A. I. R. (36) 1949 Nag. 96 : (I. L. R. (1948) Nag. 425). The only reported case in which the point raised by Mr. Das was considered is *Administrator, Lahore Municipality* v. *Bakhshi Ram*, I. L. R. (1942) 23 Lah. 592 : (A.I.R. (29) 1942 Lah. 169 F.B.) in which it was answered against Mr. Das but merely *obiter*, the decision being based on the same line of reasoning as was followed in the Nagpur case.

[4] The contention of Mr. Das is contrary to the settled practice of this Ct. which has always regarded Cl. 31, Letters Patent, as governed by S. 110 (111?) of the Code, so that the mere existence of circumstances satisfying the requirements of Cl. 31 as regards valuation will not be sufficient for an appeal to His Majesty to lie in a case in which the judgment sought to be appealed against is a judgment of affirmance. I do not think, however, that for the purposes of the present case it is necessary to enter into a discussion of the point raised by Mr. Das for, in my opinion, there is no conflict between S. 111 & Cl. 31.

[5] To understand Cl. 31, we have to read it with Cl. 10. This latter clause is concerned to provide for appeals against decisions of single Judges, exercising under S. 103, Govt. of India Act, 1915, the original or appellate jurisdiction vested in the Ct. The appeal, if any, from such decisions is to lie to the H. C. itself. In making the provision, the clause refers in terms to certain decisions of a final nature which a Judge sitting singly is likely to make, namely, decisions in exercise of revisional jnrisdiction, in exercise of the powers of superintendence under the Govt. of India Act &

decisions in exercise of criminal jurisdiction. Excluding such decisions, it provides for an appeal against other decisions of a single sitting Judge, imposing in the case of decision in second appeal a condition regarding a certificate of fitness. Then, in the latter portion of the clause, there is a reservation of the right of appeal to His Majesty from "other judgments of Judges . . . as hereinafter provided." The reference is to Cl. 31. The use of the term "other judgment" considered in the light of the specific mention in the body of the clause of the different kinds of decisions which a single Judge might give, & the further use of the term "Judges" in contradistinction to the repeated use of the term "one Judge" in the body of the clause suggest that the provision in Cl. 31 is confined to decisions of more than one Judge.

[6] Coming to Cl. 31, we find that the first portion of it is concerned with proposed appeal against decisions in appeals or in the exercise of original jurisdiction, which proposed appeals satisfy certain conditions as regards valuation. The decisions, regarding appeals against which provision is here made, are spoken of in language which is at the first sight somewhat obscure, namely,

"any final judgment, decree or order of the H. C. of Judicature at Patna made on appeal, & any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said H. C., or of any Division Ct."

Under S. 108, Govt. of India Act, 1915, the original & appellate jurisdiction vested in a H. C. may be exercised "by one or more Judges, or by Division Cts. constituted by two or more Judges of the H. C." We have thus decisions of a Judge or of Judges or of a Division Ct. all of which are decisions of the H. C. itself. It seems to me, therefore, that the phrase "of the High Court of Judicature at Patna" governs both the classes of cases described in this portion of the clause, & so also does the phrase "by Judges of the said H. C or of any Division Ct." That is to say, this provision is for appeals against decisions of the H. C. in exercise of original or appellate jurisdiction, where the decision is of Judges of the H. C. or of any Division Ct. thereof. The latter portion of Cl. 31 relates to appeals against "any other final judgment, decree or order made either *on appeal or otherwise as aforesaid*," which do not satisfy the requirements of the first portion of Cl. 31 as regards valuation. The term "as aforesaid" relates back to the first portion of Cl. 31 & avoids a repetition of the description already given thereof the nature of the decisions to which the clause relates, namely, decisions in appeal or in exercise of original jurisdiction by Judges of the H. C. or of any Division Ct. thereof. The word "otherwise," in my opinion, does not include an order in exercise of revisional jurisdiction. In this view of the clause, it is clear that it does not cover the present case & therefore, an appeal is barred by S. 111.

[7] Our attention has been drawn to *Lachmi Narain* v. *Balmakund*, 6 Pat. L. J. 116 : (A. I. R. (8) 1921 Pat. 37) in which a certificate was granted for an appeal to His Majesty in Council against an order of the H. C. passed in the exercise of civil revn. That seems to have been an order of a D. B. coming within the provisions of cl. (c) of S. 109, Civil P. C., & therefore, was not governed by S. 111.

[8] On the above grounds, I would dismiss this petn. with costs. The hearing fee will be assessed at one gold *mohar*.

[9] **Jamuar J.** — I agree.

G.M.J. *Petition dismissed.*

A. I. R. (38) 1951 Patna 550 *[C. N. 156.]*

SHEARER & REUBEN JJ.

Mohammad Mian — Applt. v. *Jugeshwar Prasad — Resp.*

A. F. A. D. No. 1367 of 1946, D/- 31-3-1948.

(a) Civil P. C. (1908), O. 7, R. 7—Suit for ejectment of tenant — Relationship of landlord & tenant not established—Ejectment decree on basis of title, when can be passed, stated—Civil P. C. (1908), O. 6, R. 2.

Where in an ejectment suit against a monthly tenant, the pltf. fails to prove the relationship of landlord & tenant but proves his title, the Ct. has discretion under O. 7, R. 7 to grant an equitable relief of ejectment on basis of title, provided the pltf. has done nothing to disqualify him from receiving an equitable relief, & the issue of title has been raised & fairly tried. [Para 20]

Anno. C. P. C., O. 7, R. 7, N. 2; O. 6, R. 2, N. 1.

(b) Civil P. C. (1908), O. 18, R. 18—Local inspection —Purpose is to enable Ct. to understand evidence on record & not to bring fresh evidence on record. [Para 21]

Anno. C. P. C., O. 18, R. 18, N. 1.

Hareshwar Prasad Sinha & Pitambar Jha — for Applt.; S. C. Mukherji & Nandlal Untwalia—for Resp.

Reuben J. — This appeal by the deft in a suit for ejectment arises in the following circumstances.

[2] The suit relating to a house in Nabinagar Bazar was instituted by the pltf. as a suit for the ejectment of a tenant on the termination of his tenancy by a notice to quit. The case of the pltf. as stated in the plaint, is that he had a room with a verandah in Nabinagar Bazar; the building collapsed in the earthquake of January 1934, & the deft. who wanted a house for establishing a shoe shop, agreed to reconstruct the building at an estimated cost of Rs. 200 & to remain in the building as a tenant at an annual rental of Rs. 40, the cost of the building to be set off against the rental payable for the first five years. The pltf. alleged that the deft. reconstructed the building in accordance with the agreement & the cost of the reconstruction was completely satisfied by setting off against it the rent up to 31-12-1939. Thereafter, the deft. agreed to pay a rent of Rs. 42 per annum but, in fact, made no payment whatever. In addition to the prayer for ejectment, the pltf. asked for arrears of rent up to the date of the expiry of the notice to quit & damages thereafter.

[3] The deft. in his written statement, denied the relationship of landlord & tenant & set up a title in himself. He pleaded that the property in question belonged to one Mathura Saran, a member of the same family as the pltf. that Mt. Champa Kuer, widow of Mathura Saran, sold the property to one Lachhmi Prasad Upadhyay by a registered sale deed dated 4-9-1931, in the *farzi* name of Hakim Missir, a servant of Lachhmi Prasad Upadhyay; & that this deft. purchased it from Lachhmi Prasad Upadhyay by a registered sale deed dated 1-3-1936. He denied the allegation in the plaint about the agreement to rebuilt the house & to hold it at a rent of Rs. 40, & also the allegation about the subsequent agreement to pay rent at Rs. 42.

[4] The parties went to trial on the following issues :

"1. Has the pltf. any cause of action or right to sue ?
2. Is the suit as framed maintainable ?
3. Is the Ct.-f. paid sufficient ?
4. Is the suit barred by the law of limitation ?
5. Is the pltf. entitled to claim rent & damages for the 'room & osara' and also recovery of possession of the same as mentioned in the plaint ?
6. Has the pltf. got any right & title to the land over which the room & osara stand ?
7. Did the deft. agree to set off Rs. 200 being the cost of rebuilding the room & osara after the earthquake against their rent ?
8. Is the kebala dated 1-3 36 propounded by the deft. valid, genuine & for consideration ?
9. To what relief, if any, is the pltf. entitled ?"

[5] In his judgment, however, the Munsif of Muzaffarpur considered only two issues, observing:

"He (the deft.) has taken several other pleas in the written statement; & several issues were originally framed. But the decision of the suit rests on the following two issues only. 1. Is there relationship of landlord & tenant between the parties ? If so, is the pltf. entitled to realise arrears of rent & damages ? 2. Was the notice to quit served on the deft duly ?

In the Munsif's order-sheet, there is nothing to show that the issues were amended by him before evidence was adduced by the parties, & the indications are that the issues as stated in his judgment were framed by him either at the time of writing the judgment or during the course of the trial.

[6] On the first issue, as framed by him, the Munsif found the evidence adduced by the pltf. insufficient to establish the relationship of landlord & tenant. Hence, he dismissed the suit without coming to any finding on the second issue.

[7] The pltf. appealed against this decision. This appeal (Title Appeal No. 118 of 1943) was disposed of by the Subordinate Judge, first Ct. Muzaffarpur, on 9-2-1944. He agreed with the Munsif that the evidence of the pltf. was insufficient to establish the relationship of landlord & tenant. In view of the decision in *Ramdahin Lohar* v. *Ramdhani Mahto*, A. I. R. (29) 1942 Pat. 379 : (199 I. C. 91), however, he considered that the Munsif ought to have decided the issue regarding the pltf's. title to the property, & if he decided the point in favour of the pltf., should have directed the deft. to deliver possession of it to the pltf. He remanded the case to the Munsif for further trial & for a finding on the issue regarding the subsistence of valid title in the pltf. observing :

"A specific issue on the question of title was raised to that effect (vide issue No. 6 of the issues framed by the lower Ct. on 24-4-41). So in view of the ruling cited above *Ramdahin Lohar's* case, A. I. R. (29) 1942 Pat. 379 : (199 I. C. 91) the pltf. is entitled to recover possession of the rent claimed land & room in suit if he is found to have a subsisting title to the same. Parties also adduced some evidence in proof of their respective title to the disputed room and site thereof. But the same do not seem to have been fully considered by the learned Munsif. Since the deft. is admittedly in possession of the land and room, it would not be sufficient to investigate and decide merely the question of title to the land and room but also the issue as to whether the pltf. was in possession of the land and room within 12 years before the date of the institution of this suit. In the circumstances the only course open before us is to remand the case to the Court below for a clear finding on the issue as to whether the pltf. has a subsisting title to the disputed land and the room thereupon. The parties may be given an opportunity to adduce further evidence on the said question at issue if any of them so desires."

The issue of limitation mentioned by the Subordinate Judge is not a new one, being issue No. 4 of the issues as originally framed.

[8] The deft. came up in appeal against this decision in Second Appeal No. 255 of 1944, which was disposed of by Beevor, J. on 29-8-1945. His Lordship set aside the order of remand because, in his opinion, the circumstances did not justify a remand for further evidence. He pointed out that, even if the pltf. had a right to succeed on his title, this would give him no right to adduce any evidence in addition to the evidence already adduced by him in the trial Court. It was sought before him to challenge the correctness of the view taken in the case of *Ramdahin Lohar*, (A. I. R. (29) 1942 Pat. 379 : 199 I. C. 91) as to the possibility of giving the pltf. relief on title in a suit brought to eject a tenant. His Lordship refused to consider the point as it would only arise after the pltf. was found to have established a subsisting title.

[9] Under the direction of Beevor J. the appeal has now been reheard by the Subordinate Judge, first Court, Muzaffarpur, who has found that the pltf. has a subsisting title to the property and has decreed the suit for ejectment and has allowed damages at the rate of Rs. 40 per year from the period of the commencement of the deft.'s occupation of the property. Hence, the present appeal.

[10] Mr. Hareshwar Prasad Sinha for the applt. has contended strenuously that the proposition of law enunciated in *Ramdahin Lohar's case*, (A. I. R. (29) 1942 Pat. 379 : 199 I. C. 91) is incorrect. He relies on *Govindakumar* v. *Mahini Mohan*, 57 Cal. 349 : (A. I. R. (17) 1930 Cal. 42) which, he urges, was approved of in an F. B. decision of this Court reported in *Narayan Jha* v. *Jogni Prasad*, A. I. R. (21) 1934 Pat. 184 : (13 Pat.

329 S. B.) and on *Chennaverasawmy* v. *Satyanarayana*, 21 I. C. 560 (Mad.).

[11] *Govindakumar Sur*, (57 Cal. 349 : A. I. R. (17) 1930 Cal. 42) was a case of an action in ejectment brought by the pltfs. after the expiry of a notice to quit served on the tenants defts. The question which arose before their Lordships was that of the valuation of the suit for the purposes of court-fee and of jurisdiction. Their Lordships held that the suit came within the provisions of S. 7, cl. xi, sub-cl (cc), Court-fees Act, and that the term "tenant" in this section includes in the case of such a suit an ex-tenant, whose tenancy has been terminated by a notice to quit. In the course of this decision, they dealt with an earlier decision of Cammiade J. reported in *Gobinda Ram* v. *Dulupuda Dutta*, 32 C. W. N. 1113 : (A. I. R (15) 1928 Cal. 753), in which it had been held that the ex-tenant in such a suit is not a tenant within the meaning of S. 7, cl. xi, sub-cl. (cc) and, therefore, the valuation for the purposes of court-fee and jurisdiction should be on the basis of the market-value of the property in suit. Their Lordships pointed out that, though the interpretation put by Cammiade J. on the term "tenant" was not correct, his decision was nevertheless correct on the facts of the case, because, in a previous rent suit brought by the pltf. and fought up to the H. C., the pltf. had been defeated on the issue as to the relationship of landlord and tenant. They, however, remarked that the

"proper course would have been to dismiss the suit, when it was found that there had been no contract of tenancy between the parties and not to convert it to a suit of another nature—a declaratory and possessory suit—the cause of action in the two suits being different, giving rise to different issues."

This remark was in the nature of an *obiter dictum*.

[12] The case of *Narayan Jha* (A. I. R. (21) 1934 Pat. 184 : 13 Pat. 329 S. B.) was similarly one in which the question of valuation for the purpose of jurisdiction arose. It was disposed of by the Full Bench on the basis that, under S. 11, Suits Valuation Act, the objection could not be raised because it had not been raised at the earliest opportunity and because the lower appellate Court had not recorded that there was any prejudice by reason of the incorrectness of the valuation. In the course of this decision, the F. B. referred to the case of *Govindakumar Sur* (57 Cal. 349 : A. I. R. (17) 1930 Cal. 42) and observed that, if the question of title is raised by the deft. and it is found as a fact that there was no contract of tenancy, the proper course would be to dismiss the suit and not to convert it into a declaratory and possessory suit "which is of another nature entirely." This observation was clearly a *obiter dictum*.

[13] The facts upon which the case of *Chennaverasawmy*, 21 I. C. 560 (Mad.) was decided, do not appear from the law report. The suit as framed was brought on the basis of a tenancy for the ejectment of the tenant. Both the Courts below found against the tenancy and it was contended that the applt. was nevertheless entitled to have his title to the land adjudicated on, and, if it were proved, to get a decree for the ejectment of the deft. as a trespasser. Ayling and Oldfield JJ. agreed with the reasons given by the Subordinate Judge in his judgment for refusing to go into the question of title, but they did not state in their judgment what the reasons were. The case of *Balmakund* v. *Dalu*, 25 ALL. 498 : (1903 A. W. N. 112 F. B.), which was relied on by Agarwala J. (as he then was) in *Ramdahin Lohar's case*, (A. I. R. (29) 1942 Pat 379 : 199 I. C. 91) was cited before their Lordships on behalf of the applt. In distinguishing that case, their Lordships observed :

"It would be impossible in this case to enquire fully into the title to the property on the pleadings as they stand."

Evidently, it was a case in which the question of title had not been fully raised in the pleadings and, therefore, could not be investigated.

[14] The decision in *Ramdahin Lohar's case*, (A. I. R. (29) 1942 Pat. 379 : 199 I. C. 91) is based upon a decision of an F. B. of the Allahabad High Court in *Balmakund's case*, (25 ALL. 498 : 1903 A. W. N. 112 F B.). There is another decision of an F. B. decision of the Allahabad H. C. reported in the case of *Abdul Ghani* v. *Mt. Babni*, 25 ALL. 256 : (1903 A. W. N. 18 F. B.). One or the other of these decisions has formed the basis of all the reported decisions of this Court to which our attention has been drawn. I will, therefore, deal with these two cases before coming to the cases of this High Court.

[15] In *Abdul Ghani's case*, (25 ALL. 256 : 1903 A. W. N. 18 F. B.), the pltf. sued to recover possession of a house which was in the possession of the deft. The pltf. alleged in his plaint that, about eight years previously, the deft. had hired the house from him at a monthly rent of one rupee, and that the deft. failed to pay rent for a period of ten months, and that the pltf. had given her notice to quit. The pltf. claimed possession of the house and damages but made no claim for arrears of rent. The defence set up was that the deft. and her sons had been in adverse possession of the house in question for a period of 17 years. The deft. denied that she had ever hired the house from the pltf. and alleged that she had purchased the land which formed the site of the house and had built the house thereon. On these pleadings, issues were joined, among others, whether the pltf. was the owner of the house in dispute and whether the deft had been in possession of the house for more than twelve years. The Court of first instance found that the pltf. had not succeeded in proving the tenancy alleged by him, but that the pltf. had all along been in proprietary possession of the house, and that the

deft.'s possession was merely permissive. The Munsif accordingly decreed the pltf.'s claim. On appeal, the Subordinate Judge reversed the decision on the sole ground that, in as much as it had been established that the deft.'s possession of the house was permissive, and the pltf. had not come to the Court on the allegation that the deft.'s possession was permissive, he could not succeed in the suit. On a remand by the H. C. for the trial of the issues : (1) What was the nature of the occupation of the house in dispute by the deft ? and (2) Was the deft.'s possession adverse or permissive ? If adverse, for how long did the deft. hold such possession ?, the lower appellate Court found that the pltf. was the owner of the house, and that the deft. occupied the house as a friend with his permission, and, further, that the deft. had never before asserted a title to the house in dispute, and that her possession was permissive. The F. B. set aside the decree of the Subordinate Judge and restored that of the Munsif, observing :

"It is now contended before us by the learned vakil for the resp. notwithstanding these findings, that inasmuch as the pltf. did not establish the case which he set up, namely, that there had previously been a subsisting tenancy, his suit must fail. We cannot accede to this contention. It is clear that the deft. was not taken by surprise. She clearly understood the case which she had to meet, namely, the case set up by the pltf. that he was the owner of the house .... We think that there was nothing in the claim & the issues which were raised which could possibly have taken the deft. by surprise, & now that the true facts have been ascertained by the Ct. the technical difficulty which has been relied upon cannot, we think, be allowed to defeat the pltfs.'s claim."

[16] In *Balmakund's case*, (25 ALL. 498 : 1903 A.W.N. 112 F. B) the pltf. came into Ct. alleging that he was the owner of a certain cattle shed, which he had built at his own expense; that the deft. had rented from him a portion of this shed; that after a while he had ceased to pay rent, & that, when the pltf. asked him to vacate the shed, he refused to do so. He alleged termination of the tenancy by the service of a notice to quit & asked for two reliefs: (1) that a decree be passed against the deft. for five months' arrears of rent for the shed, & (2) for ejectment of the deft. from the shed. The deft. traversed the allegations in the plaint. He pleaded that the pltf. was not the owner of the cattle shed, & that he (the deft.) had been in proprietary & adverse possession of it for several years. The Ct. of first instance framed only one issue, namely, whether the deft. had rented from the pltf. a part of the cattle shed in question. Notwithstanding this, evidence as to title was adduced on both sides, & the Munsif came to the conclusion that, although the pltf. had failed to prove the lease, there probably had been a lease of some sort, &, in any case, the cattle shed belonged to the pltf. & he was entitled to eject the deft. therefrom. The Ct. accordingly decreed the pltf.'s claim for ejectment but not for rent. On appeal, the Subordinate Judge held that the pltf. could succeed only if he succeeded in proving the tenancy. Agreeing with the Munsif that the pltf. had failed to prove the lease, he dismissed the pltf.'s claim altogether. The pltf. came up in appeal to the H. C. & as the two Judges who heard the appeal were divided in opinion, the decree of the Subordinate Judge stood. Against this decree, the matter came up in Letters Patent appeal to the F. B. In proposing the order of the F. B. reversing the decision of the Subordinate Judge & directing a trial by him on the evidence already upon record of the issue, who is the owner of the cattle shed, the subject matter of the suit & a return of his finding thereon to the H. C., Stanley C. J. observed :

"It is obvious from this that the question of title to the property was definitely raised. & it is clear from the evidence in the case that this question was determined after an examination of the evidence which was adduced on both sides upon this question .... The question of title was clearly raised in the pleadings, & the evidence on both sides was directed to it. The deft. could not be, & was not, taken by surprise in regard to it."

He dealt with the observation of Knox J. in the second appeal, in supporting the decision of the Subordinate Judge, that the pltf. having come to Ct. on a false case was not entitled to any relief, & pointed out that on the findings of the Munsif it did not at all follow that the pltf. had put forward a false case. In agreeing to the order proposed by his Lordship the Chief Justice, Banerji J. drew attention to an observation of Chamier J. in *Haji Khan* v. *Baldeo Das*, 1901 A. W. N. 188 : (24 ALL. 90) to the effect that, if a Ct. sees that the pltf. is entitled to the relief which he claims, although on grounds other than those put forward in his claim, the Ct. should grant such relief if the defts. were not thereby taken by surprise. He pointed out that, in the case before the F. B., the question of title was properly raised & arose for investigation.

[17] The case of *Balmakund*, (25 ALL. 498: 1903 A. W. N. 112 F. B.) was followed by Wort J. in *Mohammad Yusuf* v. *Mohd. Waheed*, A.I.R. (23) 1936 Pat. 147 : (161 I. C 585). In this case a claim for adverse possession was set up by the deft. & it was found by the Cts. of fact that the pltf. was in possession of the suit property within twelve years of the institution of the suit. His Lordship stressed the remarks in the judgment of Banerji J. to which I have refd. to above, &, referring to the facts of the case before him, remarked :

"They (the defts.) in fact claimed adverse title in contradiction to title by adverse possession & they invited the Cts. below to investigate it. Both Cts. have come to the conclusion that they have not established that title. Now it would be a matter of surprise to me if at this time of the day in India a pltf. who has established facts which would entitle him to the particular form of relief claimed, should be debarred from obtaining that relief merely because the allegations or some of them had not been established in their entirety."

In *Ramdahin Lohar's case* (A. I. R. (29) 1942 Pat. 379 : 199 I. C. 91), Agarwala J. (as he then was) followed the decision in *Balmakund's case* (25

ALL. 498: 1903 A. W. N. 112 F.B.) pointing out that there was no suggestion that the deft. was taken by surprise, that in fact the deft. had produced a *parwana* on which he relied, & the question of title "was thoroughly investigated by the trial Ct. on evidence which the deft. placed before the Ct." To the same effect is the decision of Beevor J. in the case of *Saral Sonar* v. *Sudama Singh*, A. I. R. (33) 1946 Pat. 103 : (226 I. C. 137), where his Lordship folld. the decision in *Abdul Ghani's case* (25 ALL. 256 : 1903 A. W. N. 18 F. B.) and in that of *Mohammad Yusuf*, (A. I. R. (23) 1936 Pat. 147 : 161 I. C. 585).

[18] In support of his contention, Mr. Hareshwar Prasad Singh has referred also to *Jhari Singh* v. *Pirthi Nath*, 2 Pat. L. J. 69: (A. I. R. (3) 1916 Pat. 50) and *Mt. Walihan* v. *Jogeshwar*, 7 C. L. J. 44 : (35 Cal. 189 P. C.). The former case is of a converse nature to the case before us. The pltf. sued for a declaration of his title to the land in dispute, & that he might be put into possession thereof by ousting the defts. & that he might be awarded mesne profits for use & occupation during the period they had been in wrongful possession. The suit was decreed by the Ct. of first instance. In appeal by the defts. the J. C. held that the pltf.'s case, so far as it was based on eviction & the right to claim *khas* possession, had not been established, but that there was a cause of action in reference to the pltf.'s title. He accordingly granted a declaration of the pltf.'s title & upheld the decree so far as it awarded mesne profits on the basis of rent payable to the pltf. on the foot of a tenancy existing between him & defts. 1 to 3. This decree for rent was set aside by the H. C. on the ground that a pltf. coming into Ct. with one case, & failing to prove it, should not be permitted to succeed upon another, & that directly in antagonism with his primary allegations. Their Lordships pointed out that it is not open to the Ct. to convert one cause of action into a different cause of action, a view also expressed in *Mt. Walihan's case* (7 C. L. J. 44 : 35 Cal. 189 P. C.). There is nothing in these two decisions inconsistent with the decisions in the F. B. cases of the Allahabad H. C. I have mentioned above how, in the *case of Balmakund* (25 ALL. 498: 1903 A W.N. 112 F.B.), Stanley C. J. dealt with the remark of Knox J. that the pltf. had come to Ct. with a false case & pointed out that this conclusion did not follow from the findings of the Munsif. As regards the cause of action, it has been pointed out by Banerji J. in the *case of Balmakund* (25 ALL 498: 1903 A. W. N. 112 F. B.), as also by Agarwala J. (as he then was) in the *case of Ramdahin Lohar* (A. I. R. (29) 1942 Pat. 379 : 199 I. C. 91), that a suit coming within the provisions of S. 7 (xi) (cc), Court-fees Act, is essentially a suit for ejectment on the allegation that the deft. is a trespasser, the tenancy having terminated, &, therefore, there is not really a different cause of action.

[19] Nor do I think that there is any conflict between the observations in the cases of *Govindakumar Sur* (57 Cal. 349 : A. I. R. (17) 1930 Cal. 42) and *Narayan Jha* (A. I. R. (21) 1934 Pat. 184 : 13 Pat. 329 S. B.) & the decisions of the F. B of the Allahabad H. C. All that was observed in the two former cases was that ordinarily, a suit brought as a suit for ejecting an ex-tenant should not be converted into a suit for ejectment on a finding of title. There are several reasons for this. There is, to mention one reason, the question of c.-f. A suit of the former kind is usually an easy suit, for it involves only an investigation of the existence of the alleged tenancy & whether the relationship of landlord & tenant has terminated. If the relationship is established, it is not open to the deft. to raise the question of title &, if it is not established, the pltf. will ordinarily fail. This is one of the reasons why a lesser c.-f. is charged for a suit of this kind than is charged for a suit for ejectment on title. This is not merely a question of c.-f. but also affects jurisdiction. The higher valuation placed upon a suit of the latter kind means that, if the property is of value, the decision of such a suit will go to a Ct. of higher jurisdiction, presumably more competent to deal with the questions involved. There is another way in which the question of c.-f. is relevant. If it is laid down as a rule that a pltf. suing to eject an ex-tenant is entitled to succeed on title, if he fails to establish the relationship of landlord & tenant, it will be a temptation for litigations to avoid the payment of higher c.-f. & higher costs by falsely bringing suits for ejectment on title in the form of suits for the ejectment of an ex-tenant. It is in this connection that the remarks made by Knox J. & by the D. B. in the case of *Jhari Singh* (2 Pat. L. J. 69 : A. I. R. (3) 1916 Pat. 50) become relevant.

[20] It appears to me that the relief which the F. B. of the Allahabad H. C. considered the Cts. could & shoud give, is an equitable relief entirely within the discretion of the Ct. within the provisions of O. 7, R. 7, Civil P. C. If the question of title has been raised in the trial of the suit & has been investigated, the parties knowing about it & adducing evidence on the point, & Ct. is in a position to give the pltf. the relief asked for on the basis of his title, there is no reason why the Ct. should drive the pltf. to file another suit in order to get this relief, provided that the pltf. has done nothing to disqualify him from receiving equitable relief, e.g., by coming to Ct. with a false story. In this view of the matter, the question of c.-f. is no bar to the grant of such relief. Nor will the question of pecuniary jurisdiction arise, unless an appellate Ct. is able to come to a finding within the meaning of S. 11, Suits Valuation Act, that there has been prejudice caused. It is in the light of these remarks that the case must be examined to see whether the pltf. before us can be given relief on title.

[21] Looked at in this light, it seems clear to me that he cannot. It is true that the question

of title was put in issue & that these were the issues on which the parties went to trial. I am not at all sure, however, that it was on these issues that the parties actually adduced evidence. I say this not only from the fact that the Munsif considered only two issues, namely, the issues of the existence of the relationship of landlord & tenant & of the sufficiency of the notice to quit, but because the order-sheet & the judgment itself indicate that even at the time of the trial the Munsif was proceeding on the basis that these were the only two relevant issues. The question of title was far from simple, as is apparent from a perusal of the judgment of the Subordinate Judge. Nevertheless, the Munsif, having concluded in one day the recording of the evidence, fixed the very next day for delivery of judgment & delivered his judgment on that day. Further, we find from his judgment that a petn. filed by the deft. for examining himself on commission, on the ground that he was ill & unable to come to Ct. was rejected by the Munsif because he considered it unnecessary to examine the deft. "when the evidence adduced by the pltf. falls short of establishing a case for him;" that is to say, the pltf. having failed to make out the relationship of landlord & tenant, the Munsif refused to let the deft. adduce all the evidence which he wished to adduce. That the Munsif did not take all the necessary evidence on the question of title would also appear from the action taken by the Subordinate Judge in appeal in dealing with the question of title. The first Subordinate Judge, before whom the matter came in appeal, considered the evidence recorded as insufficient, & remanded the case to the Munsif for a finding on title after giving the parties an opportunity to adduce fresh evidence thereon. This order, as I have mentioned, was set aside by Beevor J. The matter then came before the successor of the previous Subordinate Judge. He, too, found the evidence on the record inadequate by itself for coming to a decision on the point. He, therefore, held a local inspection. It is well established that the purpose of such a local inspection is to enable the Ct. to understand the evidence on the record & not to bring fresh evidence on the record. I am unable to say here that the local inspection has not also been used for the latter purpose. For instance, the Subordinate Judge mentions that in his sketch map he has incorporated the admissions of the parties as regards the possession of different persons. Incidentally, I may remark that it is difficult to follow the note of local inspection, as it makes references to certain marks on the Subordinate Judge's sketch plan which do not appear in that sketch map. In consequence. I have not been able to follow the reasoning in the Subordinate Judge's judgment, based upon his memo. of local inspection, by which he has arrived at his conclusion on the point of title.

[22] In his judgment, the Subordinate Judge characterises the evidence on the point of title as "very meagre." He then proceeds to deal with certain "admitted" facts. It is not quite clear what admissions were made, whether the admissions are contained in the record as prepared by the Munsif or were made before the Subordinate Judge. The case of the pltf. depended upon an award said to have been made by arbitrators in relation to the property of the family of which the pltf. & Mathura Saran were members. According to the pltf. the property, which forms the subject matter of the suit, was allotted to the pltf. by this award. The defence challenged the genuineness of this award, but it was held by the Subordinate Judge to be genuine. The insufficiency of the evidence on the point is clear from the ground given by the Subordinate Judge for finding this award to be genuine :

> "I find from a perusal of the contents of the award, which I shall discuss presently that the genuineness of the award cannot be questioned."

And, again,

> "The contents of the award show that great pains were taken by the arbitrators in giving the award & that the facts stated therein could not have come to light unless there were statements of the parties before them & the arbitrators perused the documents to which they have refd. in the award."

This award, be it noted, purports to have been given about three years after the reference to the arbitrators was made, & does not bear the signature of one of the three arbitrators. These points were glossed over, however, because pltf.'s witness 3 was not cross examined regarding them. It is on the basis of this award that the Subordinate Judge comes to the conclusion that the property in suit belongs to the pltf. & it is, also, on the basis of this award that he finds that the pltf. was in possession of the property at least till 1933 (*vide* p. 10 of the brief).

[23] In these circumstances, I find it difficult to hold that the question of title has been fairly tried between the parties & that the pltf. is entitled to ask the Ct. in its discretion to grant him relief on title.

[24] On the above grounds, I would allow this appeal, set aside the decision of the Subordinate Judge & dismiss the suit. The deft. will get his costs throughout.

[25] **Shearer J.** — I agree. I must say, however, that I find it difficult to conceive of a case where a pltf. seeking to recover possession of land from the deft. on the footing that the deft is his tenant & his tenancy has been determined, can be entitled to a decree on the footing that the deft. is not a tenant but a mere trespasser. If there is evidence to show the deft. is the latter & not the former, it must have been let in wrongly or by accident. In this particular case, however, there is no such evidence. Where the Ct. is unable to say, on the evidence, whether the deft. is a tenant or a licensee but is able to say definitely that if he is not the one, he is the other

the position is quite different & there is no difficulty in passing a decree.

R.G.D. *Appeal allowed.*

A. I. R. (38) 1951 Patna 556 *[C. N. 157.]*

JHA C. J. & REUBEN J.

Radha Gobinda Roy & others — Applts. v. *Sri Sri Nilkantha Narayan Singh & others — Resps.*

A. F. O. D. No. 166 of 1946, D/- 27-2-1951.

(a) Specific Relief Act (1877), S. 42, Proviso — Suit for recovery of rent against *A* with declaration of title as against *B* who claimed adversely — Maintainability.

Where the pltf. brings a suit for recovery of arrears of way-leave rent against one set of defts. on the basis of agreement entered into with them & also prays for declaration of his right to receive the rent as against the other set of defts. who were adversely claiming the right under a sale-deed from the pltf. & who had actually realised the rent for many years from the first set of defts. the two parts of the plaint are intimately connected with each other & the declaration asked for in one part of the plaint is the basis of claim in the other part. In such a case the money decree is a relief consequential upon the declaration & is as much a decree against the second set of defts. who claimed adversely as it is against the first set directed to make the payment. Such a suit cannot be treated as merely for declaration against the second set & therefore is not barred by the Proviso to S. 42, Specific Relief Act. F. A. Nos. 211 of 1946 & 35 of 1948, D/- 24-1-1951 (Pat), *Rel. on.* [Para 5]

Anno. Sp. Rel. Act, S. 42, N. 1, 7.

(b) Civil P. C. (1908), O. 2, R. 2 & O. 7, R. 7 — Failure to claim particular relief — Effect — Specific Relief Act (1877), S. 42.

A pltf. is not bound to seek all the remedies open to him. If he omits to sue for any particular relief arising out of his cause of action, he will at most forfeit his right to sue afterwards in respect of that relief. Hence the fact that in a suit for declaration not hit by the provisions of S. 42, Specific Relief Act the pltf. omits to claim all the further reliefs which he might have asked for will not affect the maintainability of the suit. [Para 5]

Anno. C. P. C., O. 2, R. 2, N. 2, 27; O. 7, R. 7, N. 1; Sp. Rel. Act, S. 42, N. 11.

(c) Limitation Act (1908), Art. 142 — Leased land — Dispossession, what constitutes.

Where the owner of property has given that property to a lessee & under the terms of the lease, is entitled merely to realise rent from the leaseholder & not to direct possession of the property leased, his dispossession can only occur by a stranger, who claims adverse to him, intercepting his receipt of rent from the leaseholder. Mere receipt of rent by stranger claiming adversely to the real owner is not sufficient by itself to constitute dispossession. The rent must also be received adversely. 8 W. R. 135, 2 I. C. 381 (Cal); 35 Cal 120, 5 I. C. 531 (Cal) & A. I. R. (9) 1922 Cal. 87, *Referred.* [Paras 6, 7]

Anno. Lim. Act, Arts. 142 & 144 N. 9, 14.

(d) Limitation Act (1908), Art. 120 — Suit for declaration & recovery of rent.

Where the suit is not a purely declaratory suit but is one for declaration of title with consequential relief of recovery of rent in which it is necessary for the Ct. to come to a finding as to title as a preliminary to the decree for rent, & the claim for recovery of rent is not barred by time, then the prayer for determination of title would equally be unaffected & would not be barred by time. [Para 14]

Anno. Lim. Act, Art. 120, N. 31; Sp. Rel. Act, S. 42, N. 30.

(e) Deed — Construction — Sale — Mining lease — Subsequent sale by lessor of his interest under lease — Right to way-leave rent if passes to vendee — T. P. Act (1882), S. 8.

There is a distinction between a grant or a reservation of 'coal' & a grant or a reservation, as the case may be, of a 'mine'. The word 'coal' does not bear a definite meaning, & its meaning must be gathered from the document under construction. 34 L. J. (N. S.) 406; L. R. 2 H. L. Sc. 166; (1876) 1 I. A. C. 701; (1876) 3 Ch. 826; (1907) 1 Ch. 256, *Referred.*

A granted a mining lease in favour of *G* in respect of the 'underground coal' lying below a plot of land *X*. *G* in his turn made a sub-lease of his interest in favour of *P* who also possessed the mining rights in another plot of land *Y* lying adjacent to it. By an agreement between *A* & *P* the latter agreed to pay way-leave rent to the former in respect of foreign coal carried to the surface throuh the underground passages in plot *X*. Subsequently, *A* executed a sale-deed in favour of *R* by which *A* sold the underground coal land of his plot *X*. The deed provided "whatever right & title I had by virtue of the patta in favour of *G* shall all from this day devolve on you". Under the mining lease the grantor *A* had in respect of the coal only the right to realise the royalty & other dues in accordance with the lease & in the event of expiry of the lease or its earlier surrender to enter into possession of the coal:

Held, on a construction of the sale-deed as a whole the right transferred to *R* was confined to the coal, regarded as so much mineral, lying below the surface of plot *X*. There was no intention to transfer the vendor's title in the cubical space within which the coal was comprised & therefore, *A's* right under the way-leave agreement to realise the way-leave rent did not pass to *R*. [Para 28]

Anno. T. P. Act, S. 8, N. 20.

P. R. Das & R. S. Chatterji — for Applts; Mahabir Prasad, Lala Atul Chandra, Jyotirmay Ghosh & Bhabananda Mukherji — for Resps.

Reuben J. — The applts. whom I shall call the Roys, were defts. 4 to 13 in the suit out of which this appeal arises.

[2] The suit was brought by the pltf. resp. to recover arrears of way-leave rent for the year 1931 to 1942 from defts. 1 to 3 under the terms of an agreement dated 14-4-1925 & also for a declaration that the pltf. & not the Roys, is entitled to the way-leave rent under this agreement. The facts leading up to the suit are as follows. In the year 1908, Banwari Lal, the father of the pltf. granted a mining lease to one Debendra Nath Ghosh for a period of 999 years in respect of coal lying subjacent to a block *mauza* Dharmaband representing a share of fourteen annas in the *mauza*. In 1911, Ghosh in his turn made a sub lease of his interest excluding coal seams Nos. 17 & 18 to Mr. H. A. Pringle, whose widow is deft. 1. Pringle also possessed the mining rights in the coal lying under the block of Dharmaband *mauza* representing the two annas share of that *mauza*. For convenience of reference, I shall speak of his block as Block *B* & shall refer to the fourteen annas block as Block *A*. Defts. 2 & 3 have acquired an interest in both these properties from Pringle by subsequent assignments. The way-leave agreement, on which this suit is based, was entered into between Pringle & Banwari Lal, while Pringle was still interested in both these properties, & gave him the right to bring coal from his workings in Block *B* to the surface through Block *A*, using the existing passages & making such fresh passa-

ges as might be necessary. For this permission, he was liable under the agreement to pay Banwari Lal one anna per ton of foreign coal so carried. The Roys derive their interest in the property from a sale-deed dated 4-7-1931 executed in their favour by the pltf. According to the pltf. by this *kebala*, he transferred to the Roys merely his interest in the coal subjacent to Block *A*, thus entitling them to realise from Debendra Nath Ghosh the royalty due under the lease of 1908 &, in case of surrender, to enter into direct possession of the coal & work the coal either themselves or through fresh lessees. Difficulty arose soon after the sale-deed, however, because the Roys claimed that, under the sale-deed, the right to the way-leave also passed to them. The pltf., therefore, brought this suit having failed to recover any way-leave rent after the execution of the sale deed. The suit having been decreed, the present appeal has been filed.

[3] Three points have been pressed before us: (1) that the suit is barred under the proviso to S. 42, Specific Relief Act, 1877; (2) that the suit, so far as it is a suit for a declaration against the Roys, is barred by limitation, & (3) that, on a correct construction of the sale-deed, the right to way-leave passed to the Roys.

[4] *Point No. 1.*—It is the admitted case of the pltf that, since 1931, he has not realised any way-leave rent from defts 1 to 3—It appears from the record that way-leave rent due under the agreement of 1925 has been recovered by the Roys. This fact was asserted by the Roys in para. 8 of their written statement, which statement was supported by deft. 3 in para. 8 of its written statement, & the evidence of Shibram Mandal (D. W. 1) regarding the realisation has not been challenged, the only suggestion in cross-examination being that the realisation was not made before the execution of an indemnity bond, which indemnity bond was executed by the Roys in favour of defts. 2 & 3 on 18-5-1935. It is contended that, on these facts, it must be held that, even supposing that the right in question did not pass to the Roys & remained vested in the pltf., the pltf. was dispossessed by the interception of the way-leave rent & is, therefore, not entitled to sue for a mere declaration u/s 42, Specific Relief Act. It is pointed out that there were three different reliefs which, supposing the title to be in him, he was entitled to seek against the Roys, namely; (1) recovery of possession, (2) an injunction restraining them from interfering with his possession, & (3) compensation in the nature of mesne profits, whereas his sole prayer, as far as the Roys are concerned, is a prayer for a declaration of his title.

[5] It appears to me that the objection fails, first of all, on the ground that S. 42 has no application. Reading the plaint as a whole, I do not think it is right to split it in the manner indicated by this argument. I do not consider that it can be regarded as consisting of two parts, one directed against the Roys & asking for a declaration against them & the second directed against defts. 1 to 3 & asking for a money decree against them. The two parts of the plaint are intimately connected with each other & the declaration asked for in one part of the plaint is the basis of the claim in the other part. The money decree is a relief consequential upon the declaration & as I have recently explained in *Phulkumari Devi* v. *Prahlad Prasad Arora*, F. A. Nos. 211 of 1946 and 35 of 1948, D/- 24 1 1951, a money decree of this kind, where a party setting up an adverse claim to the suit property is impleaded, is as much a decree against that party as it is a decree against the person directed to make the payment. On this view, the suit is not a suit for a mere declaration & does not come within the provisions of S. 42. It is true that there are other reliefs which the pltf. might have asked for against the Roys & which he has omitted to ask for. There is no provision, however, requiring a pltf. to seek all the remedies open to him. If he omits to sue for any particular relief arising out of his cause of action, he will at most forfeit his right to sue afterwards in respect of that relief (O. II, R. 2, Civil P. C.).

[6] Secondly, I do not think that in the circumstances of the present case, it can be said that the pltf. has been dispossessed. It is well settled that, where the owner of property has given that property to a lessee &, under the terms of the lease is entitled merely to realise rent from the lease-holder & not to direct possession of the property leased, his dispossession can only occur by a stranger, who claims adverse to him, intercepting his receipt of rent from the lease-holder (*Huronath Rai* v. *Indoo Bhoosun*, 8 W. R. 135 ; *Lalu Sahu* v. *Ghunaria Uraon*, 2 I. C. 881 (Cal.) ; *Omatul Mehdi* v. *Kulsum*, 8 C. L. J. 245 : (35 Cal. 120); *Satish Chunder* v. *Satya Churn*, 14 C W. N. 576 : (5 I. C. 531) and *Uday Kumar Das* v. *Katyani Debi*, 49 Cal. 948 : (A. I. R (9) 1922 Cal. 87)). Stated in this manner the proposition appears simple, but it is fraught with difficulty & a further examination is necessary to explain what constitutes dispossession.

[7] The dictum in *Huronath Rai's case*, (8 W. R. 135), was *obiter* :

"It would be otherwise if the reversioner during the time were deprived of his rent, or if rent was received adversely to him by a stranger, as for instance, if a stranger obtained a decree against him on an intervention under u/s. 77 of Act X [10] of 1859."

With respect, I would suggest that, if his Lordship meant to say that receipt of rent by a stranger claiming adversely to the real owner is sufficient by itself to constitute dispossession, the proposition is incorrect. The position of no landowner would be safe, if he is to be regarded as dispossessed merely because his tenant, in collusion with a stranger, pays the rent to that stranger. Something more is surely necessary, & it seems to me that his Lordship implied that something by saying—"if rent was received adversely."

[8] In the case of *Lalu Sahu*, 2 I. C. 381 (Cal), the contest was between the defts. claiming under Ahila Koer, the widow of one Jadupat & the pltfs. claiming under the sons of Madhupat, brother of Jadupat. Jadupat predeceased Madhupat, who was in possession of the property in suit by the realization of rent therefor from the tenants at the time of his (Madhupat's) death in 1893. The question was whether Ahila Koer had dispossessed the sons of Madhupat. It was answered in the affirmative by Mookerjee J. on the ground that Ahila Koer successfully intervened in the rent suits instituted by the sons of Madhupat & defeated their attempt to realise the rent. She, thus, prevented them from exercising the only act of possession which they could exercise in respect of the property, namely, the realisation of rent.

[9] In *Omatul Medhi's case*, 8 C. L. J. 245 : (35 Cal. 120) Mookerjee J. stated the position in the terms which I reproduce below :

"In the case of Zamindaries where the proprietor can be in possession only by receipt of rent, he is in actual possession of his interest, if he is in receipt of rent. The zamindar's possession of the right to collect rent from the tenants in occupation is actual possession of a tangible property *Sarbananda Basu* v. *Pran Sanker*, 15 Cal. 527; *Surb Narain* v. *Birj Mohan*, 23 Cal 80. When a person has proprietary interest in land & as such is entitled to receive rent, he is in possession of his interest if he is in receipt of rent, while his tenant who is in actual occupation has possession which, in a sense, is the possession of the landlord or superior proprietor [*See* the observation of Lord Davey in *Secretary of State* v. *Krishnamoni Gupta*, 29 Cal. 518 : (29 I. A. 104 P. C.). If, therefore, a proprietor finds that the rent receivable by him is intercepted by some other persons, he is dispossessed of his interest in the land. He loses possession, because the only mode of enjoyment by which that possession can be held, ceases to be available *by the act of the trespasser*." (The italics are mine.)]

The very last sentence of this citation repeats my analysis of the position in *Lalu Sahu's case*, (2 I. C. 381 (Cal.).)

[10] In *Satish Chunder Bhuttacharya's case*, 14 C. W. N. 576 : (5 I. C. 531) the question before their Lordships was the very one which I am considering here, namely, whether the proviso to S. 42 operated to bar the suit. Answering this in the negative, their Lordships stated their reason in the following words :

"Now, his position is that he is still in possession of the three plots in suit, & that he has not yet failed to recover rent from the tenants on the land. He may possibly be defeated in an attempt to recover rent, but, in the present circumstances, he has come into Ct. in order to dispel the cloud cast upon his title by the action of the deft."

According to his pleading, the pltf. had not yet been prevented by the deft. from realising his rent & therefore, the suit lay. All that had happened was that a cloud had been cast upon his title. Referring to the case of *Chinnammal* v. *Varadarajulu*, 15 Mad. 307, their Lordships remarked that, in a case of this kind, the pltf. was unable to seek any relief other than a declaration. They also refd. to the case of *Loke Nath* v. *Keshab Ram*, 13 Cal. 147, which I shall discuss later.

[11] Finally, in the case of *Uday Kumar Das*, 49 Cal. 948: (A. I. R. (9) 1922 Cal. 87), Mookherji J. stated the general position substantially in the same way as I have stated it above, namely, that the lessor is in possession by receipt of rent from his lessee & so long as such rent is not intercepted by a trespasser, he cannot be said to have been dispossessed. It was not necessary for his Lordship to examine the question in detail, as the wrongful possession in that case was adverse against the lessee & not against the lessor, the rent due to the lessor having been realised by him throughout, although a portion of the holding was not in the possession of the lessee.

[12] Let us now proceed to consider the facts of the present case. It is true that since 1931 the pltf. has not realised the way-leave rent & that some realisations of this rent have been made by the Roys. The period of limitation for the realisation of the rent by the pltf. has not yet expired & the suit with which we are now concerned has been instituted for realising that very rent. If the right to realise that rent is vested in the pltf. the fact that the Roys have made certain realisations on account of that rent will not stand in the way of the pltfs. getting a decree for the rent & putting that decree into execution. Further, it appears from the record that even the payments that have been made by defts. 2 & 3 towards the way-leave rent have been made only after the execution of an indemnity bond by the Roys. Therefore, these defts. are not really denying the title of the pltf. & have provided against the possibility of the pltf. being found entitled & obtaining a decision to that effect. This also appears from para. 8 of the written statement of deft. 3 which states that the deft. is informed & believe it to be correct that by the deed of sale the pltf. parted with his right to realise the way-leave rent. In these circumstances, I do not think that it can be said that the Roys by their action have prevented the pltf. from realising the way-leave rent. Hence, there is no dispossession.

[13] Another answer to this contention is furnished by *Lokenath Surma's case*, 13 Cal. 147. The facts of that case are that the pltfs.' having obtained a decree for the possession of certain lands & having received formal possession thereof, brought a suit against 86 persons holding distinct & separate tenures in those lands on the allegation that there was a combination between the tenants as a result of which the defts.-tenants would not recognise them as the landlords & in various ways opposed acts of the pltfs. in the capacity of landlords &, in suits brought by the pltfs. for the recovery of rent, denied the title of the pltfs., hence, the pltfs. withdrew the suits for rent & brought the present suit asking for a declaration of their proprietary right & of the relationship of landlord & tenant between

them & the defts. Unlike the present suit, that suit came within the mischief of S. 42, Specific Relief Act, as it was a purely declaratory suit. This is how their Lordships met the objection u/s. 42 :

"It is contended that the pltfs., being out of possession, should have sued to recover possession, & not merely have sued for a declaration of their title. We think that this was unnecessary. The pltfs. were not seeking for khas possession, but merely for possession by receipt of rent from the defts. Under these circumstances, even if the pltfs. had sued for & obtained a decree for possession of the property, that possession could only have been delivered by notifying the declaration of the pltfs'. title as prayed for. We think, therefore that the omission to sue for possession was immaterial, & that the suit was not liable to be dismissed on this ground."

Evidently, their Lordships consd. that the effect of a declaratory decree in the circumstances of the case would be the same as a decree for the recovery of rent. This is exactly the position here. What the pltf. has asked for is a declaration of his title & a decree for the recovery of the way-leave rent. The only way in which he can exercise his possession in respect of the property is by the recovery of the way-leave rent. The prayer for a decree for the recovery of way-leave rent is, therefore, in fact, a prayer for the recovery of possession. In the course of the argument, it was suggested that, if the suit be regarded as one for the recovery of possession, a higher amount of C.-F. than that paid on the plaint might be necessary on the value of the reversionary interest in the suit property. I do not think there is any substance in this suggestion. I have indicated above that this is really not a case of dispossession, but, even supposing it to be so, since, for the recovery of possession, it is sufficient that the pltf. should obtain the declaration asked for & also a decree for the way-leave rent claimed, the C.-F. paid by him on these two reliefs is sufficient.

[14] *Point No. 2* :—It is argued that, so far as the Roys are concerned, the suit is a suit for a declaration, the period of limitation for which is six years from the moment when the right to sue accrued (Art. 120 of the Schedule to the Limitation Act, 1903). The right accrued, it is contended, in the year 1931, whereas the suit was instituted in the year 1943. It is not clear from the record when, for the first time, the pltf. came to know of the adverse claim set up by the Roys. That point of time, however, is not important because the claim by itself would not give a start to the period of limitation. The question of instituting a suit for a declaration would hardly arise until there was an actual disturbance of the possession of the pltf. Conceivably, the actual realisation by the Roys of money on account of way-leave rent might give a start to limitation; but it is not clear that the pltf. came to know of the realisation of the way-leave rent at any time prior to the filing of the written statements in Ct. Apart from this, however, the objection is, in my opinion, sufficiently answered on the position which I have taken in dealing with the first point, namely, that this is not a purely declaratory suit. It is a suit for the recovery of rent. As a preliminary to the decree for rent, it was necessary for the Ct. to come to a finding as to title. It is not suggested that the recovery of the rent claimed was barred by time. Hence, the prayer for the determination of the title was equally unaffected.

[15] *Point No. 3* :—The operative words in the sale deed (EX. 3) are :

"Today I sell you the underground coal comprised in the demarcated fourteen annas share of mauza Dharmabandh & c."

The contention on behalf of the applts. is that on a proper construction of the sale deed the Roys acquired not merely the mineral coal lying within the limits indicated in the schedule to the sale deed but the pltf's. entire rights in the "coal mine", an expression which includes, in addition to the actual mineral, the chamber containing that mineral & the vacuum created by the removal of the whole or part of that mineral; therefore, u/s. 8 of the T. P. Act, there also passed to the Roys the right to collect way-leave rent in respect of foreign coal passing through this chamber. It is further contended that even if the grant was intended to be confined to the mineral coal the grant necessarily included the containing chambers &, therefore, the Roys would nevertheless be entitled to the way-leave rent. Reliance was placed on certain English decisions which I analyse below.

[16] The connotation of the word "mine" is thus defined by MacSwinney in Edn. 5 of his book on the Law of Mines, Quarries, & Minerals :

"The word 'mine' does not necessarily mean a cubical layer of earth, during & so long only as it contains minerals. The word is generally wide enough, if not in its primary sense, at all events according to the meaning given to it by the authorities, to include the space which is created according as the minerals are being worked, & the vacuum which is left after they have been worked out. In other words, a person who has an interest in a mine has, as such, *prima facie*, an interest in the Chamber which contains the minerals; & his interest in that chamber is precisely the same when it is in its natural state & filled with minerals; or when its natural state is altered by workings, & it consists partly or wholly of empty space." [*Vide* also Art. 173 at p. 53].

[17] In *Proud* v. *Bates*, (1865) 34 L. J. (Ch.) 406: (13 L. T 61), Wood V. C. was concerned with the construction of a lease of certain lands which contained a reservation of the "mines & quarries" lying & being within the limits of the property leased :

"With free way leave & passage to, from & along the same, on foot or on horseback, with all manner of carriages."

The question that arose was the right of the lessee of the mines to use a driftway under the property for the purpose of working mines not lying under the property in question. The Vice-Chancellor held that the exception extended to "the whole containing chamber which has the minerals" & that this containing chamber was altogether out of the demise: the grantors, there-

fore, never demised at all or parted with any right of using this containing chamber & were at liberty to use it as they thought fit. There was a further point which arose in this case & it is necessary to refer to it for the proper understanding of the judgment of Lord Chelmsford in *Duke of Hamilton* v. *Graham*, (1871) L. R. 2 H. L., Sc. 166. It related to a headway of a foot & a half for the use of horses & carriages which headway was not confined to the seam of coal but was cut in the rock above the coal to afford a sufficient height for horses to pass along the way. It was pointed out by the Vice-Chancellor that so far as the use of this headway was concerned it was not a case of a portion of a property being demised & the remainder being reserved or excepted; it was a grant of property with a regrant of certain rights in respect of that property. Stressing the fact that the exception of the mines would be sufficient by itself to give the grantors the right of working the mines & for that purpose to use the demised property, he held that the general provision for the right of winning, working & so fourth showed that the regrant was not intended to be restricted to that purpose alone & therefore, extended to the carriage of foreign coal.

[18] The question again arose before his Lordship as Lord Chancellor in *Duke of Hamilton* v. *Graham*, (1871-1 L. R 2 H.L.S. C. 166) (ante) in relation to a grant of land by the Duke of Hamilton reserving to himself, his heirs & successors " all & sundry the coal & limestone" within the bounds of the land demised. His Lordship observed that he saw no reason to withdraw from his decision in the case of *Proud* v. *Bates*, (1865-34 L J. Ch. 406: 13 L. T. 61) that by the law of England, when you demise a property excepting a certain part of it, there is no demise of the part excepted & therefore, the minerals excepted remained with the lessor; on the other hand, if you reserve certain rights & interests parting with the property, the rights & interests reserved must enure by way of regrant from the person to whom you make the disposition. Holding the reservation in question to be a reservation of property, his Lordship came to the conclusion that the Duke of Hamilton was entitled to carry foreign minerals through the reserved property. Lord Westbury & Lord Colonsay concurred in this view on the same reasoning. Lord Chelmsford in coming to the opposite conclusion distgd. the case of *Proud* v. *Bates*, (1865—34 L. J. Ch. 406: 13 L. T. 61) on the ground that it proceeded upon special grounds. His analysis of that decision shows that he had in his mind the discussion about the headway of one & a half feet. That, as I have mentioned above, was a case of regrant but there was also the reservation of the mine which was held by the Vice-Chancellor to be an exception from the demise & in respect of which the grantor was held to have *plenum dominium*. The double aspect of that case was explained by the Lord Chancellor during the speech of Lord Chelmsford.

[19] Much stress has been laid before us on the decision in *Duke of Hamiltom* v. *Graham*, (1871 L. R. 2 H. L. Sc. 166) because the reservation in that case was of "the coal & limestone" & it has been sought to rely on the decision as an authority for the proposition that a grant of coal is equivalent to a grant of a mine. In my opinion the contention is not borne out by the other cases which have been examined by us.

[20] In *Ramsay* v. *Blair*, (1876) 1 A. C. 701, three grants came under consideration made in 1825, 1927 & 1857 respectively, & the reservation in these documents were "the coal & coal-heughs", the whole coal, stone quarries, & all other metals & minerals" & "the coal"—it appears from the judgment of Lord Selborne that the expression "coal-heughs" was interpreted to mean coal pits. The dispute as in the two previous decisions was about the right of the grantor to carry foreign coal along passages under the demised property. With reference to the first & the third grants, the Lord Chancellor observed that there could be no doubt at all that the only reservation was of the coal under the surface, & the grantor would have no power whatever to carry under those lands any coal or minerals won or worked from other lands; under the grant of 1827, however,

"the whole of the land under the surface, all the coals & all the metals & minerals, were reserved to the grantor & it gave him a right of course as upon his own property to make any way for any coals or other minerals that he might have in any other part of his lands."

Lord Hatherly concurred in this view. According to him, by the grant in 1857,

"the right which has been reserved . . . is only a right to the coals under the lands which have been parted with; that is to say, a right to the portion of the coal situated under the surface demised to the resp. & nothing can be done beyond the purpose of working the coal under the resp.'s lands & no other coal."

The grant of 1927, however, being of

"the whole coal, stone quarries, & all other metals & minerals within" the lands demised, "with power to search for, work, & carry away the same,"

was, in his opinion, so extensive as to amount to a reservation of a portion of the property demised. In spite of his success in relation to the grant of 1927, the grantor could get no relief as his failure in respect of the other two grants created barriers preventing access to the property reserved in the grant of 1827. Lord Selborne, who concurred in this decision proceeded on entirely different reasoning, namely that the reservation in the grants of 1825 & 1857 was as to coal whereas the level cross-cut sought to be used for the passage of foreign minerals passed chiefly through strata consisting of shale & sandstone. The reason given by him therefore, is not relevant to the present discussion.

[21] In *Eardley* v. *Granville*, (1876) 3 Ch. 826: (45 L. J. Ch. 669), Jessel M. R. was concerned with the peculiar rights of a copyholder in respect

of minerals lying below his copyhold, namely that the estate of the copyholder is in the soil throughout except as regards trees, & minerals, the property in which remains in the lord; when the lord has removed minerals the space left belongs to the copyholder, & when the tree is cut down the copyholder has a right to the soil of the copyhold where the tree stood including the stratum of air left vacant by the removal of the tree. The decision, therefore, is not directly applicable, but it is relevant to reproduce an important distinction which the Master of the Rolls makes between a reservation of "mines" & a reservation of "minerals":

"I take it that the law is clearly settled, & I am surprised to hear it disputed. In the first place, the law is laid down, perhaps not as accurately as might be wished as regards the words used, by Lord Compbell in *Bowser* v. *Maclean*, (1860) 2 D. F. & J. 415 at. p. 420 : (30 L. J. Ch. 273) 'I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, & forehold land leased with a reservation of the minerals'—he should have said 'of the mines,' but he has used the words 'reservation of the minerals,' meaning an exception of the mines — 'or freehold land where the surface belongs to one owner & the subsoil, containing minerals, belongs to another, as separate tenements divided from each other vertically, instead of laterally.' That is quite intelligible; what he means is this—he does not say it, but he means it—If a freeholder grants lands excepting mines he severs his estate vertically, i. e., he grants out his estate in parallel horizontal layers, & the grantee only gets the parallel layer granted to him, & does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor. The freeholder retains the mineral stratum as part of his ownership; & whether or not he takes the minerals or subsoil out of the stratum, the stratum still belongs to him as part of the vertical section of the land. But he says in the case of a copyholder, that is not so, becauses the copyholder, though he has no property in the stratum in the sense of being entitled to take the minerals, has property & possession in this sense, that the moment the minerals are taken away the space is in his possession, & he only can interfere with it, the lord having no right to do so."

The importance of the distinction made by the Master of the Rolls is stressed by Warrington J. in *Batten Pooll* v. *Kennedy*, (1907) 1 Ch. 256 at p. 264 : (76 L. J. Ch. 162).

[22] It is also relevant to mention that the Master of the Rolls repelled the suggestion that the *Duke of Hamilton* v. *Graham*, (1871-L. R. 2 H. L. S. C. 166) had somehow or other altered the law & observed :

"It exactly concurs, therefore, in the reasoning with the decision of Vice-Chancellor Wood in the case of *Proud* v. *Bates*, (1865-34 L. J. Ch 406 : 13 L. T. 61) & the decision of Lord Camphell in *Bowser* v. *Maclean*, (1860) 2 D. F. & J. 415, that where a free-holder grants lands excepting the *miner*, he intends, first of all, as a matter of construction, to except not merely minerals, but the portion of the subsoil containing the minerals; in other words, to retain a stratum of the property. And if he does that, of course the lessee or grantee has no title whatever to the portion of the stratum reserved. That is all that the case of *Duke of Hamilton* v. *Graham*, (1871-L. R 2 H. L. S. C. 166) decided."

The italics are mine.

[23] The last case I shall consider is *Batten Pooll* v. *Kennedy*, (1907) 1 Ch. 256 : (76 L. J. Ch. 162) where Warrington J. had to consider the effect of a reservation "all mines and veins of coal." His Lordship followed the decision in the *Duke of Hamilton* v. *Graham*, (1871 L. R 2 H L. S. C 166) pointing out that the terms used in that case were less favourable to the grantor than in the case before his Lordship. He cited with approval the opinion of the Master of the Rolls in *Eardley* v. *Granville*, (1876-3 Ch. 826 : 45 L. J. Ch. 669) as to the real point decided in *Duke of Hamilton* v. *Graham*, (1871-L. R. 2 H. L. S. C. 166) and, adverting to the speech of Lord Selborne in *Ramsay* v. *Blair*, (1876-1 A. C. 701), he expressed the view that the dictum of his Lordship was not

"strong enough to outweigh the carefully consid. judgment of the Master of the Rolls in the case of *Eardley* v. *Granville*, (1876-3 Ch. 826 : 45 L J. Ch. 669)."

His Lordship finally concluded that

"Inasmuch as 'mines' unquestionably include not merely the bed of coal, but the workings of the coal, & the cavity after the coal has been removed,"

the right in question was part of the mine &, therefore, was comprised in the reservation.

[24] I think that from the above analysis it is clear that there is a distinction between a grant or a reservation of "coal" & a grant or a reservation, as the case may be, of a "mine," a view which is borne out by Mac Swinney (Art. 43 at p. 15 & Art. 176 at p. 55 & the last para. of Art. 1159 at p. 531 of Halsbury's Laws of England, Edn. 2, Vol. 22, Hailsham Edn.) It is not possible to lay down as a general rule what connotation the word "coal" will bear, that is a matter to be decided with reference to the document in which the word has been used. It is sufficient that the discussion of these cases shows that the word "coal" does not bear a definite meaning, & its meaning must be gathered from the document under construction.

[25] It is agreed that under the lease of 1908 all that Ghosh got was the right to win & take the coal & for that purpose to sink pits, drive shafts & do such other work as might be necessary for winning & carrying away the coal. This view is expressed in Para. 2 of the plaint, which speaks of the lease as a lease of the coal & the coal mining rights in the fourteen annas plot of mauza Dharmabandh, the correctness of which pleading is not denied in the written statement. It also finds expression in the sub-lease (Ex. 5) executed by Ghosh in favour of Pringle & in the wayleave agreement (Ex. 2) executed between Pringle & the pltf. Under the lease Ghosh had no right to carry foreign coal to the surface through the mine in Dharmabandh. After the lease, the predecessor of the pltf. remained the owner of the surface subject to the right of Ghosh to use it for the purposes of the mining lease on the conditions set out in that lease. The ownership of the passages made for the working of the mine & in the vacuum created by

the removal of the coal from the mine remained in the predecessor of the pltf. Hence, when Pringle by his sub-lease got the rights of Ghosh & wished to work by outstroke, he entered into the way-leave agreement with the predecessor of the pltf. This agreement, it is stressed, was executed by the pltf.'s predecessor as the owner of the reversion in this property. After this agreement, it is said, there were three rights vested in him; (1) the right to realise rent & royalty under the lease of 1908. (2) the right in reversion to re-enter on the demised property on the expiry of the period of the lease or on an earlier surrender by the lessee, & (3) the right to realise way-leave rent, this last right being appurtenant to his right to the reversion.

[26] There has been some discussion before us as to whether the way-leave rent is payable on account of the carriage of foreign materials only through the under-ground passages of the mine to the pit-mouth or whether it covers carriage over the surface of the property as well, the surface being vested in the pltf. Also, a suggestion has been made, although it is not supported by any evidence, that some of the passages along which the foreign coal is being brought pass through strata lying outside the coal-bearing strata &, therefore, outside the property transferred to the Roys. Neither of these two possibilities was mentioned before the Subordinate Judge, & the suit proceeded on the basis that the way-leave rent was for the carriage of foreign minerals through the coal mine. Hence, we may deal with the matter on this basis. The case of the applts. is that the pltf. sold to the Roys his right of reversion in the coal mine &, since the right to way-leave rent cannot exist *in vacuo*, the right to realise way-leave rent passed to the Roys. It is, therefore, necessary to consider what exactly the pltf. sold by this document.

[27] This brings me to the sale deed (EX. 3). It commences by mentioning the mining lease in favour of Ghosh, describing it as a settlement of "the under-ground coal," & recites that after this there remained to the grantor the right to the fixed minimum royalty & other dues arising out of the lease. It continues by referring to certain financial transactions between the parties & says:

"As there is no other means (to repay the same) I announced to sell the underground coal land *(koila pathar bhumi)* of the demarcated 14 annas share of *mauza* Dharmabandh mentioned in schedule *Ka* below & you agreed to purchase the same."

Much stress has been laid on this passage as indicating that the pltf. was selling not merely the right to the coal but also the land within which the coal was comprised, that is to say, the containing chamber. In the very next sentence, however, the kebala continues:

"Today I sell you the underground coal *paihuria koila pazhar* comprised in the demarcated 14 annas share of *mouza* Dharmabandh mentioned in schedule *Ka* below."

The kebala goes on:

"From today you shall become fully entitled to & enter into possession of the *demarcated property* in my right &c."

The words placed in italics by me are evidently used loosely, as the demarcated property on a strict interpretation would mean the entire 14 annas share of the *mauza*. The words, therefore, refer merely to the portion out of this 14 annas property which is being transferred by the sale deed, & what this is is the point which we are investigating. So, the words used do not help us to a solution. Equally unhelpful is the next passage to which our attention has been drawn:

"From this day I become fully divested of all my rights in the vended property & all the rights which I had therein shall devolve on you."

It has been emphasised that by these words the vendor was placing the Roys in his position as regards the disputed property. The transfer, however, is confined to "the vended property" & as these words do not define what the vended property is they do not help the applts. The next passage again confines itself to the coal & states:

"Be it stated that as long as the settlement in respect of the demarcated 14 annas underground coal (*koila pathar*) of the said *mouza Dharmabandh* ..... remains in force, you ... shall continue to realise hereafter .... all dues according to the terms of the said settlement from the said Debendra Nath Ghosh & his heirs & successors in-interest."

[28] The opening portion of this passage indicates that the vendor is thinking of the lease made in favour of Ghosh as a lease of the underground coal. The sale deed next recites:

"Whatever right & title I had by virtue of the aforesaid *patta & kabuliat* (that is the transaction with Ghosh) shall all from this day devolve on you."

This passage again seems to help the pltf. rather than the Roys. Under the mining lease the grantor had in respect of the coal only the right to realise the royalty & other dues in accordance with the lease & in the event of the expiry of the lease or its earlier surrender, to enter into possession of the coal. This was all that, according to this passage, the vendor was parting with. Much stress, however, has been laid on the right of reversion which is mentioned in the next following sentence:

"Should the said settlement be surrendered on any ground or the *vended underground coal (bikrita nimnastha koila)* comes to your khas possession you shall be competent to take khas possession thereof or settle the same with others as you like to which I or my heirs or successors-in-interests shall not be competent to make any plea or raise any objection."

This right of reversion, it is urged, was of the entire interest which the grantor had in the mine in addition to the right to realise royalty & other dues under the lease of 1908. Again, however, it is important to see to what exactly was the right of reversion which was being transferred. The right, as I have indicated by the italics, was confined to the coal; all that the Roys were given was the right to enter into possession of so much mineral & work it themselves or permit

someone else to work it, there was no parting with the ownership of the containing chamber. There is a mistake in the official translation of the passage which follows the passage just cited & both parties are agreed that the correct translation is :

"You shall have no concern with the surface land &c. above the demarcated coal land *(chihinta koila bhumi-ruparistha jaminadi)* or with other underground minerals &c. excepting coal *(pathuria koila pathar)*."

Here again the vendor confines to the coal the right which he is transferring to the Roys. There is some doubt about the correct reading of this passage. I have reproduced it as it was read to us in Ct. The persons responsible for preparing a transliteration of the document, as directed by us at the hearing, have read "bikrita" instead of "chihnita", & the translation should be "the vended coal land" instead of the "demarcated coal land". This reading supports the contention of the applts. but taking this passage along with the other passages refd. to before us the proper conclusion would be that the expression "*koila*" & "*koila bhumi*" have been used loosely & it is only by reading the document as a whole that we can determine what exactly was the property sold. The next passage accords to the Roys certain facilities covered by the mining lease in the winning & removal of the coal. It runs :

"Should you for the purpose of running the coal business in the leasehold coal land *(koila bhumi)* require any surface land &c. of the said coal land *(koila bhumi)* I as well as my heirs & successors-in-interest shall always remain bound to give such land according to the terms of the *Patta & kabuliat &c.*"

It is true the words used are "koila bhumi" but in this passage the vendor is not describing the property which is being transferred but merely the space within which the working of the coal is to take place. The vendor then mentions that he is making over to the vendees " the mining lease of 4-1-1903 executed by Gosh in respect of the vended property". I have mentioned above that the vendor regarded this lease as a grant of mining rights in respect of so much coal. His description of the mining lease as being in respect of "the vended property", therefore, seems to confine the transaction of sale to the coal. In the next relevant passage the vendor makes himself responsible for paying all the Govt. revenue "in respect of this *vended zamindari property.*" If all that the pltf. was selling was the coal the term "*zamindari* property" is loosely used. The fact that the pltf. was retaining the liability to pay the Govt. revenue shows that he was not divesting himself of his ownership of the property. A similar looseness in the use of language appears in the next sentence:

"Should you suffer any loss on account of any neglect on my part to pay the Govt. revenue in respect of the vended land *(bikrita bhumi)* or the *Zamindari* appertaining thereto I shall be liable for the loss."

The next sentence is again relevant & supports the contention of the pltf.

"I shall inform Debendra Nath Ghosh, the tenant in respect of the vended property mentioned in the schedule about this matter & I shall write to pay all the dues, royalty &c. in respect of the said property to you."

It is significant that, while the vendor was particular to mention the lease in favour of Ghosh & to make over the *kabuliat* executed by Ghose & undertook to inform Ghosh that in the future he should pay the dues under the mining lease to the Roys, he made no mention of the way-leave agreement & did not make over the relevant document. Evidently, he contemplated that by the sale deed the Roys would get only the right to realise the dues under the mining lease of 1908 & not the dues under the way leave agreement. It has been urged that these facts are irrelevant & that, if the effect of the sale deed was to pass to the Roys the right to the way-leave rent, the failure of the vendor to mention this in the sale deed & to hand over the relevant documents would not affect the right of the Roys to realise the way-leave rent. The contention is correct, but I am dealing with these facts for the purpose of construing the deed. If the deed was clear in itself & had the effect of passing the title to the way-leave rent, the omission of the vendor to mention this fact & to hand over the way-leave agreement would be irrelevant. Here, however, the effect of the document is not clear & in ascertaining what it was that the vendor was really giving it is necessary to construe the document as a whole. This is my answer also to the contention that the passages which immediately follow the dispositive part of the sale deed are irrelevant, & that they represent merely the vendor's conception of the legal effect of the disposition made by him. This is the way in which I understand these passages. To me it appears that in these passages the vendor is trying to make it clear exactly what the property is which he is transferring. He was conscious that the words "the under-ground coal *(Pathuria koila pathat)*" in the dispositive portion were open to misconstruction, & the passages which follow are, in my opinion, intended to show what meaning the vendor placed on these words. There follows another passage in which, considering the sale deed as a whole, the words "vended land *(bikrita bhumi)*" seem to have been loosely used.

"Should Debendra Nath Ghosh the tenant of the vended land or his heir or successors in-interest surrender the vended land you shall have not to pay any rent in respect of the surface land held by him or the tenant."

This passage should be read in the light of the previous passages which seems to regard Ghosh as a settlee merely of the mining rights. Finally, we come to the schedule which is headed: "Boundaries of the vended property *(bikrita sampatti)*" words which do not help either party. The words that follow are:

"Boundaries of underground coal land *(Koila Pathar Bhumi)* comprised in the 14 annas demarcated share of mauza Dharmabandh &c."

These words do not help either party. The boundaries of the coal would necessarily coincide with the boundaries of the coal land, & the words" coal land" used in this passage do not indicate that the sale deed was a sale deed of the coal land. To sum up, on a consideration of the sale deed as a whole, I am satisfied that the right that was being transferred to the Roys under the sale deed was confined to the coal regarded as so much mineral, lying below the surface of the 14 anna block of *mauza* Dharmabandh. There was no intention to transfer to the Roys the pltf's title in the cubical space within which that coal was comprised & therefore, the right of the pltf. under the way-leave agreement to realise way-leave rent did not pass to the Roys.

[29] For the reasons given above, the appeal fails & I would accordingly dismiss it with costs.

[30] **Jha C. J.** — I agree.

K.S. *Appeal dismissed.*

A.I.R. (38) 1951 Patna 564 *[C. N. 158.]*

RAMASWAMI & SARJOO PRASAD JJ.

Lakshmi Narayan — Accused — Petnr. v. *Comr. of Income-tax, Bihar & Orissa—Opposite Party.*

Misc. Judcl. Case No. 127 of 1950, D/- 1-3 1951.

Income-tax Act (1922), Ss. 25-A (2) & 34—Joint Hindu family—Partition—Assessment under S. 34 read with S. 25A—Procedure.

An assessment under S. 34 read with S. 25A (2) of a defunct Hindu undivided family cannot be completed on one of the members of the family. Under S. 25A (2) it is the duty of the Income-tax Officer to make total assessment in the first place & then proceed to divide it *pro rata* between the family members according to the portion of the joint family property allotted to each member at a partition. Thereafter the Income-tax Officer ought to proceed to make assessment on the various members of the family in accordance with S. 23. Unless this is done the assessment is not complete. [Paras 5 & 6]

Anno. I. T. Act, S. 25A, No. 1.

B. N. Jain & Tarkeshwar Pd.—for Petnr.; *S. N. Dutta—for Opp. Party.*

Order.—This reference is made by the Income-tax Appellate Tribunal at the instance of the assessee u/s. 66 (1), Income tax Act.

[2] The assessee was the karta of a Hindu undivided family up to 25-10-1940. Up to the year 1939-40 assessment was made on the assessee as karta. It is not disputed that u/s. 25A, sub-s. (1), the Income-tax officer made an order that there was partition of the undivided family on 25-10-1940. It is also not disputed that the family had 8 annas share in the firm called Jittanram Nirmalram of Gaya. The Income-tax Officer while making the assessment for the period 11-11-1939 to 30-10-1940 apportioned the profits of the firm into four parts, 8 annas being allotted to the outside patnr. & the other 8 annas allotted to the assessee & other two members of the family, *viz*, Vishnu Prasad Bhadani & Bhagwandas Bhadani. An appeal was preferred to the Appellate Asst. Comr. & also to the Income-tax appellate Tribunal who by its order dated 29-4-1944 set aside the assessment & remanded the case for proper determination of the date of partition after having such further evidence as it may be adduced. The firm of Jittanram Nirmalram had also been assessed to excess profits tax. A petn. u/s. 20, Excess Profits Tax Act, was filed by the firm before the Comr. of Income-tax. On 15-9-1944 the Comr. made an order, the effect of which was to reduce the assessment of the excess profits tax & to make a consequent increase in the assessment of income-tax for the period in question. The Income-tax Officer issued notice u/s. 34 against the firm & against the patnrs. with respect to the alleged escape of the income-tax. The assessee filed return showing 1/6th share of income from the firm Jittanram Nirmalram but even so the Income tax Officer assessed him for 8 annas share of the entire profits as being representative of the Hindu undivided family which had then become defunct. The assessee preferred appeals to the Appellate Asst. Comr. & to the Income-tax appellate Tribunal, who overd. the objection that the assessment was not proper or valid.

[3] At the instance of the assessee the appellate Tribunal has propounded the following question for the determination of the H. C. :

"Whether an assessment u/s. 34, read with S. 25A (2) of a defunct Hindu undivided family could be completed on one of the members of the family & the whole of the tax demanded from him without completing the assessment of the other members & making any demand from them."

[4] In our opinion the second part of the question, viz. :

"Whether the whole of the tax could be demanded from the assessee without completing the assessment of the other members & making any demand from them."

does not arise out of the order of the appellate Tribunal & we do not propose, therefore, to answer this part of the question under reference. On behalf of the assessee Mr. Jain attempted to show that this second part of the question also was argued before the appellate Tribunal; but on reference to the appln. made before the Tribunal u/s. 66 (1) it does not appear that any such question was mooted before the Tribunal & the submission of Mr. Jain cannot be entertained.

[5] As regards the first part of the question it appears to us that upon the plain meaning of S. 25A of the Act the assessment is not complete unless each member of the joint family had been assessed for the share of the tax on the income according to the portion of the joint family property allotted to him. The material portion of S. 25A (2) states :

"Where such an order has been passed . . . the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no partition had taken place, & each member or group of members shall, in addition to any income-tax for which he or it may be separately liable . . . be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it; & the Income tax Officer shall make assessments accord-

ingly on the various members & groups of members in accordance with the provisions of S. 23."

In the present case it is manifest upon the undisputed facts that the assessment proceedings have not been completed according to the manner indicated in S. 25A of the Act. It was the duty of the Income-tax Officer to make total assessment in the first place & then proceed to divide it *pro rata* between the family members according to the portion of the joint family property allotted to each. Thereafter the Income-tax Officer ought to have proceeded to make assessment on the various members of the family in accordance with the provisions of S. 23 of the Act. Though the assessment proceeding in this case is not complete the irregularity, if any, cannot avail the assessee Lakshminarain Bhadani for it will now be open to the Income-tax Officer to make a separate assessment of the various family members for the share of the tax of the income according to the portion of the joint family property allotted to each & thereafter each of the family member including the assessee will be jointly & severally liable for the tax assessed on the total income.

[6] While, therefore, we consider that the first part of the question referred to us should be answered in the negative, it is manifest the assessee has substantially failed &, in our opinion, he must pay half the cost of the reference, which, in the circumstances of the case, we assess at Rs. 125.

K.S. *Answer accordingly.*

A. I. R. (38) 1951 Patna 565 *[C. N. 159.]*

RAMASWAMI & SARJOO PRASAD JJ.

H. P. Bannerji — Petnr. v. Comr. of Income-tax, Bihar & Orissa — Opp. Party.

Misc. Judicial Case No. 185 of 1950, D/- 2 3-1951.

Income-tax Act (1922), S. 10 — Profits or compensation for sterilisation of capital.

The assessee purchased a piece of land measuring about 13 bighas for the alleged business of setting up a market & making profit. The plot was requisitioned by the military authorities under the Defence of India Rules. There was an agreement between the assessee & the military authorities that a sum of Rs. 1100 p. m. will be paid to the assessee as compensation for the use of the land. For the year 1946-47 the assessee received a total sum of Rs. 13, 200 as compensation. After making statutory deductions the Income-tax Officer held that the net sum of Rs. 9699 received by the assessee from the military authorities was liable to be taxed:

Held that the amount of Rs. 9699 was not compensation made for sterilisation of capital asset. The amount of compensation received by the assessee was really a profit derived from the land & the assessee was liable to be taxed under the Act: A I. R. (26) 1939 Pat. 662 (S. B.) & (1828) 12 Tax cases 427, *Distd.* [Paras 2, 4]

Anno. I. T. Act, S. 10, N. 1, 2.

S. K. Majumdar — for Petnr.; S. N. Dutta — for Opp. Party.

Ramaswami J. — This reference is made by the Income-tax Appellate Tribunal u/s. 66 (1), Income-tax Act of 1922.

[2] The material facts are not controverted. The assessee carries on several business activities. He had purchased a piece of land measuring about 13 bighas for the alleged business of setting up a market & making profit. The plot was requisitioned by the military authorities under the Defence of India Rules. There was an agreement between the assessee & the military authorities that a sum of Rs. 1100 p. m. will be paid to the assessee as compensation for the use of the land. It should be added that the military authorities used the land as a Store-yard. For the year 1946-47 the assessee received a total sum of Rs. 13,200 as compensation. After making statutory deductions the Income-tax Officer held that the net sum of Rs. 9699 received by the assessee from the military authorities was liable to be taxed. The assessee preferred an appeal to the Appellate Asst. Comr. & argued that the amount was not liable to be taxed since it was merely compensation from the military authorities for preventing the assessee from making use of his capital asset. This argument was accepted by the Appellate Asst. Commr. An appeal was preferred by the Income tax Officer to the Appellate Tribunal who reversed the decision of the Appellate Asst. Comr. & held that the amount was in substance profit derived from the land & so liable to be taxed.

[3] At the instance of the assessee the Income-tax Appellate Tribunal refd. the following question for being determined by the H. C viz.:

"Whether in view of the facts & the circumstances of the case, the sum of Rs. 9699 received by the assessee from the military authorities is taxable?"

[4] On behalf of the assessee Mr. S. K. Majumdar stressed the argument that upon the facts of this case it should be held that the amount of Rs. 9699 was compensation made for sterilisation of capital asset & was therefore not liable to be taxed. In support of his contention the learned counsel refd. to *Glenboig Union Fireclay Co. Ltd. v. Comr. of Inland Revenue*, (1928) 12 Tax. Cas. 427, in which the applt. Co. carried on business as manufacturers of fireclay goods & as merchants of raw fireclay, & was lessee of certain fireclay fields over part of which ran the lines of the Caledonian Rly. In 1908 the Rly. Co., to whom the lands belonged, though not the minerals beneath, instituted an action to restrain the applt. Co. from working the fireclay under the rly, contending that the fireclay was not a mineral & consequently formed part of the Rly. Co's property. While the action was pending the applt. Co. was interdicted from working under the Rly. In 1911 the House of Lords decided against the Rly. Co., which thereupon exercised its statutory powers to require part of the fireclay to be left unworked on payment of compensation. The amount of compensation was settled by arbitration & duly paid to the applt. Co. in 1913. The question debated before the House was as to whether the amount received for compensation in respect of the fireclay left unworked was profit earned in the course of the Co.'s trade.

Upon the facts of the case the House of Lords held that the amount received as compensation was not a profit earned in the course of the Co.'s trade but was a capital receipt, being a payment made for the sterilisation of a capital asset. In the present case the facts are manifestly different & it is not possible to hold that on account of requisition made by the military authorities "the capital asset" of the assessee has been "sterilised" to borrow the language used in the decision of the House of Lords. Reference was also made by Mr. Majumdar to *Comr. of Income-tax, B. & O.* v. *Prayagkumari*, 19 Pat. 186 : (A I. R. (26) 1939 Pat. 662 S. B.) in which the assessee had in pursuance of a decree received a certain sum of money as damages, for wrongful detention of her movable property & a Special Bench of the Patna H. C. held that such receipt was not "income" within the meaning of the Income-tax Act, 1922, & was not therefore liable to assessment. In my opinion the principle of this case is not of much assistance to the assessee in the present case. Manohar Lall J. who pronounced the opinion of the Special Bench pointed out that there was a distinction between a case where damages, pure & simple, have been awarded & a case where there is receipt of damages or compensation in the course of business or trade carried on by a trader. Upon the facts of that case the learned Judge held that the receipt of the decretal amount for damages by the assessee for wrongful detention of her movable property was not income within the meaning of the Income tax Act & was therefore not liable to assessment. It is manifest that the facts are not in any way parallel to the facts of the present case. On the contrary it would seem that the amount of compensation received by the assessee is really a profit derived from the land & it was rightly held by the appellate Tribunal that the assessee was liable to be taxed under the Act.

[5] Upon these grounds I hold that in the circumstances of the case the sum of Rs. 9699 received by the assessee from the military authorities is taxable. The assessee must pay the cost of this reference to the Comr. of Income-tax. Hearing fee Rs. 250.

[6] **Sarjoo Prasad J.**— I agree.

D.H. *Answer in the affirmative.*

A. I. R. (38) 1951 Patna 566 *[C. N. 160.]*

JHA C. J. & REUBEN J.

Ram Rup Singh & others — *Applts.* v. *Jang Bahadur Singh & others* — *Resps.*

A. F. O. D. No. 177 of 1947, D/- 21-2-1951.

(a) T. P. Act (1882), S. 58 — Mtge. when becomes effective.

A mtge. bond becomes an effective document after its due execution & registration. Delivery of the same is not an essential part of it unless it is specifically agreed to between the parties to the deed that title would not pass unless the deed is delivered. [Para 7]

(b) Evidence Act (1872), S. 92, Proviso 2 — Mtge. deed reciting that entire consideration money was received by mtgor.—Mtgee. admitting that only part of it was paid to mtgor.—Extrinsic evidence is admissable to prove that a duty was cast on mtgee. to pay off dues of mtgor. as the document is silent on the point. [Para 8]

Anno. Evi. Act, S. 92, N. 25.

(c) T. P. Act (1882), S. 60 — Extinguishment of right of redemption by operation of law — Revenue sale due to default of mtgee. — Mtgee. taking settlement from landlord purchaser — Effect.

A executed a usufructuary mtge. (Sudhbharna bond) of his holding in favour of *B* who entered into possession under it. It was expressly agreed between the parties that *B* would pay the landlord's dues in respect of the holding out of the consideration left in his hands. *B* failed to pay the amount of rent decree with the result that the holding was sold in execution of the rent decree & was purchased by the landlord himself. *B* subsequently took settlement of the holding from the landlord. *A* sued *B* for redemption of the mtge. It was proved that *B* was guilty of fraud & collusion in making default in payment of rent decree & taking fresh settlement of the holding:

Held, that (i) *B* was clearly in the wrong in allowing the property to be sold in execution of the rent decree & by taking settlement from the landlord he could not take advantage of his own wrong & change the character of his possession & deprive *A* of his right of redemption. It was not open to *B* to contend that the pltf. had lost his right of redemption because the old tenancy had extinguished by the rent sale : A. I. R. (15) 1928 Pat. 17 ; 21 P. L. T. 699; A. I. R. (11) 1924 Cal. 357 and 27 Mad. 591, *Rel. on*; A. I. R. (26) 1939 Pat. 382 and A. I. R. (23) 1936 Pat. 434, *Dist.* [Paras 9, 10]

(ii) *A* was entitled to treat the rent sale as against *B* as a private sale & claim redemption even without a prayer for the setting aside of the sale : 10 M. I. A. 540 (P. C.) ; A. I. R. (3) 1916 P. C. 227 ; A. I. R. (23) 1936 Pat. 434 and A. I. R. (26) 1939 Pat. 382, *Rel. on.* [Para 13]

Anno. T. P. Act, S. 60, N. 27, Pts. 2 & 3.

Lal Narain Sinha & L. S. Sinha — for Applts ; Girindra Nath Mukherjee & D. C. Verma, A. C. Mitra and Medini Prasad Singh — for Resps.

Jha C. J. — This appeal is by the defts. first party (hereafter to be referred to as 'the defts'). It arises out of a suit for redemption which has been decreed by the trial Ct. by its judgment dated 23-4-1947.

[2] The mtgees. are the defts. first party ; the transferees of the mtgees. of a portion of the disputed land are the defts. second party & the landlords are the defts. third party.

[3] Jang Bahadur Singh, who is the pltf. 1, & one Jawad Ali predecessor-in-interest of pltfs. 4 to 6, claim to be tenants of the defts. third party, in respect of a holding having an area of 20.55 acres, with an annual jama of Rs. 136 & odd, including cess, under a kabuliat dated 21-12-1922. The rent of this holding having fallen into arrears, a rent suit was instituted in 1936, being Rent Suit No. 1570 of 1936, for recovery of the arrears of rent for the years 1342 to 12 annas kist of 1343 Fasli, & a decree for rent was duly obtained *ex parte* on 4-1-1937 (Ex. 1) of which execution was taken out, being execution case No. 1080 of 1937. While the execution case was pending, Jang Bahadur & Jawad Ali jointly executed a Sudbharna bond (Ex. A) on 20-7-1937, for Rs. 800 in favour of Lalji Singh, father of defts. 1 to 3, &

Sukar Singh, deft. 9. The entire holding was given in usufructuary mtge. for paying off the dues under the decree as well as the arrears of rent which accrued due after the institution of the rent suit. The money raised under the mtge bond remained with the mtgees. who, however, did not pay the dues under the decree for which execution had been taken out & consequently the holding was sold on 20-8-1937, at a ct. sale, & the landlords themselves became the purchasers, & they obtained delivery of possession on 30-11-1937. The pltfs. later on came to know of the purchase of the holding by the landlords in execution of the decree for arrears of rent & thereupon they made an appln. to the Collector on 21-7-1939, u/s. 3, Cl. (1), Bihar Restoration of Bakasht Lands & Reduction of Arrears of Rent Act, 1938 (Bihar Act IX [9] of 1938) for the restoration of the holding to them.

[4] The case of the pltfs. was that the holding was in the possession of the landlords after the rent sale & therefore, they were entitled to the restoration of the holding. The case was resisted by the defts. as well as the landlords on the ground that the holding had been settled with Jago Singh (deft. 2) & Sukar Singh (deft. 9) under an unregistered hukumnama dated 5-12-1937, & it was alleged that the settlement was later on confirmed by two regd. kabuliats in their favour dated 10-11-1938. The Collector in charge rejected the appln. & accepted the case of the objectors that the appln. was not maintainable because, in his opinion, the settlement had been made with the defts. by the landlords before 19-4-1938 & so the pltfs. were not entitled to restoration under the Act. The Divisional Commr. as well as the Board of Revenue were moved in their revisional jurisdiction, but they did not interfere with the order of the Collector in charge on the ground that his order was final. The pltfs. have, therefore, brought the present suit for redemption of the sudhbharna bond dated 20-7-1937. Their case in short, is that the settlement is fraudulent & collusive & as such, the mtge. subsists & they are entitled to redeem it. Their further case is that the defts. having taken possession of the disputed land as mtgees. the character of their possession was not changed by reason of the settlement. The case of the defts. on the other hand, is that the mtge. bond remained inoperative & that there was no fraud in the rent sale, nor was the settlement collusive. They contend, therefore, that the pltfs. have no right to redeem.

[5] The trial Ct. has decreed the suit & held that the pltfs. are entitled to redeem the mtge. on payment of Rs. 800. The defts. have, therefore, preferred the present appeal.

[6] The questions for our consideration are (1) whether the sudhbharna bond dated 20-7-1937, was acted upon & (2) whether the pltfs.' right of redemption subsists.

[7] The mtge. bond in suit (Ex. A) was duly executed & regd. at Lakhisarai. (After discussing the evidence the judgment proceeds:) I am, therefore, of the opinion that the mtgors. handed over the registration receipt to Lalji duly endorsed in his favour & the mtgees. became entitled to take delivery of the mtge. bond from the registration office & come into possession. The defts. have led evidence to show that the mtge. bond remained in the registration office. I do not feel inclined to accept this story. Nor is it necessary to decide the question because the mtge. bond became an effective document after its due execution & registration. In support of my view I may refer to the case of *Sultan Ahmad* v. *Maksad Hussain*, 22 Pat. 306 : (A.I.R. (31) 1944 Pat. 3), where it has been held that

"to execute a document simply means to perform what is required to give validity to a writing, as by signing & sealing it. Delivery of the same is not an essential part of it, unless that is specifically agreed to between the parties to the deed."

It may be mentioned that the defts. admit the execution & registration of the sudhbharna bond in their presence & with their consent & it is not their case that there was any stipulation between the parties that unless the deed was delivered to the plfs. or the document withdrawn from the registration office, title would not pass; nor is there any indication in the mtge. bond itself to that effect. In my opinion, therefore, the mtgees. acquired a legal right to possession after the execution & registration of the mtge. bond in suit.

[8] The mtge. bond was for Rs. 800. The recital in the deed shows that the entire consideration money had been received by the pltfs. This recital is evidence, though not conclusive, against the pltfs. but the presumption arising from the recital is rebutted by the fact that D. W. 5 (deft. 1) admits that only Rs. 50 was paid to the pltfs. to meet the cost of the execution & registration. Jang Bahadur, pltf. 1 (P. W. 5), has stated in his evidence:

"We were not to get anything out of the consideration money. Out of the consideration money Lalji Singh had to satisfy the decree & rent for 4 annas kist of 1343 & also to meet the cost of the document."

Thus the entire consideration money having been left with the defts. they were in the position of a trustee, & a duty was cast upon them to pay the landlords' dues & save the property from sale. The argument of Mr. Lal Narain Sinha is that it is not open to the pltfs. to prove that a duty was cast upon the defts, by any oral evidence. His contention is that the rights & liabilities fixed under a document can be proved, u/s. 92, Evidence Act, only by the terms of the document & not otherwise ; but the argument has no force, because the document is silent on the point. Extrinsic evidence is, therefore, admissible, & the oral evidence, in my opinion, read in the light of the circumstances of the case, irresistibly leads to the conclusion that a duty was cast upon the defts. to pay off the dues of the landlords.

[9] The pltfs.' case is that soon after the registration of the bharna bond they put the defts. in possession of the disputed land as mtgees. The trial Ct. has accepted the pltfs.' evidence on the point, & I see no reason to take a different view. Jang Bahadur, pltf. 1, has stated that the bharnadars were put in possession of the disputed land after the execution of the bharna bond & they brought the land under cultivation four or five days after its execution. This evidence gets ample support from the circumstances of the case to which I shall refer hereafter. Thus on the evidence it is clear that the defts. took possession as mtgees. & it was their clear duty to save the property from the ct. sale which took place on 20-8-1937, in execution of the rent decree. Admittedly, the landlords became the auction-purchasers & the defts. took settlement from them & are in possession of the disputed land. In my opinion, the defts., by taking the settlement from the landlords, could not change the character of their possession as against the pltfs. The defts. were clearly in the wrong in allowing the property to be sold and, therefore, if the holding has come back into their hands, they cannot take advantage of their own wrong & deprive the pltfs. of their right of redemption. It is a well known legal maxim that convenience cannot accrue to a party from his own wrong (*commodum ex injuria sua memo habere debt*). The principle of this maxim was applied by their Lordships of the Judicial Committee in *Hunoomanpersaud* v. *Mt. Babooee Munraj*, 6 M. I. A. 393 at p. 423:(18 W. R. 81 P. C. where their Lordships have said :

"But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause."

A Bench of the Madras H. C. has also pointed out that the principle underlying the maxim is almost of universal application & held that no one can be allowed to benefit by his own wrongful act (*vide Vedanayagar Mudaliar* v. *Vedammal*, 27 Mad. 591 at pp. 593-99). In my opinion, the pltfs. were wronged by the misconduct of the defts. The sale could have been averted if the defts. had simply deposited the decretal amount which was in their hands as trustees for the pltfs. The defts. cannot turn round now & say that the pltfs. have lost their right of redemption because the old tenancy had been extinguished by the rent-sale. The Ct., in equity, cannot lend its aid to such a defence. A Bench of the Calcutta H. C. held in *Kamala Kanta* v. *Ananda Chandra*, 71 I. C. 1030 : (A. I. R. (11) 1924 Cal 357) that

"the mtgees. cannot by suffering dispossession & having taken a new title from the landlord affect the right of the mtgors. in the property of which they were put into possession under the mtge."

The same principle was enunciated by a Bench of this Ct. in *Tali Mahton* v. *Lekhraj Mahton*, A. I. R. (15) 1928 Pat. 17 : (104 I. C. 644), where their Lordships have said that

"the mtgee. being in possession had a certain duty towards the mtgor. & it was his clear duty to maintain his possession as against the landlord. He could not by suffering dispossession put an end to the tenancy & then proceed to take a settlement of the land from the landlord."

This case was folld. by a later Bench of this Ct. in *Chandi Mander* v. *Sitabi Bhagat*, 21 P. L. T. 699, where Harries C. J. enunciated the law thus:

"In short the finding is that the mtgee. resps. were the cause of the proceedings, & once they had been taken, they took a settlement again from the landlords of all the Bath lands. To claim these lands now as not being lands subject to the mtge. is to claim a benefit arising from their own default, & this the law does not permit them to do. A mtgee. cannot be heard to say that land is no longer subject to a mtge. as a result of his own default or of any act on his part."

It may be observed that in the case to which I have refd. the landlords had obtained possession by the abandonment of the holding & not by rent sale, & the mtgees. by suffering dispossession came back into possession by re-settlement. There is, in my opinion, no difference in principle between the case where a landlord obtains possession by abandonment & a case where he obtains possession by ct. sale. Once the land comes back into the possession of the mtgee., it is immaterial by what process of law the landlord obtained possession. Such a question becomes relevant only when the Ct. is called upon to consider the rights of the landlords & the tenants, & not when it has to consider the rights of the mtgors. against the mtgees. Therefore, the present case is governed by the principle enunciated by the Bench decisions of this Ct. to which I have refd. & the pltfs. are entitled to redeem.

[10] Mr. Lal Narain Sinha has contended that, assuming that the defts. were bound to pay the dues of the landlords & they made a default which resulted in the sale of the holding, the pltfs.' right of redemption was extinguished, & any later settlement taken by the defts. cannot revive the pltfs.' right of redemption. His contention is that, once the property has vested in the landlords, any subsequent settlement by them with the original mtgees. would not revive the mtgors.' right of redemption as tenants of the old holding. In support of his contention the learned counsel reld. upon two Bench decisions of this Ct. *Gauri Shanker* v. *Sheotahal*, A. I. R. (23) 1936 Pat. 434: (164 I. C. 213) and *Fekua Mahto* v. *Lal Sahu*, 18 Pat. 133 : (A. I. R. (26) 1939 Pat. 382). General observations made in those two cases apparently lend support to the applts.' argument, but the observations must be read in the light of the facts of those cases. In my opinion, the cases reld. upon by Mr. Lal Narain Sinha are not applicable to the facts of the case before us. In *Gauri Shanker Sahu's case* A. I. R. (23) 1936 Pat. 434 : (164 I. C 213), the landlord purchased the holding & took possession through Ct. & served a notice upon the mtgee. u/s. 167, B. T. Act, to

annul the encumbrance. Thereupon, the mtgee. brought a suit to have his mtge. right declared & impleaded the mtgor also in the action. The mtgor. did not put in appearance & the suit ended in a compromise between the landlord & the mtgee. The mtgor. had an opportunity to preserve his equity of redemption, but he did not avail himself of it, although he was joined as party deft. in the action. It was on these facts that their Lordships held that, unless the rent sale could be set aside, the mtgor. or his assignee could not be heard to assert his right to redeem. I may observe that the law laid down in *Gauri Shanker's case*, (A.I.R. (23) 1936 Pat. 434 : 164 I. C. 213) if read apart from the facts, would offend the rule of equity that a person cannot take advantage of his own wrong. In *Fekua Mahto's case*, (18 Pat. 133 : A. I. R. (26) 1939 Pat. 382), Harries C. J. folld. the Bench decision in *Gauri Shanker's case*, A. I. R. (23) 1936 Pat. 434 : (164 I. C. 213), & it was held that where property subject to a mtge. is sold in execution of a rent decree & at some later period purchased by the mtgee, whose failure to pay rent has resulted in the rent decree, such purchase by the mtgee. does not, in the absence of fraud, revive the equity of redemption which is extinguished by the sale. An examination of the facts in *Fekua Mahto's case*, (18 Pat. 133 : A. I. R. (26) 1939 Pat. 382) clearly shows that there was no duty cast upon the mtgees. to pay the rent in respect of the mortgaged property. Therefore, *Fekua Mahto's case* (18 Pat. 133 : A. I. R. (26) 1939 Pat. 382) was not at all a case where the principle whether a wrong-doer can take advantage of his own wrong was involved. The facts in *Fekua Mahto's case*, (18 Pat. 133 : A.I R. (26) 1939 Pat. 382) were these. In 1886, the ancestors of pltfs. 1 to 3 & defts. 8 to 10 mortgaged their tenure to one Musammats in village H. In 1892 the mtgors. sold their right to B, who paid up the money due on the mtge. & thus redeemed it. Later on B mortgaged the property to N. In 1898 the ancestors of pltfs. 1 to 3 & defts. 8 to 10 again mortgaged the same village to defts. 1 to 7, & by the terms of the mtge. the latter, who were given possession, were bound to pay rent in respect of the tenure mortgaged. After this mtge. litigation ensued between N (mtgee. of B) & defts. 1 to 7, & eventually N obtained a decree for possession, but he never executed the decree & never obtained possession of the tenure. Defts. 1 to 7 fell in arrears with their rent. In July, 1904, 8 annas share in this village was sold to R. S. in execution of a rent decree, which the owners of the village obtained, & later on, in the same year, the remaining 8 annas share in the village was sold to A. T. in execution of another rent decree obtained by other co-owners. Therefore, by the end of 1904, the whole of this village had been sold in execution of rent decrees to R. S. & A. T. These two persons entered into possession of the property & remained in such possession till 1919. On 22-5-1919, defts. 1 to 3 purchased 8 annas interest held by R. S. & on 10-8-1919, they purchased the other 8 annas interest held by A. T. By the end of 1919, therefore, defts. 1 to 3, who were the mtgees. under the mtge. executed in the year 1898, had become owners of the 16 annas in this village. In February, 1933, the original mtgors., namely, pltfs. 1 to 3 & defts. 8 to 10, sold their alleged mtgors'. right to pltfs 3 & 4. The pltfs. contended that they still held the equity of redemption in the mtge. & brought the suit claiming redemption. These facts clearly show that defts 1 to 3, who were the mtgees. of the ancestors of pltfs. 1 to 3 & defts. 8 to 10, were held by a decree of the Ct. to have no right in the mortgaged property in the litigation between defts. 1 to 7 & N. Therefore, they were under no obligation to pay the rent in respect of the tenure which ultimately came into their possession, because in the litigation that ensued between them & N, the latter succeeded in defeating the claim of defts 1 to 7, & so, in the eye of law, no duty was cast on them to pay the rent of the tenure in spite of their undertaking by the terms of the bond to pay the rent of the tenure mortgaged. The principle enunciated in *Fekua Mahto's case*, (18 Pat. 133 : A.I.R. (26) 1939 Pat. 382), therefore, must be read in the light of these facts. In my opinion, Harries C. J. cannot be said to have laid down a rule contrary to what he has said in the later case of *Chandi Mander* v. *Sitabi Bhagat*, 21 P. L. T. 699, where he has clearly held that a mtgee. who is bound by the terms of the mtge. to pay rent in respect of the land mortgaged to him cannot claim a benefit arising from his own default.

[11] The matter, however, does not rest only with the breach of a duty on the part of the defts. The evidence discloses not only a case of misconduct but also warrants an inference of collusion between them & the landlords' amlas. (After discussion of the evidence the judgment proceeds:) Therefore, on a careful consideration of all the facts & circumstances, I am clearly of the opinion that the defts. took the settlement in fulfilment of their design &, as such the pltfs. are entitled to treat the Ct. sale as a private sale & claim redemption, because the mtge. must be treated in the eye of law as still subsisting. If any authority be needed for this proposition, I would refer to *Sidhee Nazir Ali* v. *Ojoodhyaram*, 10 M.I.A. 540 : (5 W. R. 83 P. C.), *Deonandan* v. *Janki Singh* 44 I. A. 30 : (A.I.R. (3) 1916 P. C. 227), *Gauri Shanker* v. *Sheotahal*, A I. R. (23) 1936 Pat. 434 : (164 I. C. 213); *Fekua Mahto* v. *Lal Sahu*, 18 Pat. 133 : (A. I. R. (26) 1939 Pat. 382) & an unreported decision of this Ct. in Second Appeal No. 907 of 1948, *Ramdas Singh* v. *Manki Singh*, decided on 4-5-1949.

[12] Lastly, it was contended by Mr. Lal Narain Sinha that, even if fraud be held to have been proved, the pltfs. not having claimed reconveyance of the property ; the suit must fail, & reliance

has been placed by him on the decision of the Judicial Committee in *Deonandan* v. *Janki Singh*, 44 I. A. 30 : (A. I. R. (3) 1916 P. C. 227). In my opinion, this argument is not well founded. The pltfs', suit is, in effect, to quote the language of the Judicial Committee, in *Sidhee Nazir Ali* v. *Ojoodhyaram Khan*, 10 M. I. A. 540 at p. 553 : (5 W. R 83 P. C.), "to confess & avoid that sale, by imposing a trust on the estate which passed under it." The decree or the sale under it is not, therefore, required in law to be set aside. The pltf.'s case is that the sale enures to their benefit, & the defts. at whose instance the sale took place, must be relegated to the position in which they were before the sale. The case clearly falls within the following dictum of Lort-Williams in *Nawab Nazir Ally* v. *Ojoodhyaram Khan*, 10 M.I.A. 540: (5 W. R. 83 P. C.) :

"As to this, it is sufficient to observe that on the allegations in the plaint that bar cannot be set up; for the title & possession of the defts. against whom the redemption is prayed by this suit, is expressly alleged to be founded on fraud. This period of limitation, therefore, may be laid out of the case; & we come then to what has appeared to their Lordships to be the real question in the case (the question to which we have above refd.), whether the pltf. can in point of law, insist, notwithstanding the auction sale for arrears of revenue, that as against him, that sale ought to be viewed as a private sale. The title to redeem in this suit as against the parties subsequent to Abbott is rested on that ground, & the case which the pltf. alleges by this plaint, & by the documentary proof appended to it, is one of fraud between Abbott & McArthur, to deprive him of his title to redeem the Zemindary, by means of a secret purchase of it between them for three lacs of rupees, including a fraudulent device of a sale by auction for arrears of revenue, such arrears to be designedly incurred."

[13] The pltfs. are, therefore, entitled to treat the rent sale as against the defts. as a private sale & claim redemption even without a prayer for the setting aside of the sale.

[14] The trial Ct. has decreed the suit for redemption on payment of Rs. 800 only ; but as the defts. have used their position as mtgees. in securing an advantage by which the rent of the holding had been reduced on payment of salami, they are, in my opinion, entitled to the money which they paid to the landlords by way of salami to secure that advantage. Therefore, the pltfs. must pay Rs. 1,325, paid as salami, within four months, & they would be entitled to redeem the mtge. on payment of this amount. With this modification, the judgment of the trial Ct. is affd. & the appeal dismissed ; but, under the circumstances of the case, the pltfs. will not be entitled to costs in this Court.

[15] **Reuben J.** — I agree.

[16] On the finding that the mtge. deed was duly executed & regd. & that the registration receipt was made over to the mtgees. with the intention of giving effect to the mtge. there can be no question of want of delivery.

K.S. *Appeal dismissed.*

A. I. R. (38) 1951 PATNA 570 (C. N. 161)

RAMASWAMI AND SARJOO PRASAD JJ.

Gopeshwar Prasad Sahi, Petnr. v. State of Bihar and others.

M. J. C. No. 79 of 1951, D/- 14-3-1951.

(a) Const. Ind., Art. 226 — Powers under — Exercise of — Not obligatory in every case.

There is nothing in the language or purpose of Art. 226 which shows that the words are intended to be imperative in every case. The Constitution makers could never have intended that the H. C. should issue the writ even if the petnr. had an alternative legal remedy which was equally adequate. The remedy given by the Art. is an extraordinary one and can be invoked only in exceptional circumstances when there is no alternative remedy by way of suit or otherwise or where though such alternate remedy is available, it is not equally appropriate, beneficial or convenient. (1922) 1 K B 72 and (1889) 2 Q B 632 Ref. (Paras 5, 6)

Per Sarjoo Prasad J.: There can be no doubt on the clear provisions of Art. 226 that the H. C. has power to issue writs not only for the enforcement of fundamental rights but also "for any other purpose". But the words "any other purpose" must mean "the enforcement of any legal right and the performance of any legal duty". Although the powers of H. C. to issue writs under the Constitution are very wide, it has been rightly held that the remedy provided by the Art. must remain an extraordinary remedy to be used where ordinary legal process cannot give adequate and prompt relief: A I R (37) 1950 Pat 387, Rel. on. (Para 32)

(b) Bihar and Orissa Ct. of Wards Act IX (9) of 1879, S. 7 — Reversionary interest — Meaning — Interpretation of statutes.

The primary rule of interpretation is that words are to be construed in their popular sense. The Bihar and Orissa Ct. of Wards Act is not a special statute confined to the case of Hindu proprietors and taking into account the object and scope of the enactment it is clear that the expression "reversionary interest" is not used in a technical sense, but must be construed in a popular and ordinary sense. (Para 11)

(c) Bihar and Orissa Ct. of Wards Act IX (9) of 1879, S. 7 — Applicability — Essential conditions — Absence of property of ward — Effect.

On a proper construction of S. 7 it is plain that only two precedent conditions are necessary in order to confer jurisdiction on Ct. of Wards to act. The first condition is that the proprietor of the estate should be disqualified u/s. 6 of the Act, and secondly the minor member of the family ought to have an immediate or reversionary interest in the property of such proprietor. Provided that these conditions exist, the jurisdiction of the Ct. of Wards is complete. The question whether the Ward had personal properties of his own at the time the Ct. of Wards made the assumption order is not material. (Paras 12, 13)

Per Sarjoo Prasad J.: In granting power to the Ct. to assume jurisdiction over person and property of the minor, the two objects have been conjoined without creating any obligation upon the Ct. to take charge of both or not at all. Therefore where the State takes charge of either the person or the property of the minor, who is a member of the family of the disqualified proprietor, the minor becomes a ward of the Ct. within the meaning of the Act. (Para 48)

(d) Bihar and Orissa Ct. of Wards Act IX (9) of 1879, S. 35 — Possession under — When taken.

Possession of ward's property is taken u/s. 35 as soon as the formal direction to take possession is made by the Ct. Taking of actual possession of the

property is not necessary. The word "so" in the section refers to the particular method of taking charge and the phrase "Possession shall have been so taken" should be construed to mean "when possession shall have been taken by an order directing possession to be taken". A I R (21) 1934 P C 202, rel. on. (Paras 15, 16)

Per Sarjoo Prasad J.: Once the management of the property of the disqualified proprietor or the minor members of his family has vested in the Ct. of Wards, it is the Ct. of Wards which is legally in charge of such property although the property may be for the time being in actual physical possession of any other person. (Para 53)

(e) Bihar and Orissa Ct. of Wards Act IX (9) of 1879, S. 7 — Amendment of, in 1940 — Retrospectivity — Interpretation of statutes.

It is an established rule of construction that retrospective operation is not to be given to a statute so as to impair the existing right or obligation unless the intention is expressed in unequivocal terms. Where the Ct. of Wards validly assumed in May 1940 jurisdiction over the person and property of a certain person who was duly constituted a ward of the Ct., the amendment of S. 7 by the amending Act of 1940 which came into force in June 1940 could not affect the rights and obligations already vested, nor could it alter the juridical status of the person as a ward of the Ct. Case law referred. (Paras 18, 19)

(f) Majority Act IX (9) of 1875, S. 3 — Discrimination in age — Validity — Const. Ind., Art. 14.

The discrimination made between two classes of persons by S. 3, Majority Act, does not violate Art. 14 of the Constitution. The equal protection clause does not prevent classification and does not prevent the drawing of lines. The clause only requires that the classification must be reasonable and not arbitrary. (Para 24)

The selection of the age limit for legal majority is artificial in any case. If the legislature has fixed a different age-limit in the case of wards whose estates the Ct. of Wards has taken charge, it cannot be said that classification adopted is 'prima facie' unreasonable. The onus is therefore on the party questioning the reasonableness to establish that the classification adopted by the legislature in S. 3 is arbitrary and unreasonable. (Paras 23, 24)

(g) Interpretation of Statutes — Constitutionality of Act — Presumption.

The Ct. ought to make every possible presumption in favour of the constitutionality of an enactment. The principle is specially important when the issue of constitutionality before the Ct. is one depending on some question of degree. (1919) 249 V S 152, relied. (Para 24)

P. R. Das, Balbhadra Pd. Singh, Ishwarinandan Singh and Mrs. H. Kumar, for Petnr. — Advocate General and Govt. Pleader — for The State.

Cases referred to:

('21) 48 I A 195: (A I R (8) 1921 P C 62) (Prs 9, 56)
('23) 50 I A 227: (A I R (10) 1923 P C 128) (Pr 39)
('29) 56 I A 93: (A I R (16) 1929 P C 69) (Prs 11, 56)
('32) 59 I A 331: (A I R (19) 1932 P C 216) (Pr 9)
('41) 68 I A 155: (A I R (28) 1941 P C 120) (Prs 9, 56)
('88) 10 All 272: (15 I A 51 P C) (Pr 9)
('51) A I R (38) 1951 S C 41: (1950 S C R 869) (Pr 47)
('51) A I R (38) 1951 All 119: (1951 A L J 60) (Pr 48)
('32) 59 Cal 1289: (A I R (19) 1932 Cal 834) (Prs 23, 43, 44)
('25) 4 Pat 172: (A I R (12) 1925 Pat 179) (Prs 51, 54)
('34) 13 Pat 596: (A I R (21) 1934 P C 202) (Pr 16)
('50) 29 Pat 491: (A I R (37) 1950 Pat 387: 51 Cr L J 1509 F B) (Prs 32, 41)
(1848) 2 Ex 22: (76 R R 479) (Pr 18)
(1858) 120 E R 791: (27 L J Q B 434) (Pr 32)
(1880) 5 A C 214 (Prs 5, 33, 38, 39, 41)
(1893) 1 Q B 41: (62 L J Q B 28) (Pr 18)
(1899) 2 Q B 632: (68 L J Q B 945) (Pr 6)
(1919) 249 U S 152: (63 L Ed 527) (Pr 24)
(1920) 1 K B 155: (89 L J K B 116) (Pr 41)
(1922) 1 K B 72: (91 L J K B 163) (Pr 6)
(1923) 2 K B 193: (92 L J K B 866) (Pr 18)
264 U S 294 (Pr 47)
274 U S 208 (Pr 24)

RAMASWAMI, J.: In this case the petnr. Maharaja Gopeshwar Prasad Sahi has obtained a rule calling upon the Board of Revenue & other resps. to show cause why a writ in the nature of Mandamus should not be issued commanding them to withdraw from the management of the Hathwa Raj State. Cause was shown against the rule by the Advocate General on behalf of the Board of Revenue & other resps. to whom notice of rule was directed to be given.

(2) The petnr. is the son of Maharaja Bahadur Guru Mahadevasharam Prasad Sahi who was the last holder of the ancient impartible estate known as "Hathwa Raj". On 4-5-1940 the late Maharaja Bahadur had made an appln. u/s. 6 (e), Court of Wards Act, for being declared to be a disqualified proprietor. On 11-5-1940 the Ct. of Wards made a declaration that the Maharaja Bahadur was a disqualified proprietor within the meaning of the section & that it was expedient in the public interest that his estate should be managed by the Ct. of Wards. On the same date the Ct. of Wards notified u/s. 7 read with Ss. 28 & 35 of the said Act that it had determined to take the property of the late Maharaja Bahadur under its charge & directed that possession be taken of such property on its behalf. Acting under the powers conferred u/s. 7 of the Act the Ct. of Wards also notified that they took charge of the person & property of the two sons of the Maharaja Bahadur, viz., petnr. Gopeshwar Prasad Sahi & brother Brijeshwar Prasad Sahi who were admittedly minors on that date. It is alleged in the affidavit that on 11-5-1940 when the Ct. of Wards made the order the petnr. had no property of his own & in consequence the order of assumption was void in its inception & was inoperative. It is stated that on 6-3-1950 the petnr. completed the age of 18 years & attained majority. On 20-1-1951 Maharaja Bahadur Guru Mahadevashram Prasad Sahi died & the petnr. succeeded to the impartible estate & became the absolute owner thereof. On 30-1-1951 the petnr. requested the Ct. of Wards & the State of Bihar to make over to him charge of the estate & place him in direct control & management thereof. In spite of this demand the Ct. of Wards was illegally continuing to hold charge of the estate & the other resps. were intermeddling with the affairs of the estate. The petnr. alleged that the Ct. of Wards was under legal obligation to release the estate upon the death of the late Maharaja Bahadur. The petnr. therefore prayed to the H. C. for issue of a writ in the nature of Mandamus directing the resps. to withdraw from the control & management of the Hathwa Raj.

(3) In the counter-affidavit the resps. state that the Hathwa Raj was a joint family impartible estate which developed by survivorship on the late Maharaja Bahadur. Apart from the interest which he had in the ancestral estate the petnr. had personal properties described in para. 7 of the Counter-affidavit. Exercising the power conferred u/s. 7 of the Act the Ct. of Wards took charge of both the person & properties of the petnr. & his brother Rajeswar Prasad Sahi & appointed separate guardians from time to time. Since 4-2-1950 the

Manager of Hathwa Raj was the guardian of the properties of the petnr. & previous to him Pandit Ram Bahadur Sharma & Mr. B. N. Dutta, Dewan, had been acting as guardian.

(4) In showing cause against the rule, the Advocate General objected at the outset that the H. C. ought not to issue the writ of Mandamus since the petnr. had an alternative remedy by way of suit. But Mr. P. R. Das maintained that Art. 226 of the Constitution is not confined to the issue of prerogative writ & the existence of an alternative legal remedy is not a relevant point to be taken into consideration. Art. 226 of the Constitution states:

"(1) Notwithstanding anything in Art. 32, every H. C. shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Govt., within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus; prohibition, 'quo warranto' & certiorari, or any of them, for the enforcement of any of the rights conferred by part III & for any other purpose.

2. The power conferred on a H. C. by Cl. (1) shall not be in derogation of the power conferred on the S. C. by Cl. (2) of Art. 32".

(5) Mr. P. R. Das urged that though the article has in terms only conferred a power it is manifest from the context & scope of the article that the power is coupled with a duty & the H. C. is bound to issue the writ when a case arises for the enforcement of a legal right. In support of his argument learned counsel refd. to 'Frederic Guilder Julius v. Lord Bishop of Oxford', (1880) 5 A C 214: (49 L J Q B 577), in which the question to be determined was the construction put upon S. 3, Church Discipline Act which enacted that in every case of a clergyman charged with an ecclesiastical offence "it shall be lawful" for the Bishop on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand & seal to certain persons for the purpose of making enquiry as to the grounds of such charge or report. It was held by the House of Lords that the section gave the bishop complete discretion to issue or decline to issue such commission. Having regard to the preexisting state of the law & the character of the Bishop's office, it was consd. that it was his duty, before issuing the commission, to determine on the expediency of instituting the prosecution, taking into his consideration the nature, credibility, or importance of the charge, & the status, solvency, & religious character of the complainant as well as the general interests of the Church. At p. 214 Lord Cairns states:

"The words 'it shall be lawful' are not equivocal. They are plain & unambiguous. They are words merely making that legal & possible which there would otherwise be no right or authority to do. They confer a faculty or power & they do not of themselves do more than confer a faculty or power. But there may be something in the nature of thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised which may couple the power with a duty, & make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

Lord Selborne's view was that a phrase such as "it shall be lawful" is not ambiguous & susceptible either of a discretionary or an obligatory sense but their meaning is the same whether there is, or is not a duty or obligation to use the power which they confer. They are potential & never in themselves significant of any obligation. The question whether a judge or public officer to whom a power is given by such words is bound to use it upon any particular occasion or in particular manner must be solved 'aliunde' & in general, it is to be solved from the context, from the particular provisions or from the general scope & object of the enactment conferring the power. Similarly Lord Penzance said that the words "it shall be lawful" are distinctly words of permission only & the true question is not whether they mean something different but whether having regard to all the circumstances — to the person enabled to the general object of the statute & to the persons for whose benefit the power may have been intended to be conferred they do or do not create a duty in the person on whom it is conferred to exercise it. It is not enough that the thing empowered to be done should be for the public benefit in order to make it imperative to exercise that power on all occasions falling within the statute. In the present case, the question is whether Art. 226 should be construed as conferring a discretionary power, or imposing a duty when its exercise is called for. In my opinion there is nothing in the language or purpose of Art. 226 which shows that the words were intended to be imperative in every case. The Constitution makers could never have intended that the H. C. should issue the writ even if the petnr. had a alternative legal remedy which was equally adequate. Otherwise the ordinary legal procedure will be abrogated, payment of proper C. F. will be avoided, the H. C. will be asked to decide complicated questions of right upon affidavits — a new & cheap flood-gate of litigation will be opened. The jurisdiction may be invoked in cases of so trifling or insignificant nature that no one having discretion in the matter would allow it to be litigated. In my opinion Art. 226 cannot be so construed as to make the exercise of the power conferred on the H. C. obligatory in every case. The remedy given by Art. 226 is an extraordinary one & can be invoked only in exceptional circumstances by those who have no alternative remedy by way of suit or otherwise.

(6) Mr. P. R. Das nevertheless maintained that there was no alternative remedy, that no suit lay against the State for the tortious act committed by the act of the Manager of the Ct. of Wards. Even if such a suit was competent the determination of the question will take a considerable time, the suit will become infructuous & justice will be denied. It was contended that the Ct. cannot refuse to issue the writ unless the alternative remedy was equally appropriate, beneficial & convenient. Reference was made to 'Rex v. Poplar Borough Council No. 1', (1922) 1 K B 72' in which the Ct. granted a writ of Mandamus on the ground that the alternative remedy by distress was wholly inadequate & that Mandamus was the only effective means of securing the performance of the public duty. To a similar effect is the case of 'Reg v. Leicester Guardians', (1899) 2 Q B 632, when the Ct. decided that the duty imposed upon the guardians by S. 5, Vaccination Act, to appoint a vaccination officer may be enforced by a writ of Mandamus through the local Govt. Board on whose appln. the writ was issued had itself power under the statute to appoint a fit person to act as vaccination officer on the default of the guardinas. There is great force in the contention of Mr. P. R. Das; & if it is established that the resps. are in illegal possession of the Hathwa Raj, I should be prepared to hold that Mandamus is the proper form of procedure in this particular case & a writ may be issued to enforce the obligation imposed on the resps.

(7) The main debate therefore turns on the question whether the Ct. of Wards had jurisdiction to take charge of the person & property of the petnr. u/s. 7, Ct. of Wards Act, by the Assumption Order dated 11-5-1940.

(8) S. 7, Ct. of Wards Act states:

"Whenever the sole proprietor of an estate, or all the joint proprietors of an estate are disqualified as provided in the last preceding section, the Ct. shall have power to take charge of all the property to every such proprietor or joint-proprietor within its jurisdiction, & of the person of any such proprietor or joint-proprietor who is resident within its jurisdiction; & also of the person & property of any minor member of the family of any such proprietor or joint-proprietor who has an immediate or reversionary interest in the property of such proprietor or joint-proprietor."

(9) Mr. P. R. Das argued in the first place that the petnr. had no immediate or reversionary interest in the impartible estate before the death of the late Maharajah Bahadur, that the Ct. of Wards could not therefore legally take charge of the person & property of the petnr., that the latter was not constituted a ward of the Ct. Mr. P. R. Das reld. upon 'Surtaj Kuari v. Deoraj Kuari', (10 All 272), in which Sir Richard Couch held that an impartible estate was a joint family property in no sense & that the son's right at birth under the Mitakshara, was so connected with the right to share in & to obtain partition of the estate, that it does not exist independently of the latter right. But this doctrine was definitely negatived by Lord Dunedin when delivering the judgment of the Board in 'Baijnath Pd. Singh v. Tej Bali Singh' (48 I A 195). In that case it was decided that property, though impartible, may be the ancestral property of a joint family, & that in such cases the successor falls to be designated according to the ordinary rule of the Mitakshara. "The keynote of the whole position" (to adopt the phrase of Lord Dunedin) is not that property which is not joint property devolves by virtue of custom as though it had been joint — but that the general law regulates all beyond the custom, that the custom of impartibility does not touch the succession since the right of survivorship is not inconsistent with the custom. Hence the estate retains its character of joint family property, and devolves by the general law upon that person who, being in fact and in law joint in respect of the estate, is also the senior member in the senior line. In 'Shiba Prasad Singh v. Prayag Kumari', (59 I A 331 at p. 345), Sir Dinshaw Mulla emphatically states:

"The birth right of the senior member to take by survivorship still remains. Nor is this right a mere 'spes successionis' similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is right which is capable of being renounced & surrendered."

The same view has been affirmed by the Judicial Committee in 'Comr. of Income-tax v. Krishna Kishore', (68 I A 155), in which the question for determination was whether the income of the impartible estate, to which the assessee had succeeded by rule of primogeniture prevailing in his family governed by the Mitakshara, was chargeable in his hands in the status of "individual" the assessee being the head of the family consisting of himself and his son. The Judicial Committee answered the question in the negative holding that the estate is joint family property and that the assessee as individual cannot be charged in respect of it under section 9 of the Indian Income-tax Act. At p. 168, Sir John Rankin states:

"Though the co-ownership of the junior member may be 'in a sense' only, carrying no present right to joint possession, if the question be whether the Hindu undivided family or the present holder is owner of the estate the answer of the Hindu law is that it is joint family property. The assessee as an individual cannot therefore be charged in respect of it under S. 9 of the Act.

(10) In view of the principle established by these authorities I am of opinion that the petnr. had a reversionary if not an immediate interest in the impartible estate of Hathwa Raj within the meaning of S. 7 of the Ct. of Wards Act.

(11) Mr. P. R. Das maintained that the phrase "reversionary interest" in S. 7 should be construed in a technical sense, to mean the interest of the heirs of the last full owner to succeed on the death of a Hindu widow. Learned counsel referred to 'Pugh v. Ashutosh Sen', (56 I A 93), in which the question was whether the word "conversion" which occurs in Art. 48 of the Limitation Act ought to be construed in a technical sense. The Judicial Committee held that the word must be so construed in the context of the Act & it must be presumed that when the legislature has deliberately used a term which has a known legal significance in law, it has attached to that term that known legal significance. But the material facts of the present case are widely different. The primary rule is that words are to be construed in their popular sense & in the present case there is no reason suggested for limiting the natural & ordinary meaning of the word used. On the contrary, it is obvious that the Ct. of Wards Act is not a special statute confined to the case of Hindu proprietors. Taking into account the object & scope of the enactment I am satisfied that the expression "reversionary interest" is not used in a technical sense, but the expression must be construed in a popular & ordinary sense.

(12) Mr. P. R. Das next urged that in the lifetime of the late Maharaja Bahadur the petnr. had no personal properties of his own, that the Ct. of Wards had therefore no legal authority to take control of "the person & property of the petnr". In my opinion, this argument is not sound. For it is plain, on a proper construction of S. 7 of the Ct. of Wards Act, that only two precedent conditions are necessary in order to confer jurisdiction on Ct. of Wards to act. The first condition is that the proprietor of the estate should be disqualified u/s. 6 of the Act, & secondly the minor member of the family ought to have an immediate or reversionary interest in the property of such proprietor. Provided that these conditions exist, the jurisdiction of the Ct. of Wards is complete. In the present case there is no question that these conditions were present & it follows that by the assumption order dated 11-5-1940 the petnr. was duly constituted a ward of the Ct. within the meaning of S. 3, Ct. of Wards Act.

(13) In my opinion it is not material to enquire whether the petnr. had personal properties of his own at the time the Ct. of Wards made the assumption order. It is not relevant in determining the question of jurisdiction. But the question was elaborately argued on behalf of both parties & I shall, in deference to the argument of the learned counsel, proceed to consider whether the petnr. had personal properties of his own & whether the Ct. of Wards took charge of such personal properties.

(14) For the resps. it was contended that at the time when assumption order was made the petnr. had (1) ornaments & jewelleries presented to him in 1938 on the occasion of his mundan, (2) ornaments, jewelleries & gold coins kept in a locker of the Imperial Bank of India, (3) post office Defence Savings Certificates purchased in his name.

But the petnr. alleged that item No. 1 which constituted ornaments & jewelleries presented at the time of mundan belonged not to him but to the estate according to the custom. As regards the savings certificates Mr. P. R. Das pointed out that they were purchased between 11-11-1940 & 19-4-1941 out of the savings of the personal allowance paid to the petnr. Learned counsel contended that the purchases were made after the amending Act of 1939, viz., Bihar Act IV (4) of 1940 which came into force & so ought not to be taken into account. I do not propose at this stage to examine whether this contention is valid for, with respect to the third item — the ornaments & jewelleries kept in the locker of the Imperial Bank, I am satisfied upon the affidavits that the Ct. of Wards took charge. In the petnr's affidavit it is stated that there was a dispute as regards ownership for a period of six years from the time the Ct. of Wards assumed charge until by his award dated 11-6-1944 Mr. Y. S. Godbole, Memoer of the Board of Revenue, declared that the ornaments & jewelleries should belong to the petnr. but they may remain in charge of the mother who was then living with him. From Annexure X 3 it appears that Mr. Godbole agreed that the "jewellery may remain in charge of the mother & she would do well to keep it in a separate box with another box containing her own jewellery in the same locker."

Mr. P. R. Das then refd. to S. 35, Ct. of Wards Act, & contended that unless the Ct. of Wards had taken actual possession of the jewellery the Ct. cannot be said to be in charge of the property. S. 35 enacts:

"Whenever the Ct. has determined to take the person or property of a disqualified proprietor under its charge, whether in accordance with an order of the Civil Ct. or otherwise, the Ct. shall make an order declaring the fact & directing that possession be taken of such person & property or of such property on behalf of the Ct., & the Ct. shall be held to be in charge of such property from the time when possession shall have so taken."

(15) In my opinion the contention of the learned counsel is not sound. Possession is taken u/s. 35 as soon as the formal direction to take possession is made.

(16) I think that the word "so" in S. 35 refers to the particular method of taking charge & the phrase "possession shall have been so taken" should be construed to mean "when possession shall have been taken by an order directing possession to be taken". This view is supported by 'Lachminarain v. Ibrahim Hussain', (13 Pat 596), in which the applts. had obtained a money decree against the resp., whose property had been taken in charge in 1902 under the (Bengal) Ct. of Wards Act, 1879. They applied to execute the decree against property which the resp. had inherited upon his brother's death in 1919, but which was in the adverse possession of a claimant thereto. Upon the brother's death the Colr. issued a notfn. that the Ct. of Wards had taken the property into charge. Later, before the appln. to execute was made, the manager of the Ct. of Wards was ordered to take possession, but since the claimant still remained in possession the manager could not obtain actual possession. Upon these facts the Judicial Committee held that the Ct. of Wards had taken possession within the meaning of S. 35 of the Act so as to bring the property into charge, & that accordingly S. 60 A, precluded it from being taken in execution. At p. 606 the report states:

"The learned Subordinate Judge, in his judgment failed to appreciate the governing importance of the fact that throughout the property in question was in the adverse possession of the Mutawalli, & that from him actual possession could only be obtained by legal process, which had in fact been instituted & is not yet finally concluded. Their Lordships agree with the H. C. in their view that 'possession' under the Act must depend upon the nature of the interest in the property in question of the disqualified proprietor. It is, for instance, assumed by the Act that a reversionary interest is one of which possession can be taken."

(17) In the present case, upon the facts stated in the petnr's affidavit I am of opinion that the Ct. of Wards had taken charge not only of the person but of the property of the petnr. after the assumption order u/s. 7 was made.

(18) Mr. P. R. Das suggested in the next place that by the enactment of Bihar Act IV (4) of 1940 section 7 of the Ct. of Wards Act has been materially amended. Learned counsel pointed out that the amended section did not empower the Ct. of Wards to take charge of the person & property of the minor member of the family of the proprietor who had voluntarily applied to the Ct. to have his properties placed under the management of the Ct. Bihar Act IV (4) of 1940 came into force with effect from 28-6-1940 & it was contended that the order of assumption made by the Ct. of Wards ceased to have any legal effect from that date. In support of his contention learned counsel refd. to S. 28, Bihar General Clauses Act, & argued that there was a repeal & re-enactment within the meaning of this section. It is impossible in my opinion to accept the argument of the learned counsel. There is no question of any repeal or re-enactment. What actually happened was repeal of a part of S. 7 by the Amending Act of 1940. It is an established rule of construction that retrospective operation is not to be given to a statute so as to impair the existing right or obligation unless the intention is expressed in unequivocal terms. The principle is recognised in leading authorities. In 'Moon v. Durden' (1848) 2 Ex 22, an action was brought upon a wager, commenced before the passing of the Gaming Act, 1845, which enacts that all contracts by way of wagering "shall be null & void", & that "no suit shall be brought or maintained" for recovering money alleged to be won upon a wager. This Act was passed while the action was pending, & the question was whether it operated to defeat the pltf's claim. The Ct. of Exchequer decided that it did not & the action brought could be continued. In another case 'Knight v. Lee', (1893) 1 Q B 41, the Divisional Ct. had to consider the Gaming Act, (1892) (55 & 56 Vict. c. 9), which enacted that a promise to repay a person moneys paid by him on a wager void under the Gaming Act, 1845, should itself be void & provided by S. 1 that:

"No action shall be brought or maintained to recover any such sum of money."

In that case the pltf. before the passing of the Gaming Act, 1892, paid losses on the deft's behalf, but he did not issue his writ until after the Act was passed. It was held by Mathew & Bruce JJ. that the action was rightly brought & that the Act did not destroy the vested claims or bar the commencement of fresh actions to enforce them. In 'Henshall v. Porter', (1923) 2 K B 193, the question turned on S. 1, Gaming Act 1922 by which no action under S. 2, Gaming Act, 1835, to recover back money paid in respect of Gaming debts "shall be entertained in any Ct.". The pltf. after the Act of 1922 came into force, issued a writ in respect of causes of action which had arisen before Act came into force. It was held that the pltf's cause of action, vested in him before the Act of 1922 came into force, was not divested on the Act coming into force, & that he was entitled to recover.

(19) I consider that the Ct. of Wards validly assumed in May 1940 jurisdiction over the person & property of the petnr. who was duly constituted a ward of the Ct. & that the amending Act of 1940 could not affect the rights & obligations already vested, nor could it alter the juridical status of the petnr. as a ward of the Ct.

(20) If this view is correct, it is plain that under S. 8 read with the definition of a "ward" in S. 3, of the Act the Ct. of Wards is not bound to release the estate from its charge unless the petnr. attains twentyone years of age. The same result will be reached if S. 3, Majority Act, is applied to the case. S. 3 states:

"Age of majority of persons domiciled in British India. — Subject as aforesaid, every minor of whose person or property, or both, a guardian, other than a guardian for a suit within the meaning of Chap. XXXI, Civil P. C., has been or shall be appointed or declared by any Ct. of Justice before the minor has attained the age of eighteen years ,& every minor of whose property the superintendence has been or shall be assumed by any Ct. of Wards before the minor has attained that age, shall, notwithstanding anything contained in the Indian Succession Act X (10) of 1865 or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years, & not before: Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years & not before."

(21) It is necessary to state that in an earlier portion of this judgment I have held that the Ct. of Wards had assumed charge & therefore superintendence not only of the interest of the petnr. in the impartible estate but also of his personal ornaments & jewelleries.

(22) Dr. Sultan Ahmad, who appeared at one stage in support of the rule, contended that the Ct. of Wards had assumed charge of the person & properties of the petnr. not because the petnr. was disqualified but merely because petnr. was the minor son of the late Maharaja Bahadur whom the Ct. of Wards had, on his own appln. disqualified. Learned counsel pointed out that after the death of the Maharaja Bahadur the position has signally changed & in the language adopted by the learned counsel

"the link of relationship has snapped & the Ct. of Wards had no legal justification to retain charge of Hathwa estate."

The argument is attractive but wholly untenable. As soon as the Ct. of Wards assumed charge of the person & property of the petnr. by the Assumption order of 1940, the petnr. was duly constituted a ward of the Ct. within the meaning of S. 3, Ct. of Wards Act. S. 8 of the Act (to which Dr. Sultan Ahmad refd.) expressly provides that

"whenever the circumstances of any ward become such that the Ct. could not take charge of him or of his property, if he were not under its charge already, the Ct. shall be bound to release from its charge such person & his property."

It should be noticed that S. 3 of the Act defines a minor to be "a person who has not completed the age of twenty-one years". It follows that u/s. 8 the Ct. of Wards is not bound to release the estate of the petnr. till he attains the age of twenty-one years.

(23) Lastly Mr. P. R. Das argued that S. 3, Indian Majority Act, was unconstitutional since it prescribed a dual age of majority, one for persons of whose property superintendence has been assumed by the Ct. of Wards or of whose person or property a guardian has been appointed by a Ct. of Justice, & the other for persons whose property is not under such superintendence or for whom no guardian has been appointed by civil Ct. Learned counsel maintained that the statute made discrimination between two classes of persons & it was in violation of the guarantee of equal protection of laws made by Art. 14 of the Constitution. In my opinion the argument is untenable. If the policy & object of the Ct. of Wards Act is examined it is apparent both from the nature of jurisdiction over disqualified proprietors & by nature of the power entrusted to the Ct. of Wards that the whole scheme of dealing with females, minors & persons of unsound mind as regards their estates was an essential part of the arrangement brought into force for collection of the land revenue & the Permanent Settlement of Bengal. From the beginning, the jurisdiction exercised by the Ct. of Wards was an exercise essentially of sovereign power — power to take over the estates of persons unable to manage their own estates in order that the estates may be properly managed & Govt. revenue may be rendered safe. Public interest & the interest of the revenue were clearly the object of the powers conferred by the Act (See the judgment of Rankin C. J. in 'Secretary of State v. Shreegobinda', (59 Cal 1289). In view of the scope & object of the enactment it is plain that the minority of the persons under the charge of the Ct. of Wards was deliberately extended to the age of twenty-one years so that the estates may be properly administered & the Govt. revenue adequately protected. The selection of the age limit for legal majority is artificial in any case. If the legislature has fixed a different age-limit in the case of wards whose estates the Ct. of Wards has taken charge, it cannot be said that the classification adopted is 'prima facie' unreasonable.

(24) In my opinion the discrimination in S. 3, Majority Act does not violate Art. 14 of the Constitution. The equal protection clause does not prevent classification & does not prevent the drawing of lines. The clause only requires that the classification must be reasonable & not arbitrary. In truth all legislation involves classification of some sort & what Art. 14 means is that any classification must be reasonably relevant to the purpose of good Govt. In this context, reference should be made to the important principle that the Ct. ought to make every possible presumption in favour of the constitutionality of an enactment. The principle is specially important when the issue of constitutionality before the Ct. is one depending on some question of degree.

"It must be presumed that a Legislature understands & correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience & that its discriminations are based upon adequate grounds" 'Middleton v. Texas Power and L. Company', (1919) 249 U S 152: (63 L Ed 527).

The onus is therefore on the petnr. to establish that the classification adopted by the legislature in S. 3, Majority Act, is arbitrary & unreasonable. No material has been furnished in the petnr's affidavit to support his allegation. No material has also been placed by learned counsel to substantiate his argument. To adopt the language of Holmes J.:

"It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, & seeks to bring within the lines all similarly situated so far & so fast as it means allow." (Buck v. Bell', 274 U S 208).

(25) For these reasons I hold that the Ct. of Wards had jurisdiction to assume charge in May 1940 of the person & property of the petnr., that the notfn. to that effect was legal & valid, that the petnr. was duly constituted a ward of the Ct., that u/s. 8 of the Act the Ct. of Wards is not bound to release from its charge the estate of Hathwa Raj unless the petnr. attains 21 years of age.

(26) In my opinion the rule must be discharged & the appln. must be dismissed with costs to the resps. Hearing fee 10 gold mohars.

(27) Sarjoo Prasad, J.: This is an appln. on behalf of Maharaja Gopeshwar Prasad Sahi under Art. 226 of the Constitution. The petnr. herein prays for an appropriate direction, order or writ upon the opposite party, the State of Bihar & its agents, commanding them to forbear from retaining charge of the estate of the petnr. & to withdraw from the management thereof.

(28-29) The facts on which this petn. is based may be stated as follows: (After stating the facts & the contentions of the parties the judgment proceeds thus:)

(30) In so far as the facts are concerned, it would appear that the only difference between the parties is as to whether or not the minors including the petnr. had or had not on the date of the assumption order, namely, on 11-5-1940, any personal property of their own. The other facts do not appear to have been denied & are rather admitted by the parties. In regard to the claim of the petnr. that he had attained majority even his age is not disputed. In fact, on the face of the assumption order dated 11-5-1940 he would appear to be 18 years 2 months 5 days. There can be, therefore, no doubt that he has since then attained the age of 18 years. On behalf of the opposite party, however, it is claimed that this alone is not sufficient to enable him to obtain release of his estate because the Ct. of Wards can continue to hold charge of the estate until he attains the age of 21 years, a minor under the Ct. of Wards being a person who has not completed that age.

(31) The two main questions which, therefore arise in the case are (1) whether an appln. for a writ under Art. 226, Constitution Act, is maintainable, & (2) whether the petnr. still continues to be a ward of the Ct., &, as such, the retention of the charge of his estate by the Ct. of Wards is lawful. There are several subsidiary questions involved under these two main heads which will be discussed in their appropriate place.

(32) It has been already pointed out that the petnr. in this case claims the issue of a writ on the ground that he has an inviolable right to hold his property in his possession & to manage the same at his own sweet will & pleasure, & that the opposite party have no statutory right to take or retain charge of the same; on the contrary, that they have a legal obligation to release the estate in favour of the petnr. The allegation, therefore, is that the conduct of the opposite party is in violation of the fundamental right of the petnr. to hold & manage his property as contemplated by Art. 19 (f) of the Constitution. Under Art. 226 the H. C. has power

"throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases any Govt., within those territories directions, orders, or writs including writs in the nature of 'habeas corpus, mandamus', prohibition 'quo warranto' & 'certiorari', or any of them, for the enforcement of any of the rights conferred by Part III & for any other purpose."

Part III of the Constitution, it may be stated, deals with fundamental rights. There can be no doubt on the clear provisions of this Article that the H. C. has power to issue writs not only for the enforcement of fundamental rights but "for any other purpose". But the words 'any other purpose" must mean 'the enforcement of any legal right & the performance of any legal duty" Although the powers of this Ct. to issue writs under the Constitution are very wide, it has been rightly held that the remedy provided by Art. 226 must remain an extraordinary remedy to be used 'where ordinary legal process cannot give adequate and prompt relief'; vide Bagaram v. State of Bihar', (29 Pat 491). Mr. P. R. Das on behalf of the petnr. has refd. to a decision in 'The Mayor of Rochester v. The Queen', (1858) 120 E R 791, where Baron Martin observed:

"That Ct. has power, by the prerogative writ of mandamus, to amend all errors which tend to the oppression of the subject or other misgovernment, & ought to be used when the law has provided no specific remedy, & justice & Govt. require that there ought to be one for the execution of the common law or the provisions of a statute; Comyns's Digest, Mandamus (A)".

(33) He further stresses the fact that where the remedy would be inconvenient to the subject & injurious to the community, the only & most effective remedy is the remedy by issue of a writ to correct that injustice or injury to the subject. He also draws our attention to another passage in the judgment of Baron Martin where the learned Baron remarked:

"Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable."

Mr. Das has also reld. upon another well-known English precedent which is often cited at the Bar in support of such applications, namely the case of 'Frederic Guilder Julius v. Lord Bishop of Oxford', (1880) 5 A C 214). In this case the Lord Chancellor (Earl Cairns) made the following classical observation:

"The words 'it shall be lawful' are not equivocal. They are plain & unambiguous. They are words merely making that legal & possible which there would otherwise be no right or authority to do. They confer a faculty or power, & they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, & make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

(34) The same noble Lord, however, proceeded to state:

"the words 'it shall be lawful' being accoding to the natural meaning permissive or enabling words only, it lies upon those as it seems to me, who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which, according the principles I have mentioned creates this obligation."

(35) Mr. Das contends on the authority of these dicta & on the observations of Lord Blackburn in the same case that where

"the object of giving the power is to enable the donee to effectuate a right, then it is the duty

of the donee of the power to exercise the power when those who have the right call upon him so to do."

He points out that in the present case his appln. is to effectuate a right, &, therefore, the power conferred upon the H. C. on the authority of Art. 226 must be exercised by this Ct. as a matter of duty, & there is no discretion left in the Ct. to refuse the prayer. I am afraid the language of the noble Lords is not capable of bearing that extreme interpretation & must be read in the light of the context. In fact, each of their Lordships who decided the case expressly pointed out that there must be something in the circumstances of each case so as to create an obligation on the part of the Ct. to issue a writ of the nature prayed for. I have already refd. to the dictum of Lord Cairns. Lord Penzance who was also a party to the decision & agreed with the Lord Chancellor said as follows:

"The words 'it shall be lawful' are distinctly words of permission only — they are enabling & empowering words. They confer a legislative right & power on the individual named to do a particular thing & the true question is not whether they mean something different, but whether, regard being had to the person so enabled to the subject-matter to the general objects of the statute, & to the person or class of persons for whose benefit the power may be intended to have been conferred — they do or do not, create a duty in the person on whom it is conferred, to exercise it."

(36) Again at another place the noble Lord summed up in these words:

"The conclusion, then at which I arrive is, that the Applt. has not established his case. The words 'it shall be lawful' are permissive & enabling only. It devolved upon him to shew that the Legislature intended the exercise of the power, thus conferred, to be a duty, in the performance of which the bishop was not intended to have any discretion, & he has, in my opinion, failed to shew it."

(37) Lord Selborne, another of the learned Judges, made similar observations:

"I agree with my noble & learned friends who have preceded me, that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, & never (in themselves) significant of any obligation."

(38) These significant passages clearly show that it is always for the Ct. to find out whether in the circumstances of a particular case the failure to exercise the power would amount to a dereliction of duty; in other words, it would depend upon the facts & incidents of the case under consideration to couple the power with a duty upon the Ct. to issue the writ prayed for. If the Ct. is not satisfied on an examination of the facts & incidents of the case & the nature, object & conditions thereof that it calls for interference by a writ of mandamus or any writ of the like nature, the Ct. may refuse to exercise that power. It cannot be laid down as a hard & fast rule that in each case where the party claims the redress of any legal right, the Ct. must as a matter of duty issue a writ in his favour if he seeks to apply for it. It is important to bear in mind that on the facts of the case in 'Julius v. Bishop of Oxford' their Lordships refused to issue the mandamus prayed for.

(39) Another decision on which reliance has been placed on behalf of the petnr. is the decision of the Judicial Committee in 'Alcock, Ashdown & Co. v. Chief Revenue Authority, Bombay', (50 I A 227). In that case their Lordships relying upon the above decision in '(1880) 5 A C 214', held that it was the duty of the Chief Revenue-authority under section 51 of the Indian Income-tax Act, 1918, to state a case & refer it to the H. C. when in the course of an assessment a serious question of law arises, & the H. C. has power u/s. 45, Specific Relief Act, 1877, to make an order requiring the Chief Revenue-authority to perform that duty. It was contended before the Privy Council that though u/s. 51 of the then Indian Income-tax Act, the Chief Revenue-authority "may, if he thinks fit, draw up a statement of the case & refer it to the H. C., he is bound to do so, even on the application of the person to be assessed if he is satisfied that the appln. is frivolous or that the reference is unnecessary, & that the authority has in the present case shown that he is satisfied that the appln. was frivolous & the reference was unnecessary". Their Lordships repelled the contention thus:

"If the assessee applies for a case the Authority must state it, unless he can say that it is frivolous or unnecessary. He is not to wait for the Ct. to order him to do it; it will be a misfeasance & a breach of the statutory duty if he does not do it. Put that case aside. The rule here is supported upon the earlier part of the section. No doubt that part does not say that he shall state a case, it only says that he may. And as the learned counsel for the resp. rightly urged, 'may' does not mean 'shall'. Neither are the words 'it shall be lawful' those of compulsion. Only the capacity or power is given to the Authority. But when a capacity or power is given to a public authority, there may be circumstances which couple with the power a duty to exercise it."

(40) And then their Lordships proceeded to quote the classical observations of Lord Cairns to which I have already made a reference. Here again, it is to be observed that what their Lordships point out is that there may be circumstances which couple with the power a duty to exercise it, & the facts of that case indicated that serious questions of law did arise, & therefore a reference was necessitated.

(41) Incidentally Mr. P. R. Das also drew our attention to the limitation provided in S. 45, Specific Relief Act. He contended that these limitations are not to be found in Art. 226 of the Constitution, & therefore the exercise of the power by the Ct. was unhampered & untrammelled by any of those limitations. The existence or non-existence of the limitation as mentioned in S. 45, Specific Relief Act, is immaterial. The exercise of the power to issue writs will have to be broad-based on well-established principles & the mere fact that the limitations provided in S. 45, Specific Relief Act, have not been incorporated in Art. 226 of the Constitution will not affect the legal position as to the circumstances within which a duty is cast upon the Ct. to exercise those powers. In fact, Mr. P. R. Das, as shown above, has himself relied very strongly upon English precedents which had nothing to do with S. 45, Specific Relief Act. I may as well state that the decision in '(1880) 5 A C 214 (supra)' appears to have been expressly consd. by at least one of the Judges who decided the F. B. case of this Ct. in 'Bagaram Tulupule's case (supra)', namely, Das, J. The learned Judge refd. to a recent decision of the English Cts. in King v. Marshland Smeeth', 1920-1 K B 155, & he quoted in extenso from the judgment of McCardie, J. where his Lordship pointed out that where a statute has conferred a power or discretion only, as distinct from a duty, then the prerogative writ of mandamus will not be issued by the Ct. as a matter of course.

(42) For these reasons it will be necessary to find out whether in the circumstances of the pre-

sent case the petnr. has been able to establish that (1) he has no alternative remedy in order to obtain redress & effectuate his legal right, & even if he has, (2) whether that alternative remedy is equally convenient, beneficial & effectual for the enforcement of that right.

(43) On the first point Mr. Das urges that it is very doubtful whether the petnr. would be entitled to sue the State of Bihar for recovery of possession of his property, & even if he did institute such a suit, the protracted character of the litigation might be such as to give him no relief at all, because by that time the petnr. might complete the 21 years of his age. He submits, therefore, that the remedy by way of a suit if at all was neither convenient, nor beneficial nor effectual. He relies upon a passage in Halsbury's Laws of England Vol. IX, p. 744 paras. 269 & 270, where it has been observed that in case the alternative remedy is not equally convenient, beneficial & effective for the enforcement of a legal right, the issue of a writ is the only appropriate remedy, & its performance is to supply the lacuna in the administration of justice & to give speedy & prompt relief to the parties aggrieved by the conduct of public servants & officers. He also contends that the State of Bihar being in possession of the petnr's estate through its delegates & agents, the other opposite parties, namely the Board of Revenue & the subordinate officers, the petnr. may not be able to maintain a suit for recovery of possession against them. Reliance has been placed by him upon a decision in 'Secretary of State v. Shreegobinda', (59 Cal 1289). Rankin C. J. who delivered the judgment in that case opined that the jurisdiction exercised by the Ct. of Wards was in exercise of powers, 'essentially sovereign' to take over the estates of persons unable to manage their own estates in order that they may be properly managed & the Govt. revenue may be rendered safe. The learned Counsel also refers to S. 69 A, Ct. of Wards Act, as amended by the Act of 1940. This section enacts:

"No suit shall be instituted against the Crown in respect of anything done or purporting to be done under this Act, or in respect of any alleged neglect or omission to perform any duty devolving on the Provincial Govt. or the Ct., or any of the officers subordinate to it & acting under this Act. or in respect of the exercise of, or the failure to exercise, any power conferred by his Act on the Provincial Govt. or the Ct., or any officer subordinate to it & acting under this Act, except for the recovery of possession of property in charge of the Ct. on the ground that such property is not subject to a trust, or for making the Ct. chargeable with or accountable for the loss or misapplication of any property in its charge or the income thereof where the loss or misapplication has been occasioned by or through the wilful neglect or default of the Ct. or of any officer subordinate to the Ct."

(44) The exceptions to the section quoted above are very important. In my opinion, S. 69 A does not preclude the right of a suit altogether nor does it appar to me that the said decision in '59 Cal 1289 (supra)' is an authority for holding that there is a complete bar to the institution of suits against the opposite party for recovery of possession of the property of the petnr. taken over by the Ct. of Wards when the circumstances under which the Ct. of Wards took charge of the estate have ceased to exist & the Ct. under the statute could no longer function as a custodian of trustee in respect of such property within the meaning of the Act. S. 69 A itself provides that a suit for possession of such property will lie & makes an exception in regard to suits for recovery of possession of property in charge of the Ct. on the ground that such property is no longer subject to such a trust. Besides S. 69 A must be read subject to other provisions of the Act wherein the powers of the Ct. to hold charge of the estate of a ward & the circumstances under which it can continue to hold charge have been defined; for instance S. 8 of the Act says that whenever the circumstances of any ward become such that the Ct. could not take charge of him or of his property, if he were not under its charge already, the Ct. shall be bound to release from its charge such person & his property. Therefore subject to just exceptions mentioned in the Act, where the conditions in which the Ct. could take charge of the person & property of a ward, as provided by Ss. 6 & 7 of the Act have ceased to exist, the Ct. shall be bound to release from its charge such persons & properties. The Ct. of Wards would in that case become 'functus officio' with respect to such persons & property & a suit for recovery of possession under those conditions would lie just in the same manner as against any other trespasser. So long as those circumstances subsist, the Ct. of Wards is to continue in possession of the person & property of the ward. The property, as it were, is subject to a trust in the hands of the Ct. for the benefit of the ward. There is, therefore, not much substance in the argument that the petnr. has no alternative remedy.

(45) It is, however, doubtful whether such a remedy would equally be a convenient, beneficial & effective remedy. There is no gainsaying the fact that the decision of a regular title suit instituted in the ordinary civil Cts. is bound to be a prolonged affair, & the petnr. may even before the conclusion of the litigation complete the age of 21 years thereby necessitating the Ct. of Wards to deliver possession of the properties to him irrespective of the result of that litigation. Such a litigation might at all events prove infructuous. It is true that apart from this, the petnr. has not been able to point to any other factor so as to lead this Ct. to hold that the circumstances of this case are so compelling as to cast a duty upon the Ct. to issue a writ of mandamus the properties are in the hands of the Ct. of Wards & the state of Bihar & nothing has been brought to our notice to indicate that the estate is being mismanaged or squandered so as to cause irreparable & serious injury to the petnr. if the management of his property continues to be in the hands of the opposite party any longer. The properties have undoubtedly vested in the petnr. on the death of his father & he is now the sole owner of the Raj according to the rule of primogeniture which obtains there; & the fact that the properties are not in his possession must naturally be inconvenient to him. It does not, however necessarily follow that the management, if it continues to be in the hands of the Ct. of Wards, would not be beneficial to his interest. At any rate, there is no complaint on that score. On these grounds I find it difficult to agree with the contention of Mr. P. R. Das that it is an appropriate case where the prerogative writ of mandamus should be issued by the Ct. specially when I am not satisfied that the petnr. has a good case on merits.

(46) This leads me to an examination of the merits of the appln. namely, whether the possession of the Ct. of Wards after the death of the petnr's father when the estate had vested in the petnr., is illegal & in violation of the petnr's right to hold the property. The discussion of this problem turns upon the answer to the question whether the petnr. has attained the age of majority. Mr. P. R. Das for the petnr. relies upon

S. 3, Majority Act, 1875 (Act IX of 1875). S. 3 of the said Act provides that subject to the exceptions mentioned in the section, every other person shall be deemed to have attained his majority when he shall have completed his age of eighteen years & not before. The exceptions specified refer to: (i) a minor of whose person or property, or both, a guardian has been appointed or declared by any Ct. of Justice (other than a guardian-ad-litem under Civil P. C.), & (ii) a minor of whose property the superintendence has been or shall be assumed by any Ct. of Wards before the minor has attained the age of 18 years. In these two classes of cases only, according to the section, the minor shall be deemed to have attained majority when he completes his age of 21 years & not before. For the petnr. it is argued that he does not come under any of these exceptions, & for the opposite party it is contended that he does come within the limitation in as much as the petnr. was a person during whose minority the superintendence of his property was assumed by the Ct. of Wards. That being so, he could not attain the age of majority before he completes his age of 21 years. This necessitates an examination of S. 7, Ct. of Wards Act, as it stood prior to the amendment of 1940. But before I do that I may here dispose of a short point which has been raised by Mr. Das.

(47) He contends that the above exceptions in S. 3, Majority Act, being discriminatory in character in regard to certain class of minors, must be held to be inconsistent with Art. 14 of the Constitution & therefore void. In this context he refers to a passage from Willis Constitutional Law cited with approval by Mukherjee, J. of the S. C. in 'Charanjit Lal v. Union of India', (AIR (38) 1951 SC 41 at p. 58). It is well-estaolished however, as that decision itself recognises, that the presumption is in favour of the constitutionality of a legislation & the burden is upon him who attacks it to show that there has been a transgression of constitutional principles. Cts. of law should 'prima facie' lean in favour of upholding the legislation on any reasonable and valid assumption & it is for the party impugning the enactment to make out an unanswerable case for showing that the selection or discrimination under the enactment was arbitrary & untenable. As was laid down by the S. C. of America in 'Radice v. New York', (264 US 294):

"The Legislature is free to recognise degrees of harm & it may confine its restrictions to those cases where the need is deemed to be the clearest." This quotation has been reld. upon by Mukherjea, J. himself in the above decision & is, in my opinion, sufficient justification for rejecting the aforesaid contention of Mr. P. R. Das.

(48) I shall now turn to S. 7, Ct. of Wards Act. For the petnr. it is contended that two essentials were necessary in order that the Ct. of Wards could assume charge of the minor's property when taking charge of the estate of the disqualified proprietor. The first is that the minor must have had "an immediate or reversionary interest in the property of such proprietor or joint proprietor" at the time when the Raj was taken charge of by the Ct. of Wards. The other essential is that the said minor must have had some property of his own at the time to enable the Ct. of Wards to take charge of both the person & property of the minor. For the petnr. it is contended that the words "person & property of any minor member of the family" should be read conjunctively & not distributively & if the minor had no property of his own, in that case the Ct. of Wards could not take charge of the person of the minor. It must be remembered that the section is an enabling section empowering the Ct. of Wards to take charge of both the person & property of any minor member of the family of the disqualified proprietor. But it does not compel the Ct. to take chage of both the person & property of such minor. It creates a power & not a disability. This position becomes clear from a perusal of the subsequent provisions of the Act. In fact, the word "and" occurs in the section with reference to the person & property of a sole proprietor or joint proprietor of any estate who is 'disqualified' within the meaning of the Act. But a perusal of S. 9 shows that it is in the discretion of the Ct. to take charge either of the person or property of the disqualified proprietor or both. Mr. P. R. Das & Sir Sultan Ahmed who followed him on behalf of the petnr. have both conceded that the word 'and' with reference to the disqualified proprietor in the section might mean 'or' but they contend that with reference to the minor it must be understood in its ordinary conjunctive sense & not in a disjunctive sense. They contend that the expression should receive its literal & grammatical meaning & not one which may be forced & even lead to anomalous consequences. In this connection reliance has been placed on a large number of cases both English & Indian including the F. B. decision in 'Sukhanandan v. Suraj Bali', (AIR (38) 1951 All 119). The principle underlying those decisions cannot be doubted, but the true meaning of an expression is to be gathered from the context in each case. I have already given my reasons for holding that, in granting power to the Ct. to assume jurisdiction over person & property of the minor, the two objects have been conjoined without creating any obligation upon the Ct. to take charge of both or not at all. Therefore where the State takes charge of either the person or the property of the minor, who is a member of the family of the disqualified proprietor, the minor becomes a ward of the Ct. within the meaning of the Act.

(49) Mr. P. R. Das may be, perhaps, right in contending that the Ct. of Wards must be in charge of the property of the minor before the exception in S. 3, Majority Act, can apply to the case of such a minor & that any other meaning cannot be attached to the definition of the term 'minor' under the Ct. of Wards Act, inasmuch as such a course would lead to inconsistency between the two legislations. The question, however, does not directly arise in the present case because, as I shall show hereafter, the Ct. of Wards has been shown, on the materials as they are, to have assumed charge both of the person & property of the petnr. as a minor member of the joint family of the 'disqualified proprietor' when it took over charge of the latter's estate.

(50) Another suggestion by Mr. Das is that the term 'property' as used with reference to the minor in S. 7 of the Act, must refer to immoveable property only. Mr. Das, however, had to concede that the word 'property' used with reference to the 'proprietor' or 'joint-proprietor' in the same section means & includes both moveable & immoveable property. The expression, therefore could not have been used in any different sense in the same section & there is nothing in the context to support this suggestion of Mr. Das.

(51) In the present case the opposite party have in para. 7 of the counter-affidavit mentioned three items of property which happened to be the property of the minor. An affidavit in reply has been filed on behalf of the petnr. denying the allegations aforesaid & certain letters of the Ct. of Wards, the Maharani Saheba, the mother of the petnr. & that of the late Maharaja Bahadur form annexures to this affidavit in reply. The genuineness of these annexures has not been question-

ed before us. On a perusal of annexures X & X-2 it is quite obvious that the first item of property, namely, ornaments, jewelleries etc. presented to the petnr. on the occasion of his 'mundan' ceremony locked in the Hathwa Raj Treasury were held to be estate property, & the petnr. also does not claim that they were his property at the time. In regard to the ornaments, jewelleries & gold coins said to belong to the petnr. & his younger brother kept in the locker of the Imperial Bank of India Patna, the argument is that these properties were actually not in possession of the Ct. of Wards. It also appears from the award dated 11-6-1946, vide annexure X-3 to the affidavit in reply, that the board agreed that certain jewelleries belonging to the minors should remain in charge of the petnr's mother, the late Maharani. So far as these properties are concerned, it is argued that the Ct. of Wards never took charge of them, because admittedly some of them were placed in charge of the late Maharani Saheba, & the others were admittedly in charge of the Imperial Bank of India, Patna, although they might have been held to belong to the petnr. & his brother. In this connection the petnr's learned counsel has reld. upon a decision of this Ct. in Lachmi Narain v. Mahomed Abrahim Hussain Khan', (4 Pat 172), where Ross, J. observed in course of his judgment that the order vesting the management of certain properties

"does not take effect until possession of the property is actually taken; &, until such possession is taken, the Ct. of Wards is not in charge of the property & the ward may be free to deal with it as he likes; but this is a matter on which I express no opinion."

(52) Obviously, therefore, Ross, J. did not purport to give any express opinion on the point, & the observation in the earlier part of the sentence appears to be a mere obiter. The case is, however, an authority for another important proposition, namely, that where the Ct. declares that it has determined to take the property of the disqualified proprietor under its charge, it empowers the Ct. to take charge of all such property including the 'after-acquired property'. His Lordship observes:

"the disqualification attaches to the person; & after a declaration u/s. 6 (e) of the Act, the proprietor is to be held disqualified to manage his own property. Any property, therefore, that comes to him by inheritance or otherwise, after he has once been declared a disqualified proprietor & the Ct of Wards has taken over his property u/s. 35 of the Act, must be property which he is disqualified from managing & the management whereof must automatically vest in the Ct. of Wards."

(53) In my opinion, once the management of the property of the disqualified proprietor or the minor members of his family has vested in the Ct. of Wards, it is the Ct. of Wards which is legally in charge of such property although the property may be for the time being in actual physical possession of any other person. Here the fact that under the terms of the award the property was in possession of the mother or that of the Imperial Bank of India, Patna, could not make any difference so far as the legal custody is concerned, & it is the Ct. of Wards which would be responsible for the legal custody of those properties so that in case of any misfeasance of the properties, the Ct. of Wards could be entitled to take appropriate steps. In fact, the award itself says that although the Maharani Saheba was to be in charge, she was directed to keep it in a separate box with another box containing her own jewelleries in the same locker.

(54) In regard to the third item of property, namely, the Defence Saving Certificates purchased for & in the name of the petnr. & his brother, these purchases appear to have been made in November, 1940, & in April, 1941. The contention, in the first place, is that apparently these were after the vesting order, &, therefore, could not be taken charge of by the Ct. of Wards. To that the answer is contained in the decision in '4 Pat 172 (supra)', refd. to above. It is next contended that in any event after the amending Act of 1940 had come into operation, the Ct .of Wards could not continue in possession of the minors' properties & should have handed over possession of the same to the natural guardian of the petnr. The contention is based on S. 7 (e) of the Amending Act which clearly shows that if the estate of a proprietor is taken charge of by the Ct. of Wards on the appln. of the proprietor himself seeking to be declared a disqualified proprietor, in that case the provision in regard to the taking charge of the person or property of a minor member of the family was not applicable. The original provision was S. 6 (e) of the old Act. This was replaced by S. 6 (d) of the amending Act, & it is quite true that S. 6 (d) is not mentioned in S. 7 (e) of the amending Act under which the Ct. had jurisdiction to take charge of the property & person of the minor member of the family of the proprietor whose estate is taken over by the Ct. of Wards In my opinion, however, the amending Act does not affect the position in regard to such estates as had been already taken charge of by the Ct. of Wards under the law as it then stood. The old Act has not been completely repealed. All that has happened is that some of its provisions have been amended by Act IV (4) of 1940 & the relevant sections partially altered. The amendment, therefore, will not affect transactions which had already taken place under the old Act & the charge of the person or property of the minor having once vested in the Ct. of Wards, it could not be divested except under the provisions of the Act. For the petnr. reliance has been placed on S. 24, General Clauses Act. But S. 24, in my opinion, has no application to the case. In fact, u/s. 2, Ct. of Wards Act, which was not affected by the amendment, it has been expressly provided that all persons & properties which at the commencement of this Act were under the charge of the Ct. of Wards as constituted by Bengal Act IV (4) of 1870, shall be deemed to be under the charge of the Ct. of Wards as constituted by the said Act. If the Ct of Wards could be deemed to continue in charge of person & properties of which it had taken charge under Act IV (4) of 1870 even after the amendment of 1940 there is no reason why it should not continue in charge of person & properties of which it took charge under the existing Act prior to the amendment of 1940. The contention, therefore, in my opinion, is without any substance.

(55) The net result of these discussions is that the petnr. had properties of which the Ct. of Wards could assume charge at the time when it issued its assumption order on 11-5-1940, & that being so, the Ct. of Wards would be deemed to have assumed charge of the person & property of the petnr. within the meaning of S. 7, Ct. of Wards Act.

(56) The question then is whether the petnr. had "an immediate or reversionary interest" in the property of the Maharaja of Hathwa who was the disqualified proprietor. Mr. P. R. Das urges that he had no 'immediate interest' in the property because the Hathwa Raj was the sole & exclusive property of the disqualified proprietor, the father of the petnr. He also says that the petnr.

could neither have any reversionary interest because the term 'reversioner' has been used in a known legal significance under the Hindu law, & it should be deemed to have been used by the Legislature in that very sense (vide 'L. P. E. Pugh v. Ashutosh Sen', 56 I A 93 at p. 101) . This proposition is well known but it must be remembered that the Ct. of Wards Act is not meant to apply only to the Hindus but to other communities as well. Therefore the term 'reversionary interest' as used in the Act must have a wider connotation: & then again the term 'reversionary interest' has been used at times in authoritative judicial pronouncements in connection with succession to an impartible estate. Nor can it be asserted that the petnr. had no immediate interest in the Hathwa Raj during the lifetime of his father. I may in this context refer to a decision on the Judicial Committee in 'Comr. of Income-tax v. Krishna Kishore', (68 I A 155), where their Lordships observed:

"Since the decision of the Board in 'Baijnath Prasad v. Tej Bali Singh', (48 I A 195), it has been settled law that property though impartible, may be the ancestral property of a joint family ,& that in such cases the successor falls to be designated according to the ordinary rule of the Mitakshara." & then they quoted with approval the concluding words of the judgment delivered on behalf of the Board by Lord Dunedin in 'Baijnath's case', (48 I A 195). I will refer just to a short excerpt to illustrate my meaning:

"The birth right of the senior member to take by survivorship still remains. Nor is this right a mere spes successionis similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced & surrendered."

(57) Therefore, the petnr. had undoubtedly some kind of immediate interest in the property though he may not have been an actual co-owner much less a joint-proprietor of the estate along with his father, the late Maharaja Bahadur.

(58) The learned Advocate General contended, on the contrary, that the petnr. was a joint proprietor of the estate, & as such the Ct. of Wards had assumed charge of the estate of the joint proprietor. This contention was evidently encouraged by the observations of the Judicial Committee in the case refd. to above where their Lordships held that the property of an impartible estate in the hands of the then owner of the property was a joint family property. But their Lordships have made it absolutely clear that in such cases, the members of the family cannot be held to be the owners of the property. The income of an impartible estate is not the income of the undivided family, but the income of the present holder. The other members of the family could not restrain the rights of alienation of the present holder; nor could they claim any joint possession. They could not even necessarily claim a right of maintenance. Their Lordships observed:

"General considerations of theory have their proper place, but impartibility & primogeniture when introduced into the Mitakshara involve competition & compromise between different lines of theory; if the doctrine that 'there is no coparcenary' may be pushed too far in one direction, the doctrine that the junior members are in a sense co-owners may be pushed too far in another; the special incidents of joint family property which is impartible being overlaid in either case by rigid theory."

(59) Therefore, it is not possible to accept the contention of the learned Advocate General that the petnr. was in the position of a joint proprietor of the estate during the lifetime of his father. The other factual difficulty in adopting this argument, as pointed out by Mr. P. R. Das, is that at the time of assuming charge of the estate of the late Maharaja Bahadur, the Ct. of Wards never purported to take charge of the estate of a joint proprietor but of the estate of disqualified proprietor, namely, the then appct. Maharaja Bahadur Guru Mahadevashram Prasad Sahi, & even in their counter-affidavit, they did not claim that they had taken charge of the estate as belonging to joint proprietors. On the other hand, they conceded that the Hathwa Raj was an ancient joint family impartible estate which devolves by survivorship.

(60) The learned Advocate General has presented another ingenious & interesting argument. He contends that the word 'property' as used in S. 7, Ct. of Wards Act, means interest in property & the term 'property' with reference to the minor means & qualifies the interest which the minor has in the property of the disqualified proprietor. Viewed in this light, it is not necessary that the minor needs must have separate property of his own of which the Ct. of Wards must take charge, because in assuming charge of the property of the disqualified proprietor the Ct. must be held to be taking charge of the 'interest' or 'property' of the minor also in that property. There is apparently much substance in this contention but in view of the findings at which I have arrived, I will refrain from coming to any final decision on the point.

(61) It thus emerges that the petnr. had "an immediate or reversionary interest" in the property of the disqualified proprietor, & that he had also properties of his own, he being a member of the joint family of the late Maharaja Bahadur of Hathwa, when the Ct. of Wards took charge of the Hathwa Raj as also of the person & property of the petnr. That being so, the petnr. is a person who comes under the limitation provided in S. 3, Majority Act, viz. that he was a minor of whose property superintendence or charge had been assumed by the Ct. of Wards. In such a case he shall not be deemed to have attained his majority until he completes his age of 21 years as submitted on behalf of the opposite party. It cannot, therefore, be successfully argued that the opposite party are illegally in possession of the estate of the petnr.

(62) I cannot wind up my discussion of the topic without reference to another plausible though untenable contention of Sir Sultan Ahmad. He contended that the Ct. of Wards took charge of the property of the petnr. only because the petnr. happened to be a minor member of the family of the disqualified proprietor. This latter condition, according to him, was the 'sine-qua-non' of the Ct's power to take & retain charge of the property of the petnr.; that condition or circumstance having ceased to exist on the death of the petnr's father, the Ct. had to deliver charge of the property to the petnr. & release the same. Under S. 8 of the Act, he says, the Ct. could not take charge of the property at present on the basis that it had, & therefore the Ct. had no power now to retain hold over the property. In my opinion, the underlying fallacy to this argument is that the existence of the said condition was necessary only to enable the Ct. to take charge of the property of the 'minor' within the meaning of S. 8 of the Act. Once the Ct. has validly assumed charge of the minor's person & property, the minor becomes a ward of the Ct., & until he attains the requisite age under the Ct. of Wards Act to cease to be a minor, he continues to be such a ward. The contention therefore, cannot be upheld.

(63) For the reasons stated above, this appln. fails & must be dismissed with costs as directed by my learned brother.

D.R.R. *Application dismissed.*

A. I. R. (38) 1951 PATNA 582 (C. N. 162)

REUBEN AND RAI JJ.

Ajodhya Dutta Missir and another, Applts. v. Mt. Mohar Kali Kuer, Resp.

A. F. A. D. No. 377 of 1948, D/- 13-3-1951.

Civil P. C. (1908), O. 41, Rr. 4 and 20 — Decree for pre-emption against vendor and vendee — Appeal by vendee alone — Power of Ct. to reverse decree as against both.

Where in a suit for pre-emption a decree is passed against the vendor and the vendee and the vendee alone appeals against the decree without joining the vendor as party, the appeal does not become incompetent as the vendor is not a necessary party to the appeal. In such a case the appellate Ct. has power u/O. 41, R. 4 to reverse the decree of the trial Ct. not only against the vendee who has appealed but also against the vendor who was not a party to the appeal. A I R (35) 1948 Pat 460 and 7 All 775, Rel. on. A I R (27) 1940 Pat 137 and A I R (29) 1942 Oudh 366, Dist. (*Paras 7, 9, 10*)

Anno: C. P. C., O. 41 R. 4 N. 6; O. 41 R. 20 N. 4.

S. C. Misra, Indrabhanu Singh and B. K. N. Singh, for Applts. — B. C. De and S. S. Asgar Hussain, for Resp.

Cases referred to:

(1885) 7 All 775: (1885 A W N 182 F B) (Pr 8)

('42) A I R (29) 1942 Oudh 366: (200 I C 504) (Pr 10)

('40) A I R (27) 1940 Pat 137: (18 Pat 768) (Pr 7)

('48) A I R (35) 1948 Pat 460: (27 Pat 242) (Prs 6, 7)

RAI J.: This is an appeal by the pltfs. against the judgment & the decree of the Fourth Additional Subordinate Judge, Gaya, reversing those of the Second Additional Munsif of the same place.

(2) The above appeal arises out of a suit for pre-emption. According to the case of the pltfs., deft. 2, Shyam Dutt Missir, executed a sale deed on 19-7-1945, in respect of one anna 12 dams share in khewat No. 4, tauzi No. 753 of village Pandit Bigha in favour of deft. 1. The sale deed was regd. on 23-7-1945. On hearing of the sale the pltfs. performed the necessary ceremonies entitling them to claim pre-emption. On these allegations they claimed to be put in possession of the vended share on payment of Rs. 1000 only.

(3) The suit was contested by the vendee, deft. 1, who pleaded that the pltfs. had not performed any ceremony entitling them to claim pre-emption.

(4) The trial Ct. decreed the suit. Deft. 1, the vendee, filed an appeal before the lower appellate Ct. In the appeal, however, she impleaded only the pltfs. as resps. She did not implead deft. 2 as a party to the appeal. At the time of the hearing of the appeal an objection was taken by the pltfs. that as deft. 1 had not impleaded deft. 2 as a party to the appeal, the whole appeal had become infructuous & it was bound to fail on that ground. The lower appellate Ct., however, came to the conclusion that the pltfs. had failed to prove that they had performed the necessary ceremonies entitling them to claim pre-emption. On the point of non-joinder of deft. 2 to the appeal, it held that it was not fatal. In this view of the matter, the appeal was allowed & the suit was dismissed.

(5) In this Ct., the learned counsel for the pltfs.-applts. has argued that there is no clear finding in the judgment of the lower appellate Ct. that the necessary ceremonies had not been performed. According to him, the learned Subordinate Judge had only held that the ceremonies were not performed at the proper time. In my opinion, the lower appellate Ct. has held that the pltf's case of performing of the ceremonies is not believable. It has further held that even if the ceremonies be taken to have been performed, they were not done in accordance with law. But the alternative finding does not take away the force of the finding that no ceremonies were performed. In my opinion, the contention of Mr. Misra is untenable. There is no justification for us to interfere with the finding of facts of the lower appellate Ct.

(6) Mr. Misra, however, laid great emphasis on the incompetency of the appeal in the Ct. below because of the non-joinder of deft. 2 to the memorandum of appeal. He contended that a decree had been passed by the trial Ct. against both the defts. That decree cannot be varied in appeal so as to adversely affect the interest of deft. 2. But I do not think that the contention of the learned counsel is well founded. A similar point arose in the case of 'Radha Mohan v. Kishungir', A I R (35) 1948 Pat 460. It was held there that under the provisions of O. XLI, R. 4, Civil P. C. the appellate Ct. was competent to set aside the decree of the trial Ct. also as against a deft. who was not a party to the appeal. O. XLI, R. 4, Civil P. C. runs as follows:

"Where there are more pltfs. or more defts. than one in a suit, & the decree appealed from proceeds on any ground common to all the pltfs. or to all the defts. any one of the pltfs. or of the defts. may appeal from the whole decree, & thereupon the appellate Ct. may reverse or vary the decree in favour of all the pltfs. or defts., as the case may be."

(7) With all respect to the learned Judges who decided the case of 'Radha Mohan Singh' aforesaid, I fully agree with the view taken by them so far as the powers of a Ct. under O. XLI, R. 4, Civil P. C. are concerned. Mr. Misra relied upon the decision in the case of 'Suraj Prakash v. Sant Lal', (A I R (37) 1940 Pat 137). But the case has no application to the present case. In that case two separate decrees had been passed against two sets of defts., out of whom only one set of defts. had come up in appeal. The question that arose for consideration there was whether under the provisions of O. XLI, R. 33, Civil P. C. a Ct. was competent to give relief to that set of the defts. who had not filed an appeal against the decree passed against them. It was held there that a Ct. had no such power. In the present case, however, deft. 2, after sale of his share to deft. 1, had no interest left in it. He did not contest the suit. To me it appears that he was not even a necessary party to the appeal. I do not think that in the circumstances of this case there was any error in the decree passed by the lower appellate Ct.

(8) The learned counsel for the applts. further refd. to the case of 'Gobind Dayal v. Inayatullah', (7 All 775). The judgment in that case was given by a F. B. of five learned Judges of the Allahabad H. C. Mr. Misra drew our attention to a passage in the judgment of Mahmood, J. In my opinion, the judgment of that learned Judge is against the contention of Mr. Misra. While considering the right of a person who seeks pre-emption, the learned Judge said as follows:

"But the Muhammadan Law of pre-emption involves no such anomalous inconsistencies of reasoning, because the right of pre-emption is not a right of 're-purchase' either from the 'vendor' or from the 'vendee', involving any new contract of sale; but it is simply a right of 'substitution', entitling the pre-emptor, by reason of a legal incident

to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights & obligations arising from the sale under which he has derived his title. It is, in effect, as if in a sale deed the vendee's name were rubbed out & the pre-emptor's name inserted in its place."

(9) From the above passage also it is clear deft. 2 was not a necessary party to the appeal before the lower appellate Ct.

(10) The learned counsel for the applt. further reld. upon the case of 'Brij Narain v. B. H. K. Dhaon', (A I R (29) 1942 Oudh 366), but the facts of that case were quite different from the facts of this case. In that case the vendor had come up before the H. C. against the order of the Ct. below refusing to let him join as a party to a pre-emption suit. As appears from that judgment, there was a subsequent contract between the vendor & the vendee by which the latter had contracted to sell the property to the vendor for some consideration with a specified period. On the basis of that contract it was considered that the vendor had not lost all interest in the property which was the subject-matter of the pre-emption suit. It was in these circumstances that the vendor was ordered to be joined as a party to the suit for pre-emption. But in the present case no right remained in the vendor. I, therefore, do not think that the non-joinder of the vendor was in any way fatal to the maintainability of the appeal. The lower appellate Ct. was therefore, justified in reversing the decree of the trial Ct. & dismissing the suit of the pltfs.

(11) Mr. Misra further argued that the lower appellate Ct. does not clearly mention to have exercised its discretion under the provisions of O. XLI, R. 4, Civil P. C. But, in my opinion, that is immaterial. An objection was raised before it regarding the maintainability of the appeal in absence of deft. 2. It overd. that objection & revsd. the decree of the trial Ct. Even if it did not specifically refer to the provisions of O. XLI, R. 4, Civil P. C., it would be deemed to have exercised its power under that provision.

(12) The result is that the judgment & the decree of the lower appellate Ct. are affd. the appeal fails & is dismissed with costs.

(13) REUBEN, J.: I agree.

K.S. *Appeal dismissed.*

A. I. R. (38) 1951 PATNA 583 (C. N. 163)

LAKSHMIKANTA JHA C. J. AND CHATTERJI J.

Keshwar Thakur and others, Applts. v. Ghulam Hussain and others, Resps.

Letters Patent Appeal No. 9 of 1949, D/- 20-3-1951.

(a) Custom (General) — Right of Muhammadans to kill cows on festive occasions — Custom against slaughter of cows — Validity.

The right of the Muhammadans to slaughter kine, even in privacy, can be defeated if it is proved that there is a custom in the village prohibiting sacrifice of cows and bullocks on Bakrid day or on any other occasion, and by reason of such custom the Muhammadans have desisted from slaughtering cows in the village from time immemorial. The fact that such a custom has not been judicially recognized on any previous occasion is immaterial. And further if such a custom is proved the Ct. cannot refuse to enforce it on the ground of unreasonableness. (Para 7)

(b) Custom (General) — Onus — Exercise of right to kill cows on festive occasion by Muhammadans — Right objected to by Hindus on ground of custom — Onus of proof.

The Muhammadans found their right to kill cows on festive occasions on their ecclesiastical law. If the Hindus object to the exercise of such right by the Muhammadans on the ground of a local custom, the onus is on them to prove that the Muhammadans have lost their legal or ecclesiastical right under a valid custom, i.e., a custom which owes its origin to common consent and voluntary forbearance on the part of the Muhammadans of the village. And when proved such custom acquires an obligatory element or a binding force. (Para 8)

(c) Custom (General) — Customary right — Muhammadans agreeing not to kill cows — Reasonableness of.

Where out of deference to the religious susceptibilities of the Hindus and in order to respect their feelings the Muhammadans knowingly and willingly desist from exercising their right to slaughter kine, it is only to maintain good social relations and neighbourly feelings between the two communities; a custom thus arising cannot be said to be unreasonable. (Para 9)

Lal Narain Sinha and Girijanandan Prasad, for Applts. — Murtaza Fazl Ali, for Resps.

Cases referred to:

('88) 10 All 150: (1888 A W N 17 F B) (Pr 9)
('07) 30 All 181: (7 Cr L J 381) (Prs 7, 8)
('30) A I R (17) 1930 All 753: (125 I C 14) (Prs 7, 8)
('10) 14 C W N 487: (37 Cal 322) (Pr 8)
('14) 25 I C 104: (A I R (1) 1914 Cal 854) (Prs 7, 8)

LAKSHMIKANTA JHA C. J.: This is an appeal by the defts. under Cl. 10, Letters Patent, from a decision of a Single Judge of this Ct. It arises out of a representative suit under O. 1, R. 8, Civil P. C., for a declaration that the pltfs. & other Muhammadan inhabitants of village Trimohan in the district of Darbhanga are entitled, from time immemorial, to sacrifice & kill cows & bullocks on Bakrid & other occasions under purdah in an enclosed place without any interference or objection by the Hindus of the village & also for a perpetual injunction against the defts. restraining them from interfering with their right.

(2) It appears that the Muhammadans of village Trimohan attempted to slaughter cows on the Bakrid day in 1941, & on an interference by the Hindus of the village a case u/s. 107, Cr. P. C., was started & the Muhammadans were restrained from sacrificing cows in the village. The pltfs have accordingly instituted the present suit as the representatives of the Muhammadans of the village, impleading the Hindu inhabitants as defts., for the reliefs already stated.

(3) The defence of the Hindus, in short, is that there is a custom in the village prohibiting sacrifice of cows & bullocks on Bakrid day or on any other occasion, & by reason of such custom the Muhammadans have desisted from slaughtering cows in the village from time immemorial.

(4) The trial Ct. on a consideration of the entire oral & documentary evidence in the case held that the Hindus failed to prove the custom as alleged by them & declared that the pltfs. & other Muhammadans of the village have the right "to sacrifice & slaughter kine in the village with quiet & decency in enclosed premises exclusively in their possession on Bakrid & other occasions". The suit was accordingly decreed & the Hindus were permanently restrained from interfering with this right.

(5) On appeal by the defts., the learned subordinate Judge, before whom the case came up for hearing, set aside the decree of the trial Ct. & held that the defts. proved the custom alleged by them & that it was "ancient, uniform, undoubted & continuous". He found that

"they (Muhammadans) refrained from doing so out of regard for the Hindus, who were in greater

number, & who had very strong feelings on the point of cow sacrifices &, in course of time, this forbearance appears to have ripened into a custom directly & completely prohibiting cow sacrifice in the village....It cannot be said that this is a case of mere non-exercise of the right to sacrifice cow by the Muhammadans for a number of years."

(6) There was a second appeal by the pltfs. to this Ct. which came up for hearing before Shearer, J. He has held:

"Even if the learned subordinate Judge is correct in assuming that, until 1941, the Muhammadans of this village neither exercised nor attempted to exercise this right, it is difficult to understand on what principle they could, by their own action, have prevented themselves from ever exercising it in future. No local custom of this kind appears ever to have been judicially recognised &, if judicial recognition was sought, it might well, I imagine, be refused on the ground that it would be unreasonable that Muhammadans should have a right to kill cows elsewhere but should not have a right to do so within their own village, although it is in their own homes or the homes of their relations & neighbours that their religion contemplates such sacrifices will be performed."

In this view he has reversed the decision of the Ct. of appeal below & restored the decree of the trial Ct. with slight modification.

(7) I have given a most anxious consideration to the matter & I do not think the view taken by Shearer, J. can be supported. If a custom like the one pleaded by the Hindus in the present case be proved, the rights of the Muhammadans to slaughter kine, even in privacy, can be defeated even though the custom has not been judicially recognised on 'any previous occasion'. A similar custom was pleaded in 'Shahbaz Khan v. Umrao Puri', (30 All 181), 'Naubahar Singh v. Qadir Bux', (A I R (17) 1930 All 753); & 'Mahadeo Prasad v. Nabi Bukhsh', (25 I C 104), but the Hindus lost their case because they failed to prove the custom alleged by them. It was never suggested in any of these cases that such custom, even if proved, could not be enforced on the ground of unreasonableness.

(8) The legal right of the Muhammadans to kill their own cows in privacy, as alleged by the pltfs., cannot be disputed. It is a well known rule of jurisprudence that every man is entitled to so use his own property as not to injure the rights of another ('sic uteri tuo ut alienum non laedas'). He can, therefore, even cause destruction of his own property if by his act he does not cause injury, danger or annoyance to the people in general who dwell or occupy property in the vicinity. The Muhammadans do not found their right to kill cows on festive occasions on any custom. According to them their ecclesiastical law enjoins "the sacrifice of a camel, a buffalo, a cow, a sheep, or any other quadruped, whose meat is lawful food to the Muslim". (vide 'Shahbaz Khan v. Umrao Puri', (30 All 181); 'Naubahar Singh v. Qadir Bux', (A I R (17) 1930 All 753)). But the Hindus object to the exercise of such right by the Muhammadans on the ground of a local custom. The onus is, therefore, on the defts. to prove that the pltfs. have lost their legal or ecclesiastical right under a valid custom, i.e., a custom which owes its origin to common consent & voluntary forbearance on the part of the Muhammadans of the village & was never disputed at law. It may be observed that among the Hindus a cow is regarded as the most sacred animal & an object of worship. It is quite likely that the Hindus & the Muhammadans of the village, who are close neighbours & whose houses are intermingled, entered into an agreement not to have sacrifice of cows in the village on festive or other occasions. Such agreement, though at first a matter of opinion, has now, as found by the learned subordinate Judge, become a valid custom & can no longer be treated as a matter of choice, & the custom has acquired an obligatory element or a binding force ('Prodoyote Kumar v. Rakhal Chandra', (14 C W N 487). But it is not necessary to speculate, because the learned subordinate Judge has found that the defts. have proved the custom as alleged by them, & this finding is a finding of fact with which we cannot interfere in second appeal. 'Mahadeo Prasad v. Nabi Bukhsh', 25 I C 104 at p. 107).

(9) The learned Subordinate Judge has, as already stated, found that the local custom alleged by the Hindus is "ancient, uniform, undoubted & continuous". Therefore, the next question that arises for consideration is whether a custom like this can be said to be unreasonable. In fact, reasonableness or unreasonableness of a custom depends on various factors. What may be consd. as unreasonable in one set of circumstances may be consd. quite reasonable in a different set of circumstances. In the present case the Hindu & Muhammadan inhabitants are close neighbours, their houses are intermingled, & if out of deference to the riligious susceptibilities of the Hindus & in order to respect their feelings the Muhammadans knowingly & willingly desisted from exercising their right to slaughter kine for which occasion arose every year, it was only to maintain good social relations & neighbourly feelings between the two communities & a custom thus arising cannot be said to be unreasonable. For, as observed by Mahmood, J. in 'Queen Empress v. Imam Ali', (10 All 150 F B), "the cow as the furnisher of milk & the mother of the bovine species rose from being an object of utility to the footing of sanctity". The protection of the bovine species so universally employed in this country for purposes of agriculture has also been recognized in the Constitution. Art. 48 of the Constitution, which is only directive, lays down that the

"State shall.....take steps for preserving..... the breeds, & prohibiting the slaughter, of cows & calves & other milch & draught cattle."

This directive cannot be said to be unreasonable; & if this directive is not unreasonable, then, if the same object is fulfilled by mutual good will of the two communities & a custom has sprung up prohibiting slaughter of cows, such a custom, in my opinion, cannot equally be said to be unreasonable.

(10) I would accordingly allow the appeal & dismiss the suit with costs throughout: pleader's fee in the lower Cts. at 10 per cent.

(11) CHATTERJI, J.: I agree.

V.S.B. *Appeal allowed.*

A. I. R. (38) 1951 PATNA 584 (C. N. 164)

B. P. SINHA AND C. P. SINHA, JJ.

Abhay Kumar Singh and others, Applts. v. Kirit Narain Singh and others, Resps.

A. F. O. O. Nos. 250 to 254 of 1948, D/- 3-1-1951.

(a) Civil P. C. (1908), O. 23 R. 3, O. 32 R. 7 — Compromise by minor's guardian.

If it is intended that minors to an action be bound by a compromise, then the guardian or the next friend of the minor must apply for the leave of the Ct., to enter into the compromise and if the guardian refuses to do so a compromise cannot be forced on the minor concerned although in the opinion of the Ct., the terms of the proposed compromise may be beneficial to the minor. It is the guardian or the next friend alone who can decide for himself whether or not he should obtain

the leave of the Ct., to enter into a compromise. If he chooses not to apply for leave, then no compromise could affect the interest of the minor and the minor is not bound by any compromise which may have been entered into between the parties to the action: *Case law discussed.* (*Para 8*)

Anno: C. P. C., O. 32 R. 7 N. 2, 3.

(b) ***Civil P. C. (1908), O. 23 R. 3, O. 32 R. 7 — Compromise by father of joint Hindu family.***

Where the father is guardian-'ad-litem' of his minor son, then he cannot, without the leave of the Ct. do any act in his capacity of father or managing member of the family, which he was debarred from doing as guardian-'ad-litem'. Hence, a compromise entered into by him on behalf of his minor son, without the leave of the Ct., will not be binding on the minor: *36 Mad 295 P C, Foll.* (*Para 9*)

Anno: C. P. C., O. 32 R. 7 N. 7.

(c) ***Civil P. C. (1908), O. 23 R. 7, O. 32 R. 7 — Minor and major applts. — Interests joint — Compromise not binding on minors — Not enforceable against majors.***

Where interests of the minor and major applts. are joint and not separate, a compromise entered on their behalf, if not binding on the minors, cannot be given effect to against the majors. (*Para 10*)

Anno: C. P. C., O. 32 R. 7 N. 5.

G. C. Mukherji and S. K. Mazumdar, for Applts. — K. C. Sanyal and R. Jha, for Resps.

Cases referred to:

('13) 36 Mad 295: (40 I A 132 P C) (Pr 9)
('20) 47 I A 88: (A I R (7) 1920 P C 60) (Pr 4)
('25) 47 All 782: (A I R (12) 1925 All 570) (Pr 6)
('07) 34 Cal 70: (5 C L J 175 P C) (Pr 4)
('23) A I R (10) 1923 Cal 685: (75 I C 682) (Pr 7)
('95) 22 Mad 378 (Pr 6)
('46) A I R (33) 1946 Mad 377: (I L R (1947) Mad 126) (Pr 4)
('16) A I R (3) 1916 Pat 223: (35 I C 675) (Pr 7)
('23) 2 Pat 538: (A I R (10) 1923 Pat 375) (Pr 5)
('38) A I R (25) 1938 Pat 202: (175 I C 75) (Pr 4)
('39) A I R (26) 1939 Pat 387: (180 I C 733) (Pr 5)
('40) 18 Pat 708: (A I R (27) 1940 Pat 59) (Pr 4)
('45) 24 Pat 529: (A I R (32) 1945 Pat 391) (Pr 4)

C. P. SINHA, J: These misc. appeals arise out of a proceeding under O. 23, R. 3, Civil P. C. which was initiated by the applts. in rent appeals Nos. 141, 142, 145, 146 & 147 of 1946 pending in the Ct. of the Subordinate Judge of Purnea. In the view which we take of these appeals, it is not at all necessary to mention the facts in detail: it is enough to say that the applts. in those rent appeals alleged that a compromise had been entered into between them & the resps. to those appeals. The applts. to those appeals got an order in their favour by the learned subordinate Judge under O. 23, R. 3, Civil P. C. recording the compromise as alleged by them. The resps. in the rent appeals have filed these appeals against the said order of the learned Subordinate Judge.

(2) It appears that in the rent appeals there were six minor resps., namely, five sons of resps. 1 Abhay Kumar Singh & they were under the guardianship of their father, & a minor son of Jaikumar Singh who was under the guardianship of his father. The Ct. below has found "that the compromise is proved & is lawful & as such must be enforced".

(3) These appeals must be decided in favour of the applts. on a very short point. Abhaykumar Singh & Jaikumar Singh are brothers, & it is alleged by the resps. that the rent appeals were compromised on certain terms; & that according to the compromise Abhaykumar Singh, one of the applts. & a resp. in those rent appeals, had agreed to the terms of the compromise. In this case, there was no appln. by the guardian, either written or oral, for the leave of the Ct. to enter into the compromise on behalf of the two sets of minors aforesaid; neither is there any order giving leave to the guardians of the minors to enter into compromise, nor is there any indication on the record to show that, while holding that the compromise should be recorded, the Ct. had consd. the interest of the minors in making its order under O. 23, R. 3 of the Code. It appears, therefore, that there is a clear violation of the provisions of O. 32, R. 7, Civil P. C., which runs as follows:

"1. No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

2. Any such agreement or compromise entered into without the leave of the Ct. so recorded shall be voidable against all parties other than the minor."

It has to be remembered that the provisions contained in this rule, as they stood in the earlier Act of 1882, did not contain the words "expressly recorded in the proceedings" in Sub-R. (1) & the words "so recorded" in Sub-R. (2). These words were added in the present rule to give effect to the practice established under the old section. From the provision contained in the aforementioned rule, it is quite clear that the leave of the Ct. must be asked for by the next friend or guardian & the leave must be given by the Ct. before recording the compromise & it is also well settled now, upon authorities, that, while giving that leave to the guardian or the next friend, the Ct. must consider whether the proposed terms were for the benefit of the minor concerned. In the present case, the guardians had never applied for leave of the Ct. for entering into any compromise on behalf of the minor resps., rather they have been repudiating all through the factum of a compromise.

(4) The learned counsel appearing on behalf of the resps. has cited a number of authorities, which I will presently consider, but none of these authorities supports his contention that a compromise could be recorded by the Ct. without the guardian or the next friend having asked for the leave of the Ct. & without the leave having been granted. The case of 'Rajeswararao v. Satyanarayana', (A I R (33) 1946 Mad 377), has been cited to show that before the conclusion of the terms of the compromise & before the compromise is made a decree of the Ct., a guardian-'ad-litem' can obtain the leave of the Ct. It is not the case here that the leave of the Ct. was asked for & granted at any stage &, therefore, this case gives no support to the resps. It is rather against them as their Lordships say that a guardian-'ad-litem' must obtain the consent of the Ct., before the compromise is concluded. The case of 'Dharnidhar v Phulkumari', (24 Pat 529), is also to the effect that leave of the Ct. can be granted after the terms of the compromise have been finalised & it is not necessary under O. 32, R. 7 (1) for the guardian-'ad-litem' to obtain leave of the Ct. to negotiate the terms of the compromise. The case of 'Rameshwar Pershad v. Ram Bahadur Singh', (34 Cal 70), is a decision of the P. C. This case is absolutely of no assistance, because, it does not consider the provisions of O. 32, R. 7 of the equivalent provisions thereof in the previous Civil P. C. From the statement of the argument in the report, however, it appears that in that case also leave had been asked for and sanction of the Ct. had been given to the guardian concerned and the

question which we have to decide in this case did not fall for consideration in the case before the P. C. Reference has been made to the case of 'Badri Singh v. Chhotu Singh', AIR (25) 1938 Pat 202. That case also is no authority for the proposition that a Ct. can record a compromise without the guardian or the next friend of the minor having obtained leave of the Ct. In that case their Lordships held that a certain compromise was for the benefit of the minor concerned. What happened in that case was that a certain suit was decreed in terms of the compromise. Later, on an appln. for review of the order the Ct. set aside that order on the ground that the minors had not been benefited by that compromise & also that there was no express order by the Ct. recording the compromise that it was for the benefit of the minors, & the suit was restored to its original number. On appeal against the decree in the suit, their Lordships were assured that the compromise in the Ct. below was beneficial to the minors concerned, &, in that view of the matter, their Lordships accepted the terms of the original compromise & incidentally observed that

"if the attention of the Ct. is directed specifically to the fact that there is a minor involved & the compromise is brought to its notice.....it must be assumed that the Ct. has complied with the requirements of the law."

No authorities were refd. to in support of this general proposition & I doubt very much its correctness. In this case, however, it is not necessary to decide that point. In the case of 'Umar v. Mahabir Lal', (18 Pat 708), it was held that a decree passed on an award made on a reference, which was in contravention of O. 32, R. 7 of the Code, was not void but voidable at the instance of the minor, &, therefore, could not be impeached in an execution proceeding arising out of that decree. This case also does not throw any light upon the question that we have to consider in this case. The case of Sakinabai v. Shirinibai', (47 IA 88), was a case where a compromise was arrived at while the appeal was pending before the P. C. & that case is not at all relevant to the decision of the question in this case.

(5) It has been further urged by the learned counsel on behalf of the resps. that no particular formula is required by the Ct. in granting leave & the case of 'Ramnarain Singh v. Atal Behari Singh', (AIR (26) 1939 Pat 387), & the case of 'Ishan Chandra v. Nilratan', (2 Pat 538), have been reld. upon for this proposition. The learned counsel, however, forgets that the present case is not one where there has been substantial compliance with the provisions of O. 32, R. 7, Civil P. C. but it is a case where those provisions have been entirely ignored.

(6) The learned counsel appearing for the applts. has contended that a compromise cannot be forced upon the guardian or the next friend of a minor & that it is for the guardian & guardian alone to consider whether he should or should not apply for leave of the Ct. to enter into any agreement or compromise on behalf of the minor; & that if he does not choose to enter into compromise & ask for leave of the Ct. to enter into a compromise on behalf of the minor, the minor cannot be forced to accept the compromise & if any such compromise is made a decree of the Ct. it is not binding upon the minor. He has placed before the Ct. several cases, & it is necessary to refer only to some of those cases which throw light on the point under consideration. In the case of 'Ranga Rao v. Rajagopala Raju', (22 Mad 378), the facts were that the guardian-ad-litem' of the minors had agreed to a compromise in a suit & had also signed the petn. embodying the terms arrived at, but later on the guardian changed his mind & declined to present that petn. of compromise & opposed a decree being passed in terms thereof. One of the parties to the compromise wanted to enforce the terms of the compromise & an issue was raised in the suit, whether such a compromise had in fact been effected, & if so, whether it was binding on the minor defts. to the suit, & the Dist. J. held that the said compromise was valid & binding on the minors & he decreed the suit in terms of the compromise. The matter went up in appeal & their Lordships made the following observations:

"Assuming that the applts' guardian did as urged for the resps. agree to compromise the suit on the terms alleged, was it competent to the Ct. in the circumstances of the case to enforce the compromise as against the applts? Now, leave to enter into such compromise was never asked for on behalf of the applts., & their guardian-'ad-litem' has all along been objecting to the Ct. passing a decree according to the compromise. In the face of such opposition on the part of the person representing the applts. in the litigation the Ct. had clearly no power to enforce the compromise, even though it appeared to the Ct. that the terms of the compromise were beneficial to the applts." This case is on all fours with the facts of the present case &, with very great respect to their Lordships, I entirely endorse the observations made above. In the case of 'Gulab Dei v. Vaish Motor Co.', (47 All 782), their Lordships, accepting the view of the Madras H. C. in 'Ranga Rao v. Rajagopala Raju', (22 Mad 378), have observed:

"The mere fact that the decree has been passed in terms of the compromise does not necessarily justify an inference that the Ct. granted leave, or that it was satisfied that the compromise was for the benefit of the minor. Any compromise without the leave of the Ct. is a nullity. As, before any leave has been granted, the guardian herself does not want the compromise, it is impossible to force the compromise on the minor."

(7) That the guardian or the next friend of the minor is the sole judge as to whether or not he should enter into any agreement on behalf of the minor, has been reiterated by their Lordships of the Calcutta H. C. in 'Hemangini Dasi v. Bhagwati Sundari Dasi', (AIR (10) 1923 Cal 685). Their Lordships have held:

"It is settled law that although the Ct. can & must approve of a compromise on behalf of infants, it cannot & will not force one upon them against the opinion of their next friend or guardian 'ad litem' in the action."

& further

"No doubt if the Ct. found that a guardian or next friend was acting improperly & against the infant's interests in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him & substitute some other person."

In the case of 'Hanuman Rai v. Jagdis Rai', AIR (3) 1916 Pat 223, a Bench of this Ct. has held that it is open to a guardian to withdraw the appln. for leave to enter into an agreement at any time before the leave of the Ct. was granted.

(8) On a review of the authorities mentioned above, it is clear that if it is intended that minors to an action be bound by a compromise, then the guardian or the next friend of the minor must apply for the leave of the Ct. to enter into the compromise & if the guardian refuses to do so a compromise cannot be forced on the minor concerned although, in the opinion of the Ct. the terms of the proposed compromise may be beneficial to the minor. It is the guardian or the next

friend alone who can decide for himself whether or not he should obtain the leave of the Ct. to enter into a compromise. If he chooses not to apply for leave, then no compromise could affect the interest of the minor & the minor is not bound by any compromise which may have been entered into between the parties to the action.

(9) It was contended by Mr. Sanyal, the learned counsel for the resps. that Abhaykumar Singh being the karta of the joint family, of which the minors are members, & it having been found by the Ct. below that he had entered into the compromise, the compromise should be held binding upon the minors as well. That the family of the applts. is joint, is not admitted by Mr. G. C. Mukherji, learned counsel for the applts. Even if the family was joint & Abhaykumar Singh was the karta of the family, the resps. cannot get any advantage out of it. In the first place, the minors & under the guardianship of their respective fathers & as such the provisions of O. 32, R. 7 will apply & the powers of the karta of a joint Hindu family must be subject to the provisions of that rule, that is to say, the leave of the Ct. must be asked for by the guardian to enter into compromise & after the leave is granted by the Ct., the guardian can enter into compromise. In the second place, one of the minors is under the guardianship of his father Jaikumar Singh & the case of the resps. being that Abhaykumar Singh had entered into the compromise on behalf of the family, the acceptance of the compromise by Abhaykumar Singh alone will not bind the other minor. It has been held by the P. C. in the case of 'Ganesha Row v. Tuljaram Row', (36 Mad 295), that if the father was guardian-'ad-litem' of his minor son, then he could not, without the leave of the Ct. do any act in his capacity of father or managing member of the family, which he was debarred from doing as guardian-'ad-litem'. Their Lordships observed that to hold otherwise would be to defeat the object of the enactments. Their Lordships were considering S. 462, Civil P. C., which was replaced by O. 32, R. 7 of the present Code.

(10) Lastly, it was contended that if the compromise is not binding on the minors, the compromise is binding on the major applts. The difficulty in accepting this argument is that the interest of the minors & the major applts. are joint & not separate, &, therefore, the compromise cannot be given effect to.

(11) In the result, the appeals are allowed with costs. There will be one set of hearing fee as all these appeals were heard together.

(12) B. P. SINHA, J.: I agree.

V.B.B. *Appeals allowed.*

A. I. R. (38) 1951 PATNA 587 (C. N. 165)

LAKSHMIKANTA JHA, C. J. AND CHATTERJI J.

Kirit Singh and another, Pltfs.-Applts. v. Mt. Chandrakali Kuar and others, Defts.-Resps.

L. P. A. No. 26 of 1949, D/- 13-4-1951, from the decision of Shearer, J. D/- 19-10-1949.

(a) Hindu Law — Debt — Father's debt — Pious obligation of son to pay.

It is the primary duty of every Hindu to pay his own aebt. If for any reason he fails to pay it, the 'putra', or son, as the son of his father, is under a pious duty to discharge it. And this duty is not affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead. A I R (11) 1924 P C 50, Rel. on.

(Para 8)

(b) Hindu Law — Debt — Father's debt — Pious obligation of son to discharge how far qualified.

The son's obligation to discharge his father's debt is not unqualified. A son is not under any obligation to pay, 'inter alia', a debt of his father that is not 'vyavaharika', that is, a debt for a cause repugnant to good morals. Thus, the son is absolved from his obligation to discharge his father's debt if it is found to be, at its inctption, tainted with immorality or illegality. A I R (30) 1943 P C 142; 6 M I A 393 P C and 14 Beng L R 187 P C, Ref.

(Paras 9, 10, 11)

(c) Hindu Law — Debt — Father's debt — Pious obligation of son to discharge — Nature of debt when it originated to be seen — Joint family property sold in execution for decree for costs awarded against father — Sons challenging sale being in discharge of avyavaharika debt.

The obligation of the son to discharge his father's debt depends upon the nature or character of the debt when it originated. An examination of the circumstances before or after the liability is incurred is irrelevant to ascertain the nature or character of the debt. If there is something illegal or immoral in the act of the father when the liability is incurred, the son is not bound to discharge it. If, however, the father incurs a debt (voluntary or involuntary) to make good a loss caused by his wrongful act, such a debt cannot be said to be illegal or immoral, and the son cannot claim exemption merely because the act in consequence of which the obligation to make compensation arose was an illegal or immoral act, or both illegal and immoral. 128 P R 1879 and 16 Mad 99, Rel. on.

(Para 12)

In a suit for possession filed against A, a Hindu governed by the Mitakshara School, A in his defence produced a hukumnama bearing the thumb impression of the pltf. in the suit. The defence was disbelieved and the suit was decreed against A with costs. The pltf. took out execution for costs and land belonging to the joint family consisting of A and his sons was sold in execution. Subsequently in a suit brought by the sons, the sons challenged the sale on the ground that they were under no pious obligation to pay up the decree for costs awarded against their father A because he was guilty of a fraudulent act in that he produced a forged hukumnama in support of the settlement of the land in favour of himself. The decree for costs, according to them was of the nature of avyavaharika debt.

Held that the origin of the liability created by costs, awarded by Ct. in its discretion, could not be said to be tainted with any illegality or immorality, that even if A was guilty of a fraudulent act in filing a hukumnama which was not genuine, his conduct before the date of the decree could not be taken into consideration, that the decree for costs, was not avyavaharika and therefore, the sons of A were under a pious obligation to discharge the judgment-debt and the sale could not be assailed by them. A I R (30) 1943 P C 142, Rel on. A I R (26) 1939 Mad 528; A I R (36) 1949 Pat 515, Dist. 20 M L J 89, Not foll. A I R (15) 1928 Oudh 10, held overruled by A I R (30) 1943 P C 142.

(Para 15)

(d) Hindu Law — Debt — Father's debt — Pious obligation of son to pay — Distinction between Civil and Criminal liability of father in incurring debt.

For determination of the liability of the son, a distinction has been made between a civil and a criminal liability of the father in incurring a debt. If the father is liable to criminal prosecution for a debt incurred by him, the son is not under any pious obligation to discharge such debt. If, however, the liability of the father originates in the breach of civil duty, the son cannot claim freedom from the obligation to discharge such debt of the

father. 39 Cal 862; A I R (21) 1934 P C 238, Rel. on. (*Para 13*)

Shambhu Prasad Singh, for Applts. — Ram Chandra Sinha and Lakshman Saran Sinha, for Resps.

Cases referred to:

(1854-57) 6 M I A 393: (18 W R 81 P C) (Pr 11)
('75-76) 1 I A 321: (14 Beng L R 187 P C) (Pr 11)
('17) 44 I A 126: (A I R (4) 1917 P C 61) (Pr 8)
('24) 51 I A 129: (A I R (11) 1924 P C 50) (Pr 8)
('34) 61 I A 350: 56 All 548: (A I R (21) 1934 P C 238) (Pr 13)
('43) A I R (30) 1943 P C 142: (I L R (1943) All 727) (Prs 11, 12, 13, 14, 16, 17, 18, 19)
('84) 6 All 234: (1884 A W N 47) (Pr 13)
('39) A I R (26) 1939 Bom 289: (I L R (1939) Bom 533 F B) (Pr 19)
('97) 24 Cal 672 (Pr 13)
('10) 11 C L J 599: (14 C W N 659) (Prs 16, 17)
('12) 39 Cal 862: (12 I C 609) (Pr 13)
('79) 128 P R 1879 (Pr 12)
('93) 16 Mad 99: (3 M L J 1) (Prs 12, 13, 14)
('04) 31 Mad 161: (17 M L J 613) (Pr 13)
('04) 27 Mad 71 (Pr 13)
('08) 31 Mad 472: (3 Cr L J 147) (Pr 13)
('09) 19 M L J 759: (4 I C 1090) (Pr 13)
('10) 4 I C 105: (20 M L J 89) (Pr 17)
('39) A I R (26) 1939 Mad 928: (1939-2 M L J 499) (Pr 17)
('28) A I R (15) 1928 Oudh 10: (106 I C 392) (Pr 17)
('49) 28 Pat 165: (A I R (36) 1949 Pat 515) (Prs 17, 18)

LAKSHMIKANTA JHA, C. J.: This is an appeal under the Letters Patent from a judgment of Shearer, J. upholding the concurrent decisions of the courts below & dismissing the suit.

(2) The facts relevant to the point for decision may be shortly stated as follows: One Raghunandan Singh, father of the pltfs. along with one Awadh Singh, claimed raiyati interest in 19.5 acres of bakasht land situated in an estate belonging to Mt. Chandrakali Kuar, deft. 1. A dispute arose between the parties over the possession of this land & a proceeding under S. 144, Cr. P. C., was started, which terminated in favour of Raghunandan & Awadh. Consequently, Chandrakali Kuar, along with her granddaughter in whose favour she had executed a deed of gift, instituted a suit (Title Suit No. 113 of 1941) for possession of the disputed land against Raghunandan & Awadh. Raghunandan contested the suit & his defence was that Chandrakali had settled the land in dispute with him & Awadh under a 'sada patta'. In support of his case he produced a hukumnama, which admittedly bore the thumb impression of Chandrakali, & several rent receipts. The defence was disbelieved & the suit was decreed on 13-5-1941, with costs. Raghunandan & Awadh preferred an appeal which was also dismissed on 30-4-1942. Thereupon they preferred a second appeal to this Ct. During the pendency of the second appeal Raghunandan died, & on his death the pltfs., along with their brother Baliram (since deceased), were substituted. This second appeal was also dismissed with costs on 3-12-1943.

(3) During the pendency of the appeal in the first appellate Ct. Chandrakali took out execution for costs of the trial Ct. against Raghunandan & Awadh in Execution Case No. 998 of 1941, & 5.10 acres of land belonging to the joint family consisting of the pltfs. & Raghunandan was sold on 20-1-1942, at Ct. sale & purchased by Chandrakali for Rs. 215/- & she later on took delivery of possession of the land on 9-11-1944.

(4) The present suit was instituted by the pltfs. on the 7-4-1945, challenging the sale on the ground that they were under no pious obligation to pay up the decree for costs awarded against their father, Raghunandan, because he was guilty of a fraudulent act in that he produced a forged hukumnama bearing the thumb impression of Mt. Chandrakali in support of the settlement of the land in favour of himself & Awadh. The decree for costs, according to them was of the nature of avyavaharika debt, &, therefore, they claimed immunity & sought recovery of possession of 12 annas interest in the suit land which was claimed by them as joint ancestral property. The defence of Chandrakali Kuar was that the pltfs. Kirit Singh was himself a party to the fraud along with his father Raghunandan, that the decree for costs awarded against the pltfs. was not at all of the nature of avyavaharika debt & that the sale held in execution of the decree for costs was binding on them.

(5) The trial Ct. held that the decree for costs was not an avyaharika debt & that the pltfs. were under pious obligation to pay the same. The suit was accordingly dismissed. On appeal, the learned subordinate Judge upheld the decision of the trial Ct. On second appeal, Shearer, J. also took the same view & dismissed the appeal.

(6) The question for determination is whether the pltfs. who are governed by the Mitakshara school of Hindu law, can impeach the sale on the ground that having regard to the nature of the judgment-debt, they were under no liability to pay it & the doctrine of pious obligation could have no application. The contention of Mr. Shambhu Prasad Singh, for the applts., is that the judgment-debt created under the decree of the Ct. is avyavaharika because Raghunandan used a forged document in support of his case.

(7) On a review of the Hindu law texts, to which I shall presently refer, & the judicial pronouncements, I think the applts' contention must fail. According to Smritis, if a Hindu dies indebted, he goes to hell. For Katyayana ordains:

उद्धारादिकमादाय स्वामिने न ददाति यः ।
स तस्य दासो भृत्यः स्त्री पशुर्वा जायते गृहे ॥

"He who having taken a debt or the like does not pay it back to the creditor (or owner) is born in the (latter's) house as a slave or a servant (for wages), a wife, or a beast." (Katyayana-smriti by P. V. Kane, V. 591, p. 239).

If, however, a Hindu father fails to pay his own debt for any reason, a duty is cast upon his son to discharge it. For Brihaspati ordains:

अभावे च पितुः सुतैः ।

"In the absence of the debtor, his sons should pay the debt". (Brihaspati 11.47: Dr. Ganganath Jha's 'Hindu Law in its Sources', p. 203).

ऋणं पितृकृतं देयं पश्चादात्मीयमेव च ।

"The son shall pay off his father's debts before paying his own debts". ('Brihaspati' 11.48: Dr. Ganganath's 'Hindu Law in its Sources', p. 206).

Similarly, Narada enjoins:

अतः पुत्रेण ... ... ऋणात् पिता मोचनीयः ।

"The son should try his best to absolve his father from debt". (Dr. Ganganath Jha's 'Hindu Law in its Sources', p. 203).

पितर्युपरते पुत्रा ऋणं दद्युयथांशतः ।

"On the death of the father, the sons divided or undivided — shall pay his debt in proportion to their shares." ('Narada' 4.2: Dr. Ganganath Jha's 'Hindu Law in its Sources', p. 205).

इच्छन्ति पितरः पुत्रान्स्वार्थहेतोर्यत स्ततः ।
उत्तमर्णाधमर्णेभ्यो मामयं मोचयिष्यति ॥

"Fathers wish to have sons on their own account, thinking in their minds, 'He will release me from all obligations towards superior & inferior beings'." (i.e. from the debt which he owes to his ancestors & from creditors). ('Naradiya Dharma Sastra', by Dr. J. Jolly, p. 15, V. 5).

Yajnavalkya also lays down the rule thus:

पितरि प्रोषिते प्रेते व्यसनाभिप्लुतेऽपि वा ।
पुत्रपौत्रैर्ऋणं देयं निन्हवे साक्षिभाविताम् ॥

"When the father has gone abroad, is dead or is immersed in difficulties, his debt should be paid by the sons & grandsons, when established by witnesses in case of a dispute." ('Yajnavalkya', 2.50: Dr. Ganganath Jha's 'Hindu Law in its Sources', p. 203).

Likewise Katyayana says:

विद्यमानेऽपि रोगार्ते स्वदेशात् प्रोषिते तथा ।
विंशात्संवत्सराद् देयामृणं पितृकृतं सुतैः ॥

"Even when the father is alive, — if he is stricken by disease, or has gone away from the country, — his sons shall pay his debt after twenty years." (Dr. Ganganath Jha's 'Hindu Law in its Sources', Vol. I, p. 204).

व्याधितान्मत्तवृद्धानां तथा दीर्घप्रवासिनाम् ।
ऋणमेवंविधं पुत्रान् जीवतामपि दापयेत् ॥

"If the father is stricken by disease, or insane, or too old, or has been away from the country for a long time, the sons should be made to repay his debt." (Dr. Ganganath Jha's 'Hindu Law in its Sources', Vol. I, p. 205).

सान्निध्येऽपि पितुः पुत्रैर्ऋणं देयं विभावितम् ।
जात्यन्धपतितोन्मत्तक्षयाश्वित्रादि रोगिणः ॥

"Even when the father is at home, — if he happens to be blind from birth, or an outcast or insane, or suffering from consumption, laucoderma & such other foul diseases, — his debt, when proved, should be paid by his son." (Dr. Ganganath Jha's 'Hindu Law in its Sources', Vol. I, p. 205).

(8) From the texts quoted above, it appears that it is the primary duty of every Hindu to pay his own debt. If for any reason he fails to pay it, the 'putra', or son, as the son of his father, is under a pious duty to discharge it. According to some smritis, however, the son's liability arises on the death of his father, whereas, according to others, it arises even in his lifetime. There was divergence of judicial opinion on this point. In 'Sahu Ram Chandra v. Bhup Singh', (44 I A 126 at p. 131) the Privy Council held that the pious obligation of the son does not arise till the death of his father. But the controversy was set at rest by a later pronouncement of the Judicial Committee in 'Brij Narain v. Mangla Prasad', (51 I A 129). Their Lordships held

"there is no rule that this result (i.e. liability to pay antecedent debt) is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

(9) The son's obligation to discharge his father's debt, however, is not unqualified. There are certain kinds of debt which, according to the Smritis, he is not bound to pay, as would appear from the following texts:

प्रतिभाव्यं वृथादानमाक्षिकं सौरिकं च यत् ।
दण्डशुल्कावशषंच न पुत्रो दातुमर्हति ॥

"The son shall not be liable to pay the father's debt, on account of surety-money, or a futile gift or gambling debts, or debts due to liquor, or the balance of fines & taxes." ('Manu' 8.159: Dr. Ganganath Jha's 'Hindu Law in its Sources', Vol. I, p. 207).

सुराकामद्यूतकृतं दण्डशुल्कावशिष्टकम् ।
वृथादानं तथैवेह पुत्रो दद्यान्न पैतृकम् ॥

"The son may not pay the paternal debt which was contracted for the purposes of spirituous liquor, lust or gambling, or which is due as the balance of an unpaid fine or toll as also a gift without any consideration." ('Yajnavalkya', Gharpure's 'Mitakshara', p. 73, V. 47).

पित्रा दृष्टमृणं यत्तु क्रमायातं पितामहात् ।
निर्दोषं नोद्धृतं पुत्रैर्देयं पौत्रैस्तु तद्भृगुः ॥

"That debt which descended hereditarily from the grandfather, which was ascertained by the father (i.e. the son of the grandfather) as due, which is free from taint & which was not repaid by the sons (of the grandfather) should be paid by the grandsons." (This is the view of the Bhrigu). (Katyayana in Smritichandrika, p. 297).*

प्रतिभाव्यवणिक्शुल्कमद्यद्यूतदण्डा न पुत्रानध्यावहेयुः ।

"The sons shall not be made to pay surety-money, trade-duties, debts due to gambling or drinking or fines." ('Gautama' 12.41: Dr. Ganganath Jha's 'Hindu Law in its Sources', Vol. I, p. 207).

सौरिकं वृथादानं कामक्रोधप्रतिश्रुतम् ।
प्रातिभाव्यं दण्डशुल्कशेषं पुत्रान्न दापयेत् ॥

"Debts due to liquor, gambling, futile gifts, gifts promised in lust or anger, surety-money, balance of fines & taxes, — these debts of the father the son shall not be made to pay". ('Brihaspati' 11.51: Dr. Ganganath Jha's 'Hindu Law in its Sources', Vol. I, p. 207).

दण्डो वा दण्डशेषा वा शुल्कं तच्छेष एव वा ।
न दातव्यं तु पुत्रेण यच्च न व्यावहारिकम् ॥

"Fine or balance of fine, tax or balance of tax, or what is not proper, — such debts of the father, the son shall not pay." (Dr. Ganganath Jha's 'Hindu Law in its Sources', Vol. I, p. 208).

(10) A summary of the texts quoted above shows that a son is not under any obligation to pay the following debts of his father: (1) debts due for spirituous liquor; (2) debts due for lust; (3) debts due for gambling; (4) unpaid fines; (5) unpaid tolls; (6) futile gifts, or gifts without any consideration or promised in lust or anger; (7) suretyship debts; & (8) debts that are not vyavaharika.

(11) There is a divergence of opinion among the Nibandhakars regarding the interpretation of the phrase "na vyavaharikam" which finds place in the text of Ushanas (this text is also attributed to Vyas in Vivada Chintamani & other nibandhas. Vachaspati Misra in his Vivada Cintamani interprets it as "Vyavahara Bahishkritam" (व्यवहार बहिष्कृतम्). Mitra Misra in his Virmitrodaya says that it means "surapanadinimittam" (सुरापानादि निमित्तम), that is, incurred for the purpose of liquor & the like. Nilkantha, though he quotes the verse of Ushanas in his Vyavahara Mayukha, does not attempt to explain the expression, but Mandlik translates it as "not proper". Colebrooke, however, translates the expression as "debt for a cause repugnant to good morals". The sharp difference of opinion among the Nibandhakars as to the precise import of the term led to a divergence of judicial opinion in its English

*[See P. V. Kane: Katyayanasmritisarodhara, V. 555-Ed.]

rendering in cases in which the decision depended upon the interpretation of the text. The Privy Council in 'Hemraj v. Khem Chand', (A I R (30) 1943 P C 142 at p. 146), on a review of the cases bearing on the point, accepted Colebrooke's translation of the expression as correct, being the nearest approach to the spirit of the text, & set at rest the controversy as to its precise meaning. In this connection it is relevant to quote the observation of their Lordships, which runs thus:

"Having regard to the principles underlying the rule of 'pious obligation', which forms the foundation for the son's liability, their Lordships think that the translation of the term Avyavaharika as given by Colebrooke makes the nearest approach to the true conception of the term as used in the Smrithi text, & may well be taken to represent its correct meaning."

It is, however, clear from the texts & also authorities that the son is absolved from his obligation to discharge his father's debt if it is found to be, at its inception, tainted with immorality or illegality. Lord Knight Bruce in 'Hunoomanpersaud Pandey v. Mt. Babooee Munraj Koonweree', (6 M I A 393 at p. 421), said:

"Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindoo Law, the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, & not to the nature of the estate, whether ancestral or acquired by the creation of the debt."

In 'Girdharee Lall v. Kantoo Lall', 1 I A 321: (14 Beng L R 187 P C), the Privy Council quoting this passage observed:

"That is an authority to shew that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, & it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts."

(12) The obligation of the son to discharge his father's debt depends upon the nature or character of the debt when it originated — an examination of the circumstances before or after the liability is incurred is irrelevant to ascertain the nature or character of the debt. If there is something illegal or immoral in the act of the father when the liability is incurred, the son is not bound to discharge it. If, however, the father incurs a debt (voluntary or involuntary) to make good a loss caused by his wrongful act, such a debt cannot be said to be illegal or immoral, & the son cannot claim exemption merely because the act in consequence of which the obligation to make compensation arose was an illegal or immoral act, or both illegal & immoral. Suppose, for instance, a father steals a property, but later on repents, & being unable to restore the stolen property makes good the loss by incurring a debt. Such a debt cannot be said to be immoral or illegal in its origin because the purpose of the debt is highly moral. A son cannot be absolved from liability to pay such debt simply because the father was guilty of an immoral act when he committed the theft. In support of this view I may refer to the case of 'Kartar Singh v. Harji Mal', (128 P R 1879 at p. 374), & 'Natassayyan v. Ponnusami', (16 Mad 99). In 'Kartar Singh's case', one B. S. stole and converted to his own use certain property belonging to H. M. who sued & obtained a decree for the value of the property. In execution of the decree some ancestral property belonging to B. S. was attached for the purpose of being sold in satisfaction of the decree. N. S., a son of B. S., brought a suit through his guardian to set aside the attachment on the ground that the ancestral property was not liable to his father's debt, such debt having been contracted for an immoral purpose. It was held that the property was liable to be attached & sold in satisfaction of the pltf's decree. Plowden, J., in the course of his judgment, observed:

"Granting that the son may go behind the decree, it is impossible to hold that the debt created by the decree is a debt contracted for an illegal or immoral purpose, merely because the act from which the obligation to make compensation arose was an illegal or immoral act, or both illegal & immoral.....The most analogous case would be that of a father who had voluntarily contracted to compensate the person whom he had by a criminal offence deprived of property. A debt created by such a contract could not without an utter perversion of language be styled a debt contracted for an illegal or immoral purpose; on the contrary, it would be a debt contracted for a highly moral as well as lawful purpose, & the case of a debtor enforcing an obligation to pay an ascertained sum by way of such compensation stands upon at least as sound a basis, though the obligation be unwillingly contracted under lawful compulsion."

In 'Natasayyan v. Ponnusami', (16 Mad 99), a decree was obtained against a Hindu for money dishonestly retained by him from the pltf's family to which he was accountable in respect of it. The J. D. having died, the D. H. sought to attach in execution property of the family which had passed into the hands of his son by survivorship. The sons objected that such property was not liable to attachment & the D. H. was referred to a regular suit. Thereupon he brought a suit against the sons. It was held that the sons were not entitled to go behind the decree except for the purpose of showing that the judgment debt was immoral or illegal in its origin. In that case the learned Judges observed:

"Upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, & for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled money he has unlawfully retained."

This passage has been quoted with approval in 'Hemraj's case', (A I R (30) 1943 P C 142), to which I shall refer hereafter in detail.

(13) For determination of the liability of the son, courts in India have drawn a distinction between a civil & a criminal liability of the father in incurring a debt. If the father is liable to criminal prosecution for a debt incurred by him, the son is not under any pious obligation to discharge such debt. If, however, the liability of the father originates in the breach of civil duty, the son cannot claim freedom from the obligation to discharge such debt of the father. Mookerjee J. in 'Chhakauri Mahton v. Ganga Prosad', (39 Cal 862 at pp. 871-72) observed:

"The cases of 'Mahabir Prasad v. Basdeo Singh', (6 All 234); 'Pareman Dass v. Bhattu Mahton', (24 Cal 672); & 'Mc Dowell & Co., Ltd. v. Ragava Chetty', (27 Mad 71), seem to negative the liability of the son under such circumstances, while the cases of 'Natasayyan v. Ponnuswami', (16 Mad

99); 'Venkappayya v. Krishna Chariya', (31 Mad 161); & 'Gurunatham v. Raghavalu Chetty', (31 Mad 472), apparently support the liability of the son. These cases, however, may possibly be reconciled if we recognise the distinction between a criminal offence & a breach of civil duty. In the first three cases, the father was guilty of criminal misappropriation as regards sums of money for which he was accountable; while in the second set of three cases, the father merely failed to account for the money received by him, & his failure to do so constituted nothing more than a breach of civil duty. The distinction is real though refined, & was recognised in 'Medai Tirumalaiyappa Moodeliar v. Veerabudra', (19 M L J 759), where it was ruled that if a debt was incurred by an agent, his son was liable to pay the debt & the liability of the son was not affected by the circumstance that the father subsequently misappropriated the sum or made himself criminally liable. The case last mentioned consequently supports the view that, where the taking of the money itself is not a criminal offence, a subsequent misappropriation by the father cannot discharge the son from his liability to satisfy the debt; but the position is different if the money has been taken by the father & misappropriated under circumstances which render the taking itself a criminal offence."

The rule formulated by Mokherjee, J. was recognised by the Judicial Committee in 'Toshanpal Singh v. Dist. J. of Agra', (61 I A 350 : 56 All 548). In that case a father had incurred liability to a school committee, of which he was secretary, the total liability amounting to nearly Rs. 43,000/-. The P. C. found on the evidence that the father had misappropriated part of this sum amounting to about Rs. 30,000/- for which he could have been prosecuted for criminal breach of trust, & accordingly the sons were absolved from the liability for that amount, but with regard to the balance for which the father did not incur any criminal liability for prosecution, the sons were made liable. In 'Hemraj's case', (A I R (30) 1943 P C 142), again their Lordships observed:

"It has now been definitely established by the decision of this Board in '61 I A 350', that a son is not liable to pay a debt created by his father which would render the father liable to criminal prosecution."

(14) On a review of the relevant decisions bearing on the point, the general principle on which a son's obligation to discharge his father's debt is to be determined has been laid down by the Judicial Committee in 'Hemraj v. Khem Chand', (A I R (30) 1943 P C 142). The facts of that case were as follows: Hemraj & Danpal, with others, formed a joint family. Hemraj, on behalf of himself & another, filed a suit for partition of joint family property against Danpal & the other members of his branch of the family. The subject matter of the partition included a promissory note executed in favour of Danpal by certain of the family debtors. The partition suit was referred to arbitration & a decrree in terms of the award was passed. The promissory note was allotted to Hemraj under the award. It was provided under the award that Danpal should produce the award in Court within seven days of the decree. Danpal did not file this document within the specified time but he filed instead, without giving notice to Hemraj, another document, executed by the same debtors on a different date. Hemraj filed his application for execution & later on Danpal filed the promissory note which had been allotted to Hemraj, but by that time the claim under the handnote had become time-barred. Hemraj therefore, filed a suit against Danpal, claiming from him the amount due under the promissory note on the ground that Danpal was indebted to him under the award & was, therefore, liable for the debt due under the handnote which he (Danpal) allowed to be barred by limitation, impleading the executants of the note also as defts. It was admitted in the suit that the other document which had been filed by Danpal instead of the document in question was a forgery. It also appeared that Danpal allowed the promissory note to become barred by acting fraudulently towards Hemraj. The suit was dismissed against the executants of the note as time barred but it was decreed against Danpal. From the decree passed against Danpal an appal was preferred by him, & during the pendency of the appeal he died. Hemraj took out execution of the decree against the sons of Danpal, & they objected to the execution being taken out against them on the ground that the debt was created by the misconduct and stupidity of Danpal; therefore, there was no liability on them to pay the debt & the ancestral property in their hands was not liable to be attached & sold. On these facts the question that arose for decision before the Judicial Committee was whether the sons were under a pious obligation to discharge the judgment-debt, notwithstanding the fact that their father filed a forged document & failed to carry out his duty under the award. Their Lordships held that the sons were liabie, & the principle for fixing the liability of the son was enunciated thus:

"That the doctrine has reference to the nature or character of the debt which creates the liability can hardly be disputed.....It also appears to be clear on principle, & on authority, that examination of the nature or character of the debt should be made with reference to the time when it originated, in other words, when the liability was first incurred by the father. If, on such examination, it is found that at its inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son....The rule is not rigid but has to be applied with reference to the circumstances of each case."

Quoting with approval the passage from the judgment of the learned Judges of the Madras H. C. in 'Natassayyan v. Ponnusami', (16 Mad 99 at p. 104), which I have already quoted, their Lordships further observed:

"The subsequent dishonest conduct of Danpal, which led to the suit & the decree, so much relied upon by the Cts. in India & made the basis of their decision cannot in their Lordships' view affect the nature of the father's debt which at its inception was a just & true debt. As no such immorality or illegality in the nature of the original debt as would absolve them from the obligation to discharge it has been shown by the resps., the debt sought to be realised is not an Avyavaharika debt & the applts. are therefore entitled to proceed against the ancestral property in their hands in execution of the decree for payment of that debt."

(15) Bearing in mind the dicta of their Lordships of the Judicial Committee, we have to examine the nature or character of the debt in the case before us at the time when the liability was first incurred by Raghunandan. The obligation, it may be observed, was unwillingly incurred by him under a lawful compulsion. S. 35, Civil P. C. gives a discretion to the Ct. to award costs & the Ct. has power to determine by whom or out of what property & to what extent such costs are to be paid. If by virtue of such power the Ct. awarded costs to the resps. in the exercise of its discretion, the origin of the liability so created cannot be

said to be tainted with any illegality or immorality. Even if Raghunandan was guilty of a fraudulent act in filing a hukumnama which was not genuine, his conduct before the date of the decree cannot be taken into consideration. The decree for costs, in my view, cannot be said to be Avyavaharika. The pltfs., therefore, as sons of Raghunandan, are under a pious obligation to discharge the judgment-debt & the sale cannot be assailed by them.

(16) A similar point arose in 'Prayag Sahu v. Kasi Sahu', (11 C L J 599). The point for consideration in that case was whether the sons were liable for the costs awarded against their father by an order of the Ct. It was contended that the sons were not liable because the debt came within the meaning of "Danda" or fine in the text of Yajnavalkya quoted in the Mitakshara. Chatterji, J. held that the decree for costs could not come within the meaning of the word "Dand" because Hindu Cts. of justice did not allow costs to successful litigants but imposed upon the party who took a false plea a fine payable to the King, equal to the claim. He also held that the debt could not be characterised as Avyavaharika. The sons were accordingly held liable for the amount of costs decreed against their father. This decision seems to be in consonance with the decision of the Judicial Committee in 'Hemraj's case', (A I R (30) 1943 P C 142).

(17) In 'Lakshminarasimhamurti v. Venkata Jogisomayyajulu', (A I R (26) 1939 Mad 928); Ramiengar v. Secretary of State', (4 I C 105); 'Mohammad Ali v. Jhao Lal', (A I R (15) 1928 Oudh 10), & 'Darbeshwari v. Raghunath'. (28 Pat 165), it was held that a decree for costs is an avyavaharika debt & the son is not liable to pay such debt. Mr. Shambhu Prasad Singh strongly relied upon these cases in support of his contention. In my opinion, after the decision of the judicial committee in 'Hemraj's case', (A I R (30) 1943 P C 142), a decree for costs cannot be said to be avyavaharika, for the liability is created by an order of the Court in the exercise of its discretion. The origin of the debt, therefore, cannot be said to be tainted with illegality or immorality. The cases relied upon by Mr. Shambhu Prasad Singh are, moreover, clearly distinguishable & the decisions in those cases must be read with reference to the facts arising therein & cannot be taken to be of general application. In 'Lakshminarasimhamurti v. Venkata Jogisomayyajulu', (A I R (26) 1939 Mad 928), the decree for costs was made against the father personally, although he was not a party to the suit. Therefore, this case has no application even if it be assumed that it was correctly decided. In 'Ramiengar v. The Secretary of State', (4 I C 105), the father had brought a suit in 'forma pauperis' as next friend of his minor son to establish his adoption & recover possession of property. The alleged adoption was found to be false & the suit was dismissed & the father was directed to pay costs. The point that arose for consideration was whether the son was liable for the costs awarded against the father who was guilty of an immoral act in bringing a suit which he must have known to be false. It was held that the son was not bound to pay the costs, & the costs were treated as fine within the meaning of Hindu law texts. For the reasons given by Chatterji, J. in 'Prayag Sahu's case', (11 C L J 599), the decision cannot be supported. Moreover, the decision in this case is against the dicta of the judicial committee in 'Hemraj's case', (A I R (30) 1943 P C 142). In 'Mohammad Ali v. Jhao Lal', (A I R (15) 1928 Oudh 10), it was held that the son is not liable to pay costs in suits brought & defended by the father on false & dishonest grounds. But this decision clearly stands overruled after the decision of the P. C. in 'Hemraj's case', A I R (30) 1943 P C 142).

(18) Mr. Sambhu Prasad Singh strongly relied upon the decision of this Ct. in 'Darbeshwari v. Raghunath', (28 Pat 165). In my opinion this case, though it apparently lends support to his contention, is clearly distinguishable. There are certain observations in this case which are contrary to the dicta of the P. C. in 'Hemraj's case', (A I R (30) 1943 P C 142). I would have been inclined to refer the present case to a larger Bench if I were satisfied that the proposition of law laid down in that case could be taken to be of general application. In that case the facts were as follows: One Tejan Tewari succeeded to the property of one Bisundayal Tewari as his next reversioner. Tejan sold the property inherited by him to one Darbeshwari who obtained possession thereof. Several years after, one Sarjug Prasad obtained a fraudulent & collusive sale deed from Ramphal Dubey who claimed to be the daughter's son of Bisundayal. Sarjug having failed to obtain possession brought a title suit against Tejan's vendee for recovery of possession of the lands alleged to have been purchased by him. The Munsif decreed the suit, but on appeal the Dist. J. set aside the decree. This Ct. dismissed the second appeal & awarded costs to the vendee who was deft. 1. In execution of the decree, the entire joint family property was sold by the executing Ct. & purchased by the deft. 1 himself. The sale was ultimately confirmed & deft. 1 was granted dakhaldehani. Thereupon Sarjug's son brought a suit alleging that the decree for costs was an immoral debt & his share in the joint family property was not liable to be sold. The suit was contested on the ground that the pltf. was under a pious obligation to pay the decree for costs made against his father & the entire joint family property was liable for the payment thereof. On these rival contentions the subordinate Judge held that Sarjug had opposed the previous suit on a deliberately false claim, that the decree for costs was an avyavaharika debt & that the pltf's share in the joint family property was not liable to be sold in execution of the decree. There was an appeal to this Ct., & it was held that before instituting the previous suit Sarjug knew that Bisundayal had no daughter, that Ramphal was not the latter's grandson, & that he had no valid title to the property conveyed by the kebala. On these facts it was held that

"the costs incurred by Sarjug in the present case in prosecuting the previous suit was Avyavaharika debt for which the son is not liable & his share cannot be sold for payment of the decretal amount."

In the case before us, there is no finding that the hukumnama produced by Raghunandan was a forged & fabricated document. On the other hand, the finding is that pltf. 1 himself was conducting the previous litigation & after the death of Raghunandan the pltfs. were substituted in his place in this Ct. The learned subordinate Judge has also found that pltf. 1 had been instrumental in taking the thumb impression of deft. 1 on a blank paper. It has been further found that the pltfs' father had tried to acquire the land on behalf of the joint family & the attempt had been made by him to the knowledge of the pltfs. In fact, the second appeal which had been filed in the previous case by Raghunandan was, after his death, prosecuted by his sons, including the present pltfs., after getting themselves substituted in his place. In the circumstances, even on the findings of fact, it cannot be said that the pltfs. were under no pious obligation to pay the judgment-debt.

(19) Mr. Shambhu Prasad Singh also relied upon 'Govindprasad Tewari v. Raghunathprasad', (A I R (26) 1939 Bom 289). The question as to the liability of the son for payment of costs did not arise in this case. Therefore it is not necessary to consider whether certain dicta laid down in that case hold good after the P. C. decision in 'Hemraj's case', (A I R (30) 1943 P C 142).

(20) In my opinion, the decision of the Cts. below is correct & Shearer, J. has rightly dismissed the suit. The appeal is accordingly dismissed with costs.

(21) CHATTERJI, J.: I agree and there is nothing which I can usefully add.

V.S.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 593 *[C. N. 166]*

B. P. SINHA & C. P. SINHA JJ.

Bhudeb Chandra Roy — Applt. v. *Satya Narain Tripunait & others — Resps.*

A. F. O. O. Nos. 116 and 123 of 1948, D/- 19-2-1951.

Limitation Act (1908), Art. 182 — Revival of execution appln. — Order for dismissal for default — When operates as final disposal of execution case — Test.

The crucial test for determining whether an order for dismissal of the execution case for default amounts to a final order terminating the execution proceedings is whether there was anything to be done by the D. H. on the date the execution case was dismissed for default. If nothing had to be done by the D H. his execution case cannot be dismissed for default. [Para 10]

Where, the executing Ct. accepted the report of the Receiver to the effect that he would be making payments to the D H. and that the latter should not execute the decree against the estate which was in his charge and dismissed the execution case for default :

***Held* that the order dismissing the execution case for default was a routine order only indicating that the case should not be shown as pending for administrative purposes of returns. It only meant that the record be sent to the Record Room to be recalled when necessary and the subsequent execution appln. must be treated as one merely for the continuation of the original proceeding.** [Para 9]

Anno. Lim. Act, Art. 182, N. 143.

(b) Civil P. C. (1908), O. 21, R. 2 — Limitation for certification.

There is no period prescribed by the Limitation Act within which the D. H. has to certify payment. [Para 13]

Anno. C. P. C., O. 21, R. 2, N. 18.

R. S. Chatterji — for Applt.; G. C. Mukherji, Lala Atul Chandra, S. N. Ray & P. K. Bose — for. Resps.

C. P. Sinha J. — These are appeals by the D. H. Misc. Appeal No. 116 arises out of an objection u/s. 47, Civil P. C. filed by the J. Ds. the objection being that the execution was barred by limitation. Appeal No. 123 of 1948 has been filed against an order u/s. 13, Bihar Money-lenders Act. I would deal first with Misc. Appeal No. 116. The facts giving rise to this appeal can be briefly put as follows :

[2] The applt. obtained a money decree on 4-10-1934. for a large sum of money. The present execution case was filed on 12-3-1946, & in the execution petn. in the column which is headed as "payment or adjustment made if any", it was mentioned that the D. H. was paid a sum of Rs. 2,500 in instalments by the former Receiver of the estate of the J. Ds. once by a cheque dated 23-2-1945 for Rs. 5,000.

[3] There was a previous execution, No. 570 of 1934, & an appln. was made by the D. H. for permission to attach the properties of the J.Ds. in the hands of the Receiver who had been appointed in Execution Case No. 118 of 1933 & other execution cases. The order numbered 104, dated 19-2-1935 in Execution Case No. 118 of 1933 & other cases mentions the following :

"Receiver's reports dated 10-2-1935 & 11-2-1935 on the applns. of Babu Bhudev Chandra Rai (the present D. H. applt. and Maharajo Shris Chandra Nandi for permission to make the Receiver a party in execution of decree obtained by them against the J. Ds. proprietors put up and considered. As the pleader for Babu Bhudev Chandra Rai has agreed to the Receiver's proposal for enlisting his name in the Sch. of creditors of the estate in the hands of the Receiver, let the name of Bhudev Chandra Rai be entered in the list of creditors in the Receiver's file as prayed for by the Receiver. . . . . ."

It appears that after the above order was passed Execution Case No. 570 of 1934 was dismissed for default on 22-2-1935. On 9-4-1937, the applt. filed an appln. in the Ct. of the Subordinate Judge to the effect that the applt. had consented to become a scheduled creditor on the report of the Receiver as he thought that there was a chance of his being repaid the amount of the decree gradually & that he was made a scheduled creditor on 19-2-1935, &, although more than two years had elapsed, the applt. had been paid a sum of Rs. 200 only. The applt. therefore, prayed for permission to execute his decree after making the Receiver a party to his execution. The receiver admitted having paid only a sum of Rs. 200 but opposed the prayer for filing the execution case on the ground that. in case the execution was taken out by the applt., the estate would suffer, & the Receiver promised to make further payments. The Ct., upon the report of the Receiver, ordered the Receiver to pay to the applt. a sum of Rs. 1,000 within a month. It is to be noted that the Ct. which had appointed the Receiver of the J..Ds.' estate in Execution Case No. 118 of 1933 & the Ct. in which the applt. had filed his appln. for execution of his decree was the same Ct., namely, the Subordinate Judge's Ct. at Dhanbad.

[4] The applt. again filed an appln. (Ex. B-2) on 25-3-1938, complaining of inadequate payment by the Receiver to the applt. His grievance was that he had been paid only Rs. 1200 up to the date of the making of the appln. The applt. prayed, therefore, for permission of the Ct. to execute his decree. It appears that the Ct. asked for a report from the Receiver & in the report dated 10-5-1938 the Receiver promised that he would make regular payments to the applt., &, after having considered the petn. of the applt. & the report of the Receiver, the Ct. on 16-5-1938, ordered the Receiver to make reasonable payments. From 16-5-1938, it appears the Receiver went on making payments to the applt.

[5] From the statement of expenditure from 3-6-1935 to July 1940 (Ex. A) filed by the Receiver in the Ct. of the Subordinate Judge, Dhanbad, it

appears that the applt. was paid Rs. 200 in 1936-37, Rs. 1200 in 1937-38, Rs. 250 in 1938-39 & Rs. 600 in 1939-40, the total amount being Rs. 2250. There is another statement of receipts & disbursements during the month of February 1942 (Ex. A-1), & from an extract from that statement the following may be quoted :

'Ct. of the Subordinate Judge, Dhanbad.
Filed on 7-4-1942.

Date	Particulars	Voucher No.	Amount	Total	Remarks
19th Febru ary.	By amount paid to Babu Bhudev Chandra Rai in part payment of his decretal amount in execution case No. 570 of 34.	178	300	300	

Sd. B. K. Mitra,
Receiver Shibcharan Trigunait & nephew Estate."

There are similar statements of receipts & disbursements during the months of April 1942, November 1942 & February 1945 (vide Exs. A-2, A-3 & A-4). By Ex. A 2 a sum of Rs. 200 was paid, by Ex. A 3 a sum of Rs. 100 was paid & by Ex. A 4 a sum of Rs. 5000 was paid by the Receiver to the D.-H. applt. & in each of these statements it is mentioned in part payment of his decretal amount in execution case No. 570 of 1935.

[6] It appears from Ex. 1, order No. 830, dated 21-1-1944 (*sic*) in Execution Case No. 118 of 1933 & other cases that another appln. was filed by the D.-H. applt. for permission to proceed against the Receiver in execution of his decree, which permission was ultimately granted, & it was folld. by the prsent execution. On 23-2-1945, a petn. was filed by the D.-H. in execution case No. 570 of 1934 (Ex. B) to the effect that on the date of the appln. Rs. 5,000 was paid by the J.-Ds. & that if further payment of Rs. 7,000 was made within two months from that date, the entire decree would be deemed to be fully satisfied, if not, the D.-H. would be entitled to execute the decree for the entire balance of the amount of the decree. It was prayed that this appln. be put on record of the Receiver's file.

[7] From Ex. D, letter by Shibcharan Trigunait & others (J. Ds.) to the Ct. of the Subordinate Judge, Dhanbad, dated 14-6-1945 the following may be quoted :

"... We have no objection to your kindly discharging the present Receiver ... We have the honour to state further that we guarantee to make payments to :

(1) * * *
(2) Babu Bhudev Chandra Rai, Rs. 7,000.
(3) * * *
(4) * * *"

From Ex. C, a letter by the Receiver to the Subordinate Judge, Dhanbad, dated 18-6-1945, it appears that the Receiver also made a report that all the creditors of the estate of the J.-Ds. were paid except the present applt. who had a decree against one of the proprietors & that, according to the Receiver his due was Rs. 7,000 only & the Receiver has given in his letter a list of creditors outstanding in which he has mentioned Babu Bhudev Chandra Rai, the present applt. to be entitled to Rs. 7,000 which according to him, was the balance outstanding.

[8] The facts mentioned above are all admitted. The contentions of Mr. Chatterji, for the applt., are, firstly, that the present execution case is nothing but a continuation of the former execution case, namely, Execution Case No. 570 of 1934 & further that the payment made by the Receiver to the D.-H. applt. should be treated as payment made under the provisions of S. 20, Limitation Act, that is to say, the Receiver should be taken to be an agent of the J.-Ds. within the meaning of that section. He has raised other points also, but, in my opinion, they are not necessary to be considered if any of these two contentions is found to be well founded. Mr. G. C. Mukharji, on the other hand, argues that the former execution case having been dismissed, the present execution cannot be treated as continuation of the previous one & that the Receiver, who was appointed in some other execution case, could not be said to be an agent of the J.-Ds. when he made payments to the D.-H. applt. under the orders of the Ct. appointing him a Receiver.

[9] In my judgment the contention of the applt. that the present execution should be taken as a continuation of the previous execution is well founded. From the facts mentioned above, it is clear that, after the Ct., which was executing the decree, had accepted the report of the Receiver to the effect that he would be making payments to the present D. H. as well & that the applt. should not execute the decree against the estate which was in charge of the Receiver the order dismissing the execution case for default, on 22-2-1935, was a routine order only indicating that the case should not be shown as pending for administrative purposes of returns. It only meant that the record be sent to the Record Room to be recalled when necessary. In view of the previous order of the Ct. directing the Receiver to make payments to the D. H. there was nothing further to be done by the D. H. in furtherance of his execution & no step had to be taken, & if no other step had to be taken by the D. H. it cannot be said that he defaulted in carrying out certain orders of the Ct. or in taking some step in furtherance of his execution. The D. H. had nothing to do & therefore, there could be no default, & the order dated 22-2-35 dismissing the execution case No. 570 of 1934 for default is not happily worded. In my view what the Ct. meant was that the execution case should not be shown as pending as at that time nothing more had to be done. The D. H. & the Ct. executing the decree were to await the result of the offer of payment made by the Receiver. That the execution case, though dismissed for default, did in fact continue & was understood to be pending by the Ct. the

Receiver & the D. H. is apparent from the fact that even on dates subsequent to the date of dismissal for default of the execution case on 22-2-1935, this very execution case is mentioned in subsequent documents & orders. It appears from Exs. A-1, A-2 & A-3, the statements of receipts & disbursements by the Receiver, that the amount paid by the Receiver to the present D. H. applt. was being credited in the same execution case namely Execution Case 570 of 1934 & this brings us to 6-11-1942 (vide Ex. A- 3) & on 23-2-1945, the payment of Rs. 5,00 made by the J. Ds. was certified & recorded in this very execution case which appears from the following order (order No. 854 dated 23-2-45 in Execution Case No. 118 of 1933 & other cases) :

"The D. H. of Execution Case No. 570 of 1934, files a petn certifying payment of Rs. 5,000 file the petn. with record "

In my view Execution Case No. 572 of 1934, in spite of the order of dismissal for default, must be held to be pending & if that be so, the present execution case, which was taken out on 12-3-1946, cannot be said to be barred by time.

[10] Mr. Mukharji relies upon the order of the Ct. dismissing that execution case for default on 22-2-1935. In view of certain decisions to which I am going to refer shortly, there is no merit in the objection of Mr. Mukherji. In *Mohammad Amirul* v. *Mt. Wazir Bibi*, A. I. R. (5) 1918 Pat. 454: (48 I. C. 786) a decree was attached by the executing Ct. at the instance of the D. H. On the date fixed for orders the Ct. passed the order dismissing the execution case for default & after the execution case was dismissed for default, the J. D. sold the attached decree to one A. It was held by their Lordships that until the attached decree had been realised by the D. H. there was nothing further to be done by the D. H. in the execution case, so that the executing Ct. had no jurisdiction to dismiss the case for default. It was further held that, notwithstanding the order for dismissal of the execution case, the attachment of the decree continued to subsist & that, in that view of the matter, A the purchaser, had acquired no title to the decree by his purchase against the attaching D. H. & that A had no right to execute the decree. In my view, although the facts are not the same, the case was similar to the case in hand. The crucial test is whether there was anything to be done by the D. H. on the date the execution case was dismissed for default. If nothing had to be done by the D. H. his execution case cannot be dismissed for default.

[11] There is another case in which a similar view has been taken in the Calcutta H. C. *Sm. Sarada Sundari* v. *Jabbar Ali*, 43 C. W. N. 429 : (A. I. R. (26) 1939 Cal. 331). The Ct. had directed the property to be sold by the Nazir on a certain date & on that date the Nazir made a note that the D. H. was absent & on that basis the Ct. passed the order. "The D. H. takes no steps. Dismissed for default". It was held that there was no default on the part of the D. H. & the order, though in form an order of dismissal for default, was an order which should be taken in substance to be an order for removing the case from the pending file of cases & further that a subsequent appln. for execution was not barred by limitation but was a continuation of the previous appln. in *C Ajodhya* v. *C. Srinath*, 26 C. W. N. 338: (A. I. R. (8) 1921 Cal. 472) there was also a similar case where the execution case was dismissed for default, but the Ct. held on facts that there was in fact no default on the part of the D. Hs. & it was further held that the order recorded in that form must be treated as equivalent to an order for striking off the case or removing it from the file for the convenience of the Ct. I would, therefore, hold that the present appln. for execution is a continuation of the previous execution, namely, Execution Case No. 570 of 1934 & the order of dismissal for default of that execution case must be held on the facts of this case to mean that the record of the execution case was merely consigned to the record room for the convenience of the Ct.

[12] In the view which I have taken it is not necessary to consider & decide any other point which has been raised by the learned counsel appearing on behalf of the applt. or the resps.

[13] The Ct. below has dismissed the execution case on the ground that the execution was barred by limitation upon its finding that the payments were not certified & recorded within three years of the present execution. It is now settled beyond all doubt that there is no period prescribed by the Limitation Act within which the D. H. has to certify payments, & this point has been conceded by Mr. Mukherji. I would accordingly hold that the execution was not barred by limitation & that it should proceed in accordance with law. The order of the Ct. below is set aside & the appeal is allowed with costs.

[14] The other appeal is in respect of the valuation of the properties & was not argued at the time of hearing. It is, therefore, dismissed, but, in the circumstances, without costs.

[15] **B. P. Sinha J.**—I agree.

V.B.B. *Order accordingly.*

A. I. R. (38) 1951 Patna 595 *[C. N. 167.]*

LAKSHMIKANTA JHA C. J. & REUBEN J.

Gokaran Prasad Singh — Applt. v. *Chhotey Narayan Singh & others—Resps.*

A. F. O. D. No. 181 of 1946, D/- 24-1-1951.

(a) Civil P. C. (1908), S. 11—Competency of Court —Test—Decision regarding part of claim in previous suit—Effect.

The words "in a Court competent to try such subsequent suit," must refer to the jurisdiction of the Ct. at the time when first suit was brought, that is to say, if the Ct. which tried the first suit was competent to try the subsequent suit if *then* brought, the decision of such Ct. would be conclusive, although on a subsequent date

by a rise in the value of such property or from any other cause the said Ct. ceased to be the proper Ct. so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property. *Case law referred.*

Where, therefore, in such a case a decision has been given by a competent Ct. in a previous suit, regarding part of the claim in the subsequent suit, & where both the suits are between the same parties & the causes of action relating to part of the claim are the same, that much part of the claim should be excluded from the subsequent suit, being barred by the principle of *res judicata.* [Para 9]

Anno. Civil P. C., S. 11, N. 97 Pt. 1, 2, 3.

(b) Civil P. C. (1908), S. 11—Principle of estoppel by record'—Abrogation of, by S. 11.

Per Reuben J.—The enactment of S. 11, Civil P. C. does not do away with the principle of 'estoppel by record' which still exists. Principle explained. *Case law discussed.* 35 Cal. 353, *declared wrony to this extent.* [Para 17]

Anno. C. P. C., S. 11, N. 2.

Jaleshwar Prasad for G. P. Sahi — for Applt.; Canak Kishore Shambhu Nath, Syed Akbar Hussain & Bhabanand Mukherji — for Resps.

Lakshmikanta Jha C. J. — This appeal by deft. 1 arises out of a suit for partition. The pltfs. who are the grandsons of one Nath Sahay Singh, allege that they own 7 dams & odd share in tauzi No. 2542 in village Kendua, which has been included in Register D in the share, recorded in the names of (1) deft. 1, (2) defts 2 to 5(a), & (3) defts. 21 to 23(a) & 31 to 34, & their prayer is that a separate *takhta* of their share be allotted to them after partition. They have also claimed Rs. 449/12 as compensation for the period antecedent to the suit & future mesne profits till possession is delivered to them of their *takhta* in case they are found to be out of possession.

[2] The trial Ct. has decreed the claim in favour of the pltfs. against deft. 1 & defts. 2 to 5(a) with costs, but dismissed it against other defts. A preliminary decree for partition has accordingly been made.

[3] The pltf's. grandfather, Nath Sahay, owned 7 dams 3 kauris 12 bauris & odd share in tauzi No. 2542 in mauza Kendua & he was in possession of his share as co-sharer malik till he gave his share in ijara on 5-1-1904, to two persons, Lal Mohammad & Mullick Turab Ali. This ijara was redeemed in 1920. One Mahendra was also a co-sharer malik of this tauzi & his interest was 7 dams & odd. eqal to the share of Nath Sahay, & one Janki Prasad Singh also held 5 dams & odd share in this tauzi as a co-sharer malik. Thus the total interest of Nath Sahay, Mahendra & Janki was 1 anna & odd in this tauzi. There were other co-sharer landlords also, but we are not concerned with them in this suit. On 3-9-1906, the 1 anna & odd share, representing the total interest of these three persons, was sold for arrears of cess & auction purchased by one Jugeshwar Dayal, Mukhtar, at a certificate sale, & he got his name mutated in register D in respect of the share purchased by him. According to the trial Ct. he did not get possession over this property. & this finding has not been challenged before us. Subsequently, Jugeshwar sold 6 dams & odd share, which he described as the interest of Mahendra, & the entire 5 dams & odd share of Janki (total 11 dams & odd), to Gokaran Prasad Singh, who is deft. 1 in the present action. He also sold the remainder, describing it as the entire 7 dams & odd share of Nath Sahay & the remaining 1 dam & odd share of Mahendra, to one Ramsaran Singh, ancestor of defts. 2 to 5 (a). But Mahendra. notwithstanding the certificate sale, sold his entire 7 dams & odd interest to one Masoom Ali in 1909, who in his turn, sold this share to one Waris Ali, ancestor of defts. 31 to 34, & in 1913 Waris Ali sold one-fourth of the interest purchased by him from Masoom Ali to one Manzur Ali, predecessor-in-interest of defts. 21 to 23(a).

[4] On 30-8-1918, Waris Ali & Manzur Ali brought Title Suit No. 290 of 1918 in the Ct. of the Munsif, 3rd Ct. Gaya, for a declaration that the sale held in execution of the certificate is illegal & void & also for recovery of possession if they were held by the Ct to be out of possession. This suit was dismissed by the trial Ct. but the judgment of the trial Ct. was revsd. by the appellate Ct. & it was held that the certificate sale was illegal, void & inoperative. The judgment of the appellate Ct. was also upheld by the H. C. in S. A. No. 215 of 1920 (Ex. A1-(1)). Now the successors-in-interest of Waris Ali & Masoom Ali are in possession of 7 dams & odd share in accordance with the above-mentioned transfers.

[5] In 1928 the pltfs. brought Title Suit No. 97 of 1928 in the Ct. of the Munsif, 3rd Ct. Gaya, impleading, among others, the heirs of Ramsaran Singh as defts. 1 to 4, who are represented by defts. 2 to 5(a), Gokaran Singh as deft. 5 who is deft. 1, the heirs of Manzur Ali as defts. 20 to 22, who are represented by defts. 21 to 23 (a) & the heirs of Waris Ali as defts. 31 to 34, who are represented by defts. 31 to 34. This suit of the pltfs. was for a declaration of their title & recovery of possession with mesne profits in respect of Nath Sahay's 7 dams & odd share. It may be stated that the pltfs. claimed 6 dams & odd share from Gokaran (deft. 1), 16 kauris & odd share from the heirs of Ramsaran, & the remaining 2 kauris & odd interest from the heirs of Waris Ali & Manzur Ali. The trial Ct. decreed the suit for possession with mesne profits against Gokaran in respect of 6 dams & odd share, but in respect of the remaining share the pltfs'. title only was declared. There were two appeals one by the present pltfs. & other by Gokaran. Gokaran's appeal was dismissed, but the pltfs'. appeal was allowed & they got a decree for joint possession with mesne profits for the entire 7 dams & odd share of Nath Sahay. The pltfs. have accordingly instituted the present suit by impleading all the co-sharer maliks of the tauzi & have sought partition & allotment of separate *takhta* of 7 dams & odd share belonging to Nath Sahay. They have also claimed, as already stated mesne pro-

fits on the ground that since the year 1343 Fasli defts. 1 to 5 (a) in collusion with defts. 21 to 23 (a) & 31 to 34 realized the pltfs. share of the produce rent from the tenants but did not give them their *hakmi share* of the produce rent in spite of repeated demand, & also prevented the pltfs. from cultivating their proportionate share of the bakasht land.

[6] Several sets of written statement have been filed, but the suit was contested only by defts. 1, 21 to 23 (a) & 31 to 34. As the appeal is only by deft. 1, we are not concerned with the defence of other defts. The defence of deft. 1 is, inter alia, that he is in possession as a cosharer malik of 3 annas & odd share in the tauzi in his own right & that he is not in possession of any share belonging to the pltfs. Accordingly, his case is that the pltfs. are not entitled to any *takhta* being carved out from the share which stands recorded in Register D in his name, nor to any compensation or mesne profits from him. The trial Ct. has, as already stated, held that the pltfs. are entitled to 6 dams & odd from out of the 3 annas & odd share in the possession of deft. 1 which stands recorded in his name in register D in excess of his legitimate share. It has accordingly ordered recovery of possession of this 6 dams & odd share from deft. 1, with mesne profits. There is also a decree against defts. 2 to 5 (a) in respect of 16 kauris & odd share, with mesne profits, but the trial Ct. has dismissed the pltfs' claim in respect of the remaining shares against defts. 21 to 23 (a) & 31 to 34. There is no appeal by defts. 2 to 5 (a). Therefore, the decree in respect of 16 kauris has become final. There was, however, a cross-objection in respect of 2 kauris & odd claimed from defts. 21 to 23 (a) & 31 to 34, but the cross objection has not been pressed. The present appeal is only by deft. 1, & is directed against the decree for recovery of 6 dams & odd share from out of the 3 annas interest in the tauzi which stands recorded in Register D in his name.

[7] The following points emerge for our consideration:

(1) Whether the pltfs are entitled to claim 6 dams & odd share from deft. 1?

(2) Whether the pltfs. are entitled to claim any compensation or mesne profits from deft. 1.

(3) Whether the pltf's. claim is barred by limitation?

[8] All the three points for decision in this appeal are inter-connected & may, therefore, be conveniently taken up together. It may be recalled that Nath Sahay's 7 dams & odd share in the tauzi was in the possession of the *ijardars* as usufructuary mtgees from 1904 to 1920. The certificate sale took place on 3-9-1906, while the usufructuary mtgees. of Nath Sahay were in possession. The certificate sale, however, was held to be illegal, void & inoperative in Title Suit No. 290 of 1918. Later on the pltfs. brought Title Suit No. 97 of 1928 for possession & mesne profits against the present defts. or those who represented their interest. This suit was also decreed, & the writ of delivery of possession (Ex. 3) & the order-sheet (Ex. 4) show that the pltfs. recovered possession over 7 dams & odd share now claimed by the pltfs. in the present suit. The subject-matter of dispute in the two suits is identically the same, & the plea of the applts. is also identically the same. In spite of the plea of the applts. it was held in the previous suit that the pltfs. were entitled to 6 dams & odd share which stands recorded in the name of the applt. & the pltfs. were given a decree for mesne profits against Gokaran Prasad Singh in respect of this share. P. W. 1 has stated in his evidence that delivery of possession was given to the pltfs. in his presence. D. W. 1 has, however, stated that delivery of possession was not taken by the pltfs. but he had to admit that the pltfs. realized mesne profits but not from him. He has further admitted that there was a proceeding against him under S. 107, Cr. P. C. regarding the disputed shares at the instance of the pltfs. & he gave an undertaking not to disturb the pltfs. in their possession. Therefore, in my opinion, on the evidence in the case, there is no manner of doubt that the pltfs. recovered joint possession in January 1934. The trial Ct. has held that the evidence of P. W. 1 that mesne profits were realized from the applt. & Kabir Mian is not worthy of credence. In my opinion, in view of Gokaran's own admission that mesne profits were realised by the pltfs. (but not from him) there is no reason why the evidence of P. W. 1 on this point also should not be accepted. The pltfs. have proved by documentary evidence (Exs. 3 & 4) that they got joint possession in January, 1934. Therefore, it is not necessary to decide whether the pltfs. or their mtgees. were dispossessed prior to 1928 when the Title Suit No. 97 of 1928 was instituted, or whether dispossession of the mtgees. can, in the eye of law operate as dispossession of the mtgors. As this suit was instituted on 8-9-1934, within twelve years of the suit, the question of limitation, in my opinion, does not arise.

[9] The next question for consideration is whether the applt. can resist the pltfs. suit for possession. It appears that 3 annas 7 dams & odd share has been recorded in register D in the name of the applt. under serial No. 99. Admittedly, the applt. purchased from Jugeshwar 6 dams & odd share of Mahendra, & Ramsaran purchased 7 dams & odd share of Nath Sahay & 1 dam & odd share of Mahendra from him. It was held by the appellate Ct. as well as by the H. C., in Title Suit No. 290 of 1918 that the certificate sale was illegal & inoperative. Therefore, the purchasers from Jugeshwar acquired no title & they were in possession of the properties purchased by them as trespassers. It was held in Title Suit No. 97 of 1928 that 6 dams

& odd share now claimed by the pltfs. in the present suit from the applt. was in his possession & the pltfs. were held entitled to recover possession from him. The trial Ct. has held that the 6 dams & odd share claimed by the pltfs. from the applt. is in his possession & is included in 3 annas & old share recorded in his name in Register D. I see no reason to differ from its view. Moreover, it is not open to the applt. to resist the claim of the pltfs. for recovery of possession because the matter is *res judicata*. Identically the same point was raised in Title Suit No. 97 of 1928 before the learned Munsif, & he gave his decision in favour of the pltfs. In my opinion, the learned Munsif who decided the former suit was competent to decide the present suit in so far as it relates to the particular relief as to the title of the plts. Though the present suit has been valued at Rs. 11,000 for the purpose of jurisdiction & partition (being the value of the entire 16 annas of the tauzi under partition in 1944) the relief as to the declaration of title & recovery of possession as against the applt. must be deemed to have the same value in 1944 as it had for the purpose of jurisdiction before the learned Munsif in 1928 in Title Suit No 97 of 1928. A higher value has been put, due partly to the rise in the price of the property & partly because the entire 16 annas share has been valued for the purpose of partition. But the matter directly & substantially in issue in both the suits is identically the same. Therefore, in my opinion, the judgment of the appellate Ct., which finally heard & decided the matter, in the former suit (Title Suit No. 97 of 1928) operates as *res judicata* in the present suit. Mitter J. in *Gopi Nath* v. *Bhugwat Pershad*, 10 Cal. 697 has observed that the words "in a Ct. of jurisdiction competent to try such subsequent suit" must refer to the jurisdiction of the Ct. at the time when the first suit was brought, that is to say, if the Ct. which tried the first suit was competent to try the subsequent suit if *then* brought, the decision of such Ct. would be conclusive, although on a subsequent date, by a rise in the value of such property or from any other cause the said Ct. ceased to be the proper Ct., so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property. The principle enunciated in *Gopi Nath Chobey's case* (10 Cal. 697) has been folld. in the case of *Sarupa* v. *Khem Lal*, 10 Lah. 528: (A. I. R. (15) 1928 Lah. 929), *Lalmohan* v. *Ramlakshmi*, 59 Cal. 636: A. I. R. (19) 1932 Cal. 271) & *Debendra Kumar* v. *Pramada Kanta*, 37 C. W. N. 810: (A. I. R. (20) 1933 Cal. 879). It has been held in the case of *Drupad Chandra* v. *Bindumoyi Dasi*, A. I. R. (13) 1926 Cal. 1053: (97 I. C. 209) that if a particular relief claimed in the subsequent suit was adjudicated in the previous suit, the previous Ct. having jurisdiction to try, that relief would be barred in the subsequent suit. The same view has been reiterated in the case of *Priyanath* v. *Kalicharan*, A. I. R. (19) 1932 Cal. 162: (136 I. C. 604), & it has been held that where a decision has been given by a competent Ct. in a previous suit, regarding part of the claim in the subsequent suit, & where both the suits are between the same parties & the causes of action relating to part of the claim are the same, that much part of the claim should be excluded from the subsequent suit, being barred by the principle of *res judicata*.

[10] So far as the pltfs. claim for compensation is concerned, I am clearly of the opinion that Art. 120, Limitation Act, governs the present case & that there is no bar of limitation & they are entitled to the relief: *see Midnapur Zamindary Co., Ltd.* v. *Naresh Narayan Roy*, 29 C. W. N. 270: (A. I. R. (12) 1925 P. C. 93); *Yerukola* v. *Yerukola*, 45 Mad. 648: (A. I. R. (9) 1922 Mad. 150 F. B.) & *Mahomedally Tyebally* v. *Safiabai*, 45 C. W. N. 226 at p. 231: (A. I. R. (27) 1940 P. C. 215). It may be stated that the decision of the Subordinate Judge on this point was not seriously challenged.

[11] The appeal is, therefore, dismissed with costs.

[12] **Reuben J.**—I agree.

[13] The appeal should fail on the merits & also, I think on the ground of *res judicata*. I would base the latter conclusion on general principles rather than on S. 11, Civil P. C. Section 11 enacts that no Ct. shall try any suit or issue in which the matter directly & substantially in issue has been directly & substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Ct. competent to try such subsequent suit or the suit in which such issue has been subsequently raised, & has been heard & finally decided by such Ct. The test prescribed by this section is that the Ct. which decided the earlier suit must have been competent to try the subsequent suit. In reliance on certain observations of Lord Davey in *Gokul Mandar* v. *Pudanund Singh*, 29 I. A. 196: (29 Cal. 707 P. C.), S. 13 (now S. 11), Civil P. C. was construed strictly by a D. B. of the Calcutta H. C. in *Shibo Raut* v. *Baban Raut*, 35 Cal. 353: (7 C. L. J. 470), where a portion of the property forming the subject of the later suit had been the subject of an earlier suit between the same parties in which earlier suit the title to the property had been adjudicated between them. The question whether the earlier decision was binding as regards the subject-matter of the earlier suit was answered in the negative by their Lordships, who distd. a previous decision of the same Ct. reported in *Bhugwanbutti* v. *A. H. Forbes*, 28 Cal. 78: (5 C. W. N. 483), decided on the basis that the pltf. cannot be allowed to evade the provision of S. 13 (now S. 11), Civil P. C. by joining in one suit several causes of action. The same view of S. 11 as in the case of *Shibo Raut*, (35 Cal. 353: 7 C. L. J. 470) was taken by a D. B. of the Lahore

H. C. in *Fazal Hussain* v. *Jivan Shah*, 14 Lah. 369 : (A. I. R. (20) 1933 Lah. 551), again in reliance on the observations of Lord Davey. A situation on a *par* with that in the case of *Shibo Raut*, (35 Cal. 353 : 7 C. L. J. 470) arose in *Drupad Chandra* v. *Bindumoyi Dasi*, A. I. R. (13) 1926 Cal. 1053 : (97 I. C. 209). Apparently the attention of their Lordships was not drawn to the earlier decision & they gave a contrary answer to the question, observing without giving any express reasons :

"We think that as to the properties which measure one & half bighas of land of schedule *Kha* the decision in the previous suit operated as *res judicata* & the pltf. cannot succeed so far as this portion of the land is concerned."

This decision was folld. in *Priyanath* v. *Kalicharan*, A. I. R. (19) 1932 Cal. 162 : (136 I. C. 604). That was a case where different causes of action were combined in the subsequent suit as in the case of *Bhugwanbutti* v. *Chowdhrani*, 28 Cal. 78 : (5 C. W. N. 483), & the decision in the case of *Shibo Raut*, (35 Cal. 353 : 7 C. L J. 470) was distd. by their Lordships.

[14] I do not think that, in the present case, it is necessary to rely upon S. 11, Civil P. C. for the purposes of *res judicata*. That section prescribes certain conditions in which the matter directly & substantially in issue in an earlier suit & heard & finally decided therein may not be tried in a subsequent suit. There is nothing in that section which takes away from the final decree in the earlier suit its finality as between the parties & has the effect of setting it aside. The decree in that suit remains binding between the parties so far as the subject-matter of that particular suit is concerned, although the issues on which that result was arrived at may for the purposes of the later suit, be open to trial. In other words, the cause of action has passed into a decree & cannot be reagitated. Unless this was so, there would be no end to litigation & matters decided in suits before Munsifs would be reopened by inclusion in suits of higher valuation. The rule of *res judicata* which forbids the re-opening of matters once decided as in embodiment of the well-known maxims "*Nemo debet bis vexari pro eadem causa* & "*Interest reipublicae ut sit finis litium*," & the memorable words of Sir Lawrence Jenkins in *Sheoparasan Singh* v *Ramnandan Prasad*, 43 Cal. 694 : (A. I. R. (3) 1916 P. C. 78) set out the manner in which the question ought to be approached :

". . . in view of the arguments addressed to them their Lordships desire to emphasise that the rule of *res judicata* while founded on ancient precedent, is dictated by a wisdom which is for all time.

'It has been well said', declared Lord Coke, '*interest reipublicae ut sit finis litium*, otherwise great oppression might be done under colour & pretence of law.' (6 Coke 9).

Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara & Nitakantha include the plea of a former judgment among those allowed by law, each iting for this purpose the text of Katayayana, who describes the plea thus : "If a person though defeated at law sues again he should be answered, you were defeated formerly. This called the plea of former judgment. [See The Mitakshara (Vyavahara) Bk. II, Ch. i, edited by J. R. Gharpure, p. 14, & The Mayuka, Ch. i., S. 1, p. 11 of Mandlik's Edn.]

And so the application of the rule by the Cts. in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law."

Lord Darling consd. it worth while to repeat these words in *Kalipada De* v. *Dwijapada Das*, 57 I. A. 24 : (A. I. R. (17) 1930 P. C. 22). I may also refer to *Ramachandra Rao* v. *Ramachandra Rao*, 45 Mad. 320 : (A. I. R. (9) 1922 P. C. 80) in which case Lord Buckmaster observed that :

"The principle which prevents the same case being twice litigated is of general application & is not limited by the specific words of the Code in this respect."

The observation of Lord Davey in *Gokul Mandar's case* (29 I. A. 196 : 29 Cal. 707 P. C.) must be understood in the light of the facts of that case. There, it was argued before the Judicial Committee in reliance on S. 13 (now S. 11), Civil P. C. that a Settlement Officer being empowered to decide questions of status in the course of settlement proceedings under the Bengal Tenancy Act, his decision in such a proceeding was a bar to a civil suit. It was in answer to this argument that his Lordship observed that :

"It is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction."

As is clear from the subsequent decisions of the Judicial Committee to which I have refd., the dictum of his Lordship cannot be taken to mean that S. 13 (now S. 11) had the effect of abrogating the general principles of *res judicata*. As other decisions of the Judicial Committee supporting my conclusion, I may mention *G. H. Hook* v. *Administrator-General of Bengal*, 48 Cal. 499 : (A. I. R. (8) 1921 P. C. 11) & *Ram Kirpal* v. *Mt. Rup Kuari*, 11 I. A. 37 : (6 ALL. 269 P. C.).

[15] The conclusion to which I have come is also supported by the learned & illuminating discourse of Tek Chand J., on the doctrine of *res judicata* in *Mt. Lachhmi* v. *Mt. Bhulli*, 8 Lah. 384 : (A. I. R. (14) 1927 Lah. 289 F. B.). His Lordship cites a relevant passage from an ancient Hindu law-giver Harita which I reproduce below :

"The pltf. should be non-suited if the deft. avers : 'In this very affair, there was litigation between him & myself previously,' & it is found that the pltf. had lost his case."

In my opinion, this passage applies to the present case. His Lordship having indicated that the doctrine is of universal application & is to be found in various systems of jurisprudence, relates that in some of the ancient systems the operation of the rule was confined to cases in which the pltf. puts forward his claim to "the same *subject-matter* with regard to which his request had already been determined by a competent Ct. & had passed into judgment" this is what is described as the plea of "estoppel by *judgment*" or "estoppel by *record*." This rule of estoppel, he points out, was first enacted in British India by S. 16,

Bengal Ragulation III [3] of 1793 & again in S. 2, Civil P. C. of 1859. In other systems of law, & notably in England, his Lordship continues, the doctrine has developed & expanded, & the bar is applied in a subsequent action not only to cases where claim is laid to the same *property* but also to the same *matter* (or *issue*) as was directly & substantially in dispute in the former litigation; in other words, it is the identity of the *issue* & not the identity of the *subject-matter* which attracts the operation of the rule. This is what is described as "estoppel by *verdict*." According to his Lordship, this extension of the principle was given effect to by S. 13 of the Code of 1877, which was substantially on the same lines as S. 11 of the present Code. I do not think that the effect of the extension of the principle was to do away with "estoppel by *record*" & it is this estoppel which I would apply in the present case.

[16] That there was no intention to abrogate "estoppel by *record*" would also appear from S. 13 of the Code relating to foreign judgments. The section provides that a foreign judgment shall be conclusive as to "any matter thereby directly adjudicated upon" between the same parties or between parties under whom they or any of them claim, litigating under the same title, subject to certain conditions, one of which is that the adjudication must be by a Ct. of competent jurisdiction. If the decision of a foreign Ct. of competent jurisdiction is given this effect in India, it is not possible that the Code intended to give a lesser effect to the decision of a competent civil Ct. of this country. I may also mention O. 2, R. 2, Civil P. C. which shows the anxiety of the legislature to avoid repeated litigation of the same matter between the same parties.

[17] For the reasons which I have set out, I consider that estoppel by record still exists &, with respect, I would suggest that the decision in the case of *Shibo Raut* (35 Cal. 353 : 7 C. L. J. 470) was to this extent incorrect.

[18] Finally, I should like to draw attention to a mistake in the judgment of the learned Subordinate Judge. Having, on a consideration of the evidence, come to the conclusion that the claim against defts. 2 to 5 (a) is proved, (p. 51, lines 41-45 of the paper book), he goes on in the same para. to say that the claim is not proved against them (p. 61, lines 58-61). The latter statement is a mistake due to inadvertence & the decree has been rightly passed against these defts.

D.R.R. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 600 *[C. N. 168.]*

REUBEN & NARAYAN JJ.

Chhedi Manjhi & others—Applts. v. *Mahipal Bahadur Singh & others—Resps.*

A. F. A. D. No. 1972 of 1947, D/- 5-4-1951.

T. P. Act (1882), Ss. 108 (p) and (h), 51 — Construction of permanent structures for non-agricultural purposes by tenant — Right of landlord to removal during lease—Doctrine of estoppel by acquiescence—Applicability.

Where a tenant erects a permanent structure on the land for non-agricultural purposes, & during the continuance of the lease, the lessor objects to their erection & there is no waiver or acquiescence on the part of the lessor, then S. 108 (p) must operate & the landlord is entitled to ask for removal of the permanent structures. 27 Mad. 211, *Rel. on*; A. I. R. (22) 1935 All. 1040, *Disting.* [Para 7]

The prohibition in cl. (p), however, may not apply when according to the contract of the parties, the land is let for the erection of a dwelling house or shop thereon. [Para 7]

When a tenant raises the plea of equitable estoppel, it is incumbent upon him to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active interventions, was sufficient to justify the legal inference that he had, by plain implication, contracted that the right of tenancy under which the lessee originally obtained possession of the land should be changed into a perpetual right of occupation. 21 All. 496 (P. C.), *Foll.* [Para 5]

Where due to doubtful character of the structure, it was difficult for the landlord to take prompt action for the removal of the structures, the mere erection by the tenant of permanent structure upon the land let to him in the knowledge of & without interference by the lessor will not suffice to raise the equitable right against the latter: 21 All. 496 (P. C.), *Foll.*; 40 C. W. N. 52, *Ref.* [Para 6]

Anno: T. P. Act, S. 51 N. 22, S. 108 (h) N. 4; S. 108 (p) N. 1.

Harinandan Singh & Angad Ojha—for Applts; **S. K. Mitra & G. N. Mukherji—for Resps.**

Cases referred to:

('99) 21 All. 496 : (26 I. A. 58 P. C.). [Pr. 5]
('35) A.I.R. (22) 1935 All. 1040 : (159 I. C. 680). [Pr. 7]
('36) 40 C. W. N. 52. [Pr. 6]
('04) 27 Mad. 211: (14 M. L. J. 25). [Pr. 7]

Narayan J. — This appeal arises out of a suit in ejectment. The property in suit is 2 Kathas of *bitori* land situate in bitori Alamganj, tauzi No. 8/R of the Purnea Collectorate, & the pltf's case was that the defts. 1 & 2 who are the legal heirs of the original *bitori* tenant Dhannulal had the right to use the land for residential purposes, but that they could erect only thatched houses thereon & could not erect any pucca or permanent structure. The defts. 4 to 9 were impleaded because they claimed to be the purchasers of a portion of the *bitori* holding, & the allegation was that they had recently started constructing a pucca brick structure on the land & that the construction had been raised up to a height of 2 to 3 feet by the time the suit was instituted. The prayer was that the defts. be ejected from the land & that they be directed to remove the pucca structures raised by them within a period fixed by the Ct.

[2] The defts. 4 to 9 contested the suit, & the principal defences raised by them were, (1) that the land in question was part of their ancestral holding, (2) that they had acquired a customary right to erect pucca buildings & structures on such holding, & (3) that they had acquired permanent right in the land & their title had become perfect by their open & adverse possession for a period of more than twelve years.

[3] The Ct. of first instance rejected the claim for ejectment, but held that the defts. had no right to

raise pucca structures on the land & directed that the materials be removed by the defts. within a month from the date of the decree. That Ct. also directed that a permanent injunction be issued on the defts. preventing them from raising any pucca structure on the land in future. This decision was affd. on appeal by the Dist. J. of Purnea. Both Cts. repelled the contention of the defts. that they had acquired any permanent right in the land & that there was a custom by which they could acquire such a right.

[4] The defts. have, therefore, come up in second appeal, & on 28-11-1949 a Bench of this Ct. passed an order of remand calling upon the lower appellate Ct. to submit its findings on the following points:

"1. When the structures complained of were made?

2. What was the progress in the structures made before the landlord questioned the right of the defts. to make them?

3. Did the landlord stand by so as to create an equitable right in favour of the tenant-defts. to resist the landlord's claim for the demolition of the structures?

4. In view of the fact that the landlord's claim for ejectment has been dismissed, would it be just & equitable to call upon the defts. to remove the structures complained of?"

[5] The findings having been submitted, the appeal has now been heard finally. Mr. Harinandan Singh, the learned counsel for the defts.-appellants did not challenge the findings of the Cts. below that the defts. had acquired no permanent right or right by custom, but he strenuously urged that the landlords had waived their rights to eject these defts. as they had stood by & allowed the construction to be raised. The learned Counsel has thus invoked in this case the equitable doctrine of estoppel by acquiescence. The learned Addl. Dist. J. has, however, submitted a clear finding to the effect that there is no material "on the record to show that the landlord had knowledge, direct or indirect, about the raising of the structures by the tenant-defts.", & he has come to the conclusion that the landlord did not "stand by so as to create an equitable right in favour of the tenant-deft. to resist the landlord's claim for the demolition of the structures." The learned Addl. Dist. J. has also refd. to S. 108 (p), T. P. Act, which lays down that the lessee must not, without the lessor's consent, erect on the property any permanent structure except for agricultural purposes. In my opinion, the finding of the learned Addl. Dist. J. that the doctrine of estoppel by acquiescence cannot be invoked in this case is quite correct & cannot be questioned before us. The distinct case which the pltf. had made out was that before 10-11-1942 he had no information or knowledge about the wrongful constructions of the pucca building by the defts. This suit was instituted on 9-12-1942, & if the pltf. had no information about the constructions before 10-11-1942, then certainly there is no merit in the contention that the pltf. stood by & allowed the pucca constructions to be made. It is true that the learned Addl. Dist. J. has found that the constructions complained of were made in 1939, & we have therefore to assume that the present suit was instituted about three years after the constructions had been made. But still the question does arise as to when the pltf. came to know of the constructions, & the further question arises as to whether the facts & circumstances can lead to an inference of equitable estoppel against the pltf. It appears that the pltf.'s estate had been seized by the Colr. of Purnea u/s. 99 of the Cess Act, & the pltf. asserts that, consequently, he had no collecting agent for this village, with the result that the deft. 1 took advantage of the situation & clandestinely raised the constructions complained of. As was observed by the Judicial Committee in *Beni Ram* v. *Kundan Lal*, 21 ALL. 496, when a tenant raises the plea of equitable estoppel, it is

"incumbent upon him to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that he had, by plain implication, contracted that the right of tenancy under which the lessee originally obtained possession of the land should be changed into a perpetual right of occupation."

[6] During the course of his argument, Mr. Singh has even submitted that the structures which the defts. had raised cannot strictly be regarded as permanent structures. This contention cannot be entertained by us, because in the Cts. below it was assumed & taken as a common ground that the buildings which had been raised were of a pucca & a permanent character. But, if the defts. could be in doubt as to the permanent or the impermanent character of the structures, then certainly the lessor or the owner of the property must have some time to ascertain whether the structures are of a permanent nature or not. Moreover, if the estate was in the hands of the Colr., then certainly it was difficult for the pltf. to take prompt action against the defts. & to demand promptly that the materials & the structures be removed. The lessor could object only after he had made sure that the structures were out of proportion to his & his lessee's intention & for this he must have some time, & as pointed out by the Judicial Committee in *Beni Ram's case*, 21 ALL. 496, in circumstances similar to those of the present case, the mere erection by the tenant of permanent structures upon the land let to him in the knowledge of & without interference by the lessor will not suffice to raise the equitable right against the latter. Their Lordships say that the rule established in India is that of S. 108, T. P. Act, which provides that

"the lessee may remove at any time during the continuance of the lease all things which he has attached to the earth; provided he leaves the property in the state in which he received it."

I would also quote the following passage from the judgment of Nasim Ali J. in *Chandi Charan* v. *Ashutosh Lahiri*, 40 C. W. N. 52 :

"The equitable doctrine of estoppel by acquiescence also cannot be invoked by the defts. in the present case. The

lessee made no mistake about his rights. He knew full well that the lease was not a lease in perpetuity. He did not raise the structures on the faith of any mistaken belief. From the act & conduct of the lessee, the lessor could not & did not know that the lessee had made any mistake as to the nature of his right & that he was raising the structures under a mistaken belief that the demise was permanent . . . The question of the lessor encouraging the lessee to spend money by raising costly structures, either directly or by abstaining from asserting his right, cannot possibly arise in view of the facts & circumstances of the present case."

[7] It is no more the contention of the defts. that they had acquired any permanent right in the land &, as such, they could not construct any permanent structure on the land. Cl. (p), S. 108, T. P. Act, lays down that the lessee cannot without the lessor's consent erect on the property any permanent structure except for agricultural purposes, & cl. (h), S. 108, after amendment is in the following terms :

"the lessee may, *even after the determination of the lease remove, at any time whilst he is in possession of the property leased but not afterwards all things which he* has attached to the earth : provided he leaves the property in the state in which he received it " :

As was pointed out by the Madras H. C. in *Ismai Kani Rowthan* v. *Nazarali Sahib*, 27 Mad. 211 the rules laid down by the T. P. Act substantially reproduce the law as it stood before, & the lessor has an option either to take the building or to pay compensation for it, or if he is unwilling to pay the compensation to allow the tenant to remove the building. And there is no reason why, during the continuance of the lease, if the landlord objects to the erection of permanent structures, those permanent structures should not be removed. If there is no waiver or acquiescence & if the equitable doctrine of estoppel by acquiescence cannot be invoked, then cl. (p) of S. 108 must operate & the lessee cannot be allowed to construct permanent structures except for agricultural purposes. The prohibition in this clause may not apply when, according to the contract of the parties, the land is let for the erection of a dwelling house or shop thereon, but that is not the case here. The defts. now resist the pltf.'s claim only by asserting that the pltf. has stood by & allowed the constructions to go on. This plea on the findings & in the circumstances of the case cannot succeed.

[8] The learned counsel for the applts. reld. on a decision of the Allahabad H. C. reported in *Ahmad Nazar Beg* v. *Brij Nandan*, A. I. R. (22) 1935 ALL. 1040, & particularly on the following observation made by their Lordships :

"We do not agree that this section would apply because this section applies to lessees in general, & if the plot has become a tenancy for building purposes the section in question will not apply to it. We note that the definition of land in Act 3 of 1926, S. 3 (2) states that : Land does not include land for the time being occupied by dwelling houses or manufactories appurtenant thereto."

The full facts of this case do not appear from the report, but it does appear that in that case there was a finding that plot No. 5 which was the subject-matter of the suit was appurtenant to the dwelling house which stood on it & that this plot, although originally agricultural, *had become a plot which was held for building purposes*. There are, therefore, obviously some important distinguishing factors, & the clear provisions of law as contained in Cls. (h) & (p) of S. 108 seem to conclude the question raised in this present litigation. If there is no waiver or acquiescence, the defts. cannot be permitted to keep the permanent structures on the land.

[9] I am, therefore, of the opinion that the appeal is without any merit, & I would dismiss it with costs.

[10] **Reuben J.**—I agree.

V.B.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 602 *[C. N. 169.]*

LAKSHMIKANTA JHA C. J. & CHATTERJI J.

Ojha Brothers—Applts. v. *Volkart Brothers & another—Resps.*

L. P. A. No. 22 of 1949, D/- 4-4-1951, from decision of Shearer J., D/- 26-9-1949.

(a) Civil P. C. (1908), S. 145 & O. 21, R. 89 — Pltf. depositing amount in Ct. in order to save property from being sold in execution—Pltf. not liable to pay under decree—Suit for recovery of deposit— Deposit whether voluntary—Decree if can be executed against surety of pltf. under S. 145.

In execution of a money decree against a company attachment was taken out against the goods belonging, not to the company but to the pltfs. In the claim case preferred by the pltfs. they had to furnish security as ordered by the Ct. The claim of the pltfs. was disallowed. The surety's property was sold & in order to save the property, the pltfs. deposited a certain amount in Ct. under O. 21, R. 89. In a suit brought by the plffs. to recover the amount so deposited, it was found that the pltfs. were not liable to pay under the decree but it was held that the payment made by the pltfs. under O. 21, R. 89 being voluntary, the suit for recovery of the amount deposited could not lie. In appeal :

Held **that the payment made by the pltfs. to save the property must be regarded as being made under the force of the execution proceedings, that therefore it was not voluntary & that the pltfs. were entitled to recover the amount deposited. 7 Cal. 648 (P.C.); 40 Cal. 598 (P.C.),** *Rel. on*; **A. I. R. (8) 1921 Bom. 169 ; A. I. R. (20) 1933 Bom. 239; A. I. R. (15) 1928 Pat. 193,** *Discussed*; **A. I. R. (22) 1935 Mad. 842 (F. B.),** *Disting.* **[Paras 12, 17]**

Held **further that as the plffs. were not liable under the decree, the decree could not be executed against their surety under S. 145. 35 Cal. 202 (P. C.),** *Ref.* **[Para 19]**

Anno. C. P. C., O. 21 R. 89 N. 31 ; S. 145 N. 6a.

(b) Limitation Act (1908), Arts. 29, 49 — Wrongful attachment of goods in execution of decree — Money paid to D. H. out of sale of such goods—Suit to recover money—Limitation.

Limitation for a suit to recover money paid to the D. H. out of the sale proceeds of the goods wrongfully attached in execution of a decree is that provided in Art. 49 & not in Art. 29. The cause of action for the suit arises when the attached goods are sold & the money realised from the sale proceeds is paid to the D. H. A. I. R. (15) 1928 Cal. 106, *Rel. on* **; A. I. R. (2) 1915 Cal. 681,** *Disting.* **[Para 21]**

Anno. Lim. Act, Art. 29, N. 5.

(c) Civil P. C. (1908), S. 144 & O. 21, R. 63—Claim case set aside in claim suit—Refund of costs awarded in claim case.

Where an amount is allowed as costs by an order made by the Ct. in favour of the D. H. in a claim case but sub-

sequently in the claim suit filed by the claimant under O. 21, R. 63 the claim case is set aside, the D. H. is not entitled to retain the amount which he realised on the strength of the order. And further as the claim case is set aside the claimant is entitled to the refund of these costs in the claim suit. In such a case S. 144 has no application. 10 M. I. A. 203 (P. C.) ; 16 I. C. 131 (Cal), *Ref.* [Paras 22, 23]

Anno. C. P. C., S. 144, N. 4; O. 21, R. 63, N. 25.

G. P. Das & B. P. Varma—for Applts. ; *R. S. Chatterji & P. B. Gupta—for Resps.*

Cases referred to—

(1863-66) 10 M. I. A. 203 : (3 W. R. 25 P. C.) [Pr. 22]
('82) 8 I. A. 93 : (7 Cal. 648 P. C.) [Pr. 11]
('08) 35 I. A. 22 : (35 Cal. 202 P. C.) [Pr. 19]
('13) 40 I. A. 56 : (40 Cal. 598 P. C.) [Prs. 11, 15]
('21) 45 Bom. 1094 : (A.I.R. (8) 1921 Bom. 169). [Prs. 14, 15]
('33) 57 Bom. 601 : (A.I.R (20) 1933 Bom. 239). [Pr. 15]
('12) 16 C. L. J. 437 : (16 I. C. 131). [Pr. 22]
('15) 42 Cal. 85 : (A. I. R. (2) 1915 Cal. 681). [Pr. 21]
('28) A.I.R. (15) 1928 Cal. 106 : (105 I. C. 763). [Pr. 21]
('35) 58 Mad. 972 : (A.I.R. (22) 1935 Mad. 842 F. B.) [Pr. 18]
('28) 7 Pat. 30 : (A.I.R. (15) 1928 Pat. 193). [Prs. 13, 15]

Chatterji J. — This is an appeal under Cl. 10, Letters Patent, by the pltfs. in a suit which was originally instituted under O. 21, R. 63, Civil P. C.

[2] Deft. 1, Volkart Brothers, a firm carrying on business in motor parts & accessories in Calcutta, obtained, in February 1940, a decree for Rs. 585-3-0 in the Small Cause Court at Calcutta against Ojha Das & Co., a firm carrying on business in motor accessories at Patna, of which the deft. 2, Sripat Ojha, is the proprietor. The decree was transferred for execution to the First Munsif's Court at Patna, & in execution Volkart Brothers took out attachment, on 14-1-1941, against certain motor accessories & other moveables said to belong to their J. Ds., Ojha Das & Co. On 16-1-1941, the pltfs., Ojha Brothers, a firm also carrying on business in motor accessories at Patna, of which the proprietors are the two younger brothers of deft. 2, Sripat Ojha, preferred a claim under O. 21, R. 58, Civil P. C., asserting that the goods sought to be attached belonged to them & not to the J. Ds., Ojha Das & Co. They prayed for stay of the execution proceeding whereupon they were ordered to furnish security. In obedience to this Order, they filed, on 20-3-1941, a registered security bond executed by one Raghubir Tewari. The claim was eventually dismissed on 5-9-1941. The execution then proceeded.

[3] On 20-1-1942 the pltfs. brought the present suit under O. 21, R. 63, Civil P. C. for a declaration that the properties sought to be attached belonged to them & not to the J. Ds. Ojha Das & Co.

[4] In August, 1942 the attached goods were sold & out of the sale proceeds, Rs. 70-10-0 was paid to deft. 1 Volkart Brothers, by way of rateable distribution. The surety, Raghubir Tewari, made three payments, two of Rs. 60 each & the other of Rs. 50 to Volkart Brothers & these payments were duly certified in Court. As he did not make any further payment, the property given by him in security was proceeded against and sold in June 1943. To set aside that sale, the pltfs. made an application under O. 21, R. 89, Civil P. C. on depositing Rs. 357-8-6. Thereupon the sale was set aside. Volkart Brothers also realised from the pltfs. a sum of Rs. 85 as the costs of the claim case.

[5] On 14-12-1943 the pltfs. by leave of the Court, amended the plaint by adding a further prayer for recovery of the said sums of money, that is, (1) Rs. 70-10-0, (2) Rs. 60, (3) Rs. 60, (4) Rs. 50, (5) Rs. 357-8-6 & (6) Rs. 85.

[6] The suit was contested by deft. 1, Volkart Brothers, & their defence in substance was that the firms Ojha Das & Co. & Ojha Brothers were one & the same concern, belonging to the three brothers, & that the attached goods really belonged to the J. Ds., Ojha Das and Co.

[7] The learned Additional Subordinate Judge, who tried the suit, held that the attached properties belonged to the J. Ds. Ojha Das & Co. & not to the pltfs. He accordingly dismissed the suit. On appeal, the learned Additional Dist. J. held that the attached goods, belonged to the pltfs., Ojha Brothers, & not to Ojha Das & Co. & were, therefore, not liable to attachment or sale in execution of the decree obtained by Volkart Brothers against Ojha Das & Co. He accordingly allowed the appeal & decreed the suit in these terms :

"Declaration sought for in the suit is allowed. Pltf. shall be further entitled to refund of the money actually realised from him by the D-H. (deft. 1) in Execution Case No. 1587/40".

[8] On second appeal, Shearer J. held (1) that the claim for recovery of Rs. 70-10-0 was barred by limitation, (2) that the three payments, two of Rs. 60 each & the other of Rs. 50 being made by the surety Raghubir Tewari, the pltfs. were not entitled to recover those sums, (3) that the payment of Rs. 357-8-6 made by the pltfs. under O. 21, R. 89, Civil P. C. was voluntary & no suit could lie for recovery of that amount & (4) that the sum of Rs. 85 which the pltfs. had to pay as costs, was also not recoverable. He accordingly allowed the appeal & dismissed the suit.

[9] Before coming to the points raised on behalf of the appellants, it is necessary to dispose of the objection taken by Mr. R. S. Chatterji on behalf of the resps. that the Court of appeal below did not come to any definite finding that the attached goods belonged to the pltfs. This objection is without any force. The Court definitely found "In the above circumstances we cannot but hold that those moveables of Ojha Brothers were not liable to attachment & sale in that execution case". Shearer, J. proceeded on the footing that the Court of appeal below was satisfied that "Messrs Ojha Das & Co. & Messrs Ojha Brothers, were two separate & distinct firms & that the property which had been attached by Messrs. Volkart Brothers in execution of their decree belonged to the

latter & not to the former firm". He appears to have accepted this as a finding of fact binding in second appeal.

[10] Mr. G. P. Das on behalf of the appellants does not press the appeal with regard to the three items, two of Rs. 60 each & the other of Rs. 50, which were paid by the surety Raghubir Tewari, He presses the appeal with regard to the other three items, (1) Rs. 70-10, (2) Rs. 357-8-6 & (3) Rs. 85.

[11] With regard to the item of Rs. 357-8-6, Mr. Das's contention is that the pltfs. had to pay the amount under compulsion of legal process &, therefore, the payment could on no account be said to be voluntary. He relies on the decisions of the Privy Council in *Dooli Chand* v. *Ram Kishun Singh*, 8 I. A. 93 and *Kanhya Lal* v. *National Bank of India Ltd.* (40 I. A. 56). In the first case, the pltf. who had paid to the deft. a sum of money to prevent the sale of a certain mouza which had been attached & put up for sale in execution of a decree obtained by the deft. against a third person, sued to recover back the money. It was contended that the payment was voluntary. This contention was rejected by their Lordships in the following words :

"But the objections taken to the action were that the payment was voluntary, & that the remedy, if any, was in the execution proceedings. Their Lordships think that there is no pretence for saying that the payment was voluntary. It was made to prevent the sale which would otherwise inevitably have taken place of the mouza which the resps. had purchased, & was made therefore under compulsion of law; that is under force of these execution proceedings."

In the second case 40 I. A. 56, the deft. Bank obtained a decree against a certain limited company &, in execution of that decree, attached & took possession of certain mills of which the pltf. claimed to be the sole proprietor. The pltf. paid the decretal amount under protest & subsequently instituted a suit to recover back that amount. It was held that the money was paid under 'coercion' within the meaning of S. 72, Contract Act, & was, therefore, recoverable. The following passage from their Lordships' judgment is instructive :

"A wrongful interference with the pltf's. lawful enjoyment of his own property is alleged. The pltf. was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the defts. liable for that which they have thus caused him to do. It is true that paying under protest the sum demanded was not the only course open to him. He might have taken legal proceedings, by which, sooner or later, he might have rid himself of the interference. But to do so would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective & that might have been a serious aggravation of the wrong. To this he was in no way bound to submit. He was free to choose a course which did not involve any such prolongation of the trespass. Accordingly he paid under protest the sum demanded, & under English law he was unquestionably entitled to demand a repayment of that sum because it was an involuntary payment produced by coercion, namely, the wrongful interference of the defts. with his full & free enjoyment of his own property. By English law it is not open to the wrongdoer to prescribe by which of two lawful alternatives the injured man puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him & the wrongdoer a voluntary act or estop him from claiming that it was done under coercion."

Though the money was paid "under protest", their Lordships do not appear to have attached any importance to that fact. In their view, the payment was made under the force of the execution proceedings & must, therefore, be regarded as being made under compulsion.

[12] Here, in execution of the decree against Ojha Das & Company, attachment was taken out against the goods belonging, not to them, but to the pltfs. In the claim case preferred by the pltfs., they had to furnish security, as ordered by the Court. The surety's property was sold, & in order to save the property, the pltfs. had to pay the sum of Rs. 357-8-6. The pltfs. were not liable under the decree, & the payment made by them to save the property cannot but be regarded as being made under the force of the execution proceedings.

[13] Shearer J. in his judgment referred to the aforesaid Privy Council decisions, but apparently he felt bound by the decision of this Court in *Raghu Ram* v. *Deokali Pande*, 7 Pat. 30. In that case it was held that where a property has been sold in execution of a money decree & a payment is made under O. 21, R. 89, Civ. P. C., the person making such payment must accept the validity of the sale & cannot, therefore, maintain a suit for refund of the money deposited by him. Kulwant Sahay J. who delivered the judgment, to which James J. agreed, observed :

"A payment under R. 89 must be an unconditional payment with the object of the money being paid to the D.-H. Once a payment is made under O. 21, R. 89 it is clear that the person making the payment cannot be heard to say that the sale was not a valid sale & that the money deposited should not be paid to the D.-H. The J.-D. or the person interested is under no compulsion to make the deposit under O. 21, R. 89. Such a deposit is a voluntary deposit & the person making the deposit cannot in my opinion maintain a suit for a refund of the money deposited by him."

The reason why the deposit was held to be a voluntary deposit will appear more clearly from the following passage :

"If the property sought to be sold does not really belong to the J.-D., then the sale of the property in execution of a money decree will not affect the rightful owner of the property & he can ignore the sale & resist the auction-purchaser in his attempt to take possession of the property after the sale. A person who is the owner of the property is not affected by a sale of the right, title & interest of the J.-D. to whom the property does not belong."

In other words, if a person, who is the true owner of the property & is, therefore, not affected by the sale, makes payment under O. 21, R. 89, he does so as a mere volunteer.

[14] In this Patna case there is no reference to the aforesaid Privy Council decisions. But Kulwant Sahay J. followed the decision in *Narayan* v. *Amgauda*, 45 Bom. 1094 in which those Privy

Council decisions were considered. In that Bombay case, the deft. who had obtained a decree against a third person, got certain property sold and purchased it himself, and the pltf., who claimed to be the owner in possession of the property, got the sale set aside under O. 21, R. 89 by paying into Court the decretal amount & five per cent. of the purchase-money, & on the amount being paid to the D.-H., the pltf. sued to recover it back. It was held that under O. 21, R. 89 the amount must be taken to have been deposited for payment to the D.-H. voluntarily & unconditionally & therefore, no suit could lie to recover it back. Macleod C. J. who delivered the leading judgment observed :

"If the true owner allows the attachment to continue, & the property to be sold as belonging to the J.-D.. he can treat the sale as a nullity & resislt the auction-purchaser. There is no necessity for him to get rid of the sale of what in his opinion does not exist. The attachment of the property itself is a different matter, that may seriously inconvenience him, but if he is the true owner the sale of a non-existent interest in it does not affect him. If he pays in money to get that sale set aside it can only be treated as a voluntary payment."

The said two Privy Council decisions were distinguished on the ground that

"a payment made under protest to get rid of an attachment or to prevent a sale in execution stands on a different footing & that the *ratio decidendi* of these cases cannot be applied to a payment made under R. 89 in support of an application to set aside a sale of the right, title & interest of a third party held in execution of the decree."

But, it is to be observed, in the first of those Privy Council cases, there was no question of payment 'under protest.'

[15] In a later case, *Shankerrao Keshavrao* v. *Vadhilal Mulchand* 57 Bom. 601, the Bombay High Court took the same view, though not without some hesitation. In that case, the plffs. sued to recover back the amount which they had paid under O. 21, R. 89 to set aside a sale held in execution of a mortgage decree under which the pltff's property was not liable. The mortgaged decree was satisfied by the sale of that portion only of the mortgaged property which belonged to the pltffs. The mortgagee as well as the mortgagor were made defts. in the suit. It was held that the pltffs. were entitled to a declaration that the land belonging to them was not liable to be sold in execution of the mortgage decree, but they were not entitled to recover the amount claimed from the mortgagee, because the amount must be taken to have been deposited for payment to him voluntarily & unconditionally. Patkar, J. who delivered the leading judgment, after referring to the said two Privy Council decisions, stated:

"If the owner, in order to save the property from sale pays the amount to the D. H. he can recover back the money so paid under S. 72, Contract Act, on the ground that the payment was involuntary or obtained by coercion.

In the present case, the pltfs. paid the money after the sale under O. 21, R. 89, to set aside the sale on payment to the D. H. of the amount of the decree & five per cent of the sale price to the auction-purchaser. If the matter were *res integra* it might have been possible to hold that the pltfs. are entitled to recover back the amount under S. 72, Contract Act. The action of the pltfs. would not be a voluntary payment of the debts of the other defts. 2 to 6 who were liable, but it was a payment made to save their property & get it back from the mortgagee D. H. who had wrongly allowed it to be sold in execution of the mortgage decree."

His Lordship then quoted the passage, cited above, from 40 I. A. 56 & proceeded as follows:

"The sale of survey No. 159 was a wrongful interference with the pltfs' enjoyment of their own property & the pltfs. were entitled to rid themselves of the unlawful interference by any lawful means without thereby affecting their right to hold deft. 1 liable for what he had caused them to do. After the sale the only lawful means by which the pltfs. could get rid of the unlawful interference of deft. 1 was by payment under O. 21, R. 89, & it was not competent to deft. 1 to prescribe some other way to put a stop to the wrong to which they were subjected."

In conclusion, however, his Lordship followed the decision in the earlier case in 45 Bom. 1094 which was also followed by this Court in 7 Pat. 30. Barlee J. who agreed with him, but delivered a separate judgment, stated, with preference to the Privy Council decision in 40 I. A. 56.

"Their Lordships of the Privy Council held that he was entitled to succeed inasmuch as he had paid under legal coercion & was entitled to rid himself of the unlawful interference of the Bank by any lawful means. Thus a payment, into Court made to remove a trespass can be recovered by suit:

His Lordship then proceeded as follows:

"But according to the view adopted by a Bench of this Court in *Narayan* v. *Amgauda*, 45 Bom. 1094 a payment made under O. 21, R. 89, to have a sale set aside is not a payment to remove a trespass. . . . . *Kanyaya Lal's case* 40 I. A 56 was cited but distinguished & the main ground of distinction was that what had been sold was not the property which *A* claimed but the right, title & interest of *S* in it. There had been no actual trespass & on the assumption that the property belonged to *A* & not to the J. D. *S*, there was no threat of trespass, their Lordships considered against the property of *A* for *A* by paying the debt of *S* was protecting not his own property which was not in danger, but the non-existent right, title & interest of *S* in the property.

[16] Thus, according to the said Patna & Bombay decisions if the payment under O. 21, R. 89 is made by a third person who claims to be the real owner of the property sold, the payment is voluntary, because he is thereby protecting not his own property which is not in danger, but the non-existent right, title & interest of the J. D. in that property.

[17] In the present case, the property given in security by Raghubir Tewari was sold & the pltffs made the payment under O. 21, R. 89 to save that property from sale. It cannot be said that they made the payment to protect any non-existent right, title & interest. It was in obedience to the order of the Court that the pltffs. had to furnish security which was actually given by Raghubir Tewari. According to the finding of the lower appellate Court, the goods which were attached by Volkart Brothers belonged, not to their J. Ds. but to the pltffs. The

pltffs. had to pay the money under the force of execution proceedings. The principle laid down in the said Patna & Bombay decisions, therefore, has no application here. In my opinion, the payment made by the pltffs. can on no account be said to be voluntary.

[18] Mr. R. S. Chatterji further relies on the Full Bench decision in *Krishna Ayyar* v. *Arunachalum Chettiar*, (58 Mad. 972) in which the real question for decision was whether a deposit under O. 21, R. 89 could be accepted subject to any condition or protest. It was held that no condition could be attached to such deposit. The facts of that case are quite distinguishable from those of the present.

[19] Mr. Chatterji next contends that Raghubir having stood surety, the decree could be validly executed against him under S. 145, Civil P. C. & therefore, the pltffs, cannot recover the money paid under O. 21, R. 89 which went to satisfy the decree. But Raghubir stood surety, not for the J. Ds., but for the pltffs., as ordered by the Court in the claim case, and he undertook the responsibility (*sic*) for payment of the decree in case the claim was rejected. The claim, no doubt, was disallowed by order dated 5-9-1941, but that order was subject to the result of the present suit which was in the meantime brought under O. 21, R. 63. Raghubir's property was sold long after the institution of this suit. As pointed out by the Privy Council in *Phul Kumari* v. *Ghanshyam Misra*, 35 I. A. 22, a suit under O. 21, S. 63 (S. 283 of the old Code) is substantially a suit to set aside the summary decision in the claim case. On the finding of the lower appellate Court, there could be no valid attachment of the pltff's goods & consequently Raghubir as surety could not be held liable for payment of the decree.

[20] In this view, it is unnecessary to consider the further question raised by Mr. Chatterji, namely, whether there was a good consideration for Raghubir standing as surety.

[21] Next, as regards the item of Rs. 70-10, Mr. G. P. Das contends that the suit is governed, not by Art. 29, but by Art. 49, Limitation Act. Art. 29 refers to a suit "For compensation for wrongful seizure of moveable property under legal process" for which the period of limitation is one year from the" date of the seizure". Mr. Chatterji relies on the decision in *Madras Steam Navigation Co. Ltd.* v. *Shalimar Works Ltd.*, 42 Cal. 85 in which the pltff. company sued the deft. company for wrongful arrest of a ship belonging to the former. The suit as framed was based on malice or its equivalent, but at the hearing, the plaintiff company proceeded on the footing of the suit being one for mere trespass. It was held that in the absence of proof of malice or its equivalent, a suit for simple trespass would not lie for the arrest of a ship. On the question of limitation raised, it was held that assuming that an action would lie in the absence of proof of malice or its equivalent, the action would be for wrongful seizure under legal process & would be barred by Art. 29, Limitation Act. But the present suit is not for compensation for wrongful seizure of the pltffs' goods, but for recovery of the money which was realised by the D. Hs. by sale of those goods. Mr. G. P. Das contends that the suit will be governed by Art. 49 which refers to suits

"For other specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same."

The period of limitation for such suit is three years from

"When the property is wrongfully taken or injured or when the detainer's possession becomes unlawful."

Mr. Das relies on the case of *Maharaj Bahadur Singh of Baluchar* v. *Achala Bala Devi*, A. I. R. (15) 1928 Cal. 106 in which it was held that a suit for value of crops wrongfully attached, cut & removed by the deft. would be governed by Art. 48 or Art. 49, & not by Art. 29 or Art. 36, Limitation Act. Upon the facts of the present case, I think the proper article applicable will be Art. 49. The cause of action for the suit arose when the attached goods were sold & the proceeds were paid to the D. Hs. The attached goods were sold & Rs. 70-10 out of the proceeds was paid to the D. H. in August 1942, & the suit, so far as it related to the recovery of money, must be deemed to have been instituted on 14-12-1943 when the plaint was amended. The suit was, therefore, well within three years. Consequently the claim for recovery of Rs. 70-10 cannot be said to be barred by limitation.

[22] As regards the last item of Rs. 85, the objection taken by Mr. Chatterji is that this amount having been allowed as costs in the claim case, the pltffs. are not entitled to recover it. He relies on the decisions in *Shama Purshad* v. *Hurro Purshad* 10 M. I. A. 203 and *Dwarka Nath* v. *Mohendra Nath* 16 C. L. J. 437. It was held in these cases that money realised under a decree or judgment cannot be recovered back in a new suit or action, while such decree or judgment under which it was recovered remains in force, as the original decree or judgment, must be taken to be subsisting & valid until it has been reversed or superseded by ulterior proceeding. As already pointed out, a suit under O. 21, R. 63 is substantially a suit to set aside the summary decision in the claim case. Here, the order in the claim case was in effect set aside by the Court of appeal below. Consequently, the said decisions do not stand in the pltff s way of obtaining a refund of Rs. 85. The order in the claim case having in effect been set aside, the D. Hs. are not entitled to retain this sum which they realized on the strength of that order.

[23] It is further contended by Mr. Chatterji that in any case the remedy of the pltffs. with regard to this Rs. 85 is not by a separate suit, but by an application under S. 144, Civ. P. C. But S. 144

by its terms has no application to the present case. Here, the claim for refund of the sum of Rs. 85 is made in the very suit under O. 21, R. 63. If by the decree passed in this suit the order in the claim case is set aside, there is no reason why in this very suit the pltffs. will not be entitled to a refund of the amount.

[24] In the result I would allow the appeal in part, set aside the decision of Shearer J, & decree the suit for recovery of three sums of (1) Rs. 70.10, (2) Rs. 357-8-6 & (3) Rs. 85. The pltffs. will also be entitled to a declaration, as sought for. Both parties will be entitled to their respective costs throughout in proportion to their success, the pltffs. Costs to be recovered from deft. 1.

[25] **Lakshmikanta Jha C. J.**—I agree.

V.S.B. *Appeal allowed partly.*

A. I. R. (38) 1951 Patna 607 *[C. N. 170.]*

LAKSHMIKANTA JHA C. J. & CHATTERJI J.

Parmeshwar Dayal—Appellant v. *The Barh Local Board—Respondent.*

L. P. A. No. 19 of 1949, D/- 13-4-1951, from decision of Shearer J., D/- 23-9-1949.

(a) Bihar & Orissa Local Self-Govt. Act (III [3] of 1885), Ss. 101, 138, 146 & R. 100 —Right of local Board to sue for damages in respect trespass Committee on a property in its possession.

The Local Board is not the agent of the District Board for all purposes. Where land is transferred by the District Board to a Local Board & is in possession of the latter & if any body trespasses on the land or causes damage to any property in possession of the Local Board, it will have right to sue to remove the trespass or to recover damages. The title to the land may vest in the District Board, but as the right to possession vests in the Local Board, it can maintain a suit to recover damages for a trespass. The omission to make any provision for litigation by or against a Local Board in R. 89 made under S. 138 (s) does not & cannot take away any right of suit which belongs to the Local Board under the General law. Sections 101, 138, 146 & R. 100 do not affect the right of the Local Board under the general law to sue for damages in respect of trespass committed on the property in its possession. [Paras 6, 7, 8, 11]

(b) Bihar & Orissa Local Self-Govt. Act (III [3] of 1885), S. 29—Right of Local Board to sue through its Chairman—Civil P. C. (1908), O. 29, R. 1.

The Local Board is a body of individuals which can act collectively. The members cannot do anything except as representing the Board. Though a Local Board is not treated by the Act as a corporate body, there can be no doubt that it is a quasi corporation. Hence The Local Board can sue through its Chairman & all the members of the Board need not be made pltfs. [Para 12]

Anno: C. P. C. O. 29 R. 1 N. 2, 6.

(c) Bihar & Orissa Local Self-Govt. Act (III [3] of 1885), S. 29—Scope of.

Section 29 does not confer a right of suit on the District Board but merely enables the Board to sue & be sued in its corporate name. [Para 10]

B. P. Samiyar—for Appellant ; *Ramanand Sinha—for Respondent.*

Chatterji J.— This is an appeal under Cl. 10, Letters Patent, by the deft. in a suit brought by the Local Board of Barh through its Chairman for declaration of title & recovery of damages in respect of six palm trees said to have been cut & removed by the deft. from pltf's plot No. 313 in village Talipur, Police Station Barh.

[2] Undisputedly plot No. 313 is a road. According to the pltf. the trees in question stood on this plot on the road side. The deft. on the other hand, claimed that the trees stood on his plot, No. 212, which adjoins the road.

[3] Both the Courts below held that trees stood on the pltf's plot No. 313 & were wrongfully cut & removed by the deft. They also overruled the defence that the suit was not maintainable. Accordingly they concurrently decreed the suit with some modification in the amount of damages claimed. On second appeal, Shearer J. upheld their decisions.

[4] The first point raised on behalf of the appellant is that the road on which the trees stood vests in the District Board & not in the Local Board & therefore, the Local Board has no right to sue.

[5] Section 101, Bihar & Orissa Local Self-Govt. Act, 1885, (which will be referred to hereinafter as the Act) provides,

"The Local Govt. or, subject to its control, a District Board, may direct that, within the area subject to the authority of a Local Board, any matter placed under the control & administration of the District Board under this Act shall be wholly or partly transferred to the control & administration of the Local Board, with adequate funds for the purposes of such control & administration.

A Local Board, as the agent of, & subject to the control of, the District board, shall, so far as the funds at its disposal permit, make due provision for all matters transferred to its control & administration under this section.

It shall be the duty of the District Board to enforce the responsibility imposed on a Local Board by this section."

[6] It is not disputed that the road bearing plot No. 313 was transferred by the District Board to the Barn Local Board & is in possession of the latter for a long time. But it is contended, relying on the second paragraph of S. 101, that the Local Board is merely the agent of the District Board. What this para. really means is that in regard to making due provisions within the limits of the funds at its disposal, the Local Board will be acting as the agent of the District Board. It by no means follows that if anybody trespasses on the land or causes damage to any property in possession of the Local Board, it will have no right to sue to remove the trespass or to recover damages. The title to the road in question may vest in the District Board, but the right to possession vests in the Local Board. It is a well recognised principle that a person in possession of land, having no more than a possessory title, can maintain a suit to recover damages for a trespass.

[7] Reliance was also placed on S. 138. Cl. (s) of the Act & rule 89 of the rules made by the Local Govt. under S. 138. This section confers power on the Local Govt. to make rules for any District Board or Local Board or Union Committee for the various purposes enumerated in Cls. (a) to (t) of the section. Cl. (s) refers to

"affording guidance to District Boards when suits or other proceedings are threatended or have been instituted by or against them in Civil Courts".

It is under this Cl. (s) that R. 89 was made. Rule 89 which appears under the heading "Litigation" provides :

"In all cases where a District Board desires to sue or is sued or threatened with a suit in the civil Court the Board shall communicate with the Superintendent & Remembrancer of legal affairs, & shall be guided by the existing rules for the conduct of Civil Suits by Govt."

It is said that neither in S. 138 of the Act nor in the rules made under that section there is any such provision relating to litigation by or against a Local Board &, therefore, it must follow that the Local Board has no right to sue or to be sued. But S. 146 of the Act itself shows that a suit may be brought against a Local Board. It provides : "No suit shall be brought against any District Board, Local Board or Union Committee . . . ." Apparently, the Local Board being subordinate to the District Board, it was not thought necessary to insert in S. 138 any clause, similar to cl. (s) for "affording guidance" to Local Boards. Consequently there is no rule, similar to R. 89 concerning a Local Board. The omission to make any similar provision for litigation by or against a Local Board, does not & cannot take away any right of suit which belongs to the Local Board under the general law.

[8] It is also said that S. 146 of the Act contemplates that a suit may be brought against a Local Board, but the Act nowhere provides that the Local Board may sue. S. 146 provides for a notice of suit similar to that provided in S. 80, Civil P.C. Right of suit existing under the general law need not be provided or affirmed by a statute. Right of suit under the general law must always be presumed to exist unless it is taken away or restricted by any statute. It is, therefore, a fallacy to contend that as there is no provision in the Act or in the rules for a suit by the Local Board, it has no right to sue.

[9] Our attention is drawn to S. 29 of the Act :

"Every District Board shall be a body corporate by the name of the District Board of the district by reference to which it is known & shall have perpetual succession & a common seal, with power to acquire & hold property both movable & immovable & subject to any rules made under this Act, to transfer any such property held by it, & to do all other things necessary for the purpose of the Act, & may sue & be sued in its corporate name."

[10] It is said that this is a specific provision conferring on the District Board the right to sue. This is not the true meaning of the section. The section is intended to enable the District Board to sue & be sued in its corporate name. The right to sue is one thing and the right to sue a corporate name is quite another.

[11] Reliance is further placed on R. 100 of the rules made by the Local Govt. which provides :

"Subject to the limit imposed by the District Board, a Local Board, as the agent of the District Board may, in regard to matters, which may have transferred to its control & administration, enter into any contract or agreement in respect of a sum, or involving the value, not exceeding Rs. 5000/-

It is said that this rule also clearly shows that the Local Board is the agent of the District Board. But it does not carry us any further than S. 101 of the Act itself. In so far as power to contract is concerned, the Local Board is, of course, to act as the agent of the District Board. That the Local Board is not an agent of the District Board for all purposes is quite clear from the fact that under S. 139 of the Act the Local Board, as much as the District Board, is authorised to make by-laws which shall have the force of law. S. 141 empowers the local Board to start prosecution for breach of any by-law made by it Neither S. 101 of the Act nor the aforesaid R. 100 affects in any way the right of the Local Board under the general law to sue for damages in respect of trespass committed on the property in its possession.

[12] The next point argued is that the Local Board is not a corporation &, therefore, it could not sue through its Chairman, but all the members constituting the Board should have sued. It is said that S. 29 of the Act makes the District Board a corporate body, but there is no such provision relating to the Local Board. It cannot be disputed that the Local Board is a body of individuals which can act collectively. It cannot possibly be suggested that the members can do any thing except as representing the Board. Though a Local Board is not treated by the Act as a corporate body, there can be no doubt that it is a quasi-corporation. A quasi-corporation is well recognised in law. That a suit can be brought against a Local Board is expressly provided in S. 146 of the Act. If, therefore, a suit may be brought against the Local Board, there is no reason why, when the suit is by the Local Board, all its members, & not the Board, must sue.

[13] The contentions raised on behalf of the appellant fail & the appeal must be dismissed with costs.

[14] **Lakshmikanta Jha C. J.**—I agree.

D.H. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 608 *[C. N. 171.]*

REUBEN J.

Braja Kewat & another — Appellants v. *Madanlal Agarwalla & others—Respondents.*

A. F. O. O. No. 433 of 1950, D/- 20-4-1951.

(a) Court-fees Act (1870), Sch. I, Art. 1, Sch. II, Art. 11, 17 (iii) (iv) — Appeal to High Court against award under S. 18, Land Acquisition Act.

In a reference under S. 18, Land Acquisition Act, the Additional Dist. Judge accepted as correct the amount awarded by the Collector & rejected the claim of one of the claimants to the compensation. The latter filed an appeal under S. 54, Land Acquisition Act. He merely raised the question of the title.

Held that (1) Sch. II, Art. 11 was not applicable to the appeal as the award given by the Additional Dist. J. was to be deemed to be a decree under S. 26 (2), Land Acquisition Act. [Para 2]

(2) Sch. II, Art. 17 (iii) or (iv) also did not apply as the proceeding in which the award was obtained could not be described as a suit. Provisions of S. 26 (2), Land Acquisition Act, did not make the proceeding a suit. [Para 3]

(3) As there was no particular provision that applied the residuary provision Sch. I, Art. 1 applied. [Para 4]

(4) The value of the appeal was the entire amount of compensation awarded as the appellant was trying to set aside the award according to which he was entitled to nothing. [Para 5]

Anno. Court-fees Act, Sch. I, Art. 1, N. 2, 21; Sch. II, Art. 11, N. 1, 14; Sch. II, Art. 17 (iii) N. 1; Sch. II, Art. 17 (iv) N. 1.

(b) Court-fees Act (1870), Sch. I, Art. 1 — Applicability to H. Ct.

The word 'those' occurring at the end of the entry in Col. 1 refers not to Ct. but to the documents mentioned in S. 3, Art. 1 applies to H. Ct. A. I. R. (12) 1925 Pat. 392 (F. B.) *Ref.* [Para 4]

Anno. Court-fees Act, Sch. I, Art. 1, N. 2.

(c) Court-fees Act (1870), S. 8 —Appeal concerning question of title.

S. 8 applies not only to appeals in which the correctness of the amount of compensation awarded is challenged but also to appeals which concern questions of title, the section being applied on the basis that the appellant claims a certain amount of compensation as representing the value of his interest in the acquired property & he is given nothing or a smaller amount by the decision which he is challenging. A.I.R. (18) 1931 Lah. 343, A. I. R. (19) 1932 Cal. 346, *Rel. on.* [Para 5]

Anno. Court-fees Act, S. 8, N. 5.

Lala Atul Chandra —for Appellants; Govt. Advocate —for the State (in Court-fee matter).

Cases referred to.

('12) 39 Cal. 906 : (14 I. C. 724). [Pr. 5]
('32) 59 Cal. 528 (A. I. R. (19) 1932 Cal. 346). [Pr. 5]
('31) A. I. R. (18) 1931 Lah. 343: (134 I. C. 127). [Pr. 5]
('98) 21 Mad. 269. [Pr. 5]
('25) 4 Pat. 336 : (A. I. R. (12) 1925 Pat. 392 F. B.). [Prs. 4, 5]

Order.—This is a reference under S. 5, Court-fees Act, & relates to an appeal against an award of the Additional Dist. J. at Purulia in a reference under S. 18, Land Acquisition Act, 1894. The compensation awarded by the Collector is Rs. 11, 619-3-0. The reference related to (1) the correctness of the compensation assessed & (2) a dispute between three sets of persons as to which of them is entitled to the compensation. The Additional Dist. J. has accepted as correct the amount awarded & has rejected the claim of the appellants to the compensation. The appeal has been filed under S. 54, Land Acquisition Act. The appellants merely raise the question of title &, treating the appeal as a miscellaneous appeal, have paid court-fee under Art. 11 of Sch. II, Court-fees Act. On behalf of the State, it is contended that an *ad valorem* court-fee on the total amount of the compensation awarded is payable under Art. 1 of Sch. I, Court-fees Act.

[2] Article 11 of Sch. II, Court-fees Act, relates to "Memo. of appeal when the appeal is not from a decree or an order having the force of a decree, etc." Under S. 26, sub-s. (2), Land Acquisition Act, every award under Part. III of the Act, under which part the award in the present case has been made, shall be deemed to be a decree. In view of this provision, I do not think that this Article is applicable.

[3] It is contended for the appellants that, if Art. 11 of Sch. II does not apply the proper provision is either Cl. (iii) or Cl. (iv) of Art. 17 of Sch. II :

"Plaint or memo. of appeal in each of the following suits.

* * *

iii. to obtain a declaratory decree where no consequential relief is prayed;

iv. to set aside an award."

The weakness in this contention is that the proceeding in which the award was obtained cannot be described as a suit. The word "suit" is a technical term with a well-understood legal significance. Section 26, Land Acquisition Act, provides that the award made in the proceeding instituted under S. 18 shall be deemed to be a decree, but this does not make the proceeding a suit.

[4] Section 4, Court-fees Act, prescribes that no document of any of the kinds specified in the first or second schedule to the Act as chargeable with fees shall be filed in or received by any High Court in any case coming before such Court in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence or in the exercise of its jurisdiction as a Court of reference or revision unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document. As there is in the schedule no particular provision that applies to the present case, we have to fall back on the residuary Article, Art. No. 1 of Sch. I, which prescribes an *ad valorem* court-fee. Some doubt as to the applicability of this Article to appeals in the High Court has been caused by the last few words which occur in Col 1; "presented to any civil or revenue Court except those mentioned in section". This, however, is only due to unskilful drafting (vide *Krishna Mohan Sinha* v. *Raghunandan Pande*, 4 Pat. 336), & it is generally accepted that the Article applies to High Courts, although High Courts are among the Courts mentioned in S. 3. I would suggest that the word "those" occurring at the end of the entry in Col. 1 refers not to Courts but to the documents mentioned in S. 3.

[5] As regards the manner in which the valuation of the appeal will be computed for the purposes of applying Art. 1 of Sch. I, a special provision is contained in S. 8, Court-fees Act. This section, has been held to apply not only to appeals in which the correctness of the amount of compensation awarded is challenged but also to appeals which concern questions of title, the section being applied on the basis that the appellant claims a certain amount of compensation as representing the value of his interest in the acquired property & he is given nothing or a smaller amount by the decision which he is challenging: *Muhammad Suleman* v. *Ghamandi Lal*, A. I. R. (18) 1931 Lah. 343, & *Anandalal Chakravarty* v. *Karnani Industrial Bank, Ltd.*, 59 Cal. 528. The section, however, occurs in Chap. III, Court-

fees Act, which relates to "Fees in other Courts & in public offices", in consequence of which Mullick, J. observed in *Krishna Mohan Sinha's case*, that the section does not apply to the appeals filed in the High Court. The section has been applied to appeals in the High Court as long ago *Kasturi Chetti* v. *Deputy Collector, Bellary*, (21 Mad. 269) & *Trinayani Dasi* v. *Krishna Lal*, (39 Cal. 906) & it was so applied by Rankin, C. J. in *Anandalal Chakravarti's case*, observing that the heading of the chapter in which the section occurs should not be allowed to cut down the plain meaning of the section. It is unnecessary, to consider the applicability of the section in the present case for it is plain that the result would be the same if the value of the appeal is computed according to the natural meaning of the term. According to the claim of the appellants, they are entitled to the entire amount of compensation awarded. According to the decision, which they challenge & are trying to get set aside, they are entitled to nothing. Hence, the value of the appeal is the entire amount of the compensation awarded.

[6] For the reasons which I have given, I consider the appellants are liable to pay *ad valorem* court-fee under Art. 1 of Sch. I on Rs. 11, 619-3-0. The reference is answered accordingly.

D.H. *Answer accordingly.*

A. I. R. (38) 1951 Patna 610 *[C. N. 172.]*

LAKSHMIKANTA JHA C. J. & CHATTERJI J.

Darsan Raut — Appellant v. *Chandraman Raut and others — Respondents.*

L. P. A. No. 11 of 1949, D/-20-3-1951, from judgment of Shearer J., D/-27-7-1949.

Bihar & Orissa Public Demands Recovery Act (IV [4] of 1914), S. 45—Irregularity in service of notice—Suit to set aside sale—Maintainability.

The words "notice has not been served" in S. 45 cannot be understood to mean "notice has not been duly served or served according to law." There is some distinction between "irregular service" & "non-service."

Where, therefore, the certificate-debtor not being found, the service peon instead of serving the notice on any adult male member of his family as required by rules, hung the notice at his house, the service, though not in conformity with the prescribed rules, cannot be said to be no service at all; consequently a suit to set aside sale under S. 45 will not be maintainable. [Paras 9, 11]

B. C. De & J. C. Sanyal—for Appellant; *Prem Lall—for Respondents.*

Chatterji J. — This is an appeal by the pltf. under Cl. 10, Letters Patent, from the judgment of Shearer J. who, reversing the concurrent decisions of the Courts below, dismissed the pltf.'s suit.

[2] The suit was for setting aside a certificate sale & for confirmation of possession or, in the alternative, recovery of possession of the suit land. The suit was brought on the allegation that there was fraudulent suppression of notice under S. 7, Public Demands Recovery Act (IV [4] of 1914) & also of other processes under the Act.

[3] The defence, in substance, was that the notice & processes were duly served & that the suit was barred under S. 46, Public Demands Recovery Act.

[4] Both the Courts below held that there was no fraud & therefore, the suit could not lie under S. 46 of which the relevant portion is as follows:

"Provided that a suit may be brought in a civil Court in respect of any such question upon the ground of fraud."

The Courts, however, held that the notice required by S. 7 was not served & therefore, the suit was maintainable under S. 45 of the Act. The material portion of S. 45 runs as follows:

"Notwithstanding anything hereinbefore contained, a sale of immovable property in execution of a certificate shall not be held to be void on the ground that the notice required by S. 7 has not been served; but a suit may be brought in a civil Court to recover possession of such property or to set aside such sale on the ground that such notice has not been served:

Provided that no such suit shall be entertained:

(a) if instituted more than one year from the date on which possession of the property was delivered to the purchaser."

Both the Courts below found that the suit was brought within one year from the date on which possession was delivered to the auction purchaser. They, therefore, concurrently decreed the suit.

[5] On second appeal, Shearer J. was of opinion that S. 45 of the Act could not apply unless it was found that the notice under S. 7 was not served at all. He considered that the finding of the lower appellate Court was not that the notice under S. 7 was not served at all, but that there was an irregularity in the service of the notice. In this view, he held that the civil Court had no jurisdiction to set aside the sale.

[6] Mr. B. C. De on behalf of the appellant contends that Shearer J. was entirely wrong in assuming that the lower appellate Court merely found that there was an irregularity in the service of notice. Mr. De relies on the following passage in the judgment of the lower appellate Court:

"That being so, there was no service of the notice on the pltf. under S. 7, Public Demands Recovery Act."

This apparently means that there was no service at all. But this finding must be read with the actual discussion on the point. The discussion begins with these words:

"I would, therefore, confine myself to the consideration whether the notice under S. 7, Public Demands Recovery Act, was duly served on the pltf. appellant according to law."

The Court then proceeds:

"I take up the first point about service of the notice. Ex. B is the notice under S. 7, Public Demands Recovery Act. The service report of the peon shows that he could not meet Darshan Raut the pltf. & on enquiry he learnt that he had gone to Sitamarhi fair. Hence he hung up the notice at his house facing east.

I have now to see as to how far such a service can be deemed to be valid in law. R. 4, Sch. II which has a legal force says that where the certificate-debtor cannot be found, & has no agent empowered to accept service of the notice on his behalf, service may be made on any adult member of the family of the certificate-debtor who is residing with him. The contesting deft. 2 who figured

as D. W. 5 in this suit admits in his deposition that Darshan Raut got four sons, out of whom the eldest is aged 28 years & the second son is aged 26 years. The service report of the peon does not show that he made any attempt to find out any adult member of the family for handing over the notice. There is also no whisper in the evidence adduced before the learned Munsif that any attempt was made by the serving peon to find out any adult member of the pltf.'s family."

Next follows the passage relied upon by Mr. De which has been already quoted. Reading this whole discussion, it is apparent that the appellate Court proceeded on the assumption that the notice was served in the manner stated in the peon's report, but held that such service could not be deemed to be valid in law. In other words, there was an irregularity in the service of the notice, & in the opinion of the appellate Court, irregular service amounted to non-service.

[7] Mr. De's contention is that if the notice was not served, as required by law, there was no service at all. S. 7 of the Act provides:

"Where a certificate has been filed in the office of a certificate officer under S. 4 or S. 6, he shall cause it to be served upon the certificate-debtor, in the prescribed manner, a notice in the prescribed form & a copy of the certificate."

The rules which were made by the Board under S. 48 of the Act for service of notice are to be found in Sch, II. R. 3 in this schedule provides:

"Where it is practicable, service shall be made on the certificate-debtor in person unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient."

R. 4 then provides:

"Where the certificate debtor cannot be found, & has no agent empowered to accept service of the notice on his behalf, service may be made on any adult male member of the family of the certificate-debtor who is residing with him."

R. 5 provides for acknowledgment of service to be taken by the serving officer from the person to whom the notice is tendered. R. 6 next provides:

"Where the certificate debtor or his agent, or such other person aforesaid, refuses to sign the acknowledgment, or where the serving officer, after using all due & reasonable diligence, cannot find the debtor, certificate & there is no agent empowered to accept service of the notice on his behalf, nor any other person on whom service can be made, the serving officer shall—

(a) affix a copy of the notice on the outer door or some other conspicuous part of the house in which the certificate debtor ordinarily resides or carries on business or personally works for gain; or

(b) if there be land affected by the notice, affix a copy of the notice on some conspicuous place in the office of the Certificate Officer & also on some conspicuous part of the land, & shall then return the original to the Certificate officer by whom it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, & the name & address of the person (if any) by whom the house or land was identified & in whose presence the copy was affixed."

Thus, Rr. 3, 4, & 6 prescribe, in order of precedence, three modes of service, of which the second (R. 4) is to be adopted, failing the first (R. 3), & the third (R. 6) to be adopted, failing the first & second.

[8] In the present case, according to the peon's report, service was effected under R. 6. The lower appellate Court held that the service was not valid in law, because the peon did not make any attempt to serve the notice on the adult male members under R. 4, & consequently, such service must be treated as if there was no service at all. But if the notice was actually served under R. 6, can it be said that there was no service at all? Take a case where the certificate-debtor has an agent empowered to accept service of the notice on his behalf (R. 3), but the peon without going to the agent serves the notice on an adult son of the debtor at his house (R. 4). Can it be reasonably said that this was no service at all? In my opinion, certainly not. All that may be said is that the service was irregular. Is there any difference in principle between such hypothetical case & the present?

[9] To hold that a notice which has been actually served, though not in strict conformity with the prescribed rules, cannot be said to have been served at all will be a contradiction in terms. To understand the true import of the words "notice has not been served" in S. 45, it will be pertinent to compare the wording of S. 9 (1) of the same Act which also refers to notice under S. 7. The relevant portion of S. 9 (1) is as follows:

"The certificate debtor may, within thirty days from the service of the notice required by S. 7, or, where the notice has not been duly served, then within thirty days from the execution of any process for enforcing the certificate, present to the certificate officer. . . . . a petition. . . . . denying his liability, in whole or in part."

It will be noticed that here the word "duly" is used before "served." If service, not valid in law, is no service at all, the word "duly" would seem meaningless. Such interpretation is not justified in law. The use of the word "duly" obviously suggests that in framing this Act, the Legislature drew a clear distinction between "served" & "duly served." Where, therefore, the word "served" only is used, we cannot add "duly" before it. Consequently, the words "notice has not been served" in S. 45 cannot be understood to mean "notice has not been duly served or served according to law." There is some distinction between "irregular service" & "non-service," which cannot be ignored. Where the Legislature use the words "not duly served," it is a case of "irregular service" & where they use the words "not served," it is a case of "non-service."

[10] Mr. De draws our attention to S. 29 (1) of the Act of which the relevant portion is as follows:

"Where immovable property has been sold. . . . . the certificate debtor.....may.....apply.....to set aside the sale on the ground that notice was not served under S. 7 or on the ground of a material irregularity in the certificate proceeding or in publishing or conducting the sale."

It is argued that "the ground that notice was not served under S. 7" is not qualified by any words connoting irregularity in the service, though the words "material irregularity" are used in the subsequent portion of the section, suggest that

the word "served" must be understood to mean "served according to law." In other words, "served" must be read as "duly served." But such construction, if accepted, would, in effect, completely destroy the distinction drawn in the Act itself between "served" & "duly served."

[11] I am of opinion that if the notice was actually served, as stated in the peon's service report, the sale cannot be set aside under S. 45.

[12] The trial Court, however, appears to have held, upon a consideration of the evidence, that the peon did not actually go to the spot & his service report was not true. If this finding be correct, certainly there was no service at all. The appellate Court, without deciding the point, seems to have assumed that the péon's service report was correct. Apparently, the appellate Court did not consider it necessary to go into the question because, in its opinion, service, if effected in the manner stated in the peon's report, was not valid in law & consequently it amounted to non-service. But from what I have said above, this view cannot be sustained.

[13] In my opinion, the case should have been sent back to the lower appellate Court for a finding as to whether the notice under S. 7 was actually served, as reported by the peon, particularly when the trial Court's finding on the point was to the contrary.

[14] I would, therefore, allow the appeal, set aside the decision of Shearer J. as well as of the lower appellate Court & remand the case to the latter Court for disposal according to law in the light of the observations made above. In the circumstances, there will be no order for costs.

[15] It is to be observed that the trial Court decreed the suit in these terms: "That the suit is decreed on contest against deft. 2 & ex parte against the other defts." It was not made clear whether the pltf. was entitled to confirmation of possession, or, recovery of possession, as prayed for by him in the alternative. In case the lower appellate Court eventually confirms the trial Court's decree, the actual reliefs to which the pltf. is entitled shall be clearly stated.

[16] **Lakshmikanta Jha C. J.**—I agree.

G.M.J. *Appeal allowed.*

A. I. R. (38) 1951 Patna 612 *[C. N. 173.]*

LAKSHMIKANTA JHA C. J. & CHATTERJI J.

Netlal Sah—Petnr. v. *Ucheshwar Jha & others —Opposite Party.*

Supreme Court Appeal No. 83 of 1949, D/- 28-2-1951.

(a) Civil P. C. (1908), S. 110 — Appeal for mesne profits—Value of subject-matter.

In determining the value of the subject-matter in dispute on appeal, the Ct. has to take into account mesne profits not only for the period antecedent to the suit, but also for subsequent period up to the date of the decree of the H. C. [Para 6]

Anno. C. P. C., S. 110 N. 8 Pt. 2.

(b) Const. of India. Arts. 133, 135 — Appeal entertained by Supreme Court under Art. 135 — Art. 133 does not apply.

Where the S. C. exercises the jurisdiction & powers exercisable by the Federal Court under Art. 135 of the Constitution, the requirements of S. 110, Civil P. C. have to be fulfilled as to the value or amount & not the requirements of Art. 133 of the Constitution. The Article cannot apply where the right to appeal accrued before the Constitution came into force. S. C. A. No. 3 of 1949 (Pat.), *Followed.* [Para 7]

S. K. Sarkar — for Petitioner; S. C. Misra — for Opposite Party.

Case referred to :—

('50) S. C. Appeal No. 3 of 1949, D/- 4-4-1950 (Pat.). [Pr. 7]

Order. — This is an application by the pltf. for leave to appeal to the Supreme Court under S. 109, Civil P. C. from a judgment & decree of an appellate bench of this Court modifying the decree of the trial Court.

[2] The suit was for redemption of a usufructuary mortgage for a sum of Rs. 7,500. There was also a claim for mesne profits, the claim for the period antecedent to the institution of the suit being tentatively valued at a sum of Rs. 250.

[3] The pltf.'s case is that he made a deposit of the mortgage money under S. 83, T. P. Act, & although a written notice of the deposit was duly served on the mortgagees, they did not give up possession &, therefore, their possession of the mortgaged property, after the service of notice, was wrongful.

[4] The trial Court decreed the suit with mesne profits, holding that the deposit was sufficient & the possession of the mortgagees from the date of the service of notice under S. 83 was wrongful, & ordered mesne profits to be ascertained by the appointment of a Commissioner. The mortgagees came up in appeal to this Court & a division bench reversed the decree of the trial Court with regard to mesne profits & allowed a lump sum of Rs. 1000 in lieu thereof.

[5] The judgment of this Court being one of reversal, only two conditions under S. 110, para. 1, have got to be fulfilled, namely, (1) the subject-matter of the suit in the Court of first instance is Rs. 10,000 or upwards, & (2) the amount or value of the subject-matter in dispute on appeal is the same sum or upwards. It is contended by Mr. Misra that the subject-matter of the suit in the Court of first instance was Rs. 7,500, the amount secured under the mortgage, & a further sum of Rs. 250 tentatively claimed as mesne profits; therefore, the first condition of S. 110, para. 1, Civil P. C. has not been fulfilled. As Rs. 250 was claimed only tentatively as mesne profits, this Court, by its order dated 25-9-1950, directed the learned Subordinate Judge to hold an enquiry for the ascertainment of the actual mesne profits & give a rough estimate thereof for the purpose of valuing the suit & the appeal to the Supreme Court. The learned Subordinate Judge, after enquiry, has held that, as there was a scramble for possession in 1351 Fasli, the land in suit was not cultivated in that year &, therefore, the question of assessment of mesne profits for that year could

not arise. But he held that Rs. 6,000 per year may be taken as a fair estimate of mesne profits per year for the years 1352 & 1353 Fasli.

[6] It is conceded that 1351 & 1352 Fasli would be the period antecedent to the institution of the suit. Therefore, Rs. 6,000, as found by the learned Subordinate Judge to be the amount of mesne profits payable for the year 1352 Fasli, if added to the mortgage money, namely, Rs. 7,500 will make the value of the subject-matter of the suit in the Court of first instance upwards of Rs. 10,000 and thus the first condition of the first para. of S. 110 is fulfilled. Mr. Misra further argued that, although the first condition of S. 110, para. 1, is fulfilled, the second condition is not satisfied because the value of the subject-matter in dispute on appeal is only Rs. 6,000, the amount which has been ascertained to be the mesne profits for the year 1352 Fasli. We think there is no substance in this argument. In determining the value of the subject-matter in dispute on appeal, we have to take into account mesne profits not only for the period antecedent to the suit but also for subsequent period up to the date of the decree of the High Court. This, will, in any case, include the mesne profits for 1352 & 1353 Fasli, even leaving out 1351. According to the report of the learned Subordinate Judge, the mesne profits for 1352 & 1353 Fasli may be taken to be Rs. 6,000 per year. For these two years only the amount will be Rs. 12,000. Therefore, the amount or value of the subject-matter in dispute on appeal is more than Rs. 10,000. Thus both the conditions which are required by para. 1 of S. 110 have been fulfilled.

[7] Mr. Misra has lastly urged that the case is governed by the provisions of Art. 133 (1), & therefore, the amount or value of the subject-matter of dispute in the Court of first instance as well as on appeal ought to be not less than Rs. 20,000. An examination of the provisions of Arts. 133 & 135 shows that there is no substance in this contention. The decree sought to be appealed from was passed on 31-8 1949, & the application for leave to appeal was filed on 30-11 1949, when the provisions of Ss. 109 & 110, Civil P. C. were in force. As soon as the judgment was pronounced & the decree made, the petitioner, as an aggrieved party, had a right to prefer a direct appeal to His Majesty in Council under the provisions of Ss. 109 & 110, Civil P. C. But after the passing of the Indian Independence Act & before the commencement of the Constitution, the jurisdiction of the Federal Court was enlarged & the appellate jurisdiction of the Privy Council in Civil Cases was transferred to the Federal Court by the Federal Court (Enlargement of Jurisdiction) Act (Act I of 1948), which came into force on the first day of February 1948. Under this Act, therefore, appeals in all civil cases from which a direct appeal could have been carried to His Majesty in Council either with or without special leave could lie to the Federal Court under the provisions of Civil P. C. 1908. The present application was filed for leave to appeal to the Federal Court. Now under the Constitution, jurisdiction & powers which were exercisable by the Federal Court immediately before the commencement of the Constitution have vested in the Supreme Court under Art. 135 & it is by virtue of this Article that the jurisdiction in respect of the present case now vests in the Supreme Court. And if jurisdiction & powers are exercisable by the Supreme Court under Art. 135, the requirements of S. 110, Civil P. C. have to be fulfilled as to the value or amount & not the requirements of Art. 133 of the Constitution. This latter Article cannot apply where the right to appeal accrued before the Constitution came into force. A similar point was considered in an unreported case of this Court, *Ramkumar Das* v. *Jagdish Chandra*, S. C. A. No. 3 of 1949, D/- 4-4-1950 & it was held that Art. 133 has no application in such a case.

[8] We, therefore, direct that a certificate be issued that as regards amount of value & nature the case fulfils the requirements of S. 110, Civil P. C. The petitioner is entitled to costs; hearing fee five gold mohurs.

D.R.R. *Application allowed.*

A. I. R. (38) 1951 Patna 613 *[C. N. 174.]*

REUBEN & NARAYAN JJ.

Narayan Prasad Sukul—Appellant v. *Rajkishore Mishra & others—Respondents.*

A. F. A. D. No. 132 of 1948, D/- 13-4-1951.

(a) Registration Act (1908), Ss. 2 (7), 17 (1) (d) & 49 —Agreement to grant lease for 10 years contingent on premises being made fit for certain purpose—Creation of present interest for 9 months—Registration.

An agreement to lease, as distinguished from an agreement to grant a lease on a future date, must effect an actual demise & create a present & immediate interest in the land so as to come within the definition of a lease in S. 2 (7), Registration Act. A. I. R. (6) 1919 P. C. 79, *Rel. on.* [Para 4]

The criterion to determine whether an agreement to lease creates a present demise is the intention of the parties. *Case law Referred.* [Para 4]

By an unregistered agreement dated 24-3-1940 *A* settled ('bandobasta Kariteohi') a cinema house with *B* with a right to enter therein & make it suitable for the purposes of cinema performances. On completing the repairs within a period of 9 months & on obtaining the necessary certificate of soundness *A* was to grant a lease of the house to *B* on certain rent for 10 years. *A* bound himself not to settle the property with anybody else within the said period of 9 months. In case *B* failed to make the necessary repairs within 9 months *B* was given the option to surrender the house without claiming any money spent, but in case he continued to make the repairs after the said period *A* was bound to execute the lease deed but was not liable to pay anything for the expenses of repairs.

Held that the agreement even if regarded as a lease within S. 2 (7) would not come within S. 17 (1) (d), Registration Act as *B's* right to remain on the land was confined to a period of 9 months. Hence it did not require registration. Even if it required registration it was admis-

sible in evidence under S. 49 for collateral purpose of explaining the nature of possession. [Para 5]

Anno. Reg. Act, S. 2 (7), N. 5; S. 17, N. 28 Pt. 3, N. 76; S. 49, N. 14, and 25.

(b) T. P. Act (1882), Ss. 52, 53A—Rights existing before suit not affected by S. 52.

Under S. 52, T. P. Act, protection is given only to the rights of the parties as they existed when the suit was commenced & find embodiment in the decree in the suit. Nothing done by a party during the pendency of the suit can affect the rights of any other party under the decree, but if a right exists in a stranger from before in relation to the property it will not be affected merely because the title to the property in pursuance of that right was perfected during the pendency of the suit. [Para 6]

Under an unregistered agreement *A* agreed to grant a lease to *B* of a cinema theatre at a future date provided *B* made the necessary repairs to make it fit for purpose of cinema shows within a period of 9 months. *B* entered into possession under the agreement to make the repairs. *C* who had notice of this contract took a lease from *A* of the theatre within the period of 9 months mentioned in the agreement between *A* & *B*. On A's failure to give possession *C* sued *A* for specific performance & obtained a decree. During the pendency of this suit, *A* executed a registered lease in favour of *B* in pursuance of the prior agreement. *B* then brought a suit against *C* for injunction restraining him from executing the decree against him.

Held that *B's* rights under the agreement remained unaffected by the subsequent execution of lease in *C's* favour. Hence the lease executed in *B's* favour in pursuance of the agreement was not hit by the doctrine of lis pendens. [Para 8a]

Held further that if *B* had been impleaded in *C's* suit for specific performance *B* could have been able to interpose the shield of S. 53-A, T. P. Act. The fact that while standing in this position *B* took a lease from *A* could not make his position worse than it was. *B* having retained the possession of the property was entitled to rely on it in resisting the execution of decree obtained by C. [Para 10]

Anno. T. P. Act, S. 52, N. 7; S. 53A, N. 4, 14 and 14a.

S. N. Dutta, S. C. Ghosh & Murtaza Fazl Ali—for Appellant; Mahabir Prasad, S. C. Mazumdar & Nakuleshwar Prasad—for Respondents.

Cases referred to:—

('20) 47 Cal. 485: (A. I. R. (6) 1919 P. C. 79). [Pr. 4.]
('22) 45 All. 220: (A. I. R. (10) 1923 All. 112). [Pr. 4.]
('26) 48 All. 221: (A. I. R. (13) 1926 All. 180). [Pr. 7.]
('29) 118 I. C. 43: (A. I. R. (16) 1929 All. 440). [Pr. 7.]
('31) 134 I. C. 1: (A. I. R. (18) 1931 All 466. F. B). [Pr. 8.]
('86) 10 Bom. 101. [Pr. 4.]
('41) I. L. R. (1941) Bom. 529: (A. I. R. (28) 1941 Bom. 346). [Pr. 4.]
('10) 37 Cal. 808: (6 I. C. 443). [Pr. 4.]
('21) 49 Cal. 507: (A. I. R. (9) 1922 Cal. 436). [Pr. 4.]
('21) 25 C. W. N. 550: (A. I. R. (8) 1921 Cal. 127). [Pr. 4.]
('25) 52 Cal. 695: (A. I. R (12) 1925 Cal. 1087). [Pr. 4.]
('26) 96 I. C. 450: (27 P. L. R. 439.) [Pr. 7.]
('30) 123 I. C. 124: (A. I. R. (16) 1929 Lah. 589). [Pr. 7.]
('32) 135 I. C. 48: (A. I. R, (18) 1931 Lah. 435). [Pr. 7.]
('32) 139 I. C. 309: (A. I. R. (19) 1932 Mad. 566). [Pr. 8.]
('34) A. I. R. (21) 1934 Mad. 585: (152 I. C. 612). [Pr. 8.]
('16) 1 Pat. L, J. 455: (A. I. R. (3) 1916 Pat. 212). [Pr. 8.]
('30) A. I. R. (17) 1930 Pat 530: (122 I. C. 158). [Pr. 4.]
(1810) 104 E. R. 66: (12 East 167). [Pr. 4.]

Reuben J.—This is an appeal by deft. 1 against a decision of the Additional Dist. J. of Manbhum-Singhbhum, affirming a decision of the Subordinate Judge of Purulia restraining deft. 1 from executing against the pltfs. respondents a decree obtained by him in Title Suit No. 395 of 1940 in the Court of the Additional Munsif, Purulia.

[2] The dispute relates to a building in the town of Purulia known as Pratap Natya Mandir & the premises appertaining thereto. This building is intended for the performance of cinematograph shows & admittedly belonged to Akhoy Kumar Sen (*pro forma* deft. 3), by whom it was transferred to its present owner Shreemati Radharani Dassi (*pro forma* deft. 2). The facts as found are that the cinema hall was formerly let to the proprietors of the Shankar Talkies, who held it for some years but relinquished it on failing to obtain from the Executive Engineer, Hazaribagh Division, a certificate of soundness necessary under the law for the holding of cinematograph shows therein. It was then taken by one Nagendra Nath Dutta, who was unable to make it fit for the purpose & surrendered it in March 1940. Pltf. 1, Raj Kishore Misra, then entered into possession under an agreement entered into on 24-3-1940 with deft. 2, which is in the following terms:

"I, the first party settle (the said theatre house) with you, the second party, on the following terms: That from to-day you shall, at your own cost, go on doing all works of repairs to the said house & of reconstructing the roof, walls, etc. in accordance with the Govt. rules regarding Cinema Houses. After reconstructing the house you shall apply to the Govt. authority concerned for a soundness certificate; & then I shall lease out (the house) to you for 10 (ten) years on a rent of Rs. 75 per month. You shall be in possession of the said Cinema House on monthly rent as a tenant. The rent shall in no case be less than Rs. 75 per month.

That within nine months from to-day you shall have to make the house fit for Cinema Show after completing all works (of construction). I shall not be competent to settle (the said house) with anybody else within the specified time. Should I do so, the same shall be null & void. On your demand for a pucca deed of lease after making the house fit for Cinema Show (House) within nine months, should I refuse to execute the deed, you shall be competent, by virtue of this agreement, to get the requisite deed executed with the help of the Court & you shall pay rent at the rate of Rs. 75 per month. You shall be competent to deduct from the rent (payable by you) the amount that you shall spend from to-day in making the Cinema House fit & shall go on paying rent when your dues shall be satisfied.

Should you surrender the house on your being unable to reconstruct the same making it fit for obtaining the Soundness Certificate within nine months, you shall not be entitled to claim any amount of money from me. Should you not surrender the house on the expiry of the aforesaid time, & should you continue to make the house fit for a Cinema Show & spend money (on that account) & after completing the work should demand a pucca deed of lease from me, I shall be bound (to?) execute a deed of lease provided that you shall not be entitled to claim or deduct from the rent (payable by you) the amount that you shall spend from to-day for making the Cinema House fit for Cinema Show on the ground of compensating my loss due to your taking a longer time than the time specified in the agreement. Should I, the first party, make any breach of agreement within the time specified in the agreement, I shall be liable for the full amount of your loss caused thereby."

He made the necessary repairs & obtained a certificate of fitness on 12-11-1941 & obtained a registered lease from Smt. Radharani Dassi in favour of himself, pltf. 2 & one Rajendra Prasad Misra, who has since transferred his interest to pltf. 3, by which lease the Pratap Natya Mandir

was settled with these persons for a period of ten years on a monthly rental of Rs. 75 with an option of renewing the lease for another ten years on the same terms. The lease was executed on 3-11-1941 & was registered on 15-11-1941.

[3] The suit was brought to resist an attempt by deft. 1 to take possession of the cinema hall in execution of a decree for specific performance of an agreement to lease this property obtained by him against deft. 2 in Title Suit No. 395 of of 1940 in the Court of the Additional Munsif of Purulia. That suit originated as a suit for the enforcement of a registered lease by deft. 2 in favour of deft. 1 dated 5 4-1940 on the allegation that, in spite of executing the lease in his favour, she did not give him possession. In Second Appeal No. 66 of 1943 disposed of on 6 5-1943, it was pointed out by their Lordships that the document relied on was not a valid lease, having been executed by deft. 2 alone, & the plaint was permitted to be altered into one for specific performance & a decree was given accordingly. The lease has now been executed as directed by the decree & deft. 1 is attempting to recover possession. Deft. 1 denied the existence of the alleged contract of 24-3-1940. According to him, this is an ante-dated document fabricated subsequently to his lease & his rights under his decree are unaffected by the pltf.s' lease of 13-11-1941, as it was obtained during the pendency of his suit. The Courts below have rejected his story about the fabrication & antedating of the agreement of 24-3-1940 & have held that when deft. 1 entered into the agreement of 5-4-1940 he had notice of the agreement of 24-4-1940 & knew of the pltfs' possession of the cinema hall.

[4] The main argument on behalf of the appellant is on this line: the pltfs. rely upon two documents, (1) the agreement to lease of 24-3-1940 & (2) the lease of 3-11-1941; the first is inadmissible for want of registration, & the second is affected by the rule of *lis pendens* & does not affect the rights of deft. 1 under his decree. Under S. 17 (1) (d), Registration Act, lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent are required to be registered. Under cl. (7) of S. 2, a lease is defined to include "an agreement to lease". The meaning of this expression is now well settled. It must be an agreement which "effects an actual demise & operates as a lease" & "creates a present & immediate interest in the land" *Hemanta Kumari* v. *Midnapur Zamindari Co.*, 47 Cal. 485. It must be distinguished from an agreement to create a lease on a future date, *Panchanan Bose* v. *Chandi Charan*, 37 Cal. 808 & *Bichardas Damodar* v. *Ahmedabad Borough Municipality*, I. L. R. (1941) Bom. 529. It is not necessary to examine at length the several decisions which were cited before us. The cases in which the agreement was held to be a lease within the meaning of cl. (7) of S. 2 were all cases in which words of present demise had been used. The criterion in all the cases is the intention of the parties. *Ramjoo Mahomed* v. *Haridas Mullick*, 52 Cal. 695, *Sanjib Chandra Sanyal* v. *Santosh Kumar Lahiri*, 49 Cal. 507; *Poole* v. *Bentley*, (1810) 104 E. R. 66, *Purmananddas Jiwandas* v. *Dharsey Virji*, 10 Bom. 101; *Harinath* v. *Promotho Nath*, 25 C. W. N. 550; *Nur Muhammad Veerjibhai Veelmahomed* v. *Natwar Lal*, 45 ALL. 220 and *Khodaijatul Kubra* v. *Krishna Pershad*, A. I R. (17) 1930 Pat. 530.

[5] Let us examine the document in this light. It commences with the recitation that the first party settles "*bando basta karitechhi*" the theatre house with the second party & gives the second party the right to enter therein and to make the premises suitable for the purposes of cinema performances, & indicates that on the certificate of soundness being obtained the first party will lease the house to the second party on a certain rent for a certain time. It binds the first party for a period of nine months not to settle the property with anybody else. Apparently, after this period, the second party may make such a settlement but, if she permits the second party to continue in possession & to make the house fit for the purpose she will be bound to execute the deed of lease but will not be liable to pay the amount spent by the second party in making the house fit for use. For the period during which the second party will be in possession for the purpose of making the house fit, no payment by way of rent is provided for. The grant of a lease as such is contingent upon the premises being made fit for the purpose in view. All that the document can be said to entitle the second party to in this respect is a right on complying with the specified conditions to ask for a lease. On behalf of the appellant stress has been laid on the use of the word "settle (*bandobasta* karitechhi)" & the subsequent use of the term "surrender". These terms, it is urged, indicate the creation of a present interest in the property. This interest, however, is at best confined to the period during which it is contemplated that the second party may remain for making the property fit for the purpose to which it was to be put. The right of the second party to remain on the land for this purpose was confined to a period of nine months. Therefore, the agreement even if it is regarded as a lease would not come within the provisions of cl. (d) of sub-s. (1) of S. 17 which requires the registration of leases from year to year or for any term exceeding one year or reserving a yearly rent. For this reason, the document in question did not require registration. Even if it did, under S. 49 of the Act, it is admissible for collateral purposes. It would, therefore, be admissible to explain the nature of the possession of the pltfs. at the time of the agreement of 5-4-1940 on which deft. 1 relies.

[6] To deal with the second part of the contention on behalf of the appellant it is necessary to examine the effect of S. 52, T. P. Act. This provides that

"during the pendency . . . of any suit or proceeding which is not collusive & in which any right to immovable property is directly & specifically in question the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any of the parties thereto under any decree or order which may be made thereunder except &c."

The protection is given only to the rights of the parties as they existed when the suit was commenced & find embodiment in the decree in the suit. Nothing done by a party during the pendency of the suit can affect the rights of any other party under the decree, but, if a right exists in a stranger from before in relation to the property it will not be affected merely because the title to the property in pursuance of that right was perfected during the pendency of the suit.

[7] I am supported by *Bachan Singh* v. *Bijai Singh*, 48 ALL. 221. In that case two pre-emption suits were filed & on the day when the second of these suits was filed one P. S. entitled to pre-empt equally with the pltfs. in the two suits purchased the properties from the defts. vendees. The High Court gave a limited application to the doctrine of *lis pendens* & held that P. S. was entitled to share as a pre-emptor along with the pltfs. If the principle had been applied fully the Court would have had to hold that P. S. having acquired the property during the pendency of the suit could not resist the successful pltfs., who should, therefore, have got a decree for pre-emption in respect of the entire property. This decision was followed in *Malik Singh* v. *Shiam Lal*, 118 I. C. 143, where the purchaser *pendente lite* was a preferential pre-emptor. Their Lordships pointed out that a person entitled to pre-empt may either come to Court & ask for pre-emption or he may avoid a suit by inducing the vendee to transfer the property directly to him. The purchaser *pendente lite* as a preferential pre-emptor had a right before the institution of the suit to pre-empt in preference to the pltfs & so his purchase during the pendency of the suit was not affected by S. 52. In *Sharif Hussain* v. *Nur Shah*, 123 I. C. 124, one Imam Bibi sold certain lands on 13-12-1900. A suit in pre-emption was brought by three persons who got a decree & made the deposit on 28-11 1902 from which date the rights of the vendee vested in them under O. 20, R. 14 (1) (b). In the meantime, between the decree in the pre-emption suit & before the deposit of the money, certain in reversioners of Imam Bibi's husband had instituted a declaratory suit against her without impleading the D. H. pre-emptors & obtained a decree in their favour on 13-1-1903. On the death of Imam Bibi, they sued for recovery of possession of the property. Their suit was dismissed by the High Court which observed that the doctrine of *lis pendens* applies to things coming into existence during the pendency of the suit & not where there is an existing right prior to the suit. Reliance was placed on a decision of a Single Judge reported in *Bhag* v. *Ujagar Singh*, 96 I C. 450, which was subsequently affirmed in Letters Patent Appeal in *Bhag* v. *Ujagar Singh*, 135 I. C. 48. The facts there were similar, the D. H. in a pre-emption suit having perfected his title by the deposit of purchase money during the pendency of the declaratory suit against the original vendee. Their Lordships observed that :

"the right to take over the bargain accrued to the defts. before the commencement of the suit for declaration brought by the pltf. & it has been held that the doctrine of *lis pendens* does not apply to the enforcement of a right which existed prior to the existence of the *lis*."

[8] The same principle was applied in *Chinnaswami Padayachi* v. *Dharmalinga Padayachi*, 139 I. C. 309, to the *pendente lite* purchase in execution of a mortgage decree. Krishnan Pandalai J., with whom Waller J., agreed, observed:

"With the greatest respect, I understand by *lis pendens* the rule by which by reason of a suit being pending about the rights to some property, subsequent dealings by the parties with that property so as to prejudicially affect the determination of these rights in that suit are invalidated. . . . In my view the opinion expressed by Mukherjee J., in *Ram Sanchi Lal* v. *Janki Prasad*, 134 I. C. 1, on the subject of *lis pendens* in mortgage suits is correct. It is that the rule only applies to transfers by the pltf. or deft. of their respective interests after the suit including transfers by Court sale in money decrees against either party. But it does not apply to previously existing transfers (including mortgages) or legal proceedings to enforce such transfers by those entitled."

This decision was followed by Venkatasubba Rao J., in *Suramma* v *Surayya*, A. I. R. (21) 1934 Mad. 585, where his Lordship observed :

"The reason for the doctrine is that but for it, 'interminable litigation might be the consequence.' The alienations aimed against by the rule (as the passages extracted above show) are those made during the pendency of the suit & not those which have been effected previously. If a certain right remains unaffected, the legal remedy to enforce that right must also continue. No suit, therefore, can operate as a lis pendens so as to affect the antecedent transfers which had come into existence prior to it ; the transfers being unaffected, it follows that the legal proceedings brought to enforce those transfers are likewise immune from the operation of the rule."

My reasoning is supported by *Madhur Sah* v. *Thag Sah*, 1 Pat. L. J. 455, where the pltf. suing for specific performance of sale by deft. 1 & for a declaration that a sale deed executed by deft. 1 in respect of the same property in favour of deft. 3 was not binding on him, obtained during the pendency of the suit a sale deed from deft. 1 in respect of the disputed property. The High Court held that he was entitled to succeed if he proved that his contract for sale was prior to the conveyance in favour of deft. 2 & that deft. 2 purchased with notice of the contract.

[8a] The question, therefore, is whether when the lease of 3-11-1941 was executed in their favour the pltfs. had any right in respect of the suit property which should get priority over the lease

under which deft. 1 claims. It is important to remember that this lease was executed in favour of deft. 1 on 5-4-1940, within the period of nine months mentioned in the contract on which the pltfs. rely, & also that the finding is that deft. 1 took the lease with notice of the contract of 24-8-1940; hence, the rights of the pltfs. continued unaffected by the lease in favour of deft. 1. It has been suggested that at the time when the lease in favour of the pltfs. was executed no right to ask for a lease in pursuance of the contract existed. The argument is based on an observation which fell from me in the course of the hearing. The contract makes specific arrangements for two periods, the first a period of nine months from the contract, the second such period following the nine months during which the pltfs. might be left in occupation of the premises & permitted to complete the repairs. With reference to the first period it is provided that after the repairs are completed deft. 2 shall be bound on demand to execute a lease on a monthly rental of Rs. 75 & in the event of her doing so the other side may sue for specific performance. It also provides that the lessees shall be entitled to deduct from the rent payable the amount spent by them in making the premises fit for use. Then, coming to the second period, the agreement says that if the premises are surrendered after the period of nine months the grantees will not be entitled to any compensation on account of money spent in repairs. They will, however, be entitled to a lease if they are left in possession & complete the repairs again subject to the proviso that they will not recover anything on account of money spent in repairs. The particulars of the lease to be granted are not mentioned in this portion of the deed & there is no special mention that in the event of failure by deft. 2 to execute the lease the grantees will be entitled to specific performance. On a careful reading of the contract, I am satisfied that this division of the document between the two periods is merely to emphasise the difference in the conditions on which the grantees will be entitled to a lease according as the lease is given in one or other of the two periods. If it is given in the earlier period, the grantees will be entitled to recover the repair expenses. If it is given later, they will not be so entitled. As regards the other terms, the lease will be on the same terms, namely for ten years on a rental of Rs. 75 per month. These terms, it may be noticed, are specified in the portion of the contract which precedes the portions dealing with the two specific periods. The omission in the portion relating to the later period to provide for a suit for specific performance has, in my opinion, no significance. The power to enforce a contract does not depend on the existence of such a condition in the contract & it is clear from the contract that deft. 2 bound herself to execute a deed of lease within the second period if the grantees complied with the conditions specified therein.

[9] Next, it has been contended that the lease on which the pltfs. rely is not in pursuance of the contract. It is pointed out that whereas the agreement is with plff. 1 alone the lease was given to the pltf. & two other persons. The case of the pltf. was that pltf. 1 entered into the contract on his own account & on account of the other two persons. This case was not challenged before the Courts of fact & it cannot be challenged in second appeal. It is further pointed out that the contract contains a renewal clause for a further period of ten years & provides for adjustment out of the rents payable of an advance of Rs. 500 said to have been made by the pltfs. to deft. 2. These are merely additional terms & are not such as to justify a finding that the lease is not a transaction in pursuance of the contract.

[10] There is another way in which the right of the pltfs. to resist the execution of the decree can be looked at. On the findings of the Courts of fact, it is clear that when deft. 1 instituted his suit the pltfs. were in *bona fide* possession of the cinema hall on their own account & that deft. 1 was aware of this fact. Hence, on the position as it then was, the pltfs. were entitled to resist the execution of any decree that might be passed in the suit. The agreement on which deft. 1 succeeded in his suit was executed within the aforementioned period of nine months, & the suit itself was instituted on 30-9-40 within the period of nine months. On the finding, therefore, that deft. 1 had notice of the contract, the pltffs, if they had been impleaded as defts. in that suit, would have been able to interpose the shield of S. 53A, T. P. Act. The fact that while standing in this position the pltffs. took the deed of lease from deft. 2 cannot make their possession worse than it was. It was at the worst merely an attempt to better their position. The plffs. retained their possession of the property & are entitled to rely on it in resisting the execution of the decree obtained by deft. 1.

[11] Finally, it is commented that whereas the lease under which the pltffs. claim entitles them to remain on the property for a period of ten years from November 1951, the injunction granted to them is a permanent injunction & is not confined to the beriod of the lease. The fallacy in the argument is that in the suit we are not concerned with determining the period for which the pltfs. are entitled to occupy the suit property. The only issue is whether deft. 1 is entitled to execute his decree against the pltfs. & to evict them therefrom. The Court having held that he is not, the injunction has rightly been granted in a permanent form.

[12] For these reasons, I consider that the

appeal has no merits & must be dismissed with costs.

[13] **Narayan J.**—I agree.

K.S. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 618 *[C. N. 175.]*

JAMUAR AND C. P. SINHA JJ.

Prasadi Mahton—*Judgment-debtor* — *Petitioner*—*Appellant* v. *Ghulam Murtaza*—*Decree-holder*—*Opposite Party-Respondent.*

A. F. A. O. No. 150 of 1950 and Civil Revn. No. 233 of 1950, D/- 14-5-1951.

Civil P. C. (1908), Ss. 50 (1), 42, 47—Decree transferred for execution — Death of judgment-debtor — Transferee Court if can pass order for substitution —Omission on part of decree-holder to get order for substitution from Court passing decree—Effect.

Where a judgment-debtor dies before the decree has been satisfied, the decree-holder should apply to the Court which passed the decree for the substitution of the legal heirs of the judgment-debtor. The executing Court to which the decree is transferred for execution cannot legally decide who is the legal heir who represents the estate after the death of the judgment-debtor. Where the decree-holder has not obtained any decision from the Court which passed the decree on this point and a person who was added as the judgment-debtor on the application of the decree-holder, raises an objection under S. 47 on this ground to the maintainability of the execution at his first appearance, the execution case is not maintainable: A. I. R. (15) 1928 P. C. 162 and A. I. R. (23) 1941 Pat. 139, *Disting.* [Paras 2, 9]

Anno. C. P. C., S. 42, N. 1; S. 50, N. 13.

Balbhadra Prasad Singh—*for Appellant*; *M. Rahman* — *for Respondent.*

Cases referred to :—

('28) 55 I. A. 227:(A.I.R. (15) 1928 P. C. 162). [Prs. 6, 7]

('40) 19 Pat. 838:(A. I. R. (28) 1941 Pat. 139). [Prs. 6, 9]

Jamuar J. — The miscellaneous appeal and the civil revision application have been heard together, as they arise out of the same order.

[2] I shall deal with the miscellaneous appeal first. The appeal arises out of an application filed in the Court below under S. 47, Civil P. C. objecting to the sale of certain lots mentioned in the *talika* in the execution case by one Prasadi Mahto who was added in column No. 9 of the application for execution at the instance of the decree-holder. The facts necessary for the decision of this appeal are these: The decree-holder had obtained a decree on 18-2-1946, from the Court of the Munsif of Bihar against one Mt. Chamni on the basis of a handnote. This decree was transferred to the Court of the Munsif of Barh on 10-8-1948, for execution. On 7-9-1948, the decree-holder applied to the executing Court in the prescribed manner for the execution of the decree against Mt. Phulia and one Ram Charitar Mahto, as Mt. Chamni had died. Subsequently, the name of the appellant, Prasadi Mahto, was added as a judgment-debtor by an order dated 15-12-1948, on an application of the decree-holder, on the ground that, on the death of Mt. Chamni it was necessary to mention the name of Prasadi Mahton in column 9 of the execution petition. Thereafter, on 27-1-1949 Prasadi Mahto, having received notice, filed an objection under S. 47, Civil P. C. to the execution of the decree against him on certain grounds mentioned therein, one of the grounds being that the execution case itself was not maintainable. The learned Munsif of Barh observed that the most important and the foremost question for the purpose of determining the maintainability of the execution case was as to who was the legal heir who represented the estate after the death of Mt. Chamni, and who was in possession of the properties including the properties under *talika*. The learned Munsif stated that the decision called for the determination of the question of legal heir, and that he, being an executing Court, could not legally decide the point, as such matters were within the province of the the Court which had transferred the decree to him. As the decree-holder had not obtained any decision from that Court on this point, the learned Munsif held that the execution case was not maintainable.

[3] As against that decision, the decree-holder appealed to the Court of the District Judge, and the appeal was heard by an Additional District Judge. He reversed the decision of the learned Munsif, and held that the application for execution was maintainable. But he remanded the case to the learned Munsif for the determination of the question whether the debt in respect whereof the decree in execution was passed had been incurred for legal necessity and whether as such the decree was binding on the estate of Punai Mahto who was the husband of Mt. Chamni.

[4] On appeal to this Court, it was argued that the order passed by the learned Additional District Judge was erroneous, as the original order of the learned Munsif of Barh dismissing the execution case as not maintainable was correct for the reason that the decree-holder should have applied to the Court which had passed the decree for the substitution of the legal heirs of Mt. Chamni.

[5] Sub-s. (1) of S. 50, Civil P. C. provides as follows:

"Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representatives of the deceased."

I have no doubt that this was the objection which was taken by Prasadi Mahto before the Munsif at Barh, as will appear from the order of the learned Munsif who heard the matter. On behalf of the respondent, it was contended that such an objection was not mentioned in specific terms in the petition of objection filed under S. 47, Civil P. C., by Prasadi Mahto, though an objection had been taken in respect of the maintainability of the execution. It is true that the objection in such specific terms is not to be found in the petition; but this was the matter which was undoubtedly argued before the learned Munsif since the learned Munsif has dealt with it as follows:

"The decision of this question necesssarily calls for the determination of the question of the legal heir. This Court being only an executing Court cannot legally decide them.

They are properly within the province of the Court which has transferred the decree to this Court. The decree-holder has not produced the decision of that Court on these questions and it appears that he has in fact not obtained any decision of that Court on these points..... It is clear, however, that the decree-holder cannot maintain the execution case against all the three persons mentioned by him in column 9 of the execution petition unless he obtains a decision of the transferring Court on the points stated above. I, therefore, on a consideration of all the facts, circumstances and the evidence set forth above, hold that the execution case is not maintainable."

This was the point before the learned Munsif of Barh, and this was also the point argued in the lower appellate Court. In my opinion, therefore, the mere omission to state the point in such specific terms in the petition of objection was no bar to the appellant raising the point in the Courts below.

[6] On behalf of the respondent, reliance was placed upon the decision in the cases of *Jang Bahadur* v. *Bank of Upper India, Ltd.*, 55 I. A. 227 and *Debendra Nath* v. *G. A. Aratoon*, 19 Pat. 838, for the argument that the appellant, Prasadi Mahton, should not have been allowed to raise this point of non-maintainability of the execution at all.

[7] Both the cases relied upon by the respondent, however, are, in my opinion, distinguishable. In the case of *Jang Bahadur* v. *Bank of Upper India, Ltd.*, 55 I. A. 227, it appears that the Court to which the decree had been transferred for execution had passed an order for substitution of a certain person in place of a deceased judgment-debtor, and then sent the papers to the Court of the sale officer for holding the sale. Their Lordships then proceed to say as follows:

"During the sale proceedings the appellant made various objections from time to time both in the Court of the Subordinate Judge and of the sale officer (the Collector of the District). Amongst others, on 21-2-1921, he obtained a postponement of the sale for two months on the allegation that he wanted to effect a private sale of the property, and promised through his pleader not to put forth any objections relating to the proclamation or any other objections on the next date. The sale was postponed as the decree-holder's pleader accepted the terms offered.

"A postponement on similar terms was also obtained on 20-1-1923."

Their Lordships then proceed as follows.

"After the proceedings had been pending for three and a half years the appellant for the first time put in a petition before the sale officer on 10-4-1924, that the sale proceedings were illegal and without jurisdiction, inasmuch as the decree-holder did not get the name of the appellant entered in the decree of the Court executing the same, in accordance with the provisions of S. 50, Civil P. C. The sale officer referred the matter to the Civil Court—i. e., the Subordinate Judge of the Court of Hardoi—where the same petition was repeated.

"On 22-4-1924, the Subordinate Judge rejected the application for further postponement of the sale and to discontinue the execution proceedings."

Their Lordships upheld this order. It was argued on behalf of the respondent that in this case also it was the Court to which the decree had been transferred for execution that had passed the order for substitution, and that such an order had been upheld. In my opinion, the reason for upholding that order was that there had been a waiver by the appellant appearing at the sale proceedings, and far from taking an objection regarding the non-maintainability of the execution, he had taken time for effecting a private sale of the property, and had also made a promise through his pleader not to put forth any objections in this connection. The appellant had submitted to the jurisdiction of the Court to which the decree had been transferred and he could not, therefore, be heard to object to the exercise of that jurisdiction later, as it would then be to permit a gross abuse of procedure.

[8] In the present case before us, however, the appellant had not submitted to the jurisdiction of the Court to which the decree had been transferred for execution. There is no case of waiver. As soon as the appellant had received notice of the substitution, he appeared before the Court and at once took his objection regarding the non-maintainability of the execution case.

[9] The case of *Debendra Nath Haldar* v. *G. A. Aratoon*, 19 Pat. 838 is also distinguishable. That case followed the Privy Council case just referred to, and it was observed therein that an appellate Court ought not to interfere with an order under S. 50, Civil P. C., made by a Court to which a decree had been transferred for execution where the merits of the case are not affected by the irregularity. In the present case with which I am dealing, however, the objection taken by the appellant at his very first appearance was a substantial one affecting the merit of his case, and, in my opinion, it was rightly given effect to by the learned Munsif.

[10] For these reasons, I would allow the appeal with costs, and dismiss the execution case filed against the appellant.

[11] In this view of the matter, the civil revision application becomes infructuous, and it becomes unnecessary to deal with it.

[12] **C. P. Sinha J.**—I agree.

V.B.B. *Order accordingly.*

A. I. R. (38) 1951 PATNA 619 (C. N. 176)

LAKSHMIKANTA JHA C. J. AND CHATTERJI J.

Gaya Electric Supply Co., Ltd., Petnr. v. The State of Bihar, Opposite Party.

Supreme Court Appeal No. 34 of 1951, D/- 25-4-1951.

† *Constitution of India, Art. 133 — Final order — Order granting stay under S. 34 of Arbitration Act — Civil P. C. (1908), S. 109.*

Where the pltf. files a suit against deft. alleging that time was of the essence of the contract and the arbitration clause in the agreement is therefore not binding on him and the suit is stayed by the H. C. under S. 34, Arbitration Act, on an appeal from order of the lower Ct., the effect of the order under appeal is not finally to dispose of the right of the parties even though it decides a cardinal point in the case. A further order is necessary in order to determine the rights of the parties with respect to the matter in dispute which may termi-

nate the suit one way or the other. Further the lower Ct. has to record the finding whether the arbitration clause is binding on the parties or not and the suit must be held to be a live suit. Even assuming that in view of the finding of the H. C. there is nothing left in the suit and that the lower Ct. is bound to dismiss the suit the order of the H. C. is still interlocutory and not final. Case law discussed. *(Para 7)*

Anno: C. P. C., S. 109 N. 4.

Sir Sultan Ahmad and M. K. Mukherji and S. Sarwar Ali, for Petnr. — The Advocate General and Bindeshwari Prasad Sinha, for Opposite Party.

Cases referred to:

('20) 47 I A 124: (A I R (7) 1920 P C 86) (Pr 7)
('33) 60 I A 76: (A I R (20) 1933 P C 58) (Pr 7)
('39) 1939 F C R 159: (A I R (26) 1939 F C 43: 40 Cr L J 468) (Pr 7)
('47) 1947 F C R 180: (A I R (36) 1949 F C 1: 49 Cr L J 625) (Pr 7)
(1878) 3 C P D 67: (47 L J P C 3) (Pr 7)
(1891) 1 Q B 734: (60 L J Q B 624) (Pr 7)

LAKSHMIKANTA JHA, C. J.: This is an application by the pltf. for leave to appeal to the S. C. from an order of a Bench of this Ct. dated 30-3-1951, directing the suit instituted by the petnr. to be stayed under S. 34, Arbitration Act. The relevant facts are these:

(2) The petnr. (hereafter referred to as the pltf.) is a Company known as the Gaya Electric Supply Company Limited, incorporated under the Companies Act having its registered office at Gaya. The Company held a licence, called the "Gaya Electric Licence", granted by the Province of Bihar for the supply of electric energy within the limits of the town of Gaya. On 23-6-1949, the Govt., for certain reasons, revoked the licence by a notfn. with effect from 9-7-1949. Thereupon the petnr., on 4-7-1949, instituted Title Suit No. 58 of 1949 for a declaration that the order revoking the licence was 'mala fide' & 'ultra vires'. This suit, however, was compromised & the Province of Bihar agreed to acquire the undertaking on certain terms & conditions & an agreement was executed by & between the parties on 28-10-1949. There was an arbitration clause in the agreement which provided that in case of any difference or dispute between the parties over the payment of balance which may be found due after valuation, such dispute shall be submitted to the sole arbitration of a single arbitrator who should be a high Govt. officer of the Provincial Govt. of rank equal to or higher than a Divisional Commissioner & his award shall be final & binding on both parties.

(3) In pursuance of the agreement the pltf. withdrew the suit on 25-10-1949, & the Govt. made payment of rupees five lakhs to the pltf. on account & took possession of the undertaking on 28-10-1949. It appears that the parties did not agree as to the valuation & thereupon the pltf. instituted Title Suit No. 83 of 1950 for recovery of possession of the undertaking & for certain other reliefs. The case of the pltf., in short, was that the Govt. committed breach of the agreement in that it failed to make any valuation of the undertaking within three months of taking over of the undertaking as mentioned in the agreement & failed to pay the balance of the compensation within this period, althogh the time mentioned in the agreement was of the essence of the contract.

(4) On 9-10-1950, the State of Bihar filed an application before the learned subordinate Judge of Gaya under S. 34, Arbitration Act, in order to have the matter in dispute referred to arbitration in accordance with the terms of the agreement & prayed for stay of further proceedings in the suit. The learned subordinate Judge refused to stay the suit & rejected the application of the State of Bihar by his order dated 18-12-1950. The State of Bihar thereupon preferred an appeal to this Ct. which was heard by Ramaswami & Rai, JJ., who by their order dated 30-3-1951, set aside the order of the Ct. below & directed the suit to be stayed. The pltf. has, therefore, filed the present application for leave to appeal to the Supreme Court.

(5) The judgment of this Ct. is one of reversal & the amount or value of the subject-matter of the dispute in the Ct. of first instance & still in dispute on appeal was & is more than Rs.20,000/-. Therefore, under Art. 133 of the Constitution leave can be granted if the order in question be held to be a final order.

(6) The contention of Dr. Sultan Ahmad, for the petnr., is that the order is final & leave should be granted as a matter of course, whereas the learned Advocate General contends, on behalf of the State of Bihar, that the application is not maintainable because the order is interlocutory as the rights of the parties have not been finally determined.

(7) In our opinion the order in question is an interlocutory order & the application is not maintainable. The expression "final order" has been interpreted by the English Cts., the Judicial Committee & the Courts of India, & its meaning is now well settled on authority. Brett, L. J. in 'Standard Discount Co. v. La Grange', (1878) 3 C P D 67 at p. 71, observed:

"No order, judgment, or other proceeding can be final which does not at once affect the status of the parties, for whichever side the decision may be given; so that if it is given for the pltf. it is conclusive against the deft., & if it is given for the deft. it is conclusive against the pltf."

In 'Salaman v. Warner', (1891) 1 Q B 734, Lord Esher, M. R. while interpreting the expression "final order" observed:

"If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision if given in one way, will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

Fry, L. J. in the same case remarked:

"If I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, I think that an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined."

Lopes, L. J. also in the same case said:

"I think that a judgment or order would be final within the meaning of the rules, when, whichever way it went, it would finally determine the rights of the parties."

The point came up for consideration before the Judicial Committee in 'Ramchand Manjimal v. Govardhandas Vishandas Ratanchand', (47 I A 124 at p. 127). In that case the trial Ct. granted a stay under S. 19, Arbitration Act of 1899, which substantially corresponds with S. 34, Arbitration Act of 1940, but on appeal the Ct. of the Judicial Commissioner of Sind reversed the order & refused a stay of proceedings. The Judicial Committee held that the order of the appellate Ct. was an interlocutory one. Viscount Cave, in delivering the judgment of the Board, observed, on the authority of the decisions of the Cts. in England, that "an order is final if it finally disposes of the rights of the parties". Explaining this case in 'Abdul Rahman v. D. K. Cassim & Sons', (60 I A 76), Sir George Lowndes said:

"The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under S. 109 (a) of the Code."

In 'Hori Ram v. Emperor', (1939 F C R 159), Sulaiman, J. took the view that in cases in which the decision of the point in dispute either way did not result in finally disposing of the matter before the Ct. the decision did not amount to a final order. A similar view was taken by Kania, C. J. in 'S. Kuppuswami Rao v. The King', (1947 F C R 180), & he held: "It must be an order which finally determines the points in dispute & brings the case to an end." Applying the tests laid down in the cases noticed above, we are of opinion that the effect of the order under appeal is not finally to dispose of the rights of the parties even though it decides a cardinal point in the case. The suit is still alive because the order does not terminate the suit; a further order is necessary in order to determine the rights of the parties with respect to the matter in dispute which may terminate the suit one way or the other. Moreover, the case of the pltf. is that the time was of the essence of the contract, & that the arbitration clause is not binding because the Govt. failed to make any valuation of the undertaking within the period mentioned in the agreement. This is a point on which the subordinate Judge has to record his finding. Therefore, apart from any other consideration, if this point is still to be decided by the learned subordinate Judge, the suit must be held to be a live suit. Dr. Sultan Ahmad has strenuously contended that in view of the finding of this Ct., there is nothing left in the suit, & the learned subordinate Judge is bound to dismiss it. Even assuming that the contention of Dr. Sultan Ahmad is right, the order is still an interlocutory order. For, if an order granting a stay of proceedings is interlocutory, it cannot be said to be final if a stay is granted, because an order is final only when, whichever way it goes, it finally determines the rights of the parties. The rights of the parties in the case before us have not been finally determined in relation to the suit. Therefore, judged from any point of view, the order in question cannot be said to be final. Leave must therefore be refused. The application is accordingly rejected: hearing fee five gold mohurs.

(8) CHATTERJI, J.: I agree.

D.H. *Application rejected.*

A. I. R. (38) 1951 PATNA 621 (C. N. 177)

RAMASWAMI AND SARJOO PROSAD, JJ.

Lachhmi Narain Beriwala, Applt. v. Bharat Bank Ltd., and others, Opposite Party.

A. F. O. D. No 505 of 1946, D/- 6-4-1951.

(a) Negotiable Instruments Act (1881), Ss. 9, 37 and 82 — Bank purchasing order cheque from customer and crediting its amount to customer's account — Customer allowed to withdraw amount before clearance — Subsequent dishonour of cheque — Bank debiting customer with amount of cheque — Suit by Bank for recovery of amount of disputed cheque — Maintainability — Doctrine of merger or accord and satisfaction if applicable — Contract Act (1872), S. 37 — (Merger) — (Accord and satisfaction).

L drew a cheque for a certain sum on C Bank in favour of R. M. Firm which had a current account with B Bank. One of the partners of the R. M. Firm endorsed it in blank and the B Bank purchased it from him for its face value and credited the amount in the current account of the firm. On the same date the firm withdrew the amount of the cheque from their current account in the form of a draft. The cheque was subsequently dishonoured by the C Bank and thereupon the B Bank made a debit entry for the amount of the dishonoured cheque in the current account of the R. M. Firm. Subsequently B Bank instituted a suit on the dishonoured cheque against the partners of the R. M. Firm and L.

Held that as the B Bank obtained the cheque for consideration it became the holder in due course within the meaning of S. 9 and it did not act merely as a collecting agent. (1882) 19 Ch D 409; (1884) 9 A C 95; (1891) 1 Q B 435; (1903) A C 240, Rel. on. (Paras 6, 8)

Held further that in the absence of any evidence to show that there was sufficient bank-balance in the current account of the firm or that there was other sufficient security in the hands of the Bank, the mere fact that the Bank made a debit entry in the current account of the firm did not extinguish the right of suit on the dishonoured cheque by discharge of liability under S. 82. The right of suit was also not extinguished either by merger or accord and satisfaction. (1836) 173 E R 267 and (1894) 2 Q B 715, Rel. on. (Paras 13, 14)

Anno: Neg. Ins. Act, S. 9 N. 1; S. 82 N. 2 & 3.

(b) Merger — Doctrine of — Conditions for applicability.

The doctrine of merger only applies where a higher security is accepted in place of a security of lower operative power. For example if two parties to a simple contract embody its contents in a deed which they both execute, the simple contract is thereby discharged. But the doctrine is not applicable if the securities are of equal degree; as a bond taken for a bond or covenant; or a bond or covenant taken for payment of rent which is a speciality debt. (1851) 20 L J C P 102, Rel. on. The doctrine of merger will not be applicable unless the new security is between the same parties — a superior security given by a surety for the debt does not merge the debt as against the principal. (Para 9 a)

Mahabir Pd., Gokulanandan Pd., B. N. Bhagat and A. B. Saran, for Applt. — B. C. De, T. Nath and K. P. Verma, for Resps.

Cases referred to:

(1836) 173 E R 267: (7 Car & P 608)	(Pr 11)
((1850) 15 Q B 20	(Pr 9 a)
(1851) 20 LJCP 102: (10 C B) 561)	(Pr 9 a)
(1865) 34 L J C P 230: (15 C B 76)	(Pr 9 a)
(1882) 19 Ch D 409: (51 L J Ch 462)	(Pr 7)
(1884) 9 A C 95	(Pr 7)
(1891) 1 Q B 435: (60 L J Q B 199)	(Pr 7)
(1894) 2 Q B 715: (64 L J Q B 99)	(Pr 12)
(1903) 1903 A C 240: (72 L J K B 451)	(Pr 7)
(1904) 2 K B 465: (73 L J K B 742)	(Pr 9)
(1918) 1918 A C 1: (87 L J K B 145)	(Pr 10)
(1924) 1 K B 775: (93 L J K B 690)	(Pr 9)

RAMASWAMI, J.: This appeal is presented by deft. 4 Lachmi Narayan Beriwala against the decree of the Subordinate Judge of Arrah dated 23-9-1946.

(2) The pltf., Bharat Bank Ltd. brought the suit on the allegation that Ramballabh Das, deft 1, & Motilal, deft. 2, carried on a partnership in the name of Ramballabh Motilal for dealing in grain, that the two partners opened on 11-7-1945 a current account in the name of the firm with the pltf., that on 2-9-1945 deft. 4 drew a cheque Ex. 6 for a sum of Rs. 50,000 on the Commilla Union Bank to be paid to the firm Ramballabh Motilal, that on 4-9-1945 Motilal on behalf of the firm tendered the cheque to the pltf. after endorsing it in blank. The pltf. purchased the cheque from Motilal for its face value after deducting the bank charge & credited the amount to the current account of the firm

Ramballabh Motilal. On the same date, Motilal drew a cheque, Ex. 18, for a sum of Rs. 50,000 & obtained the amount in the form of a draft payable to the regional grain supply officer. Shortly after, the pltf. sent the cheque, Ex. 6, to the Commilla Union Bank for collection through its Patna branch but the cheque was returned unpaid on the 7th September with a note "effects not cleared". The cheque was again presented to the Commilla Union Bank on 21st September on which date the cheque was dishonoured with the intimation that the drawer had countermanded the payment. The pltf. thereupon sent a notice of dishonour to Ramballabh Motilal. On 26th September Ramballabh & Motilal appeared before the manager of the Bank & promised to pay the amount or to make arrangement with Lachhminarain Beriwala for its payment. On the same date Motilal filed an appln. in the court of the Dist. Judge for being declared insolvent. As the defts. made no payment in spite of demand, the pltf., brought the suit on the negotiable instrument for recovery of the sum of Rs. 50,375 inclusive of interest. Deft. 1 contested the suit on the ground that he had no knowledge of the cheque issued by Lachmi Narain Beriwala, that he did not present the cheque to the bank nor did he authorise Motilal to encash it. He alleged that Motilal, alone managed the affairs of the partnership. Motilal, deft. 2, admitted that he had presented the cheque to the bank & received the sum of Rs. 50,000 in the shape of a draft payable to the regional grain supply officer. But he denied that he had notice of dishonour. Deft. 4 alleged that he had drawn the cheque on condition that defts. 1 & 2 sent his railway receipt along with the permit for transport of 6,500 maunds of rice to his nominees, that the cheque would not be negotiated or presented to the drawee for payment till then. He contended that the cheque was issued not in the name of the firm but jointly in the name of defts., 1 & 2 & the cheque could not be cashed by either of them alone.

(3) The learned Subordinate Judge held that the cheque was issued in the name of the firm & Motilal alone could validly negotiate & endorse the cheque on the firm's behalf; that the encashment of the cheque was not conditional upon delivery of the railway receipt & the Govt. permit for despatch of 6,500 maunds of rice; that notice of dishonour was given to defts. 1 & 2 and that no such notice was necessary in the case of deft. 4 who had expressly countermanded the payment. The Subordinate Judge further held that the pltf. had become the possessor of the cheque for consideration & was "a holder in due course". The Subordinate Judge therefore granted a decree in favour of the pltf. against all the defts. who were made jointly & severally liable for the amount.

(4) Two questions were debated in this appeal, viz., (1) whether the pltf. was a holder in due course of the negotiable instrument, (2) whether the liability on the negotiable instrument was discharged when the pltf. debited the amount in question in the account of the firm Ramballabh Motilal on 19-9-1945.

(5) It is undisputed that the cheque, Ex. 6, was expressed as payable to Ramballabhdas Motilal & so was a cheque payable to order as stated in explanation (1) S. 13, Cl. 1, Negotiable Instruments Act. When Motilal endorsed the cheque in blank, it became payable to bearer according to explanation (2) of the same sub-section. S. 9 of the Act defines a holder in due course to mean "any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer." The question, therefore, is whether the pltf. acquired the cheque for consideration in this case. In my opinion the evidence conclusively establishes that on 4-9-1945 the pltf. purchased the cheque from Motilal for cash & made credit entry in the account of the firm Ramballabh Motilal. (After discussion of the evidence the judgment proceeds:)

(6) On the first question, I hold upon the evidence that the Bank had obtained the disputed cheque for consideration, that the Bank became holder in due course & that it did not act as a collecting agent.

(7) This conclusion is supported by a 'catena' of authorities. In 'Ex parte Richdale; In re Palmer', (1882) 19 Ch D 409, it was held by the Ct. of Appeal that when a customer pays a cheque to his bankers with the intention that the amount of it shall be at once placed to his credit, & the bankers carry the amount to his credit accordingly they become immediately holders of the cheque for value, even though the customer's account is not overdrawn. At page 417 Jessel, M.R. states:

"Alfred Palmer paid the cheque to his bankers, & they placed the amount of it to the credit of his current account. The bankers were holders of the cheque for value; the moment they credited the amount of it to Alfred Palmer it became their property. Therefore, if the drawers had stopped the payment of the cheque on the 28th of April, still they could not have avoided payment of the amount to Alfred Palmer's bankers."

To the same effect is 'Maclean v. Clydesdale Banking Co.' (1884), 9 A C 95 in which it was held upon the evidence that the Bank took the cheque as holders for value. Lord Blackburn said:

"Now in the present case did the bank get the cheque in that way as a mere agent, & nothing else, or did they get it in order that they might have the property in it transferred to them & that they might become holders of it? The condescendence makes this averment: The said draft or cheque was indorsed by the said W. B. Cotton, & was by him delivered to the pursuers on or about 14-1-1882, on their paying to him the said sum of £265 2s. 6d., or placing the same to the credit of his account which was then overdrawn to an amount in excess of the said sum, & thereby extinguishing the said account to that extent."

The case was followed in 'National Bank v. Silke, (1891) 1 Q. B. 435, in which the question arose whether the pltfs. were holders of a cheque in due course & for value. At p. 439 Bowen, L. J. states:

"The case of 'Maclean v. Clydesdale Banking Co.' (1884) 9 App C. 95 makes that clear which to a mercantile man would have appeared clear without any decision that if a cheque is paid to a bank on the footing that the amount may at once be drawn upon, & it is drawn upon accordingly, the bank is a holder for value in due course."

The principle was reaffirmed in the important case 'Capital & Counties, Bank, Ltd. v. Gordon (1903) A. C. 240 in which bankers credited a customer with the amounts of cheques as they were handed in by him to his account, & allowed him to draw against the amount so credited before the cheques were cleared. The House of Lords held that the Bank did not receive payment as against for collection but received payment as holder of the cheque on their own account & so was not protected by S. 82, Bills of Exchange Act. At p. 244 Lord Macnaghten states:

"But the protection conferred by S. 82 is conferred only on a banker who receives payment for a customer that is, who receives payment as a mere agent for collection. It follows, I think, that if bankers do more than act as such agents they are not within the protection of the section. It is well settled that if a banker before collection credits a

customer with the face value of a cheque paid into his account the banker becomes holder for value of the cheque. It is impossible, I think, to say that a banker is merely receiving payment for his customer & a mere agent for collection when he receives payment of a cheque of which he is the holder for value."

At p. 248 Lord Lindley states:—

"It was said by the applts' counsel, with some confidence that any jury of businessmen would find, as a fact, that the bank received payment of these cheques for Jones, & nothing more. All I can say is that I think it very likely they would do so if left to themselves without proper directions from the Judge, but that if proper directions were given then they would not be likely to go wrong. It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right. Nothing occurred in this case to the knowledge of the bank which had any such effect. It appears to me impossible to say that under these circumstances the bank received payment of the cheques in question for their customer Jones."

(8) Applying the ratio of these authorities it is manifest in the present case that the pltf., Bharat Bank Ltd. was a holder in due course of the cheque for Rs. 50,000 presented by Motila..

(9) Learned counsel for the appellant referred to two cases: 'Akrokerri (Ashanti) Mines Ltd. v. Economic Bank', (1904) 2 K B 465, & 'A. L. Underwood Ltd. v. Bank of Liverpool', (1924) 1 KB 775. But these authorities are not of any avail to the appellant. In (1904) 2 K B 465 it was proved as a fact that the customer was not allowed to draw against the cheques until they were cleared. There was also evidence that when the customer opened the account he read & signed an application from which contained a notice that no bills would be discounted & that cheques would not be paid against until cleared. In the other case (1924) 1 K B 775 a customer of the Bank paid into his account some cheques to which he had no title. Immediately on his so paying them in, the bank credited him with the amounts of the cheques in their ledger, but there was no agreement between the Bank & the customer that he should draw against the cheques before they were cleared, nor did the customer in fact draw against the cheques until the Bank had received the proceeds. It was held by the Ct. of Appeal that apart from any question whether the bank had notice of any defect in the customer's title, they were not holders in due course, there being no evidence that they took the cheques for value. The mere fact that bankers credit a customer with the amounts of cheques before they are cleared does not make them holders for value; in order to entitle them to that character there must have been an agreement, express or implied that the customer should be allowed to draw against the cheques before clearance, & that agreement must have been acted upon. The material facts of the present case are manifestly different.

(9 a) Learned Advocate General then concentrated his argument on the point that the obligation on the negotiable instrument was discharged by the debit entry which the Bharat Bank made on 19th of September on account of the dishonoured cheque. It was argued by the learned counsel that there was discharge by merger, that the cause of action on the negotiable instrument was extinguished by a merger by operation of law. In my opinion it is impossible to accept this argument. For the doctrine of merger only applies where a higher security is accepted in place of a security of lower operative power. For example, if two parties to a simple contract embody its contents in a deed which they both execute, the simple contract is thereby discharged. But the doctrine is not applicable if the securities are of equal degree; as a bond taken for a bond or covenant; or a bond or covenant taken for payment of rent which is a speciality debt (Cresswell J. in 'Price v. Moulton', (1851) 20 L J C P 102). In the present case, there is no evidence that any grain of the firm of Ramballabh Motilal was retained in security to the Bank on the 19th September on which date the debit entry was made. No statement to this effect is made in the written statements. There is also another difficulty involved in the appellant's argument. Under S. 37, Negotiable Instruments Act, the maker of a cheque or promissory note is liable as a principal debtor & the other parties thereto including endorser are liable thereon as sureties for the maker. It is a well settled rule that the doctrine of merger will not be applicable unless the new security is between the same parties — a superior security given by a surety for the debt does not merge the debt as against the principal. It has been held for instance that a mortgage with covenant to pay the debt given by one of the makers of a joint & several promissory note will not merge the note as against the other maker 'Ansell v. Baker', (1850) 15 Q B 20 & 'Boaler v. Mayor', (1865) 34 L J C P 230. The argument of the learned Advocate General in this respect must therefore fail.

(10) It was then contended on behalf of the applt. that there was a discharge by accord & satisfaction as soon as the pltf. made a debit entry in the account after the cheque was dishonoured. This argument is groundless. It is established by modern authorities that not only the performance of a new promise but a new promise of itself, that is to say, a promise of something different from that which the debtor was bound to perform by the original contract will discharge the original cause of action (see for instance 'Morris v. Baron', (1918) A C 1). But there will be no accord & satisfaction unless there is proof that there was clear intention on the part of the creditor that he had accepted in satisfaction merely his debtor's promise. In the present case the defts. have not given evidence of such intention. No such allegation is made in the pleadings. On the other hand, it is clear from the evidence that when the cheque was returned the bank as an account transaction showed in the ledger that the firm was liable to the exent of the dishonoured cheque. This cannot mean that the bank gave up its rights in the cheque as against the firm or against the other three defts. The evidence on the contrary unmistakably indicates that the pltf. never intended to discharge the defts. from the liability upon the cheque. Even after the debit entry was made the pltf. was presenting the cheque to Commilla Bank for payment on 21st September (vide Exs. 4 to 4d). The letter, Ex. 9, also shows that the Arrah Bank was instructing the Patna branch to present the I. B. P. to the Commilla Bank & continue presenting it "till the latter definitely refused payment on some tangible ground". These facts establish that the bank did not give up its right on the negotiable instrument as against any of the defts. It is impossible to hold that the Bank gave up a good cause of action on the negotiable instrument exchanging it for the unsecured liability of the firm Ramballabh Motilal.

(11) There are authorities to the effect that a banker may sue upon a crossed cheque in his own name as a holder in due course though he has debited the customer in the account after the cheque was dishonoured. In 'Ryder v. Willet' (1836) 173 ER 267 . A drew a bill on B & indorsed it to a

Bank where he had an account. B accepted the bill but did not pay it. The Bank then entered it on the debit side of A's account. The state of A's account at the time of the entry & up to the action was against A. It was proved that the Bank had, on former occasions, allowed A to overdraw his account, though there was no agreement to this effect. It was held by Lord Denman C. J. that the facts did not prove a plea that the bank had received from 'A' £100-6 s in satisfaction of the bill.

(12) To a similar effect is the decision in 'Royal Bank of Scotland v. Tottenham,' (1894) 2 Q. B. 715, in which an action was brought against the deft. as drawer of a cheque drawn by the deft. to the order of Cecil Hambrough & indorsed by him, of which the pltfs. were holders, & which was dishonoured. The cheque was handed by Hambrough to Mrs. Monson, & sent by her to the pltfs. on August 7; & on the 8th it was received by the plffs. & placed, according to instructions, to her credit. The deft. gave notice to his bankers on August 10 to stop the cheque, & on August 11 the plffs. received notice from their London office reporting non-payment of the cheque on presentation. Upon receipt of letter, the manager debited Mrs. Monson's account with £250. It was held by the Court of Appeal that directly the bank had entered the cheque to Mrs. Monson's credit, & communicated the fact to her, they acquired a good title to the cheque & that the bank was entitled to recover full amount of the cheque from the defts.

(13) In the present case, I hold tha the plff. was a holder in due course of the disputed cheque, that the right of suit was not extinguished by merger or accord & satisfaction, that the liability was also not discharged under S. 82, Negotiable Instruments Act. In my opinion, the learned Subordinate Judge rightly granted a decree in favour of the plff. & this appeal must be dismissed with costs with plff. resp.

(14) SARJOO PROSAD, J.: I agree. My learned brother has fully discussed the facts & the law involved in the appeal, & I have nothing to add usefully to that discussion. The only point which impressed me in the argument of the learned Advocate General was whether the liability of the maker under the cheque was discharged within the provisions of S. 82, Negotiable Instruments Act, by the debit entry made by the Bank in the accounts of Ramballabh Motilal, & whether the original liability under the cheque had been thereby innovated. It must be conceded that a debit entry is as much a payment from accounts as a credit entry is a payment in an account of the constituent of the Bank. If there had been sufficient amount in the bank-balance of Ramballabh Motilal, the cheque would have been satisfied by the debit entry & the liability thereunder extinguished. That, however, is not the case here. But it is contended by the learned Advocate General that there was sufficient stock of grains in the possession of the Bank to support the credit of Ramballabh Motlial. The onus to prove accord & satisfaction of the liability under the cheque was on the defts. & this they have not done. Our attention has been drawn to the admission of the manager of the Bank to show that on the date of payment of Rs. 50,000/- the Bank had certain quantity of grains of deft. 3 in stock. The manager, however, says that this was not sufficient to cover the value of the cheque. The defts. have not been able to prove to the contrary. Therefore, it is impossible to hold that the liability under the cheque was extinguished within the meaning of S. 82, Negotiable Instruments Act. Nor do I think that any question of contract arises in the case.

(15) The appeal must, therefore, fail, & I agree with my learned brother that it should be dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. (38) 1951 PATNA 624 (C. N. 178)

SHEARER and SARJOO PROSAD, JJ.

Ghanshyam Das Gangadhar Applicant v. Commissioner of Income-tax, Opposite Party.

Misc. Judicial Case No. 133 of 1949 D/- 12-10-1950.

Excess Profits Tax Act (1940) S. 6 — Standard profits — Assessment.

The business of the assessee was that of a cloth-dealer. There was no purchase or sale after the 31st March, 1944; there were no stocks left on that date; and all the employees were discharged before the 31st March, 1944. However, some realisations and some payments were made during the period from the 1st April, 1944 to the 1st July, 1944, and the accounts were settled during the period.

'Held' that on these materials the Tribunal was justified in coming to a finding that the business of the assessee discontinued after the 31st of March, 1944 and that the business did not run through the whole of the accounting year ending 31st July, 1944. (1925) A. C. 476; (1896) 2 Q. B. 407, dist. (Paras 2, 3)

Anno: E. P. T. Act, S. 6; N. 1.

S. K. Mazumdar, for Applicant; S. N. Dutt; for Opposite Party.

Cases referred to:

(1896) 2 Q B 407: (65 L J Q B 666) (Pr 4)
(1925) A C 476: (94 L J K B 386) (Pr 3)

SARJOO PROSAD J: The short point involved in this reference is "whether on the facts and circumstances of the case the Tribunal was right in holding that the assessee ceased to carry on any business after the 31st March, 1944."

(2) The application out of which this reference arises related to assessment of excess profits tax during the accounting year ending the 31st of July, 1944. The department held that the applicant's business was discontinued on the 31st of March, 1944, and did not run through the whole of the accounting year. Therefore, the minimum standard profits were computed up to the 31st of March, 1944, that is, for eight months, and this amount was deducted out of the profits of the chargeable accounting period, and on this basis excess profits were assessed. The assessee contends that the business continued up till the end of the accounting period. The Tribunal has come to a finding against him, and this finding is based upon certain factors mentioned in the statement of the case made by the Tribunal. The first is that it was admitted that there was no purchase or sale after the 31st March, 1944; second, that there were no stocks left on that date; and, third, that all the employees were discharged before the 31st March, 1944. It appears, however, that some realisations and some payments were made during the period from the 1st April, 1944 to the 1st July, 1944, and the accounts were settled during the period.

(3) Mr. S. K. Mazumdar for the assessee contends on the basis of this finding, namely, that there were some realisations of assets and some payments made during this period, that the business continued up to the end of the accounting period, and, therefore, the method for assessing excess profits-tax as adopted by the Department was erroneous. He relies upon a decision in 'South Behar Railway Co. Ltd. v. Commissioners of Inland Revenue', 1925 A C 476, where it was observed on the facts of that case that the Company carried on business within the meaning of Section 52 of

the Finance Act, 1920, and was liable to corporation profits-tax. Mr. Mazumdar contends that although in the case in question the railway had been relinquished to the Secretary of State and during the period of accounting the Company was doing no more than collecting the annuities payable to the Company under a certain contract, yet it was held that the business of the Company was going on. It is to be observed that the facts in that case were entirely different. Whether the Company was or was not carrying on business would depend upon the nature of the business which the Company had to carry on. Thereafter, the railway had been relinquished to the Secretary of State, the Company was in consideration of that relinquishment entitled to a fixed annuity to be paid half-yearly in lieu of the percentage of earnings payable under the principal contract. Therefore, it was held that the Company in collecting and declaring dividends was carrying on business during the accounting period. The case has, thus, no application to the facts of the present case. In this case, the business of the assessee was that of a cloth-dealer. Admittedly this business had ceased on the 31st of March, 1944, and there was no sale or purchase of any stocks, and even the employees had been discharged. On these materials the Tribunal was justified in coming to a finding that the business of the assessee discontinued after the 31st of March, 1944.

(4) Mr. Mazumdar for the assessee has referred to another decision 'In re Dagnall; Ex parte Soan', (1896) 2 Q.B. 407. That was a case arising under the Bankruptcy Law. A married woman had been carrying on trade separately from her husband. She sold the business in question, and shortly afterwards gave notice to her creditors that she was about to suspend the payment of her debts and then a bankruptcy petition was presented against her. On those facts it was held so long as her debts had not been discharged, she would be deemed to be still carrying on the trade on that date. Mr. Mazumdar very strongly relies upon certain observations of Vaughan-William, J., which are as follows:

"It seems to me that trading is not completed until you have performed all the obligations that the fact of trading imposed upon you."

He contends that the collection of dues and payments of money on account of the business were also obligations imposed upon the assessee by the trade which he had been carrying on, and, therefore, it must be assumed that because he performed these acts, the business was continued by him. The observations made in that case have to be considered in the light of the context. For the purposes of Bankruptcy law their Lordships assumed that the business was not closed until the debts had been discharged, and it was in that context that the observations were made by his Lordship. Having regard to the facts found by the Tribunal, it is impossible for us to say on this reference that there was no evidence on which the Tribunal could come to a finding that the assessee ceased to carry on his business after the 31st March, 1944. Therefore, the reference in the present case has to be answered in the affirmative, namely, that on the facts and circumstances of this case, the Tribunal was justified in holding that the assessee ceased to carry on any business after the 31st March, 1944.

(5) I must, however, observe that the facts stated by the Tribunal are to some extent vague and are not as full as they should have been. In any case, the material facts being there, I do not see any useful purpose would be served in directing a remand on this account.

(6) For the reasons stated above, I would direct that the reference should be answered in the manner stated above. The Department would be entitled to the costs of this reference. The hearing fee is assessed at Rs. 250/-.

(7) SHEARER, J: I agree.

D.H. *Answer in the affirmative.*

A. I. R. (38) 1951 PATNA 625 (C. N. 179)

DAS AND C. P. SINHA, JJ.

Ram Ranbijaya Prasad Singh, Petitioner v. Chamaru Prasad and others, Opposite Party.

Misc. Judicial Case No. 85 of 1948, D/- 7-5-1951.

(a) Stamp Act, (1899), Ss. 45, 61 — Application for refund of excess.

The party aggrieved can have his remedy by way of an appeal or revision only if the statute provides the same and such right cannot be inferred. S. 61 cannot refer to the refund of any stamp duty which might have been paid in excess by the person tendering the instrument into evidence. The Act provides a remedy in case a higher stamp duty or penalty has been paid, and that provision is to be found in S. 45. *(Para 3)*

Anno: Stamp Act, S. 45 N. 1; S. 61 N. 1.

(b) Stamp Act (1899), S. 61 — Application by private party.

The appellate Court or the Court of reference can revise the order under S. 61 only upon the application of the Collector or of its own motion. The private party who has paid the duty or the penalty has no 'locus standi' to make an application. This also suggests that section 61 has no application when refund of the excess duty or penalty is asked for. *(Para 3)*

Anno: Stamp Act, S. 61 N. 1, 6.

B. C. De and Kanhaiyaji, for Petitioner; L. S. Sinha, for Govt. Pleader, for Opposite Party.

C. P. SINHA, J: This is an application made by the plaintiff to an action, under section 61 of the Indian Stamp Act with a prayer that relief be granted to the petitioner against the order of the trial court admitting certain documents into evidence after impounding those documents and after having collected the stamp duty and the penalty on those documents.

(2) The court below by its order dated the 24th of January 1947 held that certain documents, which were proposed to be put in evidence, amounted to leases and that as such they were not properly stamped. Those documents were thereupon impounded and the Court ordered that those documents could not be taken into evidence until the proper stamp duty and the penalty were paid in respect of each of those documents. The petitioner came to this Court against that order in Civil Revision No. 52 of 1947, but that application was rejected by the order of this Court dated the 16th January, 1948. While dismissing that application, it was observed that section 61 in terms referred only to cases where a Court had made an order admitting an instrument into evidence as duly stamped or as not requiring stamp or upon payment of duty and penalty under section 35 and that, as the documents had not till then been admitted into evidence, section 61 had no application. It was further observed that at a later stage, if the penalty was paid and the documents were admitted, there might possibly be some scope for consideration under section 61. It appears that, after the application to this Court was rejected, the petitioner paid the stamp duty and the penalty asked for by the Court upon which the documents were admitted into evidence and, after having paid the duty and the penalty, the petitioner has now filed this application under section 61 of the Stamp Act for refund of the excess stamp duty and penalty paid by the petitioner.

(3) In my opinion, section 61 has absolutely no application to the facts of the present case. Section 61 is headed as follows: "Revision of certain decisions of Courts regarding the sufficiency of stamps". This means that in certain cases where the sufficiency of the stamps as levied by the Court, is in question, that can be revised by the Court to which an appeal lies or references are made by the first Court. The heading, therefore, quite clearly suggests that this section refers only to cases where insufficient duty or insufficient penalty has been paid. Section 61, clause (1) mentions that the appellate Court or the court to which reference lies from the first Court which had imposed the stamp duty or the penalty might of its own motion or on the application of the Collector take such order into consideration. The appellate Court or the Court of reference can revise the order under this section only upon the application of the Collector or of its own motion. The private party who has paid the duty or the penalty has no 'locus standi' to make an application. This also suggests that this section has no application when refund of the excess duty or penalty is asked for. Now section 61, clause (2) says that, if such Court, meaning thereby the appellate Court or the Court of reference, after 'such consideration', that is to say, after consideration as mentioned in sub-section (1), is of the opinion that either the instrument has been admitted without due stamp duty or penalty under section 35 or that the instrument required payment of a higher duty and penalty than those paid, such Court might record a declaration to that effect and determine the amount of duty with which such instrument was chargeable. This sub-section, therefore, refers back to the provisions of sub-section (1) and therefore these two sub-sections (1) and (2) must be read together. If they are so read, it is clear that (1) where the instrument has been admitted without payment of duty or penalty and (2) where less duty or penalty has been paid and more should have been paid, the appellate Court or the Court of reference should record a declaration to that effect and determine the proper duty or penalty to be paid upon such an instrument. After this is done, under sub-clause (3) of the section that Court has to send a copy of the declaration to the Collector for suitable action as provided for by sub-section (4) of the section. This section therefore cannot refer to the refund of any stamp duty which might have been paid in excess by the person tendering the instrument into evidence. Mr. De on behalf of the petitioner contends that, if there is power in the Court of appeal or in the Court of reference to levy a higher stamp duty or penalty, then it must also be within its power to order refund if any excess payment has been made. The short answer to that contention is that the party aggrieved can have his remedy by way of an appeal or revision only if the statute provides the same and such right cannot be inferred. I find, however, that the Stamp Act does provide a remedy in case a higher stamp duty or penalty has been paid, and that provision is to be found in section 45 of the Act. The view which I take is also in consonance with the view of the learned authors of the Indian Stamp Act, 5th edition, by Mulla and Pratt at page 155. Their view is thus stated:

"The sole object of this section is the protection of revenue and it does not affect the provisions of section 36.....The section only refers to cases of insufficeint duty and penalty. If excess duty or penalty has been levied the only remedy is by application to the Chief Controlling Revenue Authority under section 45 within three months."

Mr. De also contends that his client was misled by the order of this Court already mentioned, but I see no justification for that contention either. Meredith J., with whom Agarwala, C. J. concurred, only said that at a later stage, after the penalty was paid, possibly there might be some scope for consideration under section 61. As I have already indicated, section 61 empowers the appellate Court or the Court of reference to consider the sufficiency of stamp duty paid or the penalty imposed after the document has been taken into evidence and, therefore, his Lordship did not say anything more than what was contained in the section itself and it cannot be said that by that judgment the petitioner was held entitled to apply for refund under this section. The language of the section is clear that it should not have given any reason to the petitioner to believe that that section provided any remedy in case excess payment of stamp duty or penalty has been made by the petitioner. Even if it be a fact that by that judgment the petitioner was led into the belief that he had his remedies under this section, that would not affect the provisions of the section itself. In my judgment, section 61 of the Stamp Act, under which the present application has been made, has got no application, and this Court cannot give any relief to the petitioner if he has paid any excess stamp duty or penalty.

(4) I would accordingly dismiss this application with costs to the State of Bihar, which I fix at two gold mohurs as the hearing fee.

(5) DAS, J.: I agree.

D.H. *Application dismissed.*

✠ A. I. R. (38) 1951 PATNA 626 C. N. 180)

REUBEN AND NARAYAN JJ.

Gopeshwar Prasad Sahi, Petitioner v. The State of Bihar and others, Opposite-Party.

Supreme Court Appeal No. 22 of 1951, D/-28-4-1951.

✠ *Constitution of India, Art. 133 (1) — Civil proceeding — Impartible estate under management of Court of Wards — Proceedings for writ of mandamus upon Board of Revenue to withdraw from management — Validity of provisions of Court of Wards Act and Indian Majority Act questioned — Proceedings is civil proceeding under Art. 133 (1)— Letters Patent (Pat.), Cl. 31.*

Certain impartible estate in Bihar was under management of the Court of Wards. In a proceeding arising out of an application under Art. 226, Constitution of India, for a writ of mandamus upon the Board of Revenue, Bihar, or the State of Bihar, to withdraw from the management of the estate, it was contended that the provisions of the Court of Wards Act as also of the Indian Majority Act in so far as they purported to extend the period of minority of a person to 21 years had become void from the date the Constitution came into force, because those provisions were in conflict with Art. 14 of the Constitution. It was also contended that the petitioner had no reversionary or immediate interest in the impartible estate within the meaning of S. 7 of the Court of Wards Act and that the expression "reversionary interest" could not cover the right, if any available to the petitioner during the lifetime of his father.

'Held' that the proceeding in which the above contentions were raised and determined was a civil proceeding of the nature contemplated by Art. 133 (1): A I R (19) 1932 Cal 834, Disting; A I R (38) 1951 Pat. 29 (F. B.), Rel. on. (Paras 4, 7, 8, 9)

Reuben J.: The fact that the proceeding in relation to which this petition has been filed was a proceeding under Art. 226 of the Constitution does not by itself make Art. 133 inapplicable. (Part 11)

The capacity in which the State is empowered to perform the action which is challenged will no

determine the nature of the proceeding in which that action is challenged. (*Para 11*)

The words 'a civil proceeding" in Art. 133 should be interpreted in their natural sense as meaning a proceeding of a civil nature. (*Para 12*)

Anno: C. P. C., App. III; Constitution of India Art. 133 N. 2.

Balbhadra Prasad Singh and Ishwarinandan Prasad Singh, for Petitioner; Government Pleader, for Opposite Party.

Cases referred to:

(1857-58) 7 M I A 555: (1 Sar 867 P. C.) (Pr 11)

('50) 1950 S C R 621: (A I R (37) 1950 S C 222) (Pr 6)

('32) 59 Cal 1289: (A I R (19) 1932 Cal 834) (Prs 6, 11)

('51) Misc J C No 79 of 1951: (A I R (38) 1951 Pat 570) (Pr 1)

('51) 30 Pat 174: (A I R (38) 1951 Pat 29 F B) (Pr 8)

('51) S C Appeal No 57 of 1950: (30 Pat 287) (Pr 11)

NARAYAN, J.: This is an application for leave to appeal to the Supreme Court from a decision of this Court in Misc. Judicial Case No. 79 of 1951 which arose out of an application under Article 226 of the Constitution of India. The petitioner is the son of the late Maharaja Bahadur Guru Mahadvashram Prasad Sahi who was the last holder of the impartible estate commonly and compendiously known as the Hathwa Raj. On the 4th May, 1940, the late Maharaja Bahadur had made an application under section 6 (e) of the Court of Wards Act for being declared a disqualified proprietor, and on the 11th of May, 1940, the Court of Wards made a declaration that the Maharaja Bahadur was a disqualified proprietor, and on the same date a notification was issued that the Court of Wards had decided to take charge of the property of the late Maharaja Bahadur, and a direction was made that possession be taken. The present petitioner who is the eldest son of the late Maharaja Bahadur and his brother Brajeshwar Prasad Sahi were admittedly minors when the estate was taken by the Court of Wards. Acting under section 7 of the Act the Court of Wards purported to take charge of the person and the property of the two minor sons of the Maharaja Bahadur. The Maharaja Bahadur died on the 20th of January, 1951, and after his death the petitioner made an application to this Court under Article 226 of the Constitution, and his prayer was that a writ in the nature of mandamus or a direction or order be issued upon the Board of Revenue, Bihar, Patna, to withdraw from the management of the estate and to forbear from retaining charge of the estate, and a direction or order to that effect was also sought against the other respondents, namely, the State of Bihar, the Commissioner of Tirhut Division, Muzaffarpur, the Collector of Saran and the Additional Collector, Saran, who is now managing the Hathwa Raj under the direction and the supervision of the Court of Wards. This application was heard by a Bench of this Court, and it was dismissed on the '14th March, 1951'. The petitioner now prays that a certificate be granted to him as contemplated by Article 132 (1), Article 133 (1)(b) and Article 133(1)(c) of the Constitution of India.

(2) According to Article 132 (1), an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a Civil, Criminal or other proceeding, if the High Court certified that the case involves a substantial question of law as to the interpretation of this Constitution. According to Article 133 (1) (a) an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court if the High Court certifies that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees. And according to Article 133(1)(c) an appeal shall lie to the Supreme Court from any judgment, decree or final order in a Civil Proceeding of a High Court if the High Court certifies that the case is a fit one for appeal to the Supreme Court.

(3) The learned Counsel appearing for the applicant contended before us that as the value of the estate known as the Hathwa Raj to which the applicant has succeeded on the death of his father is very much more than Rs. 20,000/- a certificate has to be granted under Article 133(1)(a). The learned Counsel further submitted that in view of the contention that has been raised by the applicant in this case it must be regarded as a case fit for appeal to the Supreme Court.

(4) The learned Government pleader who appeared for the State of Bihar contended in reply that the proceeding that was before the High Court cannot be regarded as a civil proceeding inasmuch as the Court of Wards assumed charge of the State of the late Maharaja Bahadur in the exercise of a jurisdiction which is essentially the jurisdiction of a sovereign power. The important point that arises for determination, therefore, is whether the proceeding that was before the High Court can be regarded as a civil proceeding. For determination of this question, it is necessary to know what were the questions raised and decided in the proceeding. It had been strenuously urged on behalf of the petitioner that as he had attained the age of majority in the lifetime of his father the State of Bihar or the Board of Revenue had no right to remain in charge of the estate after the estate had descended on him on his father's death. It was asserted by the petitioner that he was neither a joint proprietor of the Hathwa Raj estate during the lifetime of his father nor had he an immediate or reversionary interest in the property of his father nor was he possessed of any such property of which the Court of Wards could take charge or did, in fact, take charge under section 7 of the Court of Wards Act. The second important contention raised by the petitioner was that section 7 of the Court of Wards Act had been amended and re-enacted in a form which abrogated altogether the power of the Court of Wards to take charge of the person or property of a minor belonging to the family of a proprietor who had been declared as a disqualified proprietor on his own application. Lastly, it was contended that the extension of the minority period to 21 years would be in derogation of the fundamental rights of the petitioner to hold and possess his property and that this extension is in violation of the guarantees of the fundamental rights as indicated in Article 14 of the Constitution. These points were, however, decided against the petitioner, and it was further held that the remedy given by Article 226 was an extraordinary one and could be invoked only in exceptional circumstances by a person who made no alternative remedy by way of suit or otherwise. Speaking for myself, I have not the least doubt that a proceeding in which the above-mentioned points were raised and determined is a "Civil Proceeding" of the nature contemplated by Article 133(1) of the Constitution.

(5) The expression "Civil Proceeding" has been defined in Stroud's Judicial Dictionary, and the definition given there is:

"Is a process for the recovery of individual right or redress of individual wrong; inclusive, in its proper legal sense, of suits by the Crown."

In Halsbury's Laws of England the grant of a peremptory mandamus is described as a determination

of the right according to the merits of a case. In Joseph Chitty's Treatise on the Law of the Prerogative of the Crown the learned author says that there must be a specific legal right, as well as the want of a specific legal remedy, in order to form an application for a mandamus and that this is substantially a civil remedy for the subject. In Stephen's Commentaries of the Laws of England it has been said that the action of Mandamus will only lie when the plaintiff has a right of action (not necessarily for damages) against the defendant and that the dividing line between the prerogative writ of mandamus and the statutory action of mandamus has not been clearly drawn but that the letter is sometimes used when it is desired to compel a local authority to levy a rate in order to satisfy the debt or other liability owing to the plaintiff. I should like to quote the following passage from the well-known book Dicey's Introduction to the study of the Law of the Constitution:

"The particular cases in which a party aggrieved by the decision of a State Court has a right of appeal to the Supreme Court of the United States are regulated by an Act of Congress of 24th September, 1789, the twenty fifth section of which provides that 'a final judgment or decree, in any suit, in the highest court of law or equity of a State, may be brought up on error in point of law, to the Supreme Court of the United States, provided the validity of a treaty, or statute of, or authority exercised under the United States, was drawn in question in the State Court, and the decision of any State authority was drawn in question, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favour of its validity; or provided the construction of any clause of the Constitution or of a treaty, or statute of, or commission held under the United States, was drawn in question, and the decision was against the title, right privilege, or exemption, specially claimed under the authority of the Union.' (Kent, Commentaries, 1. (12th ed.) pp. 299, 300). Strip this enactment of its technicalities and it comes to this. A party to a case in the highest Court, say of New York, who bases his claim or defence upon an article in the Constitution or law made under it, stands in this position: If judgment be in his favour there is no further appeal; if judgment goes against him, he has a right of appeal to the Supreme Court of the United States. Any lawyer can see at a glance how well devised is the arrangement to encourage State Courts in the performance of their duty as guardians of the Constitution, and further that the Supreme Court thereby becomes the ultimate arbiter of all matters affecting the Constitution."

(6) As was pointed out by his Lordship Mahajan J. in the 'Province of Bombay v. Kusaldas S. Advani', 1950 S C R 621, the expression "Sue" means the enforcement of a claim or a civil right by means of legal proceedings. His Lordship further observed that when a right is in jeopardy, and proceedings that can be adopted to put it out of jeopardy fall within the expression "Sue". The expression "suit" in the above quotation from Dicey's Law of the Constitution should, therefore, be given the meaning that has been given to the expression by his Lordship Mahajan J. Under section 45 of the Specific Relief Act the High Courts of Calcutta, Madras and Bombay could make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature, and the conditions to be specified before making an order under Section 45 are laid down in Clauses (a) to (e) of the proviso to the section. If an application is made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the act complained of, it cannot be urged that such an application is not an application for the redress of a civil wrong.

(7) The learned Government pleader, however, relied on a decision of the Calcutta High Court in 'Secretary of State v. Shreegobinda Chaudhuri', 59 Cal 1289, in which it was held that the jurisdiction exercised by the Court of Wards is the exercise essentially of sovereign power, and that a suit for damages does not lie against the Secretary of State for India in Council for misfeasance, wrongs, negligence or omissions of duties of managers appointed by the Court of Wards. In my opinion, this ruling has got no application in this present case before us in which it was strenuously contended by the applicant that the provisions of the Court of Wards Act as also of the Indian Majority Act in so far as they purport to extend the period of minority of a person to 21 years have become void from the date the Constitution came into force, because these provisions are in conflict with the provisions of Article 14 of the Constitution. It is certainly open to a citizen of the State to contend that a particular provision of law in void because it conflicts with a particular provision of the Constitution of India and a proceeding in which such a question comes to be determined must be regarded as a civil proceeding. The petitioner also contended that he had no reversionary or immediate interest in the impartible estate of the Hathwa Raj within the meaning of Section 7 of the Court of Wards Act and that the expression "reversionary interest" cannot cover the right, if any, available to the petitioner during the lifetime of his father. A proceeding in which this and the other contentions raised came to be determined must be regarded as a civil proceeding, and in this connection I may also refer to Article 31 of the Patna High Court Letters Patent according to which any person could appeal to His Majesty from any final judgment, decree or order of this Court made on appeal or made in any final decree, judgment or order in the exercise of the original jurisdiction by the Judges of this Court .

(8) Recently, a Full Bench of this Court had to consider the question as to whether the aggrieved party in a Sales Tax case decided by the High Court has the right to apply for leave to appeal to the Supreme Court, and Article 133 of the Constitution of India came to be considered by their Lordships (See 'Tobacco Manufacturers (India Ltd.) v. the State', 30 Patna 174. The majority decision is that any judgment which the High Court pronounces in regard to the question of law referred to it by the Revenue authorities is not a judgment in the technical sense of the term but merely a sort of opinion or advice given to the Revenue-authorities. Sarjoo Prosad, J., who delivered the majority judgment observed that the words "judgment" "decree" and "final order" are common to both the Articles 132 and 133 of the Constitution and that it cannot be doubted that Aricle 132 applies to all proceedings, civil and criminal. His Lordship further observed that the term "Judgment" in Article 133 has been used in the same sense as it was used in Section 205 of the Government of India Act and the dropping of the word "final" before the word "judgment" did not make any difference whatsoever. For reasons which are not relevant to the point raised and agitated before us their Lordships held that a judgment of the High Court pronounced on a reference under Section 21 (3) of the Bihar Sales Tax Act 1944 cannot be called a judgment within the meaning of Article 133 of the Constitution of India so as to give

the aggrieved party a right to appeal to the Supreme Court and that the proceedings in the Sales Tax case are not civil proceedings within the meaning of Article 133 of the Constitution, but the principles indicated in the judgment undoubtedly go to support my view that a proceeding of the nature with which we are concerned in this case must be regarded as a civil proceeding. Shearer, J. who differed from the two other Judges observed that in construing any Constitution Act, the Courts are bound to give it a broad and liberal interpretation, and that for that reason the words 'judgment", "decree" and "order" in Article 133 (1) are not to be construed distributively. His Lordship further pointed out that the phrase "any judgment, decree or final order made in a civil proceedings" must be regarded as a single compendious phrase, embracing every decision in a civil proceeding which is not a final but is merely a preliminary or an interlocutory order. We are not here concerned with the question whether the expression embraces a decision which is a preliminary or an interlocutory order. Here we are concerned with the final order in a proceeding, and the only question is whether it is a civil proceeding or a proceeding of another nature. The view which has been taken by all the three Judges in this Sales Tax case leaves no room for doubt that a proceeding of the nature with which we are concerned in this present application must be regarded as a civil proceeding.

(9) There are certain other observations of Shearer, J., with which I find myself in respectful agreement, and they are as follows:

"The Constitution, it appears to me, proceeds on the assumption that proceedings are either civil proceedings or criminal proceedings. In England proceedings arising out of references made under fiscal statutes are governed by a special procedure and are heard by the King's Bench Division on the revenue side. Nevertheless, they are, I believe, regarded as a civil proceeding. It has to be remembered that the Constituent Assembly was legislating not for today, nor for tomorrow, but for an indefinite future, and it presumably realised that at some time or other a question might be raised as to whether a proceeding was or was not a civil proceeding. More particularly, it may perhaps have considered that such a doubt might arise regarding proceedings in connection with one of the writs which the High Courts are empowered to issue under Article 226 (1). In England, a doubt appears at one time to have arisen as to whether proceedings in 'quo warranto' were civil proceedings and Section 15 of the Supreme Court of Judicature Act, 1884, was in consequence, enacted providing that they should be deemed to be civil proceedings, whether for purposes of appeal or otherwise."

Thus, in my opinion, this Full Bench decision is a decision which lends considerable support, to the view that the proceeding arising out of the application of the present applicant for a writ of mandamus was a civil proceeding. In this view of the matter, I would grant leave to appeal under Article 133 (1) (a) of the Constitution, and it is no more necessary to determine whether a certificate should or should not be granted under Article 132 (1) or Article 133 (1) (c).

(10) In the result, I would allow the application and grant leave to the applicant to appeal to the Supreme Court against the decision in Miscellaneous Judicial Case No. 79 of 1951. The applicant's counsel prayed for expediting the matter, and the applicant is prepared to deposit the security and the necessary costs at once. After the deposit is made the matter should be expedited. and the paper-book should be prepared as early as possible.

(11) REUBEN, J: I agree. The fact that the proceeding in relation to which this petition has been filed was a proceeding under Article 226 of the Constitution does not by itself make Article 133 inapplicable. 'Bihar-Bukhtearpur Light Railway Co. v. District Board of Patna', S. C. Appeal No. 57 of 1950, related to such a proceeding. The Light Railway Co. had applied to this Court under Article 226 for a mandamus against the District Board restraining the District Board from taking physical possession of the Light Railway. At the hearing, the parties came to an agreement and the case was disposed of without an adjudication. In spite of the agreement, the District Board subsequently took possession of the Railway and the Light Railway Co. applied to this Court for a writ of contempt against the District Board for an alleged breach of an undertaking given to the High Court and for a mandamus to direct the District Board to restore possession of the Light Railway to the Company. The petition of the Light Railway Co., was dismissed by the High Court and leave to appeal against this order was given to it under Article 133, Clause (1), sub-clause (c) of the Constitution. It has been sought to distinguish that case on the ground that it was between private parties whereas in the present case the proceeding was directed against the State of Bihar in relation to action under the Court of Wards Act, that is action which it is empowered to take in its sovereign capacity (vide 'Secretary of State v. Shreegobinda Chaudhuri', 59 Cal 1289.) I cannot agree that the capacity in which the State is empowered to perform the action which is challenged will determine the nature of the proceeding in which that action is challenged. For instance, in the case just cited it was held that a Civil Suit would not lie against the State because the action taken by it under the Court of Wards Act was taken in its sovereign capacity. The suit, however, was a civil proceeding nevertheless. So also was it in 'East India Co. v. Syed Ali', 7 M I A 555, where it was held for a similar reason that the suit would not lie.

(12) In the Letters Patent of the Patna High Court there are provisions relating to the different kinds of jurisdiction which the High Court has authority to exercise, namely, civil jurisdiction, criminal jurisdiction, admiralty jurisdiction, testamentary and intestate jurisdiction and matrimonial jurisdiction. A provision for appeals to the Privy Council is contained in Clause 31 of the Letters Patent, similar to the provision in Clause (1) of Article 133 of the Constitution except that the limiting valuation is Rs. 10,000 instead of Rs. 20,000. The provision in the Letters Patent relates to "any matter not being of criminal jurisdiction." Similar provisions are contained in the Letters Patent of the other High Courts in India. The provisions for appeals to the Privy Council, therefore, were not confined to proceedings in the High Court in the exercise of its ordinary civil jurisdiction as defined in the Letters Patent. Taking this into account, I do not think the words "a civil proceeding" in Article 133 of the Constitution should be interpreted in this narrow sense. There is no reason why the words should not be interpreted in their natural sense as meaning a proceeding of a civil nature.

V.B.B. *Application allowed.*

A.I.R. (38) 1951 Patna 629 *[C. N. 181.]*

B. P. SINHA AND O. P. SINHA JJ.

Deoraj Singh and others — Appellants v. *Rambilas Singh and others—Respondents.*

A. F. A. D. Nos. 343 to 347 and 1942 of 1948, D/-27-11-1950.

Civil P. C. (1908), S. 107 and O. 41, R. 33 — Subsequent events — Power of appellate Court to take

notice—Commutation of rent pending appeal in rent suits — Landlords only entitled to decree for rent commuted — Tenancy Laws — Bihar Tenancy Act (VIII [8] of 1885), S. 40.

It is the duty of the appellate Court, under the provisions of S. 107 and O. 41, R. 33 to take into account any subsequent event which might affect the rights of the parties and which may have come into existence at or before the passing of the final decree by the appellate Court. [Para 10]

Where after the institution of rent suits, the tenants defendants had made applications for commutation of their bhauli rent into nakdi under S. 40, Bihar Tenancy Act, before the Revenue Court and the order for commutation came into existence during the pendency of second appeal, the appellate Court is entitled to take notice of the commuted rent and the landlords are not entitled to get a decree for rent other than the rent commuted. [Para 6]

Anno. C. P. C., O. 41. R. 33, N. 4.

Brahmadeva Narain and R. P. Katriar and Mundrika Prasad Sinha — for Appellant; Dasu Sinha; Tribeni Prasad Sinha and K. D. De — for Respondents.

Cases referred to:—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('36) 17 Pat. L. Tim. 25: (A. I. R. (23) 1936 P. C. 49.) [Pr. 6]

('39) 20 Pat. L. Tim. 473: (A.I.R. (26) 1939 F. C. 74.) [Pr. 4]

('22) F. A. No. 118 of 1922 (Pat.) [Pr. 4]

('29) 10 Pat. L. Tim. 107: (A.I.R. (16) 1929 Pat. 177.) [Pr. 6]

C. P. Sinha J. — These two sets of second appeals arise out of suits for bhauli rent and have been heard together because they were referred to a Division Bench & were ordered to be heard together, as they involved common question of law. These appeals were accordingly heard together and are being disposed of by this judgment. In second appeals Nos. 343 to 347 of 1948, the claim for bhauli rent was for the years 1352 and 1353Fs. There was plea of payment in each of the suits which gave rise to these appeals. The quantity and kinds of produce were also challenged. The first Court decreed the suits in part with proportionate costs by its judgment dated 15-4-1947. There were appeals to the lower appellate Court and the appeals were dismissed with costs on 15-12-1947. The second appeals to this Court were filed in the year 1948. After the institution of the rent suits, the tenants defendants had made applications for commutation of their bhauli rent into nakdi, under the provisions of S. 40, Bihar Tenancy Act, before the Revenue Court. The commutation proceedings came to an end on 20-3-1950 and the rents of the holdings in suit were commuted into nakdi. According to the order of the learned Revenue Officer, the commuted rent is to take effect from the fasli year 1353.

[2] An application had been filed under O. 41, R. 27, Civil P C., along with the schedule of the commuted rent, for taking this schedule into evidence in this appeals.

[3] The points taken in this set of appeals are, that so far as the decree for bhauli rent for the year 1353Fs. is concerned, it should be set aside on the ground that the rent has been commuted into nakdi by a Court of competent jurisdiction, since, 1353Fs, as already indicated, and secondly, that the documentary and oral evidence as produced by the plaintiffs-respondents, in support of their case of the kinds & quantities of produce, having been disbelieved, the Courts below have committed an error of law in giving a decree to the plaintiffs, at a rate higher than one admitted by the defendants-appellants. Point 1 is common to both sets of second appeals mentioned above and the decision on this point in these appeals will govern the other appeal as well.

[4] It has been argued for the appellants that under S. 40, sub-cl. (5), Bihar Tenacy Act, the Revenue Court had full jurisdiction to order the time from which the commuted rent is to take effect and therefore, if the Revenue Officer has ordered in this case that the commuted rent shall take effect from the year 1353Fs, the landlords are not entitled to get a decree for rent other than the rent commuted for that year and that this Court, as a Court of appeal having the powers same as the powers of the Court of first instance should take notice of the commuted rent, the order for which came into existence during the pendency of the second appeals. It has, however, been urged by the learned Counsel for the respondents. that the rights of the parties should be decided on the materials as they did exist when the rent suits were filed and that this Court should not take into account the order of the Commutation Officer, which was not in existence on the date of the suits.

[4a] The learned counsel for the respondents has relied upon a decision of a Bench of this Court in *Chaman Singh* v. *Inderdeo*, F. A. No. 118 of 1922) which is an unreported case. That decision, no doubt, gives some support to his contention, but, in my opinion, that judgment has not discussed the effect of the provisions contained in sub-cl. (5) of S. 40, Bihar Tenancy Act. Their Lordships held, without any reference to or consideration of subcls. (5) & (6) of S. 40, Bihar Tenancy Act, that the decision of the Revenue Court cannot affect the decree of the civil Court when the revenue Court took up the question of commutation after the institution of the present suit. As I have said above, S. 40, sub-cl. (5), B. T. Act, gives jurisdiction to the Revenue Court to fix the time from which the commuted rent is to take effect and S. 40, sub-cl. (6) says that the decision under sub-cl. (5) of S. 40 shall be final subject to appeal to the prescribed authority; in case of an appeal the appellate order shall be final. In this case, there was no appeal and therefore, the order under sub-cl. (5) of S. 40 of the Act became final between the parties. The decision, therefore, in the said first appeal can be distinguished on this ground. According to S. 107, Civil P. C., an appellate Court has the power to determine a case finally and it has the same powers

& has to perform, as nearly as may be, the same duties as are conferred and imposed by the Code on the Courts of original jurisdiction in respect of suits instituted therein. Then again, under the provisions of O. 41, R. 33, Civil P. C., the appellate Court has power

"to pass any decree & make any order which ought to have been passed or made & to pass or make such further or other decree or order, as the case may require."

In view of these provisions contained in the Civil P. C., I have no doubt that the appellate Court to finally decide the case and pronounce upon the rights of the parties must take notice of the events subsequent to the filing of the suit & modulate its judgment accordingly.

[5] I am fortified in this view, which I take, by the judgment of their Lordships of the Federal Court in *Shyamakant* v. *Rambhajan*, 20 Pat. L. Tim. 473. In this case, the question that their Lordships had to decide was, whether S. 16, Bihar Money lenders Act (III [3] of 1938) was void as being repugnant to the provision of an "existing Indian law" within the meaning of S. 107, Government of India Act, 1935. The High Court had held that S. 16 of the Impugned Act, was *ultra vires* as it was repugnant to O. 21, R. 66, Civil P. C., the existing Indian law, within the meaning of S. 107, Government of India Act, 1935. When the appeal against the judgment was being heard by their Lordships of the Federal Court, it was brought to their notice that since the above decision of the High Court, the Bihar Legislature had repealed certain provisions of the impugned Act of 1938 & had substantially re-enacted them in the Bihar Money lenders (Regulations of Transactions) Act, 1939 (Act VII [7] of 1939); and that this Act had been reserved for the consideration of His Excellency the Governor General; & that it had received His Excellency's assent & that it had come into force on 3rd May. By reason of the provisions of S. 107, sub-cl. (2), Government of India Act, 1935 the new Act could not have been challenged on the ground of its repugnancy to an 'existing Indian law' and it was, therefore, contended before their Lordships that as Ss. 13 & 14 of the new Act, which, in substance, re-enacted Ss. 16 and 17 of the Act of 1938, were retrospective in effect the appellant was entitled to take advantage of the provisions of the new Act & in that view of the matter, the discussion of the validity of Ss. 16 and 17 of the earlier Act was merely academic. Their Lordships, after having held that the new Act was retrospective in its effect, made the following observation :

"Accordingly, it only remains to consider whether this Court in the exercise of its appellate jurisdiction can remit the case to the H. C. with a declaration that there shall be substituted for the judgment, decree or order of the High Court a judgment, decree or order *which recognises the state of the law as it now exists* without discussing the law as it existed at the time when the High Court had seisin of the case. We are of opinion that Ss. 205 & 209 (1), Constitution Act give us this power. *There is no doubt that a High Court possesses such a power in dealing with appeals from Courts subordinate to itself* ; see S. 107 & O. 41, R. 33, Civil P. C, & we think that, thus in the absence of any evidence of a contrary intention it is to be assumed that the powers of this Court as a Court of Appeal are not less wide."

[6] I have underlined (here italicised) the important lines in the above quotation to emphasise that an appellate Court has the power to recognise the state of law as it exists at the time it is passing the judgment. Their Lordships also relied upon the Privy Council case in *K. C. Mukherjee* v. *Mt. Ramratan*, 17 Pat. L. Tim. 25 in which case their Lordships of the Privy Council did take notice of the newly enacted Ss. 26 (n) & 26 (o) which had come into existence during the pendency of the appeal before His Majesty in Council. If the appellate Court can take notice of a change in the law made during the pendency of the appeal or after the institution of the suit, then there is greater reason to hold that the appellate Court can take judicial notice of a final decree or order binding on the parties and affecting the matter in dispute. It must be held, therefore, that this Court as a Court of Appeal is entitled to take into consideration the order of commutation which was passed on 20.3.1950 during the pendency of these second appeals. That the Revenue Court under sub-cl. (5) of S. 40, has power to give retrospective effect to its order, is clear on the language of the section itself and it has been so held by a Division Bench of this Court in *Enayat Khan* v. *Bipin Bihari*, 10 Pat. L. Tim. 107. In this view of the matter, I do not feel bound by the observations made in the judgment of the first appeal aforesaid.

[7] The application filed by the appellants under O. 41, R. 27, Civil P. C. should, therefore, be allowed and the order and the schedule of the Commutation Officer should be admitted into evidence.

[8] It must, therefore, be held that the decrees for rent for the year 1353Fs. as passed by the Court below must be set aside and in its place decrees be substituted at the rate mentioned in the schedule aforesaid.

[9] The other point urged by the learned counsel for the appellants is that the Courts below have erred in law in passing a decree at a rate higher than the one admitted by the defendants after having disbelieved the documentary and oral evidence given by the plaintiffs. I have gone carefully through the judgments by which the oral evidence of the plaintiffs has been disbelieved. That being so, it cannot be said that finding of the Court below about the quantity & kinds of produce is not supported by any evidence on record. I would accordingly reject this contention of the appellants and hold that the decree of the Court below in respect of the arrears of rent for the year 1352Fs is well-

founded and the judgment and the decree of the Court below must be affirmed to that extent. The result is that the appeals are allowed to the extent mentioned above in respect of the claim for arrears of rent for the year 1353Fs. In rent suit No. 156/46 (S. A. 343/48) the commuted rent is Rs. 16 per year for the holding; in rent suit No. 155/46 (S. A. 344/48) the commuted rent of the holding is Rs. 7-2-0, in rent suit No. 153/46 (S. A. 345/48) the commuted rent is Rs. 9-1-0; in rent suit No. 157/46 (S. A. 346/48) the commuted rent is Rs. 2-2-10 *dams* and in rent suit No. 154/46 (S. A. 347/48) the commuted rent is Rs. 5 4-10 dams. These figures have been given to us by the learned counsel for the appellants from the schedule and they have not been controverted by the other side. Office will, therefore, prepare a decree according to the above mentioned rent in the several appeals for the year 1353Fs. The appeals are, therefore, allowed to the extent indicated above, but, in the circumstances of the case, there will be no order for costs of this Court.

[10] Second Appeal 1942/48 arises out of rent suit No. 37/47 and was for the recovery of arrears of produce rent for the year 1354Fs. In this case, the rent schedule prepared after the commutation of rent by the Revenue Officer was filed during the pendency of the appeal in the lower appellate Court and prayer was made for taking this rent schedule as additional evidence in the case. The learned Subordinate Judge, while disposing of this part of the case says:

"The defence contention that the rent has been commuted into nakdi since the passing of the decree by the lower Court is not supported by evidence as the rent schedule could not be admitted into evidence in the appellate stage."

The Court below was entirely in the wrong in holding that this rent schedule which came into existence after the judgment of the first Court, could not be taken into evidence at the appellate stage. As I have said above while disposing of the other batch of second appeals, it is the duty of the appellate Court, under the provisions of S. 107 and O. 41, R. 33, Civil P. C., to take into account any subsequent event which might affect the rights of the parties and which may have come into existence at or before the passing of the final decree by the appellate Court. I have held above that the landlords respondents cannot get a decree for produce rent after the rent has been commuted by the Revenue Officer. In this case also, the rent having been commuted into nakdi, the decree of the Court below for produce rent for the year in suit must, therefore, stand vacated and in its place the landlords will be entitled to get a decree for rent for the year in suit according to the rent schedule. The office will, therefore, prepare a decree for the year in suit according to the commuted rent as per rent schedule to be found on the record of the case.

[11] The appeal is, therefore, allowed, but in the circumstances of this case, there will be no order for costs of this Court.

[12] **B. P. Sinha J.**—I agree.

V.B.B. *Appeal allowed.*

A. I. R. (38) 1951 Patna 632 *[C. N. 182.]*

AGARWALA C. J. AND MEREDITH J.

Kamla Prasad and others — *Appellants* v. *Bhikhan Mahton and others*— *Respondents.*

Letters Patent Appeals Nos. 35 to 37 of 1947, D/-31-3-1948.

Bengal Land Registration Act (VII [7] of 1876), S. 44—Mortgagee registered as in possession of land —Proprietor is not entitled to realize rent — Tenant cannot plead payment of rent to mortgagor as long as mortgagee's name stands in Register D— Tenancy law—Bihar Tenancy Act (VIII [8] of 1885), S. 60.

Once the mortgagee is registered as in possession under S 44, Bengal Land Registration Act, then as long as that entry stands, the proprietor is not entitled to realize rent. Nor is any one entitled to plead payment to him because in substance his name as rent receiver must be regarded as displaced by that of the mortgagee in Register D and the proprietor is relegated to the position of a third person under S. 60, Bihar Tenancy Act. If he redeems the mortgage it is his duty within six months to get the entry in Register D altered in his favour so as to displace that of the mortgagee, and it is the duty of the tenants not to pay him unless and until they find that the entry has been altered in this respect: A. I. R. (4) 1917 Pat 63, *Foll.*; A. I. R. (32) 1945 Pat. 157, *Explained.* [Para 3]

Mrs. D. Lall—for Appellants; B. N. Mitter and A. K. Mitter—for Respondents.

Cases referred to:

('17) 3 Pat. L. W. 245 : (A. I. R. (4) 1917 Pat. 63). [Prs 2, 3]

('44) 23 Pat. 858 : (A. I. R. (32) 1945 Pat. 157). [Pr 2]

Agarwala C. J. — These three Letters Patent Appeals are from a decision of Mukharji J. and arise out of three suits which were tried together. The suits were instituted by usufructuary mortgagees for recovery of rent, one of them being for part of the year 1350 and the other two for part of the year 1351. The defence was that the rent had been paid to the mortgagor. The fact that the mortgagor had been paid the rent is not in dispute. The only question is the effect of the payment to him.

[2] On behalf of the appellants, reliance is placed on the decision in *Bibi Mukhduman* v. *Khairat Ahmed*, 3 Pat. L. W. 245. The facts of that case were that A executed an ijara in favour of B and the latter's name was thereupon registered under the Land Registration Act as mortgagee. B, however, failed to obtain possession. Thereafter, the property was sold for arrears of rental and was purchased by C, whose name was registered as proprietor. B then sued the tenent for rent. The defence was that the payment had been made to C, and that as B was out of possession, he was justified in paying to C. It was held that the tenant was not entitled to resist the claim of B, for,

although C was registered as proprietor, he was obviously not entitled to recover rent in view of the existence of a mortgage in favour of B, who was registered as mortgagee in possession. The facts of that case are indistinguishable from the facts of the present case. The respondents, however, rely on the decision in *Jadoo Potedar* v. *Champabati*, 23 Pat. 858 where, on a consideration of the provisions of S. 60, Tenancy Act and S. 79, Land Registration Act, it was observed that the effect of these two sections was that the moment a tenant produces a receipt, granted by a person who is registered as proprietor, manager or mortgagee of an estate or of his agent authorised to receive rent, that receipt is sufficient discharge for the rent, irrespective of who was in fact entitled to it. This observation, however, goes beyond the necessity of the case. The facts of that case were that the receipt had been granted by the Sadhaua Pataudar who was in possession. The observation referred to, therefore, must be regarded as obiter. The facts of the present case being similar to those of the case in *Bibi Mukhduman* v. *Khairat Ahmad*, 3 Pat. L. W. 245 I would follow that case, with the result that the decision of the learned Single Judge who decided these appeals must be reversed and the plaintiffs' suits decreed with costs throughout.

[3] **Meredith J.** — I agree. The decision in *Bibi Mukhduman* v. *Khairat Ahmad*, 3 Pat. L. W. 245 appears to me directly in point. It is a decision of a Division Bench of this Court and is binding upon us In any event, with respect, I think it is right. It seems to me that once the mortgagee is registered as in possession under S. 44, Land Registration Act, then as long as that entry stands, the proprietor is not entitled to realise rent. Nor is any one entitled to plead payment to him; because in substance his name as rent receiver must be regarded as displaced by that of the mortgagee in Register D and the proprietor is relegated to the position of a third person under S. 60. If he redeems the mortgage, it is his duty within six months to get the entry in Register D altered in his favour so as to displace that of the mortgagee, and it is the duty of the tenants not to pay him unless and until they find that the entry has been altered in this respect.

R.G.D. *Appeals allowed.*

A. I. R. (38) 1951 Patna 633 *[C. N. 183.]*

MEREDITH AND RAMASWAMI JJ.

Kaulasan Singh and others — *Appellants* v. *Ramdut Singh and others*—*Respondents.*

First Appeal No. 252 of 1945, D/- 14-12-1949.

(a) Court-fees Act (1870), S 7 (iv) (c). S. 7 (iv) (b) — Joint Hindu family property —Partition suit—Properties standing in name of stranger.

A suit for partition of the joint Hindu family property, so far as the properties sought to be partitioned stand in the name of strangers to the coparcenary, must be regarded as a suit for declaration of title and consequential relief, and consequently *ad valorem* court-fees are payable : F. A. No. 64 of 1923 (Pat.) and A.I.R. (11) 1924 Pat. 640, *Foll.* [Para 3]

Anno. Court-fees Act, S. 7 (iv) (b), N. 13; S. 7 (iv) (c), N. 12.

(b) Court-fees Act (1870), S. 7 — Court-fee payable in suit — Determination of.

The question of the court-fees has to be determined upon the frame of the plaint, and it is not permissible in deciding that question to look into the attitude taken by the defendants or the decision of the Court on the question of title. [Para 5a]

Anno. Court-fees Act, S. 7 (Gen.), N. 3.

Cases referred to.—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('24) 5 Pat. L. Tim. 655 : A. I. R. (11) 1924 Pat. 640. [Prs. 4, 6]

('23) F. A. No. 64 of 1923 (Pat.) [Prs. 3, 4, 5a]

('45) Civil Revn. No. 188 of 1945 (Pat.). [Pr. 5]

('46) F. A. No. 200 of 1946 (Pat.). [Pr. 6]

Judgment —This first appeal is by the plaintiffs in a partition suit. When the case was taken up, our attention was drawn to the fact that the Stamp Reporter had reported a deficit court fee due on the plaint. The stamp report was to the effect that a number of the properties sought to be partitioned stood in the names of two ladies, one of them grandmother of the parties and the other, defendant 4, the widow of one of the members of the joint family. Having regard to certain decisions of this Court, the Stamp Reporter said that it was necessary for the plaintiffs to displace the apparent title of the ladies before they could ask for these properties to be partitioned. The total consideration of the documents relating to these properties came to Rs. 19,223, and, the plaintiffs' share being one-third, the value of that share would be Rs. 6,407-10 8. Accordingly, he said that the plaintiffs had got to pay *ad valorem* court-fees amounting to Rs. 609 6-0 on the memo. of appeal in this Court and a further court-fee amounting to Rs. 487 8-0 on the plaint.

[2] The matter, on the objection of the plaintiffs, came before the learned Taxing Officer in regard to the reported deficit in this Court. He accepted the stamp report and called on the plaintiffs to make up the deficit. Instead of doing so, however, the plaintiffs amended the memo. of appeal cutting out the prayer for relief in regard to these particular properties, so that, so far as this Court was concerned the appeal in its amended form could proceed on the court-fees paid. But the matter of the deficit due on the plaint still remains, and under S. 12 read with S. 10, Court-fees Act, we have to deal with that matter before the appeal can be heard.

[3] In my opinion, the view taken by the Stamp Reporter and the learned Taxing Officer is quite correct, and is fully supported by Division Bench decisions of this Court which are binding upon us. The question came before a Division Bench in First Appeal No. 64 of 1923, and the Bench held that, so far as the properties sought to be partitioned stood in the name of strangers to the

coparcenary, the suit must be regarded as a suit for declaration of title and consequential relief, and consequently *ad valorem* court-fees were payable. The matter was different in the case of properties standing in the names of members of the coparcenary.

[4] The question came again before a Division Bench in *Banku Behary* v. *Chatur Pandey*, 5 Pat. L. Tim. 655 : A. I. R. (11) 1924 Pat. 640. The Bench referred to First Appeal No. 64 of 1923 with approval and reiterated that in regard to properties standing in the name of male members of the joint family no *ad valorem* fee was payable, but it was payable in respect of properties standing in the name of strangers, for, it was necessary for the plaintiff to displace the apparent title of those strangers.

[5] Our attention has been drawn to certain unreported decisions. One is in Civil Revision No. 188 of 1945. There two learned Judges reiterated the principle that, so far as properties standing in the name of strangers who are claiming the properties as their own are concerned, the plaintiff in a suit for partition must pay *ad valorem* court fees. They went on to observe, however, and this is relied on by the appellants, that the position is entirely different where the plaintiff alleges in the plaint that the properties, though standing in the name of strangers, belong to the joint family and the strangers are alleged to be mere *benamidars* or name-lenders. In such a case, they said, the plaintiff should not be required to pay *ad valorem* court-fees because the defendants, after being served with notice of the plaint, did not claim the properties as their own. In such a case, they said, the plaintiff was merely giving information to the Court as to what were the properties which he was seeking to partition. The possession and title to the properties are claimed by the plaintiff jointly with the other defendants.

[5a] With the greatest respect we find it difficult to follow this reasoning. The question of the court-fees has to be determined upon the frame of the plaint, and it is not permissible in deciding that question to look into the attitude taken by the defendants or the decision of the Court on the question of title. If such a test were to be applied, then, even according to this decision, *ad valorem* court-fees would be payable in the present case, because it appears that defendant 4, in whose name the properties stand, does in fact claim the properties as belonging to herself exclusively. That, however, as I have said, is not a proper test in determining this question. The decision of the Court of First Appeal No. 64 of 1923 is clear and binding upon us, and no view expressed by the subsequent Division Bench can alter that position. If any subsequent Bench considers the decision wrong, the only course is to refer the question to a Full Bench. But one Division Bench cannot be taken to have overruled another.

[6] The same remarks apply to the other case relied on First Appeal No. 200 of 1946. In considering the same question, the Bench in this case expressly purports to follow *Banku Behary* v. *Chatur Pandey*, 5 Pat. L. Tim. 655, but, if I may say so again with respect, the observation made are not consistent with the decision in that case. The learned Judges say that, while *ad valorem* court-fees are payable in regard to properties standing in the name of persons not members of the joint family, still, in so far as items of property standing in the names of two women, whose husbands are members of the joint family, are concerned, *ad valorem* court-fee cannot be required in view of the decision in *Banku Behary* v. *Chatur Pandey*, 5 Pat. L. Tim. 655. But in that case the Bench was referring to property standing in the names of the members of the coparcenary. In the present case the acquisitions were all made prior to 1938. There was no question, therefore, of female members of the family being members of the coparcenary. They might be members of the family, but they were strangers to the coparcenary. There could be no presumption in the case of properties standing in the name of such ladies that they were joint family properties, and clearly the plaintiffs could not get such properties partitioned without a prior decision on the question of title—without a decision that the females were not owners, but *benamidars*.

[7] For the appellants distinction is sought to be made between strangers to the family and female members of the family. But quite clearly the real distinction is between those who are members of the coparcenary and those who are not members of the coparcenary, and the ladies in the present case fall into the latter category.

[8] Our attention has been drawn to a decision of this Court, to which one of us was a party, in *Ramautar Sao* v. *Ram Gobind Sao*, I. L. R. 20 Pat. 780 in which it was pointed out that, while in the case of partition suit, which was actually in the nature of a title suit, ad valorem court-fees were payable, yet in applying this principle caution must be observed so as not to import into the plaint anything which it does not really contain either actually or by necessary implication. In construing a plaint the Court must take it as it is, not as it thinks it ought to have been. A relief not asked for cannot be imported so as to charge court fee thereon.

[9] That, in our opinion, is perfectly correct. But it is necessary to remember that the reference is to what the plaint contains either actually or by necessary implication. If a plaint by necessary implication contains a prayer for adjudication on a question of title, then clearly the proper court-fees must be paid for in respect of that adjudication. In the present case the prayer for adjudication on this question of *benami* is most clearly present by necessary

implication. Indeed it might almost be called express. In para. 3 of the plaint it is recited that owing to the common ancestor, Babu Narain Singh, being a Government servant, transactions were not carried on in his name in spite of his being the *karta*, but properties were purchased in the names of the two ladies in question. Nevertheless, all the members of the joint family had been in possession of those properties, and those properties constituted joint family properties in which the plaintiffs had one-third share. Here is a quite clear allegation of *benami*, and in the relief portion of the plaint it is asked that on adjudication of the above facts the plaintiffs' share to the extent of one-third in the properties sought to be partitioned may be got partitioned by deputing a Commissioner. The plaintiffs have quite clearly asked for an adjudication of this question of title and indeed they had to get an adjudication of that question before partition of such properties could be ordered.

[10] The position, therefore, is that we must follow the Division Bench decision of this Court in which the matter was first expressly decided, and, apart from that, we have no doubt in our minds that in a case like this *ad valorem* court-fees are payable as held by the learned Taxing Officer.

[11] It is sought to challenge the correctness of the figures arrived at by the Stamp Reporter. But there is no substance in the contention that his figures are wrong. Para. 4 of the plaint says that the details of the properties in question are given in various schedules to the plaint, and it is added that there may be other properties which the plaintiffs do not know about and which it is obligatory on the defendants to disclose. The Stamp Reporter has simply added up the value of the properties specified in these schedules, and it is not said that there is any mistake in his addition.

[12] The reported deficit on the plaint is Rs. 487-8-0. This sum must be paid within one month from today, failing which the appeal will stand dismissed without further reference to a Bench. We feel that, as the appeal has been pending since 1945, it is not possible to allow any period greater than one month for making up the deficit.

V.B.B. *Order accordingly.*

A. I. R. (38) 1951 Patna 635 *[C. N. 184.]*

RAMASWAMI AND NARAYAN JJ.

Mohammad Jamil Ahmad and another — Appellants v. *Suraj Narain Pd.—Respondent.*

A. F. A. O. No. 113 of 1948, D/- 28-2 1950.

(a) Houses and Rents—Bihar Buildings (Lease, Rent and Eviction) Control Act (III [3] of 1947), S. 11—Decree for ejectment obtained prior to Act—Execution of—S. 11 whether a bar.

Section 11 is a bar to the execution of a decree for ejectment obtained in a civil Court, even if it has been obtained before the Act had come into force for, the provisions of S. 11 (i) indicate that it applies to pending actions inasmuch as in express terms it protects a tenant from eviction in execution of a decree: A. I. R. (37) 1950 Pat. 50 (F. B.), *Expl.*, A. I. R. (36) 1949 Pat. 355, *Disting.* [Paras 5, 8]

(b) Interpretation of Statutes—Retrospective operation of Act distinguished from interference with existing rights—Civil P. C. (1908), Preamble.

If an Act provides that as on a past date the law should be taken to have been that which it was not, that Act would be retrospective. However, the retrospective operation of an Act is one thing & interference with the existing rights is another. The latter deals with the question as to the ambit and scope of the Act and not the date from which the new Act is to be taken as having been the law.

When the question is whether a provision which prohibits the execution of certain decrees applies to all decrees or only such decrees as were passed after the Act was passed, the question falls in the latter class. [Paras 4, 8]

Anno. C. P. C., Pre. N. 3.

(c) Interpretation of Statutes—Retrospective effect—Pending actions.

When the law is altered during the pendency of an action the rights of the parties have to be decided according to the law as it stood when the action was begun unless the new statute shows a clear intention to vary such rights. [Para 8]

M. Rahman — for Appellants, B. N. Mitter; A. K. Mitter and K. B. N. Singh—for Respondent.

Cases referred to :

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('49) 27 Pat. 695 : (A. I. R. (36) 1949 Pat. 137). [Pr. 3]
('49) 27 Pat. 1 : (A. I. R. (36) 1949 Pat. 355). [Prs. 3, 6]
('50) A. I. R. (37) 1950 Pat. 50 : (29 Pat. 71 F. B.). [Prs. 3, 5, 8]
(1848) 2 Ex. 22 : (76 R. R. 479). [Pr. 4]
(1893) 1 Q. B. 41 : (62 L. J. Q. B. 28). [Pr. 4]
(1911) 2 Ch. 1 : (80 L. J. Ch. 578). [Pr. 4]

Ramaswami J.—The question which arises for decision in this appeal is whether the appellants are entitled to execute the decree for ejectment against the respondent with respect to a house in the town of Patna.

[2] The material facts are not controverted. In 1944, the appellants instituted a suit and on 22-4-1944 obtained a decree for ejectment and for arrears of rent against the respondent. The appellants applied for executing the decree but in view of certain objections taken by the respondent the execution was delayed. The latest contention of the respondent was that in view of S. 11, Bihar Buildings (Lease, Rent and Eviction) Control Act (Act III [3] of 1947) the appellants cannot obtain possession of the house. The contention has been upheld by the lower Courts.

[3] In support of the appeal Mr. M. Rahman addressed the argument that the Bihar Buildings Control Act (Act III [3] of 1947) was not retrospective in its effect, that the appellants had instituted the suit and obtained the decree long before the date when the Act came into force and that the lower Courts ought not to have refused to execute the decree. Learned counsel referred to *Kishori Lal* v. *Debi Prasad*, A. I. R. (37) 1950 Pat. 50 in which the Full Bench expressly held

that the definition of the word "tenant" in S. 2 (h) of the Act was not retrospective in its operation. In the order of reference Sinha and Mahabir Prasad JJ. noticed the conflict between *Shiveswar* v. *Parmeshwar*, 27 Pat. 1 and *Sant Kuer* v. *Ganesh*, 27 Pat. 695. In the former case, Manohar Lall and Imam JJ. held that Bihar Act III [3] of 1947 was not retrospective. In the latter case Imam and Narayan JJ. decided on similar facts that the provisions of Bihar Act III [3] of 1947 were retrospective. In the order of reference therefore the following question was formulated for the decision of the Full Bench whether the definition of the word "tenant" in Bihar Act III [3] of 1947 or the Bihar Ordinance II of 1946, which it "replaced is retrospective in its operation". All the Judges of the Full Bench answered this question to the effect that the definition was not retrospective. At page 59 the learned Chief Justice states :

"I must confess that I do not understand the purport of this question. Obviously the definition of 'tenant' in the Ordinance of 1946 and the Act of 1947 did not apply to the House-rent Control Order of 1942. Neither the Ordinance nor the Act purports to amend the definition of 'tenant' in the Order of 1942, either retrospectively or otherwise."

Meredith J. (as he then was) states as follows :

"*Question (1)*—I find nothing in the definition of 'tenant' or anywhere in the Act to make the definition retrospective. The wide definition, in my opinion, only comes into force with the Act. Section 11 of the Act is relied on. The first sub-section provides that : 'Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of S. 12, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise except' in certain specified cases. I do not think this should be taken to enact anything more than it expressly says, and what it says in effect is that from 15-3-1947, the tenant cannot be evicted, except under the Act, even in execution of a decree. That is to say, if a landlord has obtained a decree before that date, he cannot execute it after that date. If he has a suit pending on that date, then the Act will be retrospective in this sense only that the Court cannot give decree for eviction except under the conditions specified in sub-s. (1). That follows from the use of the words 'he shall not be liable to be evicted, which may be taken to mean that no decree for eviction shall be passed. If any decree is passed, it is useless because it cannot be executed."

As a member of the Full Bench I had also held that the definition of the word "tenant" in the Act was not retrospective.

[4] But the authority of the Full Bench case is of no avail to the appellants. For the question to be determined in this appeal is not whether S. 2 (h) of the Act is retrospective but whether the execution of the decree is barred under S. 11 (1), Bihar Buildings Control Act of 1947. Section 11 (1) enacts :

"Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of S. 12, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom whether in execution of a decree or otherwise. except—(a) in the case of a month to month tenant, for non-payment of rent or breach of the conditions of the tenancy, or for sub-letting the building or any portion thereof without the consent of the landlord, or if he is an employee of the landlord occupying the building as an employee, on his ceasing to be in such employment. . . ."

In construing this section it is of importance to notice at the outset that retrospective operation is one matter and interference with the existing rights is another. If an Act provides that as on a past date the law should be taken to have been that which it was not, that Act would, in my opinion, be retrospective. That is not the case in this appeal. The question is whether a certain provision of the Act affects the execution of all decrees or only some decrees, namely, decrees granted after the Act had come into force. The question is as to the ambit and scope of the Act and not as to the date as from which the new law, as enacted by the Act is to be taken to have been the law. In *West* v. *Gwynne*, (1911) 2 Ch. 1, Buckley L. J. states:

"Take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective. Such was the point which arose in *Moon* v. *Durden*, (1848) 2 Ex. 22 and in *Knight* v. *Lee*, (1893) 1 Q. B. 41. But if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys *A*'s right in an event to become a creditor of *B*."

[5] In the present case, the question is whether on the proper construction of S. 11 of the Act the right of the decree-holder appellants has been interfered with. The language of the section is perfectly general :

"Notwithstanding anything contained in any agreement or law to the contrary where a tenant is in possession of any building, he shall not be liable to be evicted therefrom whether in execution of a decree or otherwise."

The section has unqualified effect and there is nothing in the section itself to confine it to decrees passed subsequent to the Act. The term "tenant" in S. 11 ought also to be construed with reference to S. 2 (h) which is to the following effect :

"'Tenant' means any person by whom, or on whose account, rent is payable for a building and *includes a person continuing in possession after the termination of the tenancy in his favour*."

Section 11 (2) of the Act is also important. It states :

"A landlord who seeks to evict his tenant under sub s. (1) shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied that the tenant is liable to be evicted under the provisions of sub-s. (1), he shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied he shall make an order rejecting the application."

It is manifest that this section creates a new jurisdiction and has provided a new procedure for eviction of tenants. In *Kishori Lal* v. *Debi Prasad*, A. I. R. (37) 1950 Pat. 50 the Full Bench

indeed held that the civil Court has no jurisdiction in view of S. 11 of the Act to make a decree for possession. In my opinion, therefore, S. 11 of the Act is a bar to the execution of a decree, even if it had been obtained before the Act had come into force. The contention of the appellants in this respect must fail.

[6] Mr. M. Rahman made reference also to *Shiveshwar* v. *Parmeshwar*, 27 Pat. 1 in which a Bench of this Court held that the provisions of the Bihar House Rent Control Act of 1947 were not retrospective. But the material facts are to be distinguished. In that case the plaintiff had obtained a decree against the defendants for ejectment from the house and for arrears of rent. The suit was instituted on 3-5 41 and the decree was pronounced on 23-12-43. While the appeal was pending in the High Court the Bihar Buildings Control Act of 1947 came into force. On behalf of the appellants, it was argued that the decree ought to be set aside on the ground that they were protected by S. 2 (h) and also by S. 11 Cl. (1) (a), Bihar Buildings Control Act of 1947. The High Court refused to accept this contention on the ground that the provisions were not retrospective and held that the decree obtained by the landlord cannot be set aside. To my mind this decision is, with great respect correct upon the facts of that case; for it is manifest that S. 11 only bars the execution of a decree for ejectment, obtained by the plaintiff before the passing of the Act. This section does not warrant the High Court in appeal to interfere or set aside such a decree. In the present case, however, it is manifest that S. 11 (1) (a) is directly applicable and it must be held that the decree-holder cannot obtain possession of the house in execution of the decree. For these reasons, I should dismiss this appeal with costs.

[7] **Narayan J.**—I agree to the order proposed by my learned brother. The decree under execution is a decree for ejectment from a shop and it was passed on 22-4-44. The application for execution was registered as Execution Case No. 20 of 1944 and this execution case is still pending, though by virtue of an order passed in a suit brought by the judgment-debtor for setting aside the decree for ejectment the execution had been stayed for some time. The judgment-debtor filed an objection in this execution case to the effect that according to the provisions of S. 11, Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, he is not liable to be ejected. This Act is in *pari materia* with Bihar Buildings (Lease, Rent and Eviction) Control Ordinance 2 of 1946 and sub s. 11 (1) of this Act lays down that notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of S. 12, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise except for certain reasons which have been mentioned in the section. Sub-s. (2) provides that a landlord who seeks to evict his tenant under sub-s (1) shall apply to the Controller for a direction in that behalf and the rest of the sub-section lays down the procedure which the Controller has to follow. If this section is applicable to the present case, the decree-holders cannot eject the judgment-debtor in spite of the decree for ejectment which they have obtained.

[8] The most important contention urged by Mr. Rahman on behalf of the decree-holder-appellants is that because this decree was passed in April, 1944 and because the decree-holders were awarded compensation and mesne profits for a certain period, the tenancy will be deemed to have terminated before this Act came into force and hence the Act has no application in this case. The learned counsel relied on a Full Bench decision of this Court in *Kishori Lal* v. *Debi Prasad*, A. I. R. (37) 1950 Pat. 50 to which decision my learned brother was a party. One of the questions referred to the Full Bench was whether the definition of tenant appearing in the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, or the Bihar Ordinance 2 of 1946, which it replaced, is retrospective in its operation and protects the defendant. This question was answered by my learned brother in the negative who expressed the opinion that the definition of the word 'tenant' in the Bihar Act 3 of 1947 or Bihar Ordinance 2 of 1946 is not retrospective in its operation. Meredith J. (as he then was) referred to this question in the following terms:

"In this question we are also asked to say whether the definition of 'tenant' protects the defendants in the circumstances of this case. I do not understand why we are asked to say whether it is retrospective, for it appears to me that, independently of whether it is retrospective or otherwise, it does protect the defendants if they can show that they came within its terms."

The learned Chief Justice observed as follows so far as this question was concerned:

"I must confess that I do not understand the purport of this question. Obviously the definition of 'tenant' in the Ordinance of 1946 and the Act of 1947 did not apply to the House-rent Control Order of 1942. Neither the Ordinance nor the Act purports to amend the definition of 'tenant' in the Order of 1942, either retrospectively or otherwise. Whether the definition in the Ordinance was a protection for the defendants from eviction otherwise than in accordance with S. 11 (2), while the Ordinance was in force, and whether the Act of 1947 similarly protects the defendants, must necessarily depend on whether the defendants are 'tenants', a matter which the Division Bench has neither decided nor referred to us."

We are in this case primarily concerned with the interpretation of S. 11 (1) of the Act and the point which we have to determine is whether a decree for ejectment passed before the Act came into force can be executed after the Act has come into force. It is certainly a general rule that when the law is altered during the pendency of an action the rights of the parties have to be decided according to the law as it stood when the action was begun unless the new statute shows a clear inten-

tion to vary such rights. So far as this particular statute is concerned a careful reading of the provisions of S. 11 (1) indicates that it applies to pending actions. In express terms it protects a tenant from eviction in execution of a decree and this part of the statute has to be given effect to even if the decree in execution by which eviction of the tenant is sought was passed before the Act came into force. The word 'tenant' has been defined in S. 2 (h) of the Act and it includes a person continuing in possession after the termination of the tenancy in his favour. The judgment-debtor is the person who has continued in possession after the termination of the tenancy in his favour and Meredith J. in his judgment in the case of *Kishori Lal* v. *Debi Prasad*, says that whether the definition of the word "tenant" is retrospective or otherwise it does protect the defendants if they can show that they come within its terms. Reading therefore the provisions of S. 11 of the Act along with the provisions contained in S. 2 (h) of the Act we see no reason to differ from the view taken by the Courts below that the judgment-debtor is protected from eviction.

V.S.B. *Appeal dismissed.*

A. I. R. (38) 1951 Patna 638 *[C. N. 185.]*

DAS AND NARAYAN JJ.

The State of Bihar — Appellant v. *Amir Hasan—Respondent.*

Govt. Appeal No. 7 of 1950, D/- 29-11-1950.

(a) Explosive Substances Act (1908), S. 5—"Possession" & "Control"—Meaning of.

"Possession" under the section means conscious possession but it need not always be manual possession, that is, possession by physically touching the incriminating object. 'Control' is a somewhat wider concept than 'possession' but there again the control must be actual control & not merely constructive or notional control. [Para 11]

Anno. Explosive Substances Act, S. 5, N. 1.

(b) Explosive Substances Act (1908), S. 5—Onus of proof—Evidence Act (1872), S. 106.

It is for the prosecution to prove conscious possession & actual control of the incriminating articles with guilty knowledge. It is only when such possession & control is proved that onus changes & it is then for the accused to explain his possession & control. [Para 11]

Anno. Explosive Substances Act S. 5 N. 1; Evidence Act, S. 106 N. 9.

(c) Explosive Substances Act (1908), S. 5—Possession or control by more than one person.

It is possible for more than one person to be in conscious possession or actual control of an incriminating object, but whether they are in such possession or not must be inferred from the facts & circumstances proved. [Para 11]

Anno. Explosive Substances Act, S. 5 N. 1.

S. C. Chakraverty, for Govt. Advocate — for Appellant; S. Safdar Imam—for Respondent.

Cases referred to:

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('45) I. L. R. (1945) Bom. 302: (A. I. R. (32) 1945 Bom. 333). [Pr. 7]

('45) I. L. R. (1945) 26 Lah. 137: (A. I. R. (31) 1944 Lah. 339: 46 Cr. L. J. 1 F. B.). [Prs. 5, 8]

('43) 22 Pat. 549: (A. I. R. (30) 1943 Pat. 389: 45 Cr. L. J. 159). [Pr. 7]

('47) 26 Pat. 46: (A. I. R.(35) 1948 Pat. 222 : 49 Cr. L. J. 445). [Pr. 10]

('47) A. I. R. (34) 1947 Pat. 236: (48 Cr. L. J. 53). [Pr. 10]

('50) A. I. R. (37) 1950 Pat. 243: (51 Cr. L. J. 977). [Pr. 10]

Das J.—This is an appeal by the State of Bihar against an order of acquittal recorded by the learned Ses. J. of Bhagalpur in respect of one Amir Hasan, aged about thirty-two years, who was tried by the learned Ses. J. for an offence under S. 5, Explosive Substances Act. The assessors who aided the learned Ses. J. were of the opinion that the respondent (Amir Hasan) was guilty. The learned Ses. J. did not accept the opinion of the assessors & acquitted the respondent. Three women, namely, the mother of the respondent, his wife & the wife of another member of the family, were also on trial before the learned Ses. J. They were also acquitted. The appeal against the order of acquittal when presented for admission in this Court, was not pressed as against the women accused persons, & the appeal was admitted only in respect of the respondent Amir Hasan. It may also be stated that the respondent Amir Hasan had an elder brother Abdul Hasan, who was also committed to the Court of Session. He was suffering from pthisis, & died about a month before the trial began.

[2] The facts found & not disputed before us are these. On 7-5-1948, at about 6 a. m. there was a raid by a police party on several houses in village Maheshmunda within the jurisdiction of Colgong police station. One of these houses belonged to the two brothers Abul Hasan & Amir Hasan. The house was north of a village lane & faced east. It was built of mud & consisted of two storeys. There were two rooms on the ground floor, one towards the north & the other towards the south, both of which opened on a verandah towards the east. There was a staircase leading to the upper storey where there was a hall partitioned by a wall in the middle. This wall had an opening without any shutter or door plank. The search was conducted by an Assistant Sub-Inspector of Police, Biseswar Nath Rai (P. W. 1), in the presence of a Magistrate, Jagdish Narayan Sinha (P. W. 8) & two search witnesses, Etwari Mandal (P. W. 2) & Iswer Bind (P. W. 3). The police party consisted of the Assistant Sub-Inspector & some other constables. These constables, it appears, surrounded the house at about 5 a. m. but remained outside when the search was actually made. One Imtiaz Hassain, a brother of the respondent, was present at the time of the search. The womenfolk were inside the house, but the respondent was absent. There was evidence which was accepted by the learned Ses. J, that the respondent was seen in the house on the evening previous to the search.

[2] The search party first went to the second storey. The northern room in the second storey was searched, but nothing was found. Then, the southern room in the second storey was searched & four country-made bombs placed between the top of the eastern wall of the room & the thatch were recovered. The bombs were live bombs & of the size of cocoanuts. The prosecution led evidence to show that the bombs were capable of causing injury to life on explosion. After searching the upper floor, the search party came down to the ground floor & went first to the northern room. The women of the family who were in the northern room, were asked to go into the southern room, & this they did. In the northern room on the ground floor two country made bombs of a similar character were found inside an earthern granary. The search party then went on to the verandah & asked the womenfolk, who were then in the southern room, to go again into the northern room. The women had veiled their faces, & the Assistant Sub Inspector gave evidence to the effect that he suspected that the women were carrying something under their *Saris*. The women, however, were allowed to go into the northern room, & then the southern room was searched. Nothing was found there except the uniform of a constable minus the belt & the number badge. After this, the Assistant Sub-Inspector of Police sent for a woman in order to search the person of the women of the family. One Mt. Reshmi (P. W. 5) was called for the purpose & she searched the womenfolk. But nothing was found on their person. The search party then again went into the northern room of the ground floor & recovered ten country-made bombs, five of the bombs being found between the western wall & a bag of grains & the other five from under a wooden box close to the wall. Thus, all told, sixteen country-made live bombs were recovered from the house, four from the southern portion of the upper room & twelve from the northern room of the ground floor.

[4] The prosecution led evidence to show that the house in question belonged to the two brothers Abul Hasan & Amir Hasan. There was evidence of one prosecution witness to the effect that Abul Hasan was the *malik* of the house, being the elder brother. There was also evidence which was accepted that both the brothers were seen in the house on the day previous to the search & also on several days before that. I have already referred to the evidence that Amir Hasan was seen in the house in the evening previous to the search.

[5] The fact of the recovery of sixteen country-made live bombs in the circumstances mentioned above has not been seriously disputed before us. The learned Ses. J. accepted this part of the prosecution case & negatived a suggestion made by the defence that the bombs might have been planted in the house. He gave his finding in the clearest terms "Accordingly, I hold that there was no possibility of the planting of the bombs". As to the women accused, the learned Sessions Judge was rather doubtful of that part of the prosecution case which seemed to suggest that the women had removed some of the bombs from one room to another under their *saris*. I need not say anything more about this part of the case, as the acquittal of the women accused is not in question before us. With regard to the two brothers, the learned Sessions Judge felt the difficulty which has been felt by many Courts when some incriminating object is recovered from a house which is in the possession or occupation of more than one person. The learned Sessions Judge considered some of the decisions bearing on this question, and relying very largely on the Full Bench decision of the Lahore High Court in *Emperor* v. *Santa Singh*, 26 Lah. 137, he held that though there was a strong suspicion against the respondent, the prosecution had failed to bring home the charge against the respondent.

[6] The learned Government Advocate has contended before us (1) that the learned Sessions Judge has not correctly applied the principles laid down in the Lahore Full Bench decision, (2) that the facts and circumstances proved by the prosecution bring home the charge against the respondent, inasmuch as they prove that the respondent was in conscious, actual and effective control of, at least, four of the country-made bombs, and (3) that the learned Sessions Judge failed to consider a statement of the respondent made in his examination before the committing Magistrate to the effect that the southern portion of the upper flat, from where four of the bombs were recovered, was his.

[7] The crucial question for consideration in this case is if the prosecution has been able to prove beyond reasonable doubt that the respondent was in conscious possession or actual and effective control of the bombs, or at least some of them, recovered from the house, with the necessary guilty knowledge. The difficulty which has arisen in this case has been the subject of judicial consideration in several decisions relating to offences punishable under S. 19 (f), Arms Act, or S. 5, Explosive Substances Act. A summary of these decisions will be found in *Emperor* v. *Wasant Waman*, I. L. R. (1945) Bom. 302, though that decision itself related to a case under R. 39, Defence of India Rules. The learned Government Advocate has referred to two decisions relating to R. 39, Defence of India Rules,—one is the Bombay decision cited above and the other is the case of *Anantanath* v. *Emperor*, 22 Pat. 549. In my opinion, the decisions relating to R. 39, Defence of India Rules are not directly in point. Sub-r. (2) of R. 39, Defence of India Rules, was so worded as to throw the onus on the accused persons, when any document containing a prejudicial report etc., was found in premises in his occupation or under his control. The important point

of difference between S. 5, Explosive Substances Act and sub-r. (2) of R. 39, Defence of India Rules is this: in the Defence of India Rules the occupation or control of the premises in which the prejudicial document is found shifts the onus; whereas in S. 5, Explosive Substances Act, conscious possession or actual control of the incriminating object itself must be proved before the accused can be called upon to explain such possession or control. For this reason, I do not think that the decisions relating to R. 39, Defence of India Rules are of any help in the present case.

[8] There is no dispute that the house from where the incriminating objects were found in this case belonged to the two brothers Abul Hasan and Amir Hasan. It is now well-settled that, though there is a difference between the two concepts denoted by the words 'possession' and 'control', possession and control for the purpose of S. 5, Explosive Substances Act, mean something more than mere constructive or legal possession and control. As has been rightly pointed out by Harries C. J., in *Santa Singh's case*, 26 Lah. 137:

"possession and control required to constitute offences under the Explosive Substances Act and Arms Act must mean conscious possession and actual control: a man must know of the existence of something before he can be said to control it or have it under his control;"

in other words, there must be *mens rea* or guilty knowledge before a person can be convicted of possession or control of explosive substances. I thing that the wording of S. 5, Explosive Substances Act, itself makes this clear. The section uses the word 'knowingly' in connection with possession and control; it further states:

"under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object."

These words make it perfectly clear that before the onus shifts, the prosecution must prove conscious possession or actual control with a guilty knowledge.

[9] On the question whether more than one person can be in conscious possession or actual control of an incriminating object the Lahore decision is equally emphatic. Harries C. J. stated as follows:

"I do not suggest that the recovery of an article in a house occupied by a number of persons is proof of joint possession but that fact coupled with other evidence might establish such joint possession. All I desire to point out is that exclusive possession or control of any particular person is not required under these sections. The possession or control might well be possession or control of two or more persons."

If I may say so with respect, this is the correct view. Section 5, Explosive Substances Act, does not require exclusive possession, as was observed in some previous decisions.

[10] On the question of presumption, it is now well-settled that in cases where incriminating articles are recovered from a place in the occupation or possession of more persons than one and it is not possible to fix the liability on any particular individual, a Court is not bound to hold that the said article was in possession or control of the head of the family. It is also clear that S. 106, Evidence Act, has no application unless and until the prosecution has proved conscious possession or actual control with guilty knowledge. These propositions laid down in the Lahore Full Bench decision have now been accepted and approved by a Division Bench of this Court. In *Sahendra* v. *Emperor*, 26 Pat. 46, it was pointed out that ordinarily S. 106, Evidence Act, would not apply to cases of this sort; but it would only apply in such circumstances as where an article is found in a house in circumstances in which all the members of the house must have been aware of its existence. In *Bheka Ahir* v. *Emperor*, A. I. R. (34) 1947 Pat. 236, it was pointed out that the duty lay on the prosecution to adduce some evidence from which the inference could properly be deduced that any particular member, or, for the matter of that, the head of the joint family was in possession in the sense of conscious possession of the *corpus delicti*. It was also observed:

"Like all other criminal trials, the burden lies entirely on the prosecution and all the time on the prosecution, to show the guilty knowledge in any particular individual or the head of the joint family."

These views were again approved in *Mohan Lahiri* v. *The King*, A. I. R. (37) 1950 Pat. 243.

[11] From a consideration of the aforesaid decisions the following propositions clearly emerge: (1) The prosecution must prove conscious possession or actual control of the incriminating objects, remembering at the same time that possession need not always be manual possession, that is, possession by physically touching the incriminating object. 'Control' is a somewhat wider concept than 'possession,' but there again the control must be actual control and not merely constructive or notional control. (2) The prosecution must prove *mens rea* or guilty knowledge. It is possible for more than one person to be in conscious possession or actual control of an incriminating object, but whether they are in such possession or not must be inferred from the facts and circumstances proved. (3) When the aforesaid two conditions are fulfilled, then the onus changes, and it would be for the person in such possession or control, as has been indicated above, to explain his possession or control.

[12] Let us now come back to the facts of this case, and see how far the tests laid down above have been fulfilled. With regard to four of the bombs, it seems to me that there is no doubt that the respondent was in conscious possession or actual control with a guilty knowledge. These bombs were recovered from the southern portion of the Upper flat. Though the house itself belonged to the two brothers, the respondent himself admitted that the southern portion of the upper flat was his: therefore, these four bombs were recovered from the portion which was the res-

pondent's. Mr Safdar Imam appearing for the respondent, tried to show that the respondent was a constable who lived away from the village, and when he came to the house, he lived on the ground floor only. He drew our attention to the evidence of Iswar Bind (P. W. 3) who said "Amir Hassan lives outside the village as he is in police service." He also drew our attention to the fact that the uniform of a constable was recovered from the southern room of the ground floor. There is, however, good evidence in the record, which the learned Sessions Judge has accepted, that the respondent was discharged from the Police Department some years ago, and that he used to go about as a *fakir* and do other business (vide the evidence of Tejnarain Misra, P. W. 6). Mr. Safdar Imam tried to explain the statement of the respondent by making a distinction between 'living' and 'owning.' I am unable to accept that explanation of the statement of the respondent. That statement shows clearly enough that four of the bombs were recovered from a portion of the upper flat which was the respondent's portion. I have already referred to the evidence that the respondent was seen in the house in the evening previous to the search. There is also evidence that his elder brother was suffering from pthisis for some months before the occurrence, and died after he had been committed to the Court of Session. The learned Sessions Judge has opined that the elder brother, who was a tubercular patient, might have secreted the bombs. It seems to me most unlikely that a person, who is suffering from pthisis and is on the verge of death, will think of secreting country made-live bombs in the house. After giving my most anxious consideration to the facts and circumstances, I have come to the conclusion that the only reasonable inference from the facts and circumstances proved in this case is that the respondent Amir Hasan, the younger brother, who was formerly in police service, had kept at least those four bombs which were found in his portion of the house; the circumstances further show that he must have secreted the bombs between the wall and the thatch for another than lawful object. There is no evidence that any of the women occupied that portion, nor is it likely that any of them would secrete the bombs in the way they were secreted between the thatch and the wall. I agree with the learned Sessions Judge that any hypothesis of planting by an outsider must be excluded in view of the facts and circumstances of this case.

[13] For the reasons given above, I would allow this appeal, set aside the order of acquittal, convict the respondent of the offence under S. 5, Explosive Substances Act, and sentence him to rigorous imprisonment for three years.

[14] **Narayan J.**—I agree.

G.M.J. *Appeal allowed.*

A. I. R. (38) 1951 Patna 641 *[C. N. 186.]*

DAS AND C. P. SINHA JJ.

Ashfaque Ali Khan & others — Appellants v. *Asharfi Mahaseth & another — Respondents.*

A. F. A. D. No. 80 of 1948, D/- 2 8-1951.

(a) Evidence Act (1872), S. 13—"Claimed"—Claim whether to be made in presence and knowledge of person to be affected thereby — Documents showing land in suit as rent-free fakirana grant—Admissibility.

The Legislature by using the language in S. 13 intended the operation of this section to be very wide. The word "claimed" used in S. 13 is not used in a narrow sense. The claims need not necessarily be made in the presence and to the knowledge of the person to be affected thereby. A claim can very well be made in the absence and without the knowledge of the person to be affected. [Paras 8, 10]

In a suit brought by the plaintiff for recovery of possession and in the alternative for assessment of fair and equitable rent, the defendant pleaded that the land in suit was an old rent-free fakirana grant, and produced two documents, namely, a patta of the year 1905 and a sale deed of the year 1922 in favour of the predecessor-in-interest of the defendant mentioning the suit land as a rent-free fakirana grant. The plaintiff contended as these documents were not *inter partes*, he had no concern with any of them and that they were not admissible in evidence.

Held, upon an interpretation of the language used in S. 13 that these documents were admissible in evidence. A. I. R. (23) 1936 Pat. 543, *Dissent.*; A. I. R. (14) 1927 Cal. 1 (FB). *Not foll.*; A. I. R. (9) 1922 Pat. 488; A. I. R. (20) 1933 Pat. 656; A.I.R. (20) 1933 Pat. 685 and A.I.R. (21) 1934 Pat. 81, *Rel. on.* [Para 10]

Anno. Evidence Act, S. 13, N. 6 and 12.

(b) Civil P. C. (1908), S. 100 — Question of law — Admissibility of document in evidence.

The finding of the lower Court to the effect that the land in suit is rent-free fakirana grant, being an inference of law from the facts found, and the question whether the documents relating to the land in suit are admissible in law both being questions of law, can be taken for the first time in second appeal. [Para 7]

Anno. Civil P. C. Ss. 100 & 101, N. 27, Pt. 1; N. 30, Pt. 2.

A. A. Khan Warsi and S. S. Ashghar Hussain — for Appellants; A. B. N. Sinha —for Respondents.

Cases referred to:—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('18) 29 Cal. L. Jour 577 : (A. I. R. (5) 1918 Cal. 34). [Pr. 9]

('27) 31 Cal. W. N. 135 : (A. I. R. (14) 1927 Cal. 210). [Pr. 8]

('27) 31 Cal. W. N. 82 : (A. I. R. (14) 1927 Cal. 1 F. B.). [Pr. 8]

('34) 60 Cal. L. Jour 569. [Pr. 8]

('22) 1 Pat. 375 : (A. I. R. (9) 1922 Pat. 488). [Pr. 9]

('33) 14 Pat. L. Tim 575: (A. I. R. (20) 1933 Pat. 285). [Pr. 9]

('33) A. I. R. (20) 1933 Pat. 685 : (149 Ind. Cas. 979). [Pr. 9]

('34) A. I. R. (21) 1934 Pat. 81 : (150 Ind. Cas. 884). [Pr. 9]

('34) 13 Pat. 45 : (A. I. R. (20) 1933 Pat. 656). [Pr. 9]

('36) 15 Pat. 260 : (A. I. R. (23) 1936 Pat. 543). [Prs. 8, 9, 10]

C. P. Sinha J. — The plaintiffs have filed this appeal. They had brought the suit for recovery of possession and in the alternative for assessment of fair and equitable rent. The suit land is situated in village Gobindpur which is a part of the town of

Laheriasarai, and is comprised in survey plot No. 961, khata No. 247, having an area of 1 bigha 2 kathas 4 dhurs. Formerly, plaintiffs 1 to 6 who had an eight annas share, had instituted this suit, and the Maharajadhiraja of Darbhanga had been impleaded as defendant second party. Later on, the said Maharajadhiraja of Darbhanga was added as a plaintiff. The plaintiffs' case was that the aforesaid plot was parti up to the time of the last earthquake in 1934, but, after the earthquake, with the permission of the plaintiffs, the Government had built temporary sheds over a portion of the plot. When things became normal, the Government sold the materials of the temporary sheds on the suit land in their existing condition and they were purchased by the defendant first party. The plaintiffs asked defendant 1 to vacate the land and remove the materials, but, instead of doing so, he started making alterations in the structures and did not vacate. There was also a prayer for mesne profits from 1937 to 1944.

[2] Defendant 1 contested the suit mainly on two grounds (1) that the suit was barred by limitation, estoppel, waiver and acquiescence, and (2) that plot No. 961, the land in suit, besides other plots, were given as a rent-free fakirana grant to the ancestors of Akal Sah and others a long time ago by the then maliks. It is the second ground of defence with which we are concerned in this second appeal.

[3] The first Court came to the following findings: — (1) that several documents, namely, Exs. F. G. to G. 3 and L to L-14, which date from as far back as 1905, show that the predecessors-in-interest of the defendant dealt with the suit land, and the documents mentioned this land as a rent-free fakirana grant; (2) that there stands a substantial building which must have taken at least a year to complete and that its appearance and other evidence on record left no room for doubt that it had been constructed more than 20 years ago; (3) that Mr. T. A. Freston I. C. S., the then District Magistrate of Darbhanga, sought the permission of the defendant to build temporary huts on the suit land after the earthquake (exhibits E series); (4) that respectable witnesses were examined on behalf of the defendant to show that they resided in the house on the land in suit as tenants more than 12 years ago; and (5) that in the Collectorate partition of the tauzi, which took place in 1939, the Batwara Deputy Collector found the possession of the defendant over the suit land and recorded his possession over it and disallowed the objection of the plaintiff second party, namely, the Maharajadhiraja of Darbhanga (Exhibit L). After having found the possession of the defendant over the suit land, the learned 3rd Additional Subordinate Judge held that the defendant had acquired an indefeasible right to remain in possession of the suit land and that the plaintiffs' claim for possession was barred by time, estoppel, waiver and acquiescence. In regard to the question whether the suit land was a fakirana rent-free grant, the learned Subordinate Judge found that the defendant claimed a rent free grant to the knowledge of the plaintiffs for the first time in the year 1939 during the Collectorate partition and that, therefore, the suit having been brought within 12 years of that date, the plaintiffs' claim for assessment of fair and equitable rent was not barred and, in that view of the matter, a fair and equitable rent was assessed at the rate of Rs. 5 per katha. It is to be mentioned that the document filed by the defendant did not mention the plot number as 961, the plot in suit, but they mentioned plot Nos. 957 and 958, and the plaintiffs contended that those documents did not relate to the land in suit. But it was found on a comparison of the boundaries mentioned in those documents with the boundaries of the land in suit that those documents did in fact relate to plot No. 961.

[4] Against the judgment and decree of the trial Court, the defendant preferred an appeal to the Court of the District Judge of Darbhanga and the plaintiffs filed a cross-objection with a prayer that the plaintiffs should be given a decree for ejectment against the defendant. The appeal and the cross-objection were heard by Mr. Umakanta Prasad Sinha, Additional District Judge of Darbhanga, and, after having decided the question of onus which lay heavy on the defendant, he came to the conclusion that the land in suit was an old rent-free fakirana grant. He also affirmed the judgment of the 1st Court to the effect that the documents filed by the defendant, namely, the patta (exhibit F) dated 14-8-1905, by Akal Sah and Juman Sah in favour of Abdul Hakim, and the sale deed (Exhibit G-2) by Akal Sah and Juman Sah in favour of Moqim and Sadiq, the sons of Abdul Hakim and the predecessor-in-interest of the defendant, dated 28-2-1922, related to the land in dispute, namely, plot No. 961. The learned Additional Judge also dealt with documents subsequent to the documents mentioned above by which Abdul Moqim had mortgaged portions of the land in suit with the house thereon and also certain other lands to several persons from 17-2-1925 to 20 4 1929. It was also found that Abdul Hakim, since the date of the patta in 1905, continued in possession of the land in suit in his own right as fakiranadar and that prior to that year it was in possession of the fakiranadars Akal Sah and Juman Sah. There was a further finding that the defendant was all along in possession of this land and that the plaintiffs were never in possession at least since 14-8-1905, and the defendant is a purchaser from the sons of Abdul Hakim by the sale deed of the year 1929. Upon his findings mentioned above, the learned Additional Judge held that the plaintiffs were not entitled to an assessment of fair

and equitable rent and, in that view of the matter, allowed the appeal, rejected the cross-objection and dismissed the suit with costs.

[5] Two second appeals were filed in this Court —one by the Maharajadhiraja of Darbhanga and the other by the plaintiffs 1 to 6. The Maharajadhiraja of Darbhanga, however, did not press his appeal (Second Appeal 127 of 1948) and, therefore, it was dismissed.

[6] The only point pressed in this second appeal is that the documents Exhibits F and G 2, namely, the patta of the year 1905 and the sale deed of the year 1922 in favour of the predecessor-in interest of the defendant, and other documents relied on by the Court below mentioning the suit land as a rent free fakirana grant, were not admissible in evidence and, therefore, the judgment of the Court below was vitiated and unsustainable in law because these documents were not *inter partes* and the plaintiffs had no concern with any of these documents.

[7] These documents were admitted into evidence without objection and in the lower appellate Court also no objection was taken to the admissibility of these documents by the plaintiffs. The finding of the Court below, however, to the effect that the land in suit is rent-free fakirana grant, being an inference of law from the facts found, and the question whether the documents are admissible in law both being questions of law, can be taken in second appeal.

[8] It has been urged on behalf of the defendant-respondent that the documents in question are admissible in evidence under S. 13, Evidence Act. Section 13, Evidence Act, runs as follows:

"Where the question is as to the existence of any right or custom, the following facts are relevant :

(a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was in consistent with its existence. (b) particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from."

The question is whether the right of the defendant claiming a rent-free fakirana grant in the land in suit was either claimed or asserted by any transaction within cl. (a) of the section or whether such right was exercised by the defendant within the meaning of cl. (b) of the section. In my view, the language used in the section is wide enough to cover the present case. There is no doubt in my mind that the deed of lease of the year 1905 and the sale-deed of the year 1922 were both transactions by which the rent-free fakirana grant was asserted by the executants of those documents in respect of the land in suit and they are therefore, relevant facts both within the meaning of cls. (a) and (b) of the section. The illustration to the section as given in the Evidence Act is clear enough to uphold the view I have taken. The lease and the sale were both on the footing that the lessor and the vendor were transferring their interest in the suit land which, according to them, was a rent free fakirana grant. Learned Counsel for the appellants has relied upon the case of this Court in *Jyoti Prashad Singh* v. *Bharat Shah*, 15 pat. 260. This is a judgment of Agarwala J. (as he then was) with whom Varma J. agreed, and relying upon a Bench decision of three Judges of the Calcutta High Court in *Brojendra Kishore* v. *Mohim Chandra*, 31 Cal. W. N. 32, their Lordships held that the word "claim" in the section indicated "that the right is asserted to the knowledge and in the presence of the person whose right will be affected by the establishment of the claim", and also relied upon the following quotation from the Calcutta case : "The mere assertion of a right in a document to which the person against whom the right is asserted is not a party and of which he knows nothing is not to claim the right '. In my judgment, the scope and object of S. 13, Evidence Act, have been unduly restricted by this judgment although, as I have said, the Legislature by using the language in the section intended the operation of this section to be very wide. Ordinarily, we would have been bound by the Division Bench decision of this Court, but I find that there are other previous Division Bench decisions of this Court which were not considered by Agarwala J. If there is a Division Bench decision in this Court which has not been considered by a subsequent Bench decision of the Court, then, in my view, the authority of the previous Bench decision is not shaken. I would, however, like to consider the Full Bench case in *Brojendra Kishore* v. *Mohim Chandra*, 31 Cal. W. N. 32 on which this Patna case is based and some other decisions of this Court and other Courts. The facts of this Calcutta case were that the plaintiff in that case had sued for assessment of fair rent for the land in suit in which, he alleged, the defendants had only an occupancy right, and the defence was that the land was held rent-free. In support of their case, the defendants produced in evidence a kebala executed in 1874 whereby one of their predecessors-in-interest had purported to sell the plaint lands with other lands alleging that the lands were his nishkar brahmattar. There was a difference of opinion between Cuming J. and Mukerjee J. who heard the appeal in the first instance, and there was a Letters Patent Appeal which was heard by three Judges. It appears that both the Courts below had held that this kebala was a benami document. Cuming J. made the following observation :

"The Court has found that the sale was a fictitious one. I have considerable doubts whether the execution of a benami document by which nothing really passes can be called a transaction. It is obviously a fictitious transaction and as such would not come within S. 13. I am of the opinion that the kebala Ex. A, is not admissible."

And Mukerji J. on this part of the case held as follows :

"Now, whatever may be the correct view as regards the admissibility of the kebala or of its recitals, I do not

think it can be ever urged that the recitals contained therein can go in evidence under S. 13 in view of the fact that the transaction was held by the Munsif to be a benami one, and the Subordinate Judge has not dissented from that view .... A transaction contemplated by S. 13 is a genuine and bona fide transaction, but a benami transaction which is one not meant to be acted upon is a fictitious transaction and in the eye of law is no transaction at all. Such a transaction, in my opinion, cannot be let in as evidence in proof of a right or custom."

In my judgment it is obvious that in this case the observation of their Lordships in regard to the applicability of S. 13, Evidence Act, was no more than obiter because both the learned Judges had held that the kebala was a fictitious document and that, therefore, it did not amount to a transaction. I, therefore, do not feel bound by the weight of the decision in this Calcutta case. Even in that Court there is a great difference of opinion as appears from the case reported in *Kiran Chandra* v. *Srinath Chakravarti*, 31 Cal. W. N. 135. In this case, one of the documents was Ex. A, a hibanama, executed by the predecessors-in-interest of the defendant which described the land as barhmotter. Another document was Ex. B which was a sale certificate by which the defendants had purchased the land at the sale and there was a third document (Ex. C), the writ of delivery of possession. This appeal had also arisen out of a suit for ejectment and the defence was that it was a rent-free barhmotter. Dealing with the admissibility of these documents, Chakravarti and Panton JJ. made the following observation :

"As to the second point raised by the learned Vakil, as I have already stated, no objection as to the admissibility of those documents was raised in either of the Courts below. Nor was it raised in the written grounds of appeal before this Court. It is difficult to see on what ground their admissibility as evidence can be questioned. The first document is a piece of evidence which shows the dealing of the property by the descendants of the original grantee as rent-free brahmottar land ; ....."

There is a recent Calcutta case, decided by a single Judge, reported as *Rasik Lal* v. *Prasanna Kumar*, 60 Cal. L. Jour. 569. In this case also, it was held that the documents in question, which were the title deeds of the defendants and to which the other side was not a party, were admissible in evidence under S. 13, Evidence Act.

[9] Now, coming to the decisions of our own Court, I find that the earliest case cited before us was the case of *Sabran Sheikh* v. *Odoy Mahto*, 1 Pat. 375 decided by their Lordships Coutts and Ross JJ. The head-note runs as follows:

"In a suit in which the plaintiffs claimed the land in dispute as their *man* land and the defendant claimed it as this *jote*, the plaintiffs produced an *ekrarnama* addressed by a third person to an ancestor of the plaintiffs in which the land in suit was described as *man* land. Held, that the *ekrarnama* was admissible under both clauses (a) and (b) of S. 13, Evidence Act, 1872".

This Bench decision was not placed before their Lordships who decided the case reported in 15 Pat. 260. There is another Division Bench case of this Court *Keshava Prasad* v. *Brahmdev Rai*, 18 Pat. 45. The question in this case was whether the recitals in a sale deed to which the plaintiff landlord was not a party were admissible under S. 13, Evidence Act. This was a case between landlord and tenant and involved the consideration of the provisions of S. 18A, Bengal (Bihar) Tenancy Act, 1885, which contained the following:

"Nothing contained in any instrument of transfer to which the landlord is not a party shall be evidence against the landlord of the permanence, amount or fixity of rent, area, transferability or any incident of any tenure or holding referred to in such instrument".

It was contended that under the provisions of S. 18A, Bengal Tenancy Act, the recitals in the sale-deed to which the landlord was not a party were not admissible in evidence. This contention was repelled and their Lordships held as follows:

'Section 18A is a rule of evidence which must necessarily apply to all proceedings taken after it came into force and it is applicable to recitals in a sale-deed of a prior date so that they are not evidence of title and cannot be used to prove a grant; it is, however, permissible to use the recitals not as evidence of a grant but to show the nature of the title that was being asserted and as transactions relevant under S. 13, Evidence Act, 1872, by which a right was claimed or asserted on some past occasion",

and reliance for this proposition was placed upon a Calcutta case in *Banwari Lal Singh* v. *Dwarkanath Missir*, 29 Cal. L. Jour 577. It was further observed that in Bengal S. 18A had been amended and the following words were inserted in S. 18A, Bengal Tenancy Act, for Bengal: "notwithstanding anything contained in S. 13, Evidence Act". This decision again was not considered in the 15 Patna 260 case. Besides these Bench decisions, there were other decisions by single Judges of this Court, namely, *Kameshwar Singh* v. *Ramji Misser*, A. I. R. (20) 1933 Pat 685 by Dhavle J. and *Thakur Kurmi* v. *Lalji Misser*, A. I. R. (21) 1934 Pat. 81 by Mohammad Noor J. two eminent Judges of this Court who had taken the view that documents similar to the documents in the present case were admissible in evidence under S. 13, Evidence Act. There is one other decision of this Court in *Ram Kishun* v. *Niranjan Pande*, 14 Pat. L. Tim. 575 by Wort and James JJ. in which it is held that the right mentioned in S. 13 refers only to an incorporeal right. In this case, again the earlier decisions of this Court were not referred to.

[10] The documents to which exception has been taken by learned counsel on behalf of the appellants are no doubt documents to which the plaintiffs were no parties. But upon an interpretation of the language of the section and upon consideration of the authorities of this Court as also of the Calcutta High Court, I must hold that these documents were admissible in evidence and the Courts below were right in admitting those documents into evidence. The Calcutta case on which the 15 Pat. 260 case was based, in my judgment, takes a very narrow view of the meaning of the word "claimed" used in S. 13, Evidence Act. The claim need not necessarily be made in the presence and to the knowledge of the person to be affected thereby.

A claim can very well be made in the absence and without the knowledge of the person to be affected. That a claim can be made in the absence and without knowledge of the person to be affected thereby is well illustrated by the ceremonies connected with the right of pre-emption. The first ceremony is called 'talab-i-mua-thibat' or assertion or claim immediately on getting information of sale—the second is called 'tala-i ishhad' or confirmatory *demand* made on the land in presence of witnesses. It is clear, therefore, that 'claim' need not be made in presence of the persons affected thereby or in his presence.

[11] These documents in question are again documents of title of the defendant or his predecessors-in-interest, and I see no reason why these documents should not be admitted into evidence.

[12] No other point was urged before us, and, having rejected the only contention made in this Court on behalf of the appellants, I must hold that there is no merit in this appeal and it must, therefore, be dismissed with costs.

[13] **Das J.**—I agree that the recital in the documents in question was admissible in evidence under s. 13, Evidence Act. The finding that the land in dispute was rent free is an inference of law from the facts proved, and can be agitated in second appeal. But in view of the facts proved in the case, I think that the Court of appeal below correctly drew the inference.

V.S.B. *Appeal dismissed.*

A. I. R. (33) 1951 Patna 645 [*C. N. 187.*]

B. P. SINHA AND C. P. SINHA JJ.

Kamal Kishore Prasad Singh and another—*Appellants* v. *Hari Har Prasad Singh and others*—*Respondents.*

A. F O. O. No. 19 of 1949, D/- 19-2-1951.

(a) Civil P. C (1908), O. 21, R. 15—Decree in favour of members of Joint Hindu family—Execution.

Rule 15 of O. 21 is an enabling one. It is not absolutely incumbent on the executing decree holder to state in so many words in the execution petition itself that the decree is being executed for the benefit of all the decree-holders. If it appears to the Court that the decree is, as a matter of fact, being executed for the benefit of all the decree-holders, it will allow the execution to proceed, even though such a statement does not find place in the application for execution. In the very nature of a joint Hindu Mitakshara family every transaction is, *prima facie*, for the benefit of all the coparcenary and all the members of the joint family, and, if, since after the passing of the decree, any one of the members shown as decree-holders has died, the other members automatically step into his shoes, and the decree executed by one of the members of the family must inure to the benefit of all. Where a joint Hindu Mitakshara family is concerned as decree holders, the application for execution by the leading members of the family cannot be said to be invalid, simply because it has not been stated in so many words that it is for the benefit of all the members of the joint family. Whatever rights a Hindu widow has in the decree under execution that right has got to be conserved for her benefit. A. I. R. (6) 1919 Pat. 286 and A. I. R. (32) 1945 Pat. 459, *Disting.* [Paras. 5, 7]

Anno. C. P. C., O. 21 R. 15 N. 2, 4.

(b) Hindu Women's Rights to Property Act (1937), S. 3 (2), (3)—Effect of.

The effect of the Act is to interpose the interest of Hindu Women's estate in a joint Hindu coparcenary, that is to say, so far as the coparceners themselves are concerned, the coparcenary continues as before the death of one of the coparceners: there is no disruption of the joint family. Hence, those members still continue to enjoy as amongst themselves the benefits of survivorship. But, so far as the widow of the deceased coparcener is concerned, she acquires in the interest of her deceased husband in the coparcenary property a Hindu women's estate, which she can get separated from the rest of the family by a suit for partition. [Para 6]

Anno. H. W. R. P. Act, S. 3 N. 1.

(c) Practice — Procedure — Preliminary decree amended—Execution.

The preliminary decree having been amended, the final decree also must be deemed to have been amended accordingly, and the execution cannot proceed in respect of any amount in excess of the correct amount determined in accordance with the amended preliminary decree. [Para 9]

Lalnarayan Sinha and Ramdeo Prasad Singh—for Appellants. Mahabir Prasad, Rajkishore Prasad; Ugra Singh and A. K. Ray—for Respondents.

Cases referred to:—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('19) 4 Pat. L. Jour 575: (A. I. R. (6) 1919 Pat. 286). [Para 5]

('45) 24 Pat. 485: (A. I. R. (32) 1945 Pat. 459). [Pr. 5]

B. P. Sinha J.—This is a judgment-debtors' appeal from the decision and order, dated 18th January 1949 based by the Subordinate Judge of Patna overruling their objections to the execution of the decree, under S. 47, Civil P. C.

[2] It appears that the respondents' family, which, admittedly, continues to be a joint Hindu Mitakshara family, obtained a decree on the foot of a simple mortgage bond. The preliminary decree was made final on 24th August 1938. The decree had been passed in favour of five persons, namely, (1) Nem Narain Singh, the karta of the family, (2) Haribar Singh, son of Nem Narain's brother, Jangi, (3) Rang Bahadur *alias* Madni, (4) Rameshwar, both sons of Nem Narain Singh, and (5) Nageshwar *alias* Rajniti, son of Haribar aforesaid. It appears that Rang Bahadur *alias* Medni aforesaid died sometime in 1939, leaving him surviving a widow and the other members aforesaid. By a petition, dated 16th September 1939, the Court was apprised of the fact that Medni, one of the decree-holders, was dead. That was done on the 22nd of August, 1945. The present execution case was instituted on the 1st February 1947, by Nem Narain Singh for himself and as guardian of his grand-nephew, Nageshwar, as also by Haribar and Rameshwar. Nem Narain himself died in July 1947. Nageshwar attained majority during the pendency of the execution proceedings.

[3] An objection under S. 47, Civil P. C. was filed by the judgment-debtors on the grounds (1) that Nem Narain Singh and Rang Bahadur *alias* Medni, two of the decree-holders died leaving behind them their respective widows, who became joint decree-holders along with the other members of the family, and that, in their absence, the decree could not be executed; (2) that, the preliminary decree having been amended, unless the final decree also was accordingly amended, the execution was not maintainable; and (3) that the valuation of the properties should be revised, as the last valuation was made as long back as 1940. These objections were overruled by the Court below. Hence this appeal.

[4] Before us, only one point has been pressed in support of the appeal, namely, that, the widows of Nem Narain Singh and Rang Bahadur Singh *alias* Medni not having been made parties to the execution proceedings, and the terms of R. 15 of O. 21 of the Code not having been complied with, the execution was not maintainable. So far as Nem Narain is concerned, he died after the filing of the execution petition, and his widow could not have been made a party to the proceedings at the time the execution petition was filed. But the position is different so far as the widow of Rang Bahadur is concerned. Rang Bahadur died in 1939, during the pendency of the first execution case. In the present execution case, the decree-holders filed the execution petition on behalf of the surviving co-parceners under the impression that it was not necessary to implead the widow of the deceased Medni. On behalf of the judgment-debtors, it has been contended vehemently that, under the provisions of the Hindu Women's Rights to Property Act (XVIII [18] of 1937) as amended by Act XI [11] of 1938, the widow of the deceased decree-holder should have been impleaded as a party to the execution proceedings. It was also contended that the application, not being in terms of R. 15 of O. 21, was not maintainable.

[5] The facts of this case are not disputed on either side. It is an admitted fact that Medni died in 1939, leaving him surviving only his widow. It is also not disputed that the family still continues to be a joint Hindu Mitakshara family. Hence, in such a family, it is always open to the leading member as the *karta* of the family to represent the whole family in all transactions in Court or out of Court. But it was contended on behalf of the appellants that, though it was open to the mortgagees to sue through the *karta* of the joint family for the enforcement of the mortgage bond, as a matter of fact, all the male members of the family, that is to say, all the coparceners, joined in bringing the suit. Hence, it was urged, the suit was not by the *karta* alone in his representative capacity. Under the provisions of R. 15, any one of the several joint decree-holders may apply for the execution of the whole decree for the benefit of all the decree-holders, including the survivors and the legal representatives of a deceased decree-holder, if any. Rule 11 of O. 21 of the Code has enumerated the details which have got to be stated in the petition for execution, and Rr. 12, 13 and 14 of O. 21 have also laid down the details to be filled in as regards the description of the property to be proceeded against in execution of a decree. Rule 15 of O. 21 is an enabling one. Ordinarily, all the persons shown in the decree as decree-holders would be entitled to execute the decree. But R. 15 has made it possible for one of the decree-holders to execute the whole decree, unless the decree itself contains any provisions to the contrary. The provisions of R. 15 apply to all cases where a decree has been passed in favour of more persons than one as joint decree-holders. If the decree itself indicates that, though a number of persons figure as decree-holders, their interests are clearly defined as to shares or as to amounts out of the total amount decreed, the decree may not be executed by any one of them as regards the whole, because it may be several decrees contained in one document. If there are several decree-holders, who have obtained a joint decree, they may be members of a joint Hindu Mitakshara family or they may be complete strangers to each other. In the latter case, it will be incumbent upon any one of the decree-holders clearly to state in the execution petition that he is executing the decree in its entirety for the benefit of all the other decree-holders or for the benefit of the survivors and legal representatives of such of them as have died since after the passing of the decree. But, in the case of a joint Hindu Mitakshara family, though it may be desirable expressly to state that the decree was being executed for the benefit of all the others, it is not absolutely necessary that that should be so stated in the petition itself. As I read R. 15, it does not make it obligatory upon one of the decree-holders executing the entire decree to state in so many words in the execution petition that the decree is being executed for the benefit of all of them, because, in the very nature of a joint Hindu Mitakshara family, every transaction is, *prima facie*, for the benefit of all the coparcenary and all the members of the joint family, and, if, since after the passing of the decree, any one of the members shown as decree-holders has died, the other members automatically step into his shoes, and the decree executed by one of the members of the family must inure to the benefit of all. Rule 17 of O. 21 insists upon the requirements of Rr. 11 to 14 being complied with, and empowers the Court to reject the application for execution, if, upon opportunity being given to the applicant, the defects, if any, are not removed within the time allowed. Rule 17 does not speak of any particulars required by R. 15 to be neces-

sarily incorporated in the application for execution. Hence, in my opinion, if the particulars required by Rr. 11 to 14 of O. 21 of the Code have been incorporated in the petition, it becomes an application in accordance with law. The provisions of R. 15 are meant to safeguard the interests of the decree-holders as also to ensure that the judgment-debtor, on making payment of the decretal sum, gets a full and valid discharge. Hence, it is for the Court, in each case, to satisfy itself that, where the decree has been, on the face of it, passed in favour of more than one person, it is being executed for the benefit of all of them. In order to do that, the Court has been empowered to make such order as it deems necessary for protecting the interests of the persons who have not joined in the application for execution. Hence, in my opinion, it is not absolutely incumbent on the executing decree-holder to state in so many words in the execution petition itself that the decree is being executed for the benefit of all the decree-holders. If it appears to the Court that the decree is, as a matter of fact, being executed for the benefit of all the decree-holders, it will allow the execution to proceed, even though such a statement does not find place in the application for execution. Ordinarily, of course, such a statement ought to find place in the execution petition itself, so that the matter is placed beyond all controversy. But the absence of such a statement from the execution petition does not necessarily entail the result that the application for execution becomes contrary to law. On first principles, therefore, and on an examination of the relevant provisions of the Code, it does not appear to me that the application for execution in the present case is not in accordance with law. Certainly, it is for the Court to lay down such conditions as would ensure the protection of the interests of such of the decree-holders as have not joined in the application for execution. In the present case, we have been assured by counsel for the decree-holders that they did not implead the widows of the deceased decree-holders aforesaid under the mistaken legal advice that those ladies, not being coparceners, need not be shown as decree-holders in the application for execution. On behalf of the appellants, great reliance was placed upon the Division Bench ruling of this Court in the case of *A. J. Meik* v. *Midnapur Zamindari Co. Ltd*, 4 Pat. L. Jour. 575 which lays down that a decree in favour of two persons jointly cannot be executed by one of them in respect of what he considers to be his share of the decree; nor can the whole decree be executed by him, unless he applies for execution on behalf of all the decree-holders or for the benefit of them all. That was not a case of a joint Hindu Mitakshara family. The decree-holders in that case were the Midnapur Zamindari Company and Mr. Mathesa; but only the Midnapur Zamindari Company applied for the execution of the decree, without stating that it was for the benefit of both the decree-holders. On a perusal of the execution petition in that case, their Lordships held that it was neither in substance nor in form an application within the terms of R. 15 of O. 21 of the Code. Naturally, therefore, they held the execution to be incompetent. But, in the present case, in the very nature of things, so long as the family has not disrupted, the application for execution must be deemed to be for the benefit of all the members of the joint family. A joint Hindu Mitakshara family is in the nature of a corporation, which owns all the property of the family as one body, and, so long as there has been no partition, no individual member can say that he has a particular share in the property. Each member's proprietary interest extends over the whole property. Hence, any dealing by any member of the family, provided he is authorised to do so, is a dealing in respect of the entire property. In the present case, the application for execution is in respect of the entire decree and on the assumption that it is for the benefit of all the decree-holders. Hence, in the circumstances of the present case, where a joint Hindu Mitakshara family is concerned as decree-holders, the application for execution by the leading members of the family cannot be said to be invalid, simply because it has not been stated in so many words that it is for the benefit of all the members of the joint family. The decision of another Division Bench of this Court in the case of *Mt. Nasiban* v. *Surendranath*, 24 Pat. 485 relied upon on behalf of the appellants is also not clear on the question whether the decree-holders were members of a joint Hindu Mitakshara family. Hence, that decision is also equally distinguishable from the facts of the present case.

[6] It was further argued on behalf of the appellants that, as a result of the amendment of Hindu law by the Hindu Women's Rights to Property Act, 1937, the widow of Rang Bahadur acquired an interest distinct and separate from that of the coparcenary on the death of her husband. Hence, it was argued, the widow was a necessary party to the execution proceedings and her absence from the proceedings was fatal to the execution case. According to the provisions of sub-ss. (2) and (3) of S. 3 of that Act, the widow of Rang Bahadur had the same interest in the decree as he himself had. But the nature of that interest is the limited interest known as a woman's estate. She has also been given the right to claim partition equally with a male member of the family. As I apprehend the effect of the Act, it amounts to interposing the interest of Hindu Women's estate in a joint Hindu coparcenary, that is to say, so far as the coparceners themselves are concerned, the coparcenary continues as before the death of one of the coparceners; there is no disruption of the joint family. Hence, those

members still continue to enjoy as amongst themselves the benefits of survivorship. But, so far as the widow of deceased coparcener is concerned, she acquires in the interest of her deceased husband in the coparcenary property a Hindu woman's estate, which she can get separated from the rest of the family by a suit for partition.

[7] It was argued on behalf of the respondents decree-holders that the interest of such a Hindu widow is only an inchoate right which ripens into property only after she has chosen to get a partition effected, and that, so long as she does not choose to enforce this statutory right of partition, her rights are the same as before, namely of maintenance out of the joint family property. But it is not necessary to discuss this aspect of the question, because we are not called upon in this case to determine exactly as to what is the extent of the rights conferred by the Act upon the widow of Rang Bahadur. Whatever rights she has in the decree under execution, that right has got to be conserved for her benefit. In this view of the matter, in my opinion, it is not necessary to discuss a number of rulings which have been placed before us by Mr. Mahabir Prasad, appearing on behalf of the decree-holders.

[8] In this Court, the widow of Rang Bahadur has filed an affidavit to the effect that the present execution is for her benefit also, and that her interests are safe in the hands of the applicants for execution. Whatever the interest of the widow concerned may be in the decree, that interest can be safeguarded by providing that the money realised by the sale of the mortgaged properties shall not be made over to the applicants without the consent of the widow concerned, that is to say, if the widow of Rang Bahadur *alias* Medni makes an application to the executing Court to the effect that the money may be made over to the *karta* of the family, or to any particular member of the family, only then the decree would be deemed to be satisfied, and the judgment-debtors completely discharged from their liability.

[9] A further question appears to have been raised that, the final decree not having been amended in accordance with the preliminary decree, which was amended at the instance of the judgment-debtors by an order of this Court, the final decree was not capable of execution. But the judgment-debtors themselves should have got the final decree amended, if they were so interested. At any rate, the preliminary decree, having been amended, the final decree also must be deemed to have been amended accordingly, and the present execution shall not proceed in respect of any amount in excess of the correct amount determined in accordance with the amended preliminary decree. That will, in my opinion, protect the interest of the judgment-debtors.

[10] For the reasons aforesaid, and subject to the directions given above, the appeal is dismissed but, in the circumstances, without costs.

[11] **C. P. Sinha J.**—I agree.

D.H. ***Appeal dismissed.***

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